Report

of the National Commission on Judicial Discipline & Removal

August 1993

NATIONAL COMMISSION ON
JUDICIAL DISCIPLINE AND REMOVAL
2100 Pennsylvania Avenue, N.W., Suite 690
Washington, D.C. 20037

August 2, 1993

The Honorable William Clinton
President of the United States
Washington, D.C.

The Honorable Albert Gore, Jr.
Vice President and President of the Senate
Washington, D.C.

The Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C.

The Honorable William H. Rehnquist
Chief Justice of the United States
Washington, D.C.

Dear Mr. President, Mr. Vice President, Mr. Speaker and Mr. Chief Justice:

In accordance with the provisions of Public Law 101-650 (Title IV, Subtitle II), I have the privilege of submitting to you the Final Report of the National Commission on Judicial Discipline and Removal.

The Report contains the Commission's findings and recommendations about the problems and issues related to the discipline and removal from office of life tenured federal judges, including the impeachment process. In satisfying its statutory assignment of evaluating the advisability of proposing alternatives, including constitutional amendments, to current arrangements for responding to judicial discipline problems and issues, the Commission reached agreement that it would focus its limited time and resources on ways to improve the current system rather than engaging in radical restructuring of our institutions. As individual Commissioners, we may have had reservations about how to resolve specific issues, but this Report is one of consensus. We—as a Commission—are satisfied that the recommendations that we make to you set forth the administrative and policy issues that await your consideration and facilitate the necessary choices that must be made in the future.

Hopefully, the goal of improved government will be promoted by this report. We believe the net result of our recommendations would be a Congress better equipped to handle the difficult process of impeachment, an executive that effectively and fairly enforces the laws of the land, and a judiciary both independent and accountable under our Constitution.

Sincerely,

ROBERT W. KASTENMEIER
Chairman

MEMBERS OF THE COMMISSION

Robert W. Kastenmeier [1]
Chairman

S. Jay Plager [2]
Circuit Judge
U.S. Court of Appeals for the Federal Circuit
Washington, DC
Vice Chairman

Stephen B. Burbank [1]
Robert G. Fuller, Jr. Professor of Law
University of Pennsylvania
Philadelphia, PA

Levin H. Campbell [2]
Senior Circuit Judge
U.S. Court of Appeals for the First Circuit
Boston, MA

Stephen L. Carter [4]
William Nelson Cromwell Professor of Law
Yale University
New Haven, CT

Charles J. Cooper [4]
Shaw, Pittman, Potts & Trowbridge
Washington, DC

Roger C. Cramton [2]
Robert S. Stevens Professor of Law
Cornell University
Ithaca, NY

Hamilton Fish, Jr. [1]
Member of Congress
Nineteenth District of New York

Gordon R. Hall [5]
Chief Justice
Supreme Court of the State of Utah

Howell T. Heflin [3]
United States Senator
State of Alabama

Beth Nolan [4A]
Associate Counsel to the President
The White House
Washington, DC

Arlen Specter [3]
United States Senator
State of Pennsylvania

Frank M. Tuerkheimer [3]
Habush-Bascom Professor of Law
University of Wisconsin
Madison, WI

John C. Harrison [4B]
Deputy Assistant Attorney General
United States Department of Justice
Washington, DC

[1] Appointed by the Speaker of the U.S. House of Representatives
[2] Appointed by the Chief Justice of the United States
[3] Appointed by the President Pro Tem of the Senate
[4] Appointed by the President of the United States
[4A] Served from April 1993
[4B] Served until April 1993.
[5] Appointed by the Conference of Chief Justices

STAFF OF THE COMMISSION

Michael J. Remington
Director

William J. Weller
Deputy Director

Michael W. Straight
Assistant Director

Victoria Y. Smith
Administrative Officer

Elizabeth Hutter
Executive Assistant

LIAISONS TO THE COMMISSION

Jeffrey N. Barr
Staff Attorney
U.S. Court of Appeals for the First Circuit

Leland E. Beck
Senior Counsel
Office of Policy Development
U.S. Department of Justice

William R. Burchill, Jr.
General Counsel
Administrative Office of the U.S. Courts

William Eldridge
Director of Research
Federal Judicial Center

Allen Erenbaum
Counsel
House Committee on the Judiciary

Jeffrey Hartley
Counsel
Subcommittee on Courts and Administrative Practice
Senate Committee on the Judiciary

Richard Hertling
Minority Chief Counsel
Subcommittee on the Constitution
Senate Committee on the Judiciary

Robb Jones
Administrative Assistant to the Chief Justice
Supreme Court of the United States

Peter J. Levinson
Minority Counsel
House Committee on the Judiciary

Edward H. O'Connell
Assistant Counsel
Subcommittee on Intellectual Property and Judicial Administration
House Committee on the Judiciary

CONSULTANTS TO THE COMMISSION

Jeffrey N. Barr
Staff Attorney
U.S. Court of Appeals for the First Circuit
Boston, MA

Elizabeth B. Bazan
Legislative Attorney
American Law Division
The Library of Congress
Washington, DC

Michael J. Gerhardt
Associate Professor
Marshall-Wythe School of Law
College of William and Mary
Williamsburg, VA

Charles G. Geyh
Assistant Professor
Widener University School of Law
Harrisburg, PA

Warren S. Grimes
Professor
Southwestern University School of Law
Los Angeles, CA

Jerome M. Marcus
Berger & Montague
Philadelphia, PA

Richard L. Marcus
Professor
Hastings College of Law
University of California
San Francisco, CA

Dan M. McGill
Professor Emeritus of Insurance
Wharton School of Business
University of Pennsylvania
Philadelphia, PA

Timothy R. Murphy
Consultant
National Center for State Courts
Williamsburg, VA

Beth Nolan
Associate Counsel to the President
The White House
Washington, DC

Todd D. Peterson
Associate Professor
The National Law Center
The George Washington University
Washington, DC

Peter M. Shane
Professor
University of Iowa College of Law
Iowa City, IA

Kersi B. Shroff
Senior Legal Specialist
American-British Law Division
The Law Library of Congress

William K. Slate, II
President
Justice Research Institute
Philadelphia, PA

Emily Field Van Tassel
Associate Historian
Federal Judicial Center
Washington, DC

Thomas Eugene Willging
Researcher
Federal Judicial Center
Washington, DC

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PREFACE

On October 9, 1986, having deliberated for three consecutive days, the United States Senate removed from office Harry E. Claiborne, a judge of the United States District Court of Nevada. The Senate had last removed a federal judge more than fifty years earlier, on April 17, 1936. Judge Claiborne's removal was only the fifth in the nation's history. Yet, within twenty-five months, two other district court judges, Alcee L. Hastings of the Southern District of Florida and Walter L. Nixon of the Southern District of Mississippi, were removed from their offices by the Senate.

Many Members of Congress reacted to three judicial impeachments within three years with expressions of concern about existing arrangements for handling situations in which life-tenured federal judges had misbehaved. In the House, the three judicial impeachment proceedings had required seventeen days of hearings and, in two instances, the time from commencement of the investigation until approval of final articles of impeachment exceeded a year. In the Senate, a total of thirty days had been spent by trial committees receiving evidence and testimony, and a total of ten days by the full Senate in acting upon articles of impeachment. Records developed by both the House and the Senate in all three cases combined exceeded 23,000 pages of material. Even Senators and Representatives with only a general awareness of the work involved regarded the allocation of resources and time as burdensome.

Many also found especially troublesome the fact that two of the judges had been convicted of felonies, sentenced to incarceration, had exhausted all available judicial appeals, yet were still receiving full salaries and benefits until they were finally removed through the impeachment process. Before 1983, no sitting judge had ever been prosecuted and convicted of a crime committed while in office. Since then five sitting federal judges have been indicted for such crimes, and four have been convicted.

Before 1986, twenty-two of thirty-five life-tenured federal judges charged with serious misbehavior had resigned from office rather than endure an impeachment trial before the Senate, the most recent being Otto Kerner of Illinois in 1973. Had a new ethic evolved that would require, in each instance of serious wrongdoing, the burden of impeachment proceedings, simply to indulge a judge's unreasonable grasp at one last chance for vindication -- or an unscrupulous grasp at the last attainable dollar of salary?

If so, the sheer number of life-tenured judges was a cause for apprehension. In 1936, there were 224 life-tenured federal judgeships. In 1989, there were 757 such positions, and an increase in that number was then being processed by Congress. Today, there are 842 such positions. Although there has been discussion within the judiciary of limiting the number of judgeships to 1,000, many believe the number will exceed 1,000 within a decade. If even a small percentage of the incumbents were to regularly "go wrong" -- and refuse to leave office until removed by the Senate -- might each Congress be processing at least one judicial impeachment? Would familiarity with the exercise render it less time consuming and burdensome?

If not, Senators and Representatives considering the prospect in early 1990 quite understandably thought it time to find a better way. Senator Strom Thurmond introduced a bill to provide that any life-tenured federal judge convicted of a felony be suspended from office without pay. Senator Howell Heflin sponsored proposals to amend the Constitution to permit alternative procedures for removing federal judges, stating that:

> The legislative burdens and responsibilities of today's Congress are very heavy. To have the additional responsibility of removing federal judges from office, in addition to a large legislative workload, no longer makes sense.... I believe that it is clear that the methods of impeachment and removal from office are cumbersome and out of date.[1]

Senator Trent Lott and Representatives Douglas Applegate, Jack Fields, Henry Hyde, Andrew Jacobs, Gerald Kleczka, George Sangmeister, and James Sensenbrenner, Jr., all sponsored reform proposals, most proposing amendments to the Constitution.

Not all Members of Congress, however, believed the burden of removing federal judges from their offices by impeachment should be shifted from Congress. Senator Arlen Specter, one week after Senator Heflin's proposed amendments were introduced, expressed his view:

> Before participating in Judge Hastings' impeachment hearings, I favored such a constitutional amendment. After serving as vice chairman of the Impeachment Trial Committee, I now believe that the issues raised in any judicial impeachment...are sufficiently important to require attention notwithstanding our workload.[2]

He cited troublesome incidents in the prosecutions and judicial branch activities related to the recent impeachments and noted that "none of these matters would likely have come to our attention but for the Constitution's requirement that we try impeachment cases."[3] Conceding the great time and effort involved in the recent impeachments, he concluded: "For all that, however, I believe there is an overriding value in the Senate continuing to act as the body that tries the impeachment of all federal officials including federal judges."[4] Senator Joseph Lieberman, a member of the Trial Committee for Judge Hastings, also opposed radical reform. In his view "the impeachment process, while onerous, does not unduly impede our ability to complete our legislative responsibilities, as we have demonstrated three times in the last three years."[5] Representatives Jack Brooks and John Bryant, after the Hastings and Nixon impeachments, concluded that the system worked well: "Efforts to change the system, whether by statute or constitutional amendment, are ill-advised as a matter of constitutional principle and national policy."[6]

Expressions of support for the impeachment process notwithstanding, the several proposals mentioned above were introduced, seeking to find a better way than impeachment to remove life-tenured federal judges from office. Ranging from abolition of life-tenured appointment to the authorization of additional means to effect removal, these proposals were a reflection of a strong interest in reform.

One proposal in early 1990, however, did not manifest advocacy of any specific or drastic immediate change; it recommended the creation of a group to examine the scope of the problem of judicial discipline and impeachment. An idea first proposed by Senate Majority Leader Robert Dole in 1986, as he wrestled with scheduling the Claiborne Senate Trial, the proposal was refined by the House Judiciary Committee in February and March 1990, passed by both the House and Senate in late October, and approved by the President on December 1, 1990.

As envisioned by the House Judiciary Committee and ultimately authorized by Public Law 101-650 (104 Stat. 5124), the National Commission on Judicial Discipline and Removal was assigned three specific duties. The first was to investigate and study problems and issues related to the discipline and removal from office of life-tenured federal judges. Second, the Commission was asked to evaluate the advisability of proposing alternatives to current arrangements for responding to

judicial discipline problems and issues. Third, the Commission was directed to submit to Congress, the Chief Justice, and the President a report of its findings and recommendations. Congress stipulated that the President, the Chief Justice, the Speaker of the House, and the President Pro Tempore of the Senate each appoint three members of the Commission. A thirteenth member was to be appointed by the Conference of Chief Justices of the States, to bring to the study the experience attained by fifty state court systems.

Following selection and appointment of commissioners by all appointing authorities, the Commission formally commenced its work on January 30, 1992, with its first public meeting, reviewing presentations concerning historical, constitutional, and current perspectives on judicial discipline and the removal of life-tenured judges from office. By March 1992, a general plan had been established for identifying policy questions in need of review. The Commission made arrangements for consultancy studies, individually designed to explain existing laws, policies, perceptions, and the historical background that led to the current state of affairs. Major contributions to the research effort were also made by the Federal Judicial Center and the State Justice Institute, each providing two valuable reports, and by the Library of Congress Law Library, which prepared a report on the removal and discipline of judges in twenty-six countries and five international judicial organizations.

In addition to that extensive academic research, the Commission held two days of public hearings in May 1992 and a further day in January 1993, receiving testimony and prepared statements from more than thirty witnesses, including a Representative who had served as a House Manager, a former Senator who had served as a Senate Trial Committee chairman in recent impeachments, four additional Representatives with opinions concerning House impeachment proceedings, a former House Parliamentarian, two former House Special Counsels, two Senators who had served on Trial Committees, attorneys who had served either the Congress or judges in recent impeachment proceedings, a Deputy Attorney General of the United States, a former prosecutor of federal judges, federal judges who had experience with the judiciary's internal procedures for responding to complaints of judicial misbehavior, and representatives of concerned public interest organizations. In December 1992, the Commission sponsored a Roundtable Discussion of constitutional issues related to the discipline and removal of life-tenured federal judges, conducted by four constitutional law professors and a constitutional historian.

From May 1992 to January 1993, in a series of six public meetings, consultants who had prepared draft reports appeared before the Commission to discuss their work and any specific aspects of it that were in need of reexamination or additional research. As final research reports were made available, the Commission, in public meetings in late February and early April 1993, discussed recommendations for reforms based upon information gained through its research program. The Commission's tentative conclusions and tentative recommendations for reform were then embodied in a Draft Report, which was distributed to more than 3,300 individuals, including every federal judge and all Members of Congress, in June 1993.

Later that month the Commission held three days of public hearings in Philadelphia, Chicago, and San Francisco, receiving testimony from a diverse group of witnesses. The Commission had the benefit of views expressed by members of the House Judiciary Subcommittee on Intellectual Property and Judicial Administration at a hearing on July 1, 1993, attended by the Commission chairman. The Commission then reviewed all testimony and all written commentary submitted concerning the Draft Report, and revised as necessary its findings and recommendations. This Report presents those findings and recommendations as finally approved by the Commission on July 28, 1993.

CHAPTER I
BACKGROUND

The framers and ratifiers of the Constitution attempted to ensure the independence of federal judges by providing in Article III that they "hold their Offices during good Behaviour" and "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." They attempted to render federal judges accountable by providing in Article II that, as "civil Officers of the United States," judges could "be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Although the Constitution specifies only one means of removing a federal judge from office, the impeachment process has not been the only check on federal judges who may have abused their independence, or the only assurance of their accountability. Other constraints and influences -- institutional and individual, formal and informal -- have traditionally played, as they play today, an important role.

Primary among such constraints have been the character and self-discipline of the people who have served on the federal bench. With few exceptions the nation has been served by a corps of federal judges whose honesty, integrity and fidelity to their oaths of office have enabled them to adhere to accepted standards of judicial conduct.

Essential to obtaining federal judges who meet accepted standards is the appointment process. Its effectiveness depends in part on the seriousness with which it is viewed by those to whom it is constitutionally committed: the President, who appoints federal judges; and the Senate, which has the power of advice and consent to the President's appointments. In recent decades legislative oversight has also served as an institutional check but has tended to focus on systemic concerns rather than misconduct by individual judges.

Within the federal judiciary itself the system of appellate review, including the extraordinary writ of mandamus, constitutes a fundamental check. Although primarily designed for other purposes, such a system can address some forms of judicial misconduct, correcting errors that result from it and, through the medium of opinions, providing deterrence against repetition.

The influence of federal judges on the behavior of their colleagues has not been confined to formal, hierarchical review. Of equal importance historically have been the various ways in which peer influence has operated to deter misconduct in the first place or to prevent its recurrence. Particularly when the federal judiciary was a small and homogeneous group, the threat of peer disapproval may have compensated for the absence of formal mechanisms, other than the impeachment process, to impose discipline on an errant colleague. Certainly, peer influence has been instrumental in satisfactorily resolving problems caused not by judicial misconduct, but by judicial disability. Many federal judges have persuaded colleagues to retire even though for them, as for Justice Stephen J. Field, there may never have been "a dirtier day's work."[1]

For those few federal judges who have been corrupt, who avoided detection during, or turned bad after, the appointment process -- and for whom neither appellate review nor peer influence was an effective influence -- impeachment was not the only remedy. Although rarely invoked against sitting federal judges until recently, the criminal process has always been available, and its threat, sometimes in combination with an impeachment investigation, has induced a number of corrupt judges to resign.

Each of the traditional checks on abuses of judicial independence has limitations. Some limitations are inherent, while others have appeared in particular historical contexts. In the former category, appellate review can have at best a marginal influence on some types of serious judicial misconduct. In the latter category, accepted standards of judicial conduct became contestable as a result of changing societal expectations and of the increasing heterogeneity of the federal judiciary. Moreover, for years federal retirement and disability provisions were either non-existent or palpably inadequate; some federal judges simply could not afford to heed their colleagues' pleas to cease work.

When group cohesiveness fails, peer influence may be effective if it is backed up by a credible threat of formal action. In the case of the federal judiciary, peer influence suffered from the absence of consensus about the power of the judiciary itself to formally deal with misconduct and disability. The creation of the circuit judicial councils as instruments of local administrative responsibility and authority in 1939 marked a major step in federal judicial administration, but the power of the councils to discipline or otherwise constrain an individual judge was in

question both before and after the Supreme Court attempted to clarify it in the 1970 *Chandler* decision.[2]

The limitations of many of the traditional checks on abuses of judicial independence have long been apparent, but our lawmakers were slow to intrude, doubtless in part because of reluctance to impose potentially damaging constraints upon a system that, overall, was working well. Although legislation has resolved most of the problems caused by inadequate provisions for retirement and disability, judicial misconduct has been a more difficult problem for the judiciary, the Congress, and the executive branch.

The federal judiciary itself responded to changing societal expectations and other forces that rendered accepted standards of judicial conduct contestable by adopting the Code of Conduct for United States Judges in 1973. Since then, Congress has supplemented those standards with provisions requiring financial disclosure and regulating disqualification, conflicts of interest, outside earned income, outside employment and activities, and the receipt of gifts or honoraria.

Although the standards enacted by Congress are enforceable by civil and criminal process, the Code of Conduct does not provide any mechanism for its enforcement. Shortly after adoption of the Code, the nation as a whole was pondering the lessons of Watergate, and Members of Congress were again urging the statutory establishment of formal disciplinary mechanisms for the federal judiciary modeled on those in place in many states. The circuit councils attempted to avert such legislation by following the recommendation of the Judicial Conference of the United States that they adopt rules to provide a disciplinary mechanism within the judiciary. Because, however, the Supreme Court's *Chandler* decision had left in doubt the councils' power to act effectively and had raised concerns about the independence of individual federal judges -- and because the councils' rules were silent on important matters of procedure and inconsistent on others -- Congress determined that legislation was necessary to ensure that the councils would have sufficient power and that their rules would be adequate.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the 1980 Act) was the result of compromises both within the Congress and between the legislature and the federal judiciary. It was the product of dialogue that revealed to the judiciary Congress's concern that there be in place a formal and credible supplement to the

impeachment process for resolving complaints of misconduct or disability against federal judges, and revealed to Congress the judiciary's concern that any such system not prove to be a cure worse than the disease. In the end, believing that misconduct in the federal judiciary was not widespread, and sensitive to both institutional and individual judicial independence, Congress provided a charter for self-regulation that followed closely a model devised by the judiciary. The 1980 Act was, however, avowedly an experiment, and key Members of Congress promised that it would be the object of vigorous oversight.

Although Congress was principally concerned with assuring public accountability in the 1980 Act, a subsidiary goal was to help the House and Senate in those cases where the Act would not be adequate to the task and resort to the impeachment process would be necessary. With a large increase in the number of federal judges in the late 1970s, some Members of Congress deemed it a statistical certainty that there would be more instances of misconduct. Moreover, even though -- or perhaps because -- there had not been an impeachment since 1936, it was hoped that, in cases where impeachment might be warranted, the Act's processes could lead to the development of a record that would ease the burdens on the House and Senate.

Within only a few years of the 1980 Act's effective date, Congress in fact undertook the first impeachment of a federal judge in fifty years, and two others followed in quick succession. For two of them, involving the prior felony convictions of Judges Claiborne and Nixon, the Act's procedures for certifications by a judicial council and the Judicial Conference that a judge "may have engaged in conduct which might constitute grounds for impeachment" (or that "consideration of impeachment may be warranted") were only a formality. Congress implicitly acknowledged as much in a 1990 amendment that permits the Judicial Conference to initiate and transmit such a determination on the basis of the criminal record. In the matter of Judge Hastings, however, the exhaustive investigation by a special committee and subsequent report and certification by the judicial council -- coming as they did after the acquittal of Hastings on criminal charges -- were undoubtedly critical to the House's willingness to proceed.

This Commission was therefore created at a time when there was in place a formal mechanism within the judiciary, the heavy artillery of impeachment had been brought out of mothballs, and the criminal process was a credible threat to a federal judge engaged in, or bent upon,

serious misconduct. The perceived costs of the recent impeachments identified in this Report's Preface suggest why the impeachment process so long lay dormant and account for much of the political force that led to the Commission's creation. Moreover, calls for the reform of the impeachment process to reduce such costs have included allegations that the judiciary has failed to perform its responsibilities under the 1980 Act and that more comprehensive reform, extending to all formal mechanisms for federal judicial discipline, is necessary. In any event, an assessment of the performance and potential of existing arrangements for dealing with federal judicial misconduct and disability, including formal and informal mechanisms within the judicial branch, is a necessary part of any comparative evaluation of suggested alternatives, whether those alternatives relate only to the impeachment process or are more comprehensive.

In defining the scope of its work, the sequence in which issues should be examined, and the methodology to be used in identifying recommendations, the Commission decided to address adjustments to existing arrangements before proceeding to proposals to replace them. As this Report makes clear, the Commission believes that adjustments in current arrangements are, in fact, both feasible and preferable to more radical reform. The reasons for that conclusion are best appreciated after a consideration of this Report as a whole. It is appropriate, however, briefly to summarize them here.

The primary concerns arising from recent impeachments and Senate trials of federal judges have been the costs and delays associated with removing those judges, particularly judges who had previously been convicted of crimes and were receiving their salaries in prison. Concerns were also raised about the fairness of the process. The Commission studied whether an alternative mechanism to remove federal judges from office could be provided by statute or would require a constitutional amendment. It concluded that a constitutional amendment would be necessary to implement any such removal mechanism, as well as any mechanism that would suspend or otherwise diminish a federal judge's compensation while in office.

In considering possible constitutional amendments, the Commission was aware that proposals already made have varied in scope, from those that have addressed only removal from office to those that would replace the entire existing formal system of judicial discipline

with systems modeled on those in place in the states or with a system to be specified by Congress.

The Commission concluded that the broader proposals, which would replace not only the current impeachment process but the 1980 Act, were unnecessary and unwise. The Commission's analysis of experience under the 1980 Act and other formal mechanisms of discipline within the judicial branch reveals that existing arrangements are working reasonably well. Moreover, improvements are both possible and desirable, and the Commission offers numerous recommendations to that end.

Those recommendations take account, and seek to take advantage, of perhaps the most important benefit of the 1980 Act, namely the impetus it has given to informal resolutions of problems of judicial misconduct and disability. No alternative system of discipline of which the Commission is aware has similar potential for effective informal resolutions.

In addition, absent a convincing demonstration of the inadequacy of the 1980 Act, the Commission would not recommend, whether by constitutional amendment or by statute, an alternative whose capacity to walk the tightrope between independence and accountability is a matter of speculation. This is particularly true with respect to alternatives that were crafted for state systems that may balance judicial independence and judicial accountability differently than did the framers and ratifiers of our federal constitution.

Proposed constitutional amendments that would change only the process of removing federal judges also vary in scope, with some focusing on convicted judges and others proposing a new system for all judges. As to both kinds of proposals, the Commission was concerned about the effects of altering one important equilibrating mechanism in the complex machinery of American government. Specifically, it does not believe that the House and Senate should be relieved of the power and responsibility to make an independent political judgment about the fitness of a federal judge to remain in office. This is the problem with proposals for automatic removal of judges convicted of certain crimes and with broader proposals that would shift the locus of judgment to the judiciary. A special court to consider removal may or may not be able to walk the tightrope between judicial independence and accountability as well as Congress has walked it under existing arrangements. In any event, such

a system holds a serious risk of lack of public confidence, the costs of which would adversely affect the judiciary as a whole.

Risks such as these might be worth incurring if current arrangements were wholly inadequate and incapable of improvement. Having carefully considered the relevant mechanisms within the three branches, the Commission concludes that substantial improvements are possible, and its recommendations are crafted to bring them about. The Commission understands the public's outrage when convicted federal judges continue to draw their salaries in prison. It also understands the frustration of Members of Congress when they are put to the burdens of impeaching and removing those judges from office. Neither outrage nor frustration, however, should cause us to forget that Congress has the power to lighten some of the burdens of the impeachment process, or that others of those burdens are inherent and desirable in a system of checks and balances. The recommendations that follow reflect the view that the risks and uncertainties of alternative removal mechanisms should be avoided until every effort has been made to reduce the burdens of the existing process to the core that is required to maintain that delicate balance between judicial independence and judicial accountability.

CHAPTER II
CONSTITUTIONAL ISSUES*

The Commission dealt with a variety of questions of constitutional law and policy. First, several features of the current system of judicial discipline have been criticized on constitutional grounds. For example, some have questioned the constitutionality of criminal prosecution, and especially incarceration, of sitting federal judges. The Commission thus confronted the question whether reforms might be necessary because of possible constitutional infirmities in current practice.

Second, the Commission considered proposals for statutory changes in the judicial discipline system that raised constitutional questions. In particular, the question whether Congress may and should provide for removal other than through impeachment is a recurring one. In order to assess any such statute, the Commission needed to decide whether it would violate the Constitution as it currently stands and thus require a constitutional amendment.

Finally, the Commission considered a number of proposed changes in the judicial discipline system that clearly would require constitutional amendments and that are framed as such. The Commission assessed possible constitutional changes as a matter of policy.

CURRENT CONSTITUTIONAL STRUCTURE

Article III of the Constitution vests the "judicial Power of the United States" in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Immediately after making that grant, it provides for the tenure and compensation of judges: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

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* See Chapter Notes.

The only method of removing judges specified by the Constitution appears in Article II, which provides that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." Under Article I, the sole power of impeachment rests with the House of Representatives, while the Senate has the sole power to try all impeachments. Conviction in the Senate requires "Concurrence of two thirds of the Members present."

Taken together, these provisions create what is commonly referred to as judicial independence. Independence obtains at several levels. As a result of the separation of powers, the federal courts alone possess the judicial power. Their judgments therefore are not formally subject to revision by Congress or the Executive. Guaranteed compensation makes the judges (like the President personally) to some extent immune from coercion based on Congress's appropriation power.[1] And tenure during good behavior means that the judges need never face the voters.

The impeachment mechanism is the only means expressly set forth in the Constitution by which a judge may be removed from judicial office and thus debarred from exercising judicial power. Removal by joint action of the House and Senate is therefore the only explicit qualification of judicial independence and the only explicit means by which a federal judge may be called to account for his or her actions while in office.

The framers and ratifiers of the Constitution believed that substantial independence and limited accountability were important to the role of the federal courts in the new system of government. They shared the long-standing English distrust of judges who were dependent on the King, and recent experience had demonstrated the dangerous tendencies of popular legislatures. Speaking of good behavior tenure, Alexander Hamilton said in *The Federalist*: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." [2]

Although no consensus has ever developed on the exact scope of the impeachment power, its reach is illuminated by two hundred years

of experience. Congress has removed judges for various forms of official and personal misconduct, but it has not done so because it disagreed with the outcome of cases. The impeachment and acquittal in 1805 of Samuel Chase, the controversial Federalist justice, seems to have inclined Congress and the country away from regarding impeachment as a general political check on the substantive exercise of judicial power.[3] The recent impeachments that provided the impetus for the Commission arose out of criminal prosecutions. But while the impeachment mechanism has not functioned as a means of systematic congressional supervision of the judiciary, impeachment is generally thought to be available as a response to serious misuse of judicial power.

The most significant legal question to have arisen concerning the actual conduct of impeachment proceedings recently came before the Supreme Court in *Nixon v. United States*.[4] Judge Walter Nixon was prosecuted by the Department of Justice, convicted by a jury, and imprisoned. The House then impeached Judge Nixon, and the Senate convicted and removed him from office. Judge Nixon sought judicial review of his impeachment conviction by challenging Senate Rule XI, under which a special committee of the Senate heard witnesses and compiled evidence. Only a portion of the evidence was presented during the impeachment trial before the full Senate, although the records and videotapes of the special committee were available to all Senators.

Judge Nixon maintained that use of the special committee ignored the Senate's constitutional duty to "try all Impeachments," which he said obliged the Senate to conduct all fact-finding in a plenary proceeding. The Court held that questions concerning the conduct of impeachment trials are committed for final decision by the Senate and that Judge Nixon's claim therefore was nonjusticiable -- it could not be decided by the courts. Chief Justice William Rehnquist, writing for the Court, considered it significant that the Constitution's text gives the Senate the "sole" power to try impeachments. The Court stated that there are no clear standards to guide the courts if they, rather than the Senate, were to interpret the word "try." The Court stressed that during the founding no one appears to have suggested that there would be judicial review of impeachment convictions. As a result of the Court's decision in *Nixon*, the great majority of legal issues surrounding the impeachment system are to be resolved by the Senate and the House and not by the courts. In exercising their responsibilities, Senators and Representatives, of course, are as much bound by the Constitution as are the judges.

CONSTITUTIONAL CONCERNS

Criminal Prosecution of Federal Judges

Congress established this Commission in substantial measure because of the impeachment in the 1980s of three federal judges who had been prosecuted for felonies by the United States Department of Justice. Many in Congress wondered whether, if most judicial impeachments can now be expected to follow criminal prosecution, the enormous time and trouble associated with the impeachment process are still justified.

Criminal prosecution is an aspect of the system of judicial discipline broadly conceived. Because its charge extends to all questions of judicial discipline, the Commission considered whether constitutional difficulties with criminal prosecution are grounds for reform.

The Constitution does not exempt federal judges from the criminal statutes that apply to other citizens and government officials. It specifically provides that a party who has been convicted by the Senate may be punished criminally, but it does not require that impeachment precede prosecution.[5] The authors of the Constitution may have anticipated that impeachment would generally precede prosecution, but the proviso concerning prosecution does not logically imply any time order.

The purposes of impeachment and prosecution are different. The impeachment process is "political" in the loftiest sense of that word; it deals with misconduct in office, and it imposes wholly political sanctions – loss of office and disqualification from further government service. Criminal prosecution, by contrast, concerns personal wrongdoing. It results in punishment (including loss of liberty) aimed at individuals in their private character. There is no reason to believe that the two should interfere with one another.[6] Finally, if the impeachment clause implies that removal must precede prosecution, its protections would extend not only to serving judges but to all civil officers of the United States, for all such officers are subject to impeachment. Such a result, contrary to historical practice from the earliest times, cannot plausibly be attributed to the framers of the Constitution.[7]

The principal argument against prosecution of judges while they are in office is that incarceration is equivalent to removal, because it may make it impossible for the judge to exercise judicial power. This

argument rests on the assumption that if something is the functional equivalent of removal, then it should be treated as removal for purposes of constitutional analysis. Functional arguments, however, are of limited value in interpreting the structural aspects of the Constitution. Rather, as the recent practice of the Supreme Court indicates, on structural questions the appropriate method of interpretation is relatively literalistic and formal.[8]

As a formal matter, imprisonment is not equivalent to removal. Under Article III, federal judicial office has two consequences. First, a judge is legally eligible to exercise judicial power, because the judicial power of the United States is vested in courts made up of judges. Second, a judge is entitled to receive undiminished compensation. Imprisonment does not deprive a judge of either of those accompaniments of office. Even in jail, a judge continues to receive salary and remains eligible to exercise judicial power when circumstances change.

For similar reasons, criminal fines and forfeitures are not diminutions of judicial compensation forbidden by Article III.[9] A judge who must pay a fine will still have received salary from the Treasury. Guaranteed compensation does not immunize judges from ordinary legal obligations, such as private debts, and there is no reason to treat differently an obligation to the government.

Criminal prosecution does not threaten the constitutional value of judicial independence because it does not enable anyone other than the federal courts to decide cases and controversies. The requirement that judges comply with the law, and their liability for punishment if they do not, has only incidental consequences for the exercise of judicial power. The mere possibility that the Executive might use the criminal enforcement power in an attempt to influence judicial decisions does not support the inference that the Constitution therefore confers judicial immunity from punishment. A President who misuses the enforcement power would risk scandal with serious political consequences.

> ***The Commission concludes that Article III judges constitutionally may be prosecuted, convicted, and punished, and that the punishment may lawfully include incarceration.***

Judicial immunity from state prosecution would be undesirable. It would leave federal judges free of most of the criminal laws that apply to all citizens, including, for example, the laws against battery and larceny. Federal judges, and federal officers generally, already enjoy the protection of the principle that a state government may not discriminate against the federal government.[10] In addition, as federal officials, federal judges may remove any criminal prosecution against them to federal courts if the charge is related in any way to their role as judges and if they feel they will be treated unfairly in state court. This further reduces the need for general judicial immunity from state prosecution.

> ***The Commission concludes that Article III judges constitutionally may be subjected to state prosecution and incarceration. Although Congress has power to create some privileges against such prosecutions, the Commission concludes that such statutory privileges would be unwise.***

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

Congress canvassed the constitutional questions associated with the 1980 Act in detail when the Act was adopted.[11] The primary objection was that the discipline mechanisms of the Act were inconsistent with the principle that federal judges are independent individually as well as collectively. Under the strongest form of that principle, not only are the political branches forbidden to interfere with the courts, but federal judges may not discipline one another; the only means that the judiciary may use to control judges is the appellate process.

As a general matter, the Commission agrees that the Act is within Congress's authority to make laws that will carry into execution the powers of the other two branches. The fact that individual judges enjoy life tenure and protected compensation does not, in the Commission's view, imply that they must be free from all internal sanctions, provided those sanctions do not threaten tenure and compensation. The Commission believes that a power in the judiciary to deal with certain kinds of misconduct furthers both the smooth functioning of the judicial branch and the broad goal of judicial independence.

The Commission's work brought one question concerning the 1980 Act into the foreground. Recent criminal prosecutions of federal judges have raised the possibility that a judge might seek to continue to exercise judicial functions while under indictment or in prison. So far, judges who have been indicted have relinquished voluntarily some or all of their cases, and no judge has sought to continue to exercise judicial authority while imprisoned. The Commission expects that judges will ordinarily avoid judicial activity while under indictment and in all events will refrain from exercising judicial authority while incarcerated. Even a judge who believes himself or herself to be innocent and expects to be acquitted should recognize the harms to institutional integrity that result when someone who faces criminal charges exercises judicial power.

It is possible, however, that a judge might refuse to relinquish judicial authority while under indictment or even while imprisoned. Should that happen, the appropriate circuit council would have to consider whether to reassign the judge's cases, using its authority under sections 332 or 372 of title 28 of the United States Code.

Such control over judicial duties would not effect a removal. The judge would continue to receive salary and would continue to hold office, because he or she would still be eligible to exercise judicial authority. Control of duties of this sort therefore is permissible, even if impeachment is the sole constitutional mode of removal. Such control is consistent with the constitutional grants of tenure and undiminished compensation. The independence the Constitution grants to Article III judges is preserved. Two questions therefore remain. First, does Congress have the constitutional power to grant this authority to the circuit councils? Second, does that grant conflict with any other part of the Constitution's text or structure?

On the first point, the authority to transfer cases and other duties from judges who face criminal charges properly carries into execution the judicial power granted to the federal courts. The difficulties and scandal that would accompany the exercise of judicial power by someone who was the subject of criminal proceedings would detract from the effective and impartial administration of justice and damage the courts' reputation for integrity. Means to avoid such difficulty thus further the exercise of judicial power, and assigning cases and other duties is a traditional adjunct to the judicial power. Granting this authority to the circuit councils rather than to the courts is appropriate because judicial

bodies that are not courts may properly exercise powers ancillary to the resolution of cases and controversies.

The Commission also believes that such a power in the circuit councils is consistent with the constitutional grant of the judicial power solely to the courts. That grant, interpreted in light of its purpose of creating an independent judiciary, requires that no organ of government other than the courts decide cases. Reassignment of cases because a judge has been indicted, convicted, or imprisoned cannot fairly be characterized as an attempt to decide cases or to influence the outcome of cases. It thus leaves intact the independence the Constitution grants to the Article III courts.

Of course, a circuit council could misuse this authority. In particular, any attempt to control case assignments in order to affect case outcomes would be subject to the very serious constitutional objection that the circuit council was exercising the judicial power, which is granted only to the courts. But to say that certain exercises of a power are unconstitutional is not to say that the power itself may not be conferred.

Objections to the circuit council case reassignment power based on more expansive notions of judicial independence are in the Commission's view unfounded. Although the Commission agrees that the constitutional provisions pertaining to judicial tenure and the power of the courts may be understood in terms of their underlying purpose of judicial independence, this is not to say that everything that could interfere with the work of an Article III judge or court is unconstitutional.

The transfer of a judge's cases is not the equivalent of removal from office. Cases may be transferred when a judge is temporarily ill or has fallen far enough behind on motions or opinions to require assistance from colleagues. Transferring cases when a judge has become permanently, or temporarily, disabled mentally or physically is a necessary exercise of power ancillary to the resolution of cases and controversies. Current provisions in section 372 of title 28, the United States Code, and predecessor provisions, have for more than fifty years recognized that necessity in disability situations. Circuit councils have been authorized to exercise authority in such situations since 1949. Transfers related to disability situations do not interfere with the constitutional vesting of the judicial power in the courts. Although the

Constitution establishes a form of judicial independence, it does not say or imply that judges and courts are to be free from any influence that might affect their work. Rather, judges and courts possess the degree of independence set out in the Constitution, no less and no more.

> ***The Commission concludes that a circuit council constitutionally may use its statutory authority to assign and reassign cases, and otherwise control the judicial duties, of a judge who has become disabled.***
>
> ***The Commission further concludes that a circuit council constitutionally may use its statutory authority to control the assignment and reassignment of cases and other judicial functions of an implicated judge during the criminal process, from investigation and indictment through the expiration of sentence, including a term of probation.***

POSSIBLE STATUTORY REFORMS

Removal Other Than Through Impeachment

Suggestions for the removal of federal judges other than through impeachment are common. Some favor automatic removal upon conviction of certain criminal offenses. Others argue that a noncriminal removal mechanism, such as a special judicial tribunal, should be created by statute.[12]

The Commission believes that removal may be effected only through the impeachment process. By "removal," the Commission means anything that relieves the judge of the aspects of office provided for in the Constitution -- namely, the judge's commission of office, with its accompanying eligibility to exercise the judicial power, and nonreducible compensation.

Either of two related but slightly different readings of the text yields the conclusion that impeachment is the sole means of removal. First, the most plausible reading of the phrase "during good Behaviour" is that it means tenure for life, subject to the impeachment power. According to this reading, judges, like the President, serve for a specified period, subject to impeachment -- life in the case of the judges,

four years in the case of the President. Alternatively, "during good Behaviour" might mean unless convicted by the Senate of treason, bribery, or another high crime or misdemeanor.

The framers and the ratifiers of the Constitution understood the text in one of those two ways, with the result that judges may be removed only through impeachment and conviction. *The Federalist* speaks repeatedly of the permanence of Article III tenure.[13] And while *The Federalist* discusses the displacement of executive officers other than through impeachment and conviction, it nowhere suggests that judges could be removed in any other way.[14] The ratification debates about the federal judiciary seem to have proceeded on the assumption that good-behavior tenure meant removal only through impeachment and conviction.[15]

It is true that English practice permitted use of the writ *scire facias* to remove certain officers who served on good behavior. *Scire facias* was an ordinary civil proceeding brought by the Attorney General under which an officer could be removed if the court found a failure to behave well. There is no evidence, however, that those who drafted and ratified the Constitution considered the writ or thought it available to remove federal judges.[16]

The founding debates confirm this view of the original understanding. Federalists and antifederalists seem to have agreed on the importance of an independent judiciary, and Federalists stressed that tenure during good behavior secured independence. Judges subject to removal through a civil proceeding such as the writ *scire facias* would be far less independent than judges removable only through impeachment by the House and trial by the Senate. It is very likely that had any significant number of people understood tenure "during good Behaviour" to permit removal other than through the impeachment process, the issue would have come up, probably as a criticism of the Constitution. That no one seems to have even raised the question is indirect but powerful evidence concerning the understanding of the text that prevailed during the framing.

An examination of Articles I and II reinforces this conclusion. Representatives, Senators, the Vice President, and the President serve for terms of years, subject to removal only as specified in the Constitution: the President and Vice President may be removed by impeachment and conviction; the Senate and House may expel their members with a two-

thirds vote. The tenure of these officers is fully determined by the Constitution, with nothing left for Congress to decide through legislation. This arrangement accords with the overall design of the Constitution, under which basic rules of structure are chosen by the people, not the ordinary organs of government. The tenure of judges is no less important to the nature and operation of the federal judiciary than the tenure of the President is to the nature and operation of the executive branch. It would be anomalous if the Constitution did not fully specify the terms under which judges serve and instead left that basic question to some extent up to Congress.

The most difficult question in this connection is whether Congress may provide for removal as a criminal punishment. Congress has broad power to impose penalties for crimes. Indeed, a statute enacted by the First Congress in 1790 provided that a judge convicted of bribery would be disqualified from holding office.[17] Arguably, this would effect removal if the judge were still serving. Moreover, neutral criminal laws do not threaten judicial independence. They are not adapted to retaliate against courts or judges for judicial decisions. Finally, there are strong policy considerations in favor of removal as a criminal sanction. Many crimes, especially criminal breaches of the public trust, warrant removal from public office as part of the punishment.

Nevertheless, the Commission concludes that Congress may not provide for removal as a criminal penalty. If removal may lawfully follow on conviction for a federal judge, then it may do so for the Vice President of the United States or perhaps even the President.[18] But if the constitutional grant of a term of office to the Vice President and President prevails against any provision for removal in the criminal law, the same should be true of the tenure the Constitution grants to judges. The Constitution quite explicitly separates impeachment and removal from the ordinary criminal process.[19] The Commission does not believe that Congress's power to punish crimes is an exception to judicial life tenure, or alternatively a way in which good behavior may be inquired into, in the way that the impeachment process clearly is.

The 1790 bribery statute does not indicate that the First Congress believed in removal through the criminal process. The 1790 Act provided that a federal judge who accepted a bribe would be "forever disqualified to hold any office of honor, trust or profit under the United States."[20] Although it might seem that disqualification from office would include disqualification from the office one occupies at the time of conviction,

Congress in 1790 apparently regarded disqualification and removal as distinct. Less than a year after adopting the 1790 Act, the First Congress provided for the punishment of bribe-taking by revenue officials: an officer who took a bribe was to "forfeit his office, and ... be disqualified from holding any other office under the United States."[21] Moreover, the Constitution itself distinguishes between removal and disqualification as punishment for officers who have been impeached and convicted.[22] The best view of the 1790 Act is that it would disqualify a convicted judge from further office, but that it did not purport to remove the judge.[23]

The American Bar Association recently adopted a position on this issue that supports the Commission's conclusion. The Association maintains that "no significant benefit would be realized by adding statutory removal from office to the methods of discipline under the [1980] Act, especially in light of the serious constitutional question whether article III judges may be removed by means other than impeachment."[24] When it adopted this position, the Association rescinded long-standing positions in favor of nonimpeachment statutory removal mechanisms.[25] A task force of the Association had concluded that legislation providing for nonimpeachment removal would be of "uncertain constitutional validity."[26]

The Commission concludes that a statute providing for the removal from office of judges who serve on good behavior under Article III by means other than impeachment and conviction would be unconstitutional.

The Commission's conclusion on this question has implications for the modern descendant of the 1790 Act, section 201 of title 18, United States Code, under which a government official convicted of bribery "may be disqualified from holding any office of honor, trust, or profit under the United States." The Commission believes that section 201, like the 1790 Act, is best understood to provide only for disqualification, not removal. The opposite construction would render it unconstitutional.

The Commission recommends that section 201, title 18, United States Code, be amended to make clear that it does not authorize the removal of any judicial officer who serves during a term specified in the Constitution.

Automatic Suspension of Pay Upon Conviction

Similar reasoning applies to proposals under which a judge's compensation would be suspended upon indictment or conviction. Failure to pay the salary of a serving federal judge quite literally violates the Constitution. An undertaking to return the money later does not cure that violation.

> ***The Commission concludes that a statute under which a judge's compensation would be suspended on the basis of a criminal conviction would be unconstitutional.***

Automatic Suspension of Duties Upon Conviction

As noted above, the Commission believes that the circuit councils may constitutionally exercise their statutory power to control the assignment of judicial duties to a judge who has been convicted, including the total suspension of judicial duties. The Commission also considered the suggestion that suspension of duties be made automatic by statute.[27] The Commission sees no constitutional objection to such legislation. Unusual circumstances, however, may require that the automatic suspension be tempered in some fashion. For example, the judge might be very close to deciding a pending case that had involved lengthy litigation. In such a situation, especially when the offense of which the judge had been convicted did not involve a breach of integrity or otherwise implicate the case being decided, the interests of justice might be best served by permitting the judge to decide the case. On balance, however, the judicial duties of a convicted judge should be suspended unless special circumstances dictate otherwise. (See Chapter V for additional discussion and recommendations on this topic.)

> ***The Commission recommends adoption of a statute under which a judge who has been convicted of a felony shall not hear or decide cases unless the circuit council determines otherwise.***

POSSIBLE CONSTITUTIONAL AMENDMENTS

Major reform of the system of judicial discipline and removal would require constitutional amendment. The Commission therefore considered the desirability of a number of types of constitutional change.

Life Tenure

The statutory assignment to the Commission included the duty to "investigate and study the problems and issues involved in the tenure. . . of an article III judge." This could be read as raising the question of whether the grant of life tenure to federal judges, provided by Article III of the Constitution, is a policy that should be reconsidered. This is a question of profound significance to the judiciary and to the form of governance that has prevailed in this country. It is a question about which much has been written, and the answer lies in the realm of individual political beliefs; it has not proven to be subject to empirical proof.

The need for a method of judicial discipline and removal, although influenced to some extent by the existence of life tenure, does not derive from it. Whether the system calls for service for life or some other measure of judicial tenure, the problems and issues surrounding judicial misconduct would, in the large, remain. The decision to base the system of federal judicial service on tenure during good behavior was arrived at by the founders after thoughtful consideration and debate. It has not been shown to be fundamentally flawed or otherwise in need of basic change. Accordingly, the Commission determined to place the focus of its limited time on ways to improve the existing system, rather than on the more abstract question of whether, as a political construct, judges' tenure should be measured by some different yardstick, with the possible different systems that might entail.

Significant Reforms in the Impeachment Mechanism

Assuming that life tenure will be retained, the Commission considered whether any defects in the current system of judicial discipline and removal call for constitutional amendment. The principal criticism of the impeachment mechanism is that it is unworkable in light of current demands on the time of the House and Senate. (See discussion in Chapter III.) Although the Commission fully appreciates these

concerns, it decided against proposing basic changes in the impeachment mechanism primarily for three reasons.

First, the system of life tenure implies that judicial removal is a very serious undertaking. If the framers so valued judicial independence that they established service during good behavior, then the removal of a judge ought to be a difficult matter, one requiring the close attention of the government.

Second, the process of judicial removal should remain *political.* To place removal of federal judges in the hands of a body less electorally responsible than Congress would shift the constitutional balance significantly in the direction of unaccountability. Moreover, as the framers recognized, impeachable offenses by government officials are by their nature political crimes, both because they involve breaches of the public trust and because they represent misuse of office. In the extreme case, impeachment may be the response to abuse of power. Judging whether the public trust has been violated or the power granted by the people misused is fundamentally a political decision, one that should be made by officers who answer to the voters.

Finally, administrative changes recommended by the Commission should significantly improve the efficiency of the impeachment mechanism and make it more likely that judges who have committed crimes will resign before impeachment is necessary. The Commission believes that the reduced burden on the House and Senate will be a reasonable burden in light of the importance of impeachment decisions and the need that they be made by politically accountable national bodies.

> ***The Commission recommends retaining the political mechanism of impeachment by the House and trial by the Senate as now provided in the Constitution. The impeachment process is the sole appropriate means for the removal of life-tenured judges.***

Constitutional amendments have been proposed that would automatically remove a judge who has been convicted of certain crimes, such as any felony.[28] The Commission agrees with the policy underlying these suggestions: it is very undesirable for a convicted criminal, especially a felon, to continue as a federal judge. The fact that this spectacle has been repeated several times in recent years has been a matter of serious concern to the Commission.

Nonetheless, the Commission does not think a constitutional amendment is warranted. If the Commission's proposals for improvements in the impeachment system, especially improved cooperation between Congress and the Justice Department, are adopted (see Chapter III), the judge-in-prison scandal will become much less likely. Automatic removal, moreover, is not without difficulties. Such a mechanism would eliminate the congressional check on improper prosecutorial targeting of judges. Furthermore, an automatic removal provision would encounter important drafting problems. Although such a provision should include only serious offenses, it is not at all clear how to define a serious offense. On balance, given the prospects for improvement in the current system, the Commission does not believe that this problem, albeit serious, warrants a change in the Constitution.

The Commission recommends against a constitutional amendment under which convicted judges would be removed automatically.

Following the approach taken in some states, some have proposed that a new body be added to the constitutional system that would have the authority to discipline and remove federal judges.[29] Under the Constitution as it now stands, important political decisions are made by elected officials. Life tenure, and the insulation from electoral accountability that comes with it, are reserved for those officials whose function is strictly legal, not political. As noted earlier, the removal of a federal judge is fundamentally a political choice because official misconduct and abuse of power are political offenses. A new judicial discipline body would be nonelected and hence would be, at best, imperfectly accountable to the voters. It would be inconsistent with the theory of government that we attribute to the Constitution as it now stands. It would also, in all likelihood, make removal of judges easier than it now is, thus substantially changing the constitutional scheme of judicial tenure and balance among the branches.

The Commission recommends against the creation of a new organ of government that would have the authority to discipline and remove federal judges.

One proposal would give Congress authority to determine the practice and procedures to be used in removing judges for misconduct or disability.[30] This would give Congress enormous power. For example, Congress could adopt a statute under which either House could remove

a judge by majority vote, or upon application of the President. Congress would decide how independent the judges should be. Such a congressional power would subvert not simply the character of the federal judiciary as it now exists but the even more fundamental constitutional principle that basic decisions about the structure of government should be made by the people in the Constitution, not by the ordinary organs of government. Even those who question the current system of life tenure agree that judicial tenure should be set out in the Constitution, not left up to the ordinary political process.

> ***The Commission opposes the suggestion that Congress should be able to determine by statute the way in which federal judges are removed.***

The Commission considered three proposals that would involve the Supreme Court in the judicial removal process.[31] Most important, such a change would call on the Court to perform a fundamentally political function. Political functions should not be exercised by life-tenured judges. Moreover, any role for the Court would harm its primary function of deciding cases and would create temptations for an improper blending of appellate and disciplinary responsibilities.

> ***The Commission opposes any proposal under which the Supreme Court would participate in the removal of federal judges.***

The precise meaning of the Constitution's list of impeachable offenses has been controversial throughout American history. In practice, however, there has been substantial consensus as to the concept's core. In addition to treason and bribery, significant breaches of criminal law are grounds for impeachment. Although there has been debate whether an officer may be impeached for anything other than treason, bribery, or acts that are criminal, there appears to be widespread agreement that serious political offenses could lead to impeachment. For example, when George Mason proposed the current standard to the Federal Convention, he explained that it would cover attempts to subvert the Constitution.[32] A delegate to the Massachusetts ratifying convention argued that the President could be impeached for abuse of power.[33] Similarly, Alexander Hamilton in *The Federalist* suggested that impeachable offenses "may with peculiar propriety be denominated POLITICAL."[34] The nineteenth-century commentators generally agreed that impeachment lies for noncriminal political offenses.[35]

As a matter of policy, the Commission thinks it reasonable that officials be removable for serious crimes or serious breach of the public trust, including abuse of power. While some clarification of the constitutional standard might be helpful, there is no reason to believe that any lack of clarity has created a difficulty so severe as to call for constitutional amendment.

> ***The Commission concludes that the current constitutional standard for impeachment, as interpreted over the years, has been adequate to its purpose and recommends that it not be amended.***

CHAPTER III
LEGISLATIVE BRANCH*

Impeachment and removal of high-ranking federal officers are among the most awesome, although perhaps the least used, powers of the Congress. Designed to address serious wrongdoing, the impeachment clauses of the Constitution empower the legislative branch with authority to impeach (formally indict or charge) and then, after trial, to convict and remove from office the most powerful public servants in the land: the President, Vice President, Chief Justice of the United States and Associate Justices of the Supreme Court, other federal judges, and Cabinet officers.

The delegates to the Constitutional Convention struggled for months over the subject of impeachment, and only after careful deliberation did they assign the power to the national legislature -- and then with carefully crafted conditions for its exercise. Having established a single executive, the feeling prevailed that impeachment would be a central element of executive accountability. James Madison argued convincingly that some provision was "indispensable" to defend the community against "the perfidy of the chief magistrate."[1] The framers were concerned not only with the applicability of impeachment to the President, but also with the establishment of checks and balances among the legislative, executive, and judicial branches.

To permit the impartial and courageous discharge of judicial duties, the framers sought to provide the federal judiciary with a high degree of independence from the executive and legislative branches of the government. The power to impeach and try impeachments vested in the Congress serves as a counterweight -- providing a mechanism for judicial accountability. The House's authority to investigate (and accuse) and the Senate's power to try (and remove) are limited only by other constitutional provisions and, as a general proposition, are not judicially reviewable. As the Supreme Court recently found in *Nixon v. United States*, judicial interference with the process would be counterintuitive and improper.[2]

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* See Chapter Notes.

But judicial independence and judicial accountability are not at odds with each other. The corrupt acts of an individual reduce the judicial branch's independence because of loss of public respect for the branch. The independence, autonomy, and integrity of a branch of government take precedence over the independence of an individual officeholder. In addition, accountability contributes to legitimacy and confidence which are the true components of independence. In statements made after the Constitutional Convention, Alexander Hamilton noted that federal judges too would be tried by the Senate, which he described as "consistent with the independence of the judicial character."[3] Hamilton further observed that the judiciary will always be the branch least dangerous to the "political rights of the Constitution," and "all possible care is requisite to defend [the judiciary] against [the other branches'] attacks."[4]

Unlike some constitutional provisions that charted entirely new directions in practices and procedures for the nation, impeachment was a familiar subject to the framers. The English model, firmly embedded in the common law for six centuries, was well known to them. The new American system of impeachment, however, deviated markedly from the English system and drew on years of experience in the states prior to the Constitutional Convention.[5] American impeachment is limited to officeholders; in the English system anyone (except members of the royal family) could be impeached. The English favored penal sanctions (fine, imprisonment, and perhaps even death) to attach upon conviction. The American remedy, aimed more at the office than the officeholder, tilts toward protecting the public interest rather than punishing the individual.

CONSTITUTIONAL AUTHORITY[6]

The scope of the impeachment power is succinctly set forth in Article II, section 4: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." This provision for impeachment and removal is the Constitution's only reference to the disciplining of federal judges.

Provisions in Article I assign responsibility for the impeachment process to the two houses of the Congress and specify several formal requirements. Section 2 confers on the House of Representatives the

"sole Power of Impeachment." The threshold power to determine whether impeachment is an appropriate remedy therefore lies in the collective wisdom of the body most representative of the people. The Senate in section 3 is assigned the sole power to try all impeachments, with only two requirements applicable to federal judges: the Senate must be on oath or affirmation, and a two-thirds vote is required to convict on any article. (An additional requirement that the Chief Justice must preside in proceedings against the President of the United States does not apply to judicial impeachment.) Delegation of the impeachment power to the House of Representatives and the trial power to the Senate derived, in part, from the framers' belief that independence and autonomy in the executive and judicial branches would be necessary for the preservation of liberty.

Section 3 also clarifies the consequence of a Senate conviction, providing that a judgment of conviction shall extend no further than removal from office and disqualification from enjoying any "Office of honor, Trust or Profit under the United States." Finally, section 3 provides that a convicted party may also be liable for criminal prosecution, trial, judgment, and punishment in a court of law.

Of lesser significance are two phrases that mention impeachment in connection with other subjects. One provides that "The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment" (Article II, section 2). Another states that the trial of all crimes, except in cases of impeachment, shall be by a jury (Article III, section 2).

HISTORICAL EXPERIENCE

In the United States, impeachment activity commenced almost immediately after independence and has continued at irregular intervals during the past two centuries. There have been fifty-eight documented House impeachment investigations involving federal judges. Only fourteen Senate impeachment trials have taken place, eleven of federal judges. The following persons were impeached and were tried by the Senate: William Blount, United States Senator from Tennessee (impeachment proceeding occurred in 1798 and 1799); John Pickering, U.S. District Judge for the District of New Hampshire (1803-1804); Samuel Chase, Associate Justice of the United States Supreme Court (1804-1805); James H. Peck, U.S. District Judge for the District of

Missouri (1826-1831); West H. Humphreys, U.S. District Judge for the District of Tennessee (1862); Andrew Johnson, President of the United States (1867-1868); William W. Belknap, Secretary of War (1876); Charles Swayne, U.S. District Judge for the Northern District of Florida (1903-1905); Robert W. Archbald, Circuit Judge, U.S. Court of Appeals for the Third Circuit, then serving as Associate Judge of the U.S. Commerce Court (1912-1913); Harold Louderback, U.S. District Judge for the Northern District of California (1932-1933); Halsted Ritter, U.S. District Judge for the Southern District of Florida (1936); Harry E. Claiborne, U.S. District Judge for the District of Nevada (1986); Alcee L. Hastings, U.S. District Judge for the Southern District of Florida (1988-1989); and Walter L. Nixon, Jr., U.S. District Judge for the Southern District of Mississippi (1988-1989). [7]

Of these fourteen persons, seven (six federal district judges and one circuit judge) were convicted by the Senate and removed from office: Judge Pickering (drunkenness and senility), Judge Humphreys (incitement to revolt and rebellion against the Nation), Judge Archbald (bribery), Judge Ritter (kickbacks and tax evasion), Judge Claiborne (tax evasion), Judge Hastings (conspiracy to solicit a bribe), and Judge Nixon (false statements to a grand jury). Only Judge Humphreys and Judge Archbald also were disqualified from holding future office of honor, trust, or profit under the United States.

Two famous impeachment proceedings resulted in Senate acquittals. President Andrew Johnson was charged with eleven articles of impeachment, all but two relating to violations of the Tenure of Office Act, which required congressional consent for the removal of any public servant whose appointment was congressionally approved. The Senate failed to reach the two-thirds necessary for conviction by a single vote on three of the articles, and it adjourned without voting on the remaining eight. After extremely contentious proceedings in the Senate, Justice Samuel Chase, accused of partisan conduct on the bench, also was acquitted. In terms of precedent, these two acquittals may be as important as the seven convictions. They enabled the Senate to create a body of knowledge about what factual circumstances are necessary for conviction and what circumstances fall short.

In a number of instances, the impeachment process commenced in the House but resignation of the officer foreclosed further action. The foremost of these cases involved President Richard M. Nixon who resigned from office in 1974 after the House Judiciary Committee

approved three articles of impeachment relating to the Watergate affair (obstruction of justice, abuse of presidential power, and unconstitutional defiance of House subpoenas). Impeachment was voted against a federal judge (Mark W. Delahay) in 1873, but he resigned before actual articles of impeachment were approved. Another federal judge (George English) resigned before trial in 1926. In 1876, Secretary of War William Belknap resigned from office two hours before the House voted to impeach him; the Senate failed to remove Belknap because many Senators questioned the jurisdiction of the Senate to try an individual no longer in office. The applicability of the Belknap precedent to federal judges who retire and continue to draw salary is unclear.

Members of Congress, like federal judges, take an oath of office to defend and uphold the U.S. Constitution. When sitting for the purpose of impeachment, Senators take a special oath to do impartial justice according to the Constitution and laws. Historically, and on a case-by-case basis, respect for this latter oath has shown the Senate capable of distinguishing between facts warranting conviction and facts warranting acquittal, ultimately contributing to maintenance of the separation of powers envisioned by the framers.[8]

PROPOSALS FOR REFORM

Legislative activity relating to the discipline of federal officials has been sporadic but continuous throughout American history. The First Congress enacted a law providing that a federal judge convicted of bribery shall forever be disqualified from holding any office of honor, trust or profit under the United States. The Act of April 30, 1790 -- as codified in section 201(b)(2), title 18, United States Code -- has apparently never been enforced. (See the discussion of this Act in Chapter II.)

The first proposed constitutional amendment for a removal mechanism other than impeachment was introduced in 1791. Between 1807 and 1812 nine other constitutional amendments were proposed in the wake of the attempted removal of Justice Chase, but no resolution proposing one ever was enacted. Just after the Civil War, several measures providing for the mandatory retirement of federal judges failed enactment.

Debate continues unabated today. Some Members of Congress argue that impeachment (and removal) of federal judges is, to use Thomas Jefferson's words, a "bungling way of removing judges -- an impractical thing -- a mere scarecrow."[9] Others respond that the current process works well, albeit slowly, exactly as the framers contemplated.

After nearly every impeachment proceeding, some Members of Congress have introduced proposals to amend the Constitution or to establish statutory means for removal of federal judges These reform proposals have always failed to garner the requisite support for enactment.

Current proposals to modify impeachment and removal mechanisms fall within two categories -- constitutional amendments and statutory enactments. Although those proposals have failed to achieve final passage, the Commission has given them serious consideration because they reflect the concerns of the elected representatives of the people.[10]

ROLE OF THE HOUSE OF REPRESENTATIVES

Although the Senate makes the ultimate decision on conviction and removal of a respondent (and establishes precedents for future impeachments), it is the House that initiates the impeachment process. The House's powers are comparable to those of a law enforcement agency exercising broad discretion to determine the direction and execution of criminal justice policy. Over the past fifty years, the House has made infrequent use of its power to charge federal judges. The House impeached three federal judges during the period 1986 to 1989, but to find another impeachment, one must go back to 1936. Looking at the House's conduct of impeachment investigations, which in the past were much more frequent than formal impeachment proceedings, the decrease in House investigatory activity is even more striking.

However, it would be a mistake to assume that the House's overall impeachment activity is limited to the relatively small number of actual impeachments. The House's role begins with the lodging of a complaint of judicial misconduct in the House. Only a small percentage of these complaints were deemed to warrant investigation by the House, and an even smaller percentage have resulted in impeachment. Yet the very act of a complaint can provoke a response. Of the fifty-eight cases

actually investigated by the House, thirty-eight involved charges that a judge engaged in financial corruption related to official duties. (This number may be understated because four judges accused of unknown charges -- which may have included financial corruption -- resigned during House investigations.) Thirty-one of these cases were disposed of without the House voting on impeachment, most often (in twenty cases) by the resignation of the judge.

The last time a judge was forced out of office was in 1945, when Albert W. Johnson submitted his resignation after a House subcommittee investigation. Judge Johnson's rulings were "commonly sold for all the traffic would bear," according to a scathing report by the subcommittee.[11] In the five decades since that resignation, the House has conducted only four impeachment investigations of federal judges: one in 1970 of Justice William O. Douglas, when no articles of impeachment were voted upon, and three in the period 1986 to 1989 that followed Justice Department prosecutions and led to impeachments and removals.[12]

Rules of Procedure

The Constitution mentions the role of the House in the conduct of impeachment only once, in Article I, granting the House the sole power of impeachment. Article I also contains a general grant of authority to the House to determine the rules of its proceedings.

The House has initiated the impeachment process in a variety of ways: by charges made on the floor by a member; by charges set forth in a memorial; by a resolution introduced by a member; by a message from the president; by charges transmitted from the legislature of a state or territory or from a grand jury; or based upon facts developed and reported by an investigating committee. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 created a new vehicle for transmitting a request for impeachment proceedings directly from the federal judiciary. Under section 372(c)(8) of title 28, United States Code, the Judicial Conference may forward a certification to the House that "consideration of impeachment may be warranted." Certifications were transmitted to the House prior to two of the 1980s impeachments (Judges Hastings and Nixon). In the case of Judge Claiborne, the House Judiciary Committee received a certification after it had begun its impeachment investigation.

Under present House rules the impeachment of an official is a matter of high constitutional privilege on the House floor. Any member can supersede ongoing proceedings to command an hour of debate on a proposition to impeach. In theory, the House can then vote immediately thereafter on impeachment, without any intervening investigation. Despite the ability to depart from a more deliberate approach, the House is unlikely in today's world to act without referring the matter to committee for investigation.

Some argue that elimination of the privileged nature of impeachment resolutions would foster a more regular and procedurally consistent treatment of all impeachment resolutions. By placing responsibility squarely in the House Committee on the Judiciary, incentive would be given to the Committee to improve its internal operating procedures for handling impeachment inquiries. If the Committee were not suitably responsive, the discharge petition process could be invoked.

Others argue that the procedure, which is rooted in two hundred years of history, has never created a problem and may have positive side effects. The ability of any House member to move an impeachment motion may be an important check on the Judiciary Committee, a check that is easier to implement than a discharge petition. Further, the power to move the impeachment of any civil officer lays the responsibility for impeachment on each and every Representative.

The Commission considered these competing arguments and ultimately decided to make no recommendation regarding the privileged status of impeachment resolutions. However, the Commission was strongly of the view that impeachment resolutions should be automatically referred to the House Committee on the Judiciary.

Committee on the Judiciary

Under House rules (Rule X, clause m), the Committee on the Judiciary has jurisdiction over federal courts and judges. While resolutions calling for an investigation by the Judiciary Committee or a select committee are referred to the Rules Committee, impeachment resolutions are referred to the Committee on the Judiciary. Impeachment resolutions referred to the Committee are ordinarily referred to the Subcommittee on Intellectual Property and Judicial Administration, although in recent cases involving judges who have been prosecuted, the

Judiciary Committee has delegated the initial inquiry to different subcommittees. The subcommittee may investigate or choose not to investigate the facts behind any particular resolution.

In 1986, the Subcommittee on Judicial Administration and Intellectual Property elected not to pursue the impeachments of three federal judges. Thousands of citizen petitions had complained about an appellate court's decision to grant a petition for habeas corpus in a notorious murder case. None of the complaints alleged unethical or criminal activity. The chairman of the subcommittee determined that federal judges should not be impeached for judicial decision-making even if the decision is an erroneous one. Standing alone, the act of rendering a judicial decision does not rise to the level of a "high crime or misdemeanor." If this were otherwise, the impeachment remedy would become merely another avenue for review and thereby compromise the separation of powers.[13]

Complaints of judicial misconduct are sent directly to the Committee on the Judiciary or are referred to the Committee by any member of the House or Senate who receives them. The complaints sent to the Judiciary Committee are similar to those received by the circuit courts under the 1980 Act. Some 80 percent of the complainants in the 98th and 101st Congresses were disgruntled civil or criminal litigants, or friends or relatives of those litigants. Concerned citizens and attorneys were also complainants. Over one-half of the complaints were directed at the behavior of federal district judges, while a much smaller number challenged the conduct of circuit judges or Supreme Court justices (approximately 10 percent in the 98th and 101st Congresses). Other complaints named magistrates, court clerks, tax court judges, or state court judges. Finally, a small but significant group of the complaints was directed at the federal judiciary without identifying a particular judge.[14] The Judiciary Committee refers these complaints to its subcommittee with responsibility for matters relating to the federal courts, the Subcommittee on Intellectual Property and Judicial Administration.

Since 1983, the Committee has kept a record of the number and nature of judicial discipline complaints it has received and has reported this data in the Summary of Activities published each Congress. Every Congress these complaints are archived and may be made available upon request. Today the Committee responds to every complaint with a letter acknowledging receipt of the complaint and directing the complainant's attention to the 1980 Act. Further, the Committee has developed and

made available to the public impeachment procedures, including "Procedures for Access to Confidential and Executive Session Materials."

With a few changes, the Committee's responses to judicial complaints could be even more informative. The acknowledgment letter should tell complainants that the 1980 Act does not contemplate sanctions for judges' decisions or issues relating to the merits of litigation. In appropriate cases, the Committee may request to be kept apprised of the complaint's disposition. Finally, because Members of Congress sometimes receive complaints from constituents, Members might be encouraged by the House Judiciary Committee Chairman -- perhaps once a Congress -- to forward the complaints to the Committee.

> ***The Commission recommends that the House Committee on the Judiciary continue to acknowledge every judicial discipline complaint. In serious cases involving potentially impeachable conduct, the Committee should conduct a follow-up inquiry or solicit the aid of the Justice Department in such an inquiry. The Committee should continue to keep a record of the number and nature of these complaints, and report these data each Congress.***

If this recommendation is adopted, the Committee may need to strengthen its resources. A continuation of current trends -- more complaints and more federal judges -- will result in more work for the Committee. The number of complaints received during the 101st Congress (1989-1990) is more than double the number received in the 98th Congress (1983-1984). Furthermore, a snapshot of recent congressional activity suggests possible additional sources of committee activity. For example, on May 11, 1993, Representative Frank Tejeda apprised the Commission of complaints filed by himself, a Senator, and twenty-eight other members of the House Texas delegation against a bankruptcy judge for ethnic bias committed in the Eleventh Circuit. On May 19, 1993, Representative Charles Canady introduced a resolution impeaching Judge Collins. On the same day, Representative James Sensenbrenner, Jr., introduced separate resolutions calling for the impeachment of Judge Collins and Judge Robert P. Aguilar. On June 22, 1993, the Judicial Conference certified that Judge Robert F. Collins, a district judge for the Eastern District of Louisiana, had engaged in conduct that might constitute one or more grounds for impeachment. On June 24, 1993, the Chairman and Ranking Minority Member of the

House Judiciary Committee (Jack Brooks and Hamilton Fish, Jr., respectively) introduced a resolution to impeach Judge Collins.

The Committee has discretion to assess its resources, the experience of the Members and the competency of professional staff, and weigh these factors against workload requirements. Three alternatives, each offering advantages and disadvantages, come to mind. First, the Committee might consider the creation of an ad hoc impeachment subcommittee composed of selected members from both sides of the aisle with a range of seniority and experience and chaired by the full committee chairman. Second, the Committee might ensure that experienced attorneys would handle all matters relating to impeachment inquiries. Third, in a specific impeachment inquiry, the Committee might consider appointing a special master to find the pertinent facts and report to the investigating subcommittee.

> ***The Commission recommends that the House ensure that its Committee on the Judiciary has the resources to deal with judicial discipline matters, and the resources and institutional memory necessary to deal with impeachment cases as they arise.***

EVALUATION OF THE HOUSE'S ROLE

The House's role in the three impeachments in the 1980s was unusual. Instead of playing a key role in determining whether and when impeachment should be instituted, as it had in previous inquiries, the House waited until all alternatives to impeachment had been exhausted. Not a single House member voted against the impeachment of Judges Claiborne and Nixon. And only three members voted against the impeachment of Judge Hastings. These one-sided votes are not surprising. Two of the three judges were convicted and imprisoned felons at the time of impeachment. The third had been acquitted of felony charges, but an investigative committee of the Eleventh Circuit found that he may have engaged in impeachable conduct.

Complaints of Judicial Misconduct

When a complaint appears on its face to raise potentially impeachable conduct, the Judiciary Committee may wish to consider further steps, such as a committee investigation into the judge's behavior

or deferral pending resolution of a complaint filed with the Judiciary under the 1980 Act. Although the House remains free to seize the initiative at any point, deference to the judicial discipline mechanism is appropriate in most cases. Deferral spares unnecessary or redundant investigations and avoids unwarranted intrusions into the affairs of a coordinate branch. This approach would aid the Committee not only in its policy role but, if necessary, in moving to the next stage of a judicial misconduct complaint: an impeachment investigation.

A formal judicial discipline mechanism -- either statutory or administrative -- does not exist at the Supreme Court. Because of the Court's special constitutional position, the 1980 Act does not apply to it. Currently, complaints received by the Supreme Court about the behavior of a justice are sent directly to that justice. Aside from informal peer pressures within the Court and the forum of public opinion, impeachment is the only formal judicial discipline mechanism. The House of Representatives, as well as the public and press, would benefit from an understanding of Supreme Court procedures.

Impeachment Investigations

There is no defined procedure for the conduct of a House impeachment investigation. At times, the House has ordered an immediate investigation. The investigation leading up to the impeachment of Justice Samuel Chase was perfunctory. As a result, the House managers were uncertain how the testimony of the witnesses would unfold. Nineteenth century House impeachment investigations were often conducted *ex parte*. But committee investigators began permitting the accused to appear, explain, present witnesses, and engage in cross-examination. Along with these procedural protections came the right to be represented by counsel during the committee hearings. By the early twentieth century, House subcommittees sometimes traveled to a judge's home district to hold hearings.

The nature of impeachment investigations has varied widely since the 1980s. For Judge Claiborne, the investigating subcommittee held only a one-day hearing. In the subsequent investigations of Judge Hastings and Judge Nixon, hearings were far more extensive. The three impeachment investigations in the 1980s differed from any previous investigations conducted by a House committee in one critical respect: each followed a criminal trial and relied in varying degrees on the record from these proceedings. The subcommittee assigned impeachment responsibility

made full use of the court record (and prior grand jury investigations). In the investigation of Judge Hastings, the subcommittee also reviewed an investigation and report by the Eleventh Circuit's Judicial Council.

The House investigating subcommittees have relied upon professional staff, and increasingly on outside counsel, to assist in the impeachment inquiries. For the Claiborne investigation in the House, the Judiciary Committee obtained the pro bono assistance of an experienced trial attorney. Two other trial attorneys assisted the House managers on a pro bono basis during the Senate trial. For the Hastings and Nixon investigations, the Judiciary Committee created a separate impeachment staff. The extensive duties performed by outside attorneys in these cases contrast with the investigation of Justice Douglas during the 1970s, when the Judiciary Committee relied on permanent committee counsel.

In terms of public perception, the most serious problem in House procedures is that of expedition. Careful and deliberate action is desirable, but the public interest requires expedition, particularly when a convicted judge is sitting in jail collecting full salary.

Sequencing of Impeachment and Criminal Prosecution. In recent years, federal prosecutors have given priority to criminal prosecution over an impeachment inquiry that might have more quickly resolved the removal issue. When evidence of serious misconduct may warrant a judge's removal from the bench, the Justice Department and the Judiciary Committee should consult about a choice between competing priorities: punishment through the criminal process or removal through the impeachment process. These consultations would ensure that the House is notified when a criminal investigation of a sitting federal judge becomes public or an indictment is returned. Preferably, the Justice Department could confer at an earlier stage and, if it chooses, defer prosecution until after impeachment has run its course.

Timely and meaningful consultations between the executive branch and the House, with each recognizing the other's authority, interest, and expertise, would have an underlying purpose: to remove a corrupt judge from the bench. If the executive branch and the House agree that the first priority is to remove the judge, consultation might determine the most suitable way of doing so. In some cases, an initial prosecution would be the best way to proceed; in others, impeachment would be a priority. Some cases might call for simultaneous action. In still others, the negotiation of plea bargains and pretrial diversions could

bring about an early removal from office (through resignation) of a judge who has engaged in misconduct. Such a course was successfully pursued in the 1970s for Vice President Spiro Agnew and Judge Herbert Fogel from the Eastern District of Pennsylvania.

> ***The Commission recommends that the House Committee on the Judiciary and the Justice Department -- upon obtaining information that a federal judge has committed criminal acts that may be inconsistent with continued service on the bench -- work cooperatively to resolve the removal issue, including, if desirable, postponing criminal proceedings.***

Access to Executive and Judicial Branch Materials. Questions concerning the exchange of information between Congress and the other two branches during the impeachment of a federal judge include (1) whether Congress should have access to all executive and judicial branch documents that are relevant to an impeachment investigation, (2) whether Congress should have access to grand jury evidence that is protected by Rule 6(e) of the Federal Rules of Criminal Procedure, and (3) whether Congress should have access to electronic surveillance materials, the disclosure of which is regulated by statute.

In the recent cases the Department of Justice has provided the House with all of the documents in its investigative files, including so-called "prosecution memoranda" that set forth detailed and candid assessments of the strength of the prosecution's case. Because the Department has cooperated in this manner, the issue of whether it is obligated to do so has not arisen.

The House holds the sole power of impeachment under the Constitution. Accordingly, the House has investigative powers ancillary to its impeachment power. In order to satisfy its constitutional responsibility to conduct an impeachment inquiry into misbehavior by federal judges, the House Judiciary Committee needs prompt access to investigative materials, including grand jury materials and wiretap information.

The basis upon which the executive branch could arguably refuse to comply with a congressional request for documents would be a claim of executive privilege. The scope of executive privilege has long been debated, and the exact boundaries of the President's right to withhold

documents from Congress are not entirely clear. It is widely accepted that some form of executive privilege applies to documents and information relevant to foreign affairs and national security, and to communications between a president and his advisors. And, of particular relevance to this issue, executive officials have successfully argued that certain investigatory information, such as the identity of informants, must be privileged in order to ensure effective law enforcement.

Against these various executive claims of privilege must be balanced the needs of Congress in carrying out its impeachment function. In recent cases the courts have struck the balance in favor of Congress.[15] As noted, the executive branch has operated in these matters consistent with that conclusion.

The only evidence that Congress recently has found difficult to obtain (at least in a timely fashion) is testimony before a grand jury, which is protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure, and electronic surveillance materials, the disclosure of which is regulated by statute.

With respect to grand jury evidence, Federal Rule 6(e)(2) of the Federal Rules of Criminal Procedure states that individuals involved in the grand jury process "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules." Knowing violation of this provision is punishable as contempt of court. Rule 6(e)(3) sets forth a list of exceptions that authorize disclosure in certain circumstances. The question here is whether disclosure to a House committee considering impeachment of a federal judge is permitted by Rule 6(e).

This issue was directly raised in the impeachment proceedings concerning Judge Hastings. On two separate occasions, the House Judiciary Committee sought grand jury records relating to Judge Hastings. Although the Department of Justice supported the Committee's request for the material, lawyers for Hastings opposed disclosure to Congress. The Eleventh Circuit held that disclosure to the Committee was authorized by the rule. The court concluded, however, that it was necessary for the House to show particularized need for the documents and for such need to outweigh the need for continuing secrecy. Later, in response to a subsequent request for additional grand jury documents, the court upheld the additional disclosure to the House Judiciary Committee.

Information obtained through electronic surveillance is also protected from disclosure except under certain circumstances. An officer who obtains information from court-approved electronic surveillance may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer receiving the disclosure. However, current law also provides that applications and orders for electronic surveillance may be disclosed upon a showing of good cause.[16] In Hastings's case, the court of appeals upheld the trial court's conclusion that good cause warranted the disclosure of electronic surveillance material to Congress for the purposes of the impeachment proceeding.

Ultimately, the Judiciary Committee in the Hastings impeachment proceeding was able to obtain grand jury and electronic surveillance materials. The proceeding suggests, however, the difficulties regarding congressional access to investigative material. The litigation necessary for the Committee to obtain disclosure absorbed a great deal of time and resources, and it substantially delayed the Committee's work. This problem exists even if the Justice Department wishes to disclose the materials.

The problem could be ameliorated if Congress enacted legislation, and changes were made in the Federal Rules, providing under appropriate conditions for congressional access to both grand jury and electronic surveillance materials directly relevant to any House investigation involving the possible impeachment of a federal judge. The Commission recognizes that the Justice Department, in its capacity as the federal criminal prosecutor, determines in the first instance the need for confidentiality of informants and other privileged evidentiary matters, as well as exercises its right to proceed expeditiously with a criminal prosecution. There may be circumstances in which disclosure of sensitive information from one branch of government to another might compromise an on-going investigation. Accordingly, any legislation should respect the constitutional roles of the several branches, and further changes should provide for the preservation of confidential material. Congress could ensure that any disclosed material is subject to strict controls to protect confidentiality, as the House Judiciary Committee did with respect to confidential materials in the Hastings impeachment. A statute could be drafted to permit the release of executive branch and grand jury materials to the Committee whenever requested by the Chair of the Committee and authorized by the Attorney General.

Another potential source of investigative materials relevant to a House impeachment inquiry would be the files of a judicial council investigation undertaken pursuant to the 1980 Act. Section 372(c), created by the 1980 Act, is unclear about the circumstances under which a circuit council should, despite the confidentiality restrictions of §372(c)(14), release such materials to the Congress. The 1980 Act could be amended to permit the release of circuit council materials to the Committee when requested by the Chair of the Committee and authorized by either the circuit council or the Judicial Conference of the United States.

All of the above changes, properly drawn, would pose little risk of unnecessary or improper disclosure. It can be expected that these provisions would not be used frequently or lightly. The potential for abuse or disruption of the grand jury or circuit council processes therefore probably would be minimal.

> ***The Commission recommends that the executive and judicial branches share with Congress information that might be useful to it when it considers whether to impeach a federal judge, subject to exceptions necessary to the law enforcement function and to protect serious confidentiality interests. Congress should enact legislation, with proper safeguards, to facilitate the exchange of this information in appropriate circumstances.***

Commencement of Impeachment Proceedings After Convictions. The House has tended to wait until all direct appeals (including petitions for certiorari) have been determined before initiating impeachment proceedings. This results in extended delays, often several years, before the judicial status of a convicted judge is decided. This delay seems unnecessary. Initiation of impeachment proceedings need not wait. The House would retain discretion to take into account appellate proceedings in drafting articles of impeachment or dismissing articles in a Senate trial. The House also could delay a final vote on the articles, but much of the investigative and preparatory work could be accomplished in advance.

Articles of Impeachment

During the nineteenth century, the House voted on impeachment before adopting any articles of impeachment. The House sent notice of its desire to have its Managers appear before the bar of the Senate to impeach the respondent. After completing this task, the House Managers reported back to the House and only then drafted articles for the approval of the full body. In modern practice, the House has considered and approved the articles of impeachment in the same vote that determines impeachment.

The content of House impeachment articles is dictated by the constitutional standard for removal: "Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The constitutional standard appears to limit not only the Senate's conviction but also the House's decision to impeach. During the impeachment investigation of Justice Douglas, Representative Gerald Ford found this language to suggest that an impeachable offense "is whatever a majority of the House of Representatives considers [it] to be at a given moment in history."[17]

An obvious constraint on the House as prosecutor in the Senate trial is that it must draft articles that will obtain the two-thirds vote necessary for conviction. The House usually approves multiple articles, which increase the odds of obtaining a conviction, and also may be fairer to the impeached judge. Articles that list individual acts of alleged misconduct allow the judge to respond to each one and the Senate to rule individually as well.

Frequently, the House has used an article that lists each of the judge's allegedly illegal or improper acts and declares that such acts have brought the judiciary into disrepute or caused the public to question its integrity. Judges George English and Robert Archbald were charged with one of these articles, as was Judge Harold Louderback. In the 1936 impeachment of Judge Halsted Ritter, the last of seven impeachment articles stated that the judge's conduct had brought "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the federal judiciary." The article then listed each of the allegedly improper actions that were the basis of the previous six articles. Only this article received the requisite two-thirds vote for conviction. Although the wording varied, the final article

in all three impeachments in the 1980s included a similar listing of improper acts and a declaration that this conduct undermined confidence in the "integrity and impartiality" of the judiciary. The Senate's response was mixed. Judge Claiborne was convicted on this "integrity" article; Judges Hastings and Nixon were acquitted on similar articles.

Article III in the Claiborne Proceeding. Probably the House's most innovative experiment of the 1980s was its third article of impeachment in the Claiborne proceeding. That article declared that Judge Claiborne was guilty of misbehavior and high crimes in office based solely upon his conviction and sentencing for filing two years of false income tax returns. From the outset of its investigation of Judge Claiborne, the House Judiciary Committee sought to take advantage of the prior judicial proceedings. Judge Claiborne was the first impeachment respondent who had already been convicted and imprisoned for a felony. Judge Charles Wiggins (a former Committee member) urged the Committee to give "collateral estoppel" effect to the findings of the courts in the criminal proceeding. The House subcommittee's investigation was abbreviated. In the House debate leading up to the impeachment vote, Committee Chairman Peter W. Rodino, Jr., explained the decision to take "legislative notice of the factual finding already determined beyond a reasonable doubt by a jury of Judge Claiborne's peers and sustained at all levels of direct appeal."

When the matter reached the Senate, the House Managers filed a pretrial motion seeking summary conviction based upon the third article of impeachment. The Managers found support in judicial doctrines of finality, collateral estoppel, and full faith and credit. In a second motion, the Managers urged application of collateral estoppel to specific issues alleged in the first two impeachment articles. Importantly, the House Managers argued that neither motion sought to usurp the Senate's function in determining whether the particular conduct constituted an impeachable offense. Rather, the Managers sought to avoid fact-finding proceedings before the Senate on issues that the Managers believed had already been fairly and finally adjudged by a court of law.

The House's two motions were directed to the Senate trial committee, a twelve-member committee designated by the Senate to receive and report evidence. This committee lacked the authority to decide a motion for summary disposition and declined requests to refer it to the full Senate for a pretrial ruling. The chairman of the committee construed the House's motions as a request that the Senate

unconstitutionally restrict the trial that the Senate must conduct. Although the first of the House's motions might reasonably have been construed as an effort to establish a precedent that a prior court judgment of guilt in a felony proceeding requires conviction in an impeachment trial, the second motion (to apply the doctrine of collateral estoppel to the courts' findings on factual issues) seems less amenable to this construction. Issue preclusion is not available if the person against whom it is asserted did not have a full and fair opportunity to litigate the issue in the first proceeding, a limitation well suited to the impeachment context.

Completion of the evidentiary trial mooted the House's pretrial motions, and the Senate ultimately voted to acquit Judge Claiborne on Article III. Even had he been convicted on this article, the post-trial vote would have had little meaning. Article III's value lay in providing an opportunity for a pretrial summary disposition in a case in which the facts were not genuinely in dispute. The Senate's refusal to consider the motion before trial had a number of secondary effects. For instance, when the House considered how to proceed with the impeachment of Judge Nixon, who like Judge Claiborne was a convicted and imprisoned felon, the House elected not to seek a pretrial summary disposition.

If the House erred in its past bid for issue preclusion, the mistake may have been in describing its purpose too broadly. In fact, the motions in the Claiborne trial represented little more than a request for summary judgment that the Senate should be free to deny, grant in part, or grant in full. Such motions are a central part of modern civil litigation and aid the court in narrowing the issues for trial. The Senate trial committees in the impeachment proceedings during the 1980s devoted attention to narrowing the issues for trial and resolving other pretrial motions. Of course, pretrial motions are properly a two-edged sword and should be available to either the House or the accused judges. Motions to dismiss have been filed by judges, and decided by the Senate, yet summary disposition motions (such as issue preclusion for previously convicted judges) have been denied.

As the charging body, the House need not make a precise factual determination. If it wishes to do so, the House is perfectly free to use a conviction as evidence of the underlying facts.

> ***The Commission recommends that the House avoid repetition of prior fairly conducted proceedings. When impeachment proceedings follow criminal convictions,***

issue preclusion should be used except in unusual circumstances.

The Issue of Relief. The articles of impeachment offer the House an opportunity to signal the form of relief that the House believes appropriate. The Constitution states that an impeached officer may be disqualified by conviction from holding any "office of honor, trust, or profit under the United States." By a separate majority vote following conviction, the Senate has sometimes imposed the additional sanction of disqualification, as it did in the case of Judge Archbald in 1913. Despite the opportunity to use the articles of impeachment to indicate the relief it believes appropriate, the House had not done so before the 1980s. For example, in the 1936 Ritter impeachment, each article of impeachment asked only that the judge be found "guilty of high crimes and misdemeanors in office." In the three impeachments in the 1980s, the articles adopted by the House did address the relief issue. Each article asked that the judge be removed from office, not mentioning disqualification from future office, and the Senate issued orders removing each convicted respondent from office without voting on whether to disqualify from future federal office. Elsewhere in this chapter, the Commission recommends that the House and Senate consider both removal and disqualification in impeachment proceedings.

House Managers' Role in the Senate Trial

The House's role does not end with the approval of articles of impeachment. Through its designated Managers, the House serves as a prosecutor in the Senate trial. Although the House may decide that all of its members will attend the impeachment trial (as it did for Justice Samuel Chase and President Andrew Johnson), that practice has not been followed in impeachments of federal judges. Typically, during the impeachment trials of the 1980s, the House continued with its regular calendar of business, and only its Managers attended Senate proceedings.

Historically, the House has chosen its Managers in one of three ways: (1) election by the House; (2) a resolution naming them; and (3) a resolution authorizing the Speaker of the House to appoint them. In recent practice, the House Managers have been designated by a resolution drafted by the leadership of the House Judiciary Committee in consultation with the House leadership. The House designated nine Managers in the Claiborne trial, six Managers in the Hastings trial, and five Managers in the Nixon trial. The Managers have usually been

chosen from among interested Committee members, most often from the subcommittee that conducted the investigation. The full Committee chairman has generally been selected as a Manager and then elected chairman of the Managers regardless of service on the investigating subcommittee.

The first responsibility of the House Managers is to present the articles of impeachment before the bar of the Senate. In the words of traditional English parliamentary practice, the Managers orally "impeach," or accuse, the respondent in the Senate. The Managers demand that the Senate summon the respondent to appear and answer the impeachment charges. Thereafter, the Managers await the scheduling of the Senate, although the House may file amendments to its articles, as occurred during the pretrial stage of the Nixon case. Any such amendments are approved by House resolution.

Before the 1980s, the House Managers were accompanied by outside counsel, but usually only the Managers spoke in impeachment proceedings. During the 1980s, all major procedural and substantive decisions remained in the control of the Managers, but counsel performed much of the "nuts and bolts" litigation work. Counsel took depositions, drafted briefs and motions (subject to the approval of the Managers), interviewed witnesses, and cross-examined witnesses during the trial. The presence of House Managers added a degree of formality and credibility, but for significant portions of the Senate trial committee proceedings in the 1980s, outside counsel spoke on behalf of the Managers. During the Claiborne trial, for example, the Managers conducted the direct examination of three witnesses called by the House but left virtually all of the extensive cross-examination to counsel. During the trials of Judge Hastings and Judge Nixon, the Managers conducted some of the cross-examinations of witnesses but continued to rely heavily on counsel.

Traditionally, the House has filed a "replication" to the answer filed by the respondent. In the impeachments of the 1980s, the House Managers continued to file replications, although these documents were no longer expressly approved by the full House, departing from the practice in earlier impeachments.

The filing of a replication goes beyond any document required in modern civil procedure. In the system of common law pleading widely used in the nineteenth century, a replication was one of a series of

pleadings for narrowing the legal and factual issues in dispute. In modern civil practice, those functions are addressed by a more flexible panoply of devices, including discovery, pretrial motions (such as summary judgment), and pretrial conferences. In the 1980s, the Senate trial committees adopted in substantial measure this more flexible approach to narrowing the issues. The House's replication appears to have added nothing.

> ***The Commission recommends that the House dispense with the filing of a "replication" to a respondent judge's answer.***

The conflicting responsibilities of a Manager are today far greater than they were during the early nineteenth century impeachment trials. During the Claiborne trial, on at least four occasions, the Senate trial committee called a recess or adjourned early to allow the Managers to cast votes in the House. To avoid these interruptions, it was agreed during the Hastings trial that, whenever possible, the Senate trial committee would continue proceedings while the Managers were absent for a House vote.

Despite increased delegation of responsibilities to counsel, the control of the Managers over the prosecution of a Senate trial remains unquestioned. Counsel must obtain the Managers' approval before filing any papers or making any fundamental strategy decisions. Importantly, all arguments before the full Senate on behalf of the House continue to be made by the Managers. This includes Senate proceedings on pretrial motions as well as post-trial motions and closing arguments.

ROLE OF THE SENATE

The Senate's role in the impeachment and removal of civil officers of the United States has been the subject of widespread study and a recent Supreme Court decision, *Nixon v. United States.*[18]

Rules of Proceeding

Like the House, the Senate is constitutionally authorized to determine its own rules of proceeding. As regards removal trials, the Senate has developed "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials." These impeachment rules have

changed very little since the Senate trial of President Andrew Johnson in 1868. Their current form dates from the 1986 removal proceedings against Judge Harry Claiborne, when they were slightly modified. These rules govern removal proceedings before the full Senate unless and until a majority of the Senate decides to amend, revise, or reject them. Debate about the adequacy of the rules and the appropriateness of revisions is commonplace, particularly before a Senate impeachment trial. To the extent that impeachment rules are silent, the Senate's general rules for legislative business apply.

Initiation of the Senate Trial

The Senate's trial role commences only after receipt of articles of impeachment from the House at the bar of the Senate. The chairman of the House Managers demands that the Senate order the appearance of the accused to answer the charges, demands a conviction and appropriate judgment, and exhibits the articles. Unless a Rule XI committee is appointed, the Senate by resolution sets a date and time for proceeding to the consideration of the articles. The Senate's jurisdiction is narrowly circumscribed by the case brought before it by the House. Absent articles, individual senators are, of course, free to refer complaints or evidence of judicial misconduct to the House of Representatives and to encourage an investigation by the appropriate committee.

The Senate has an obligation to render a final decision on articles of impeachment. It cannot take the matter under advisement indefinitely. Although the House of Representatives renews itself every two years, the Senate -- as a continuing body -- can carry forward an impeachment proceeding from one Congress to the next. In the proceeding involving Judge Hastings, the Senate did precisely that. This resulted in four Senators who had been Members of the House being excused from participation.

Rule XI Trial Committees

Throughout its first 150 years, the Senate exercised its trial authority by conducting proceedings on the Senate floor as a plenary court of impeachment. During this period, seven out of eleven impeachments resulted in acquittal, including four of eight impeached federal judges. During the three judicial impeachments in the 1980s, the Senate designated a trial committee under Rule XI of the impeachment rules. After completion of the committee's work, the full Senate heard

closing arguments by House Managers, counsel for the accused, and the accused himself before voting on the impeachment articles. All three of these trials resulted in convictions and removal from office.

Rule XI developed as a response to complaints about the length of removal trials, as well as the paltry attendance of Senators at them. Debate about Senate attendance reached a crescendo in Judge Harold Louderback's impeachment trial in 1933. The Louderback proceeding extended for seventy-six of the first hundred days of Franklin D. Roosevelt's first administration, one of the busiest legislative periods in American history. At the time, at least forty senators urged the Senate Judiciary Committee to consider "whether a committee could be appointed to take evidence." In 1935, after examining various proposals, the Senate adopted Rule XI, which allowed a committee of twelve senators to receive evidence and testimony. In 1986, Rule XI was amended to allow the committee to appoint any number of Members in accord with the needs of the situation. (Another amendment eliminated all references to the Senate sitting as a court of impeachment.)

Pursuant to recent resolutions, a trial committee is appointed by the Presiding Officer, based on the recommendations of the majority and minority leaders who each designate six Senators. The committee designates one member to be chairman and another to be vice chairman. A trial committee functions as the Senate would, with the same investigatory powers, in receiving evidence, issuing orders and subpoenas, and taking testimony. For its procedure, the committee follows the Senate's impeachment rules unless the Senate orders otherwise. When the impeachment rules are silent on a matter, the Senate's legislative rules govern the committee's proceedings subject to the vote of the committee. The chairman can decide motions that are evidentiary in nature. The committee prepares a certified copy of the transcript of the entire proceeding and testimony heard before it. It also prepares an impartial statement of facts, along with a summary of the evidence that the parties have introduced on the contested issues of fact, called the "trial committee report." Neither the transcript nor the report contains any recommendation as to the accused's guilt or innocence. Both documents are distributed to the full Senate. In addition, the trial committee's proceedings, including actual testimony, are recorded and videotaped for other Senators to review if they so desire.

Senate Trials

If the Senate chooses to forgo using a trial committee, as it did in the impeachment trial of former Judge Ritter in 1936, the House Managers and counsel for the impeached judge present evidence and make their motions and arguments on all evidentiary and constitutional questions before the full Senate. Debate by Senators on any question is not allowed in open session. Rule XXIV explicitly directs that all "the orders and decisions [in a removal trial] shall be voted on without debate." Unless they suspend or modify the applicable rules by a majority vote, Senators are not permitted to engage in colloquies or to participate in any argument in impeachment trials.

If the Senate elects to use a trial committee, following a period sufficient for the Senators not on the committee to review the record, the full Senate reconvenes and may determine the "competency and relevancy" of the evidence and decide whether to call witnesses or rehear testimony before the entire body. After the parties make their closing arguments, the Senate conducts its debate in closed session, during which the committee members may express their opinions as to guilt or innocence. Finally, the full Senate votes on the individual articles.

Even if the Senate is inclined to use a trial committee, current practices permit dispositive motions (such as the motions to dismiss in the Hastings trial) to be made and decided by the full Senate. Thus, any question that could deprive the full Senate of an opportunity to judge the guilt or innocence of the impeached officer is referred to the entire Senate and resolved by a majority vote.

Supreme Court Decision on Trial Procedure

The Supreme Court in 1993 upheld the Senate's authority to determine the method it uses for conducting impeachment trials. It concluded that the challenge to the Senate's use of a Rule XI committee by former Judge Nixon was not judicially reviewable. The decision underlined a textual commitment in the Constitution to assignment of impeachment trial authority to the Senate. Writing for the Court, Chief Justice William Rehnquist stated that "judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counter-intuitive because it would eviscerate the 'important constitutional check' placed on the judiciary by the Framers."[19] The decision indicates that the Senate's procedural determinations in an

impeachment are not subject to review by the courts if the Senate fulfills its constitutional requirements (a two-thirds vote and being on oath or affirmation).

EVALUATION OF THE SENATE'S ROLE

When evaluating the Senate's removal trial proceedings, senators have expressed three related concerns. The first concern is that the impeachment process is cumbersome and interferes with Senators' ability to conduct other important legislative business. Senators Robert Dole and Warren Rudman observed that the Senate's floor proceedings for Judge Claiborne's removal "took more time than any other issue considered by the 98th Congress, including national defense and the budget."[20] Senator Carl Levin, however, rejected the proposition that impeachment trials interfere with the Senate's other legislative business, stating that he didn't "think too much of the Senate's time is taken up by impeachments."[21] Former Senator Charles McC. Mathias, Jr., argued that even if "the process is difficult, I think it helps to give the sense of independence that is important to the judiciary."[22]

A second concern is that impeachment trials put Senators in roles for which they may feel ill-equipped. A related concern is whether Senators are sufficiently informed. "How can a United States Senator carry out his constitutionally mandated impeachment responsibilities if he does not participate in . . . the committee hearing or have an opportunity to gain knowledge of the case from a full trial on the Senate floor?"[23] asked Senator Howell Heflin, a member of this Commission. Oscar Goodman, attorney for Judge Claiborne, wrote to the Commission that "some senators, who were not privy to the facts brought out before the committee, had not read the transcripts. (The bindings of their booklets were not even creased.)" David Stewart, attorney for Judge Nixon, agreed: eighty-eight Senators "who do not serve on the trial committee have only a glancing exposure to the case." Senator Arlen Specter, another member of this Commission, expressed a different view from the perspective of Senators who sit on the Rule XI Committee: "we have been able to discharge our constitutional obligations . . . without detracting from our other responsibilities...."[24] Senator Joseph Lieberman expressed agreement.

A final concern about the Senate removal process is that the impeachment rules may not contribute to fair proceedings. Senators

disagree over whether the Fifth Amendment's due process clause applies to impeachment trials, and if so, about what process is due in such proceedings. In practice, the Senators decide what process is due in a removal proceeding. Much debate has taken place about the need for previously established evidentiary rules, issue preclusion and collateral estoppel for previously convicted judges, prosecutorial misconduct in the criminal trial, the standard of proof, and whether fact finders must confront witnesses directly. In future impeachments the debate will continue. A collegial institution, the Senate places great confidence in its precedents. Commitment to and continual evaluation of these precedents on a case-by-case basis will stimulate debate, consensus, and necessary improvements.

Continued Use of Rule XI Trial Committees

Despite the criticism of Rule XI trial committees, it is clear that, particularly after the *Nixon* decision, use of a trial committee is now a firmly embedded precedent. A clear majority of Senators who responded to the Commission's questionnaire stated a preference for the Senate to continue to use trial committees for the trial of federal judges.[25] A trial committee provides a forum in which a representative number of Senators evaluate critical evidence, expedite the gathering of evidence for removal proceedings, and reduce the amount of interference with legislative business caused by time-consuming proceedings. The question becomes whether the operations of a Rule XI trial committee can be improved.

Under the Constitution, the Senate has great latitude to modify the duties and procedures of Rule XI committees. For example, the Senate could adopt a formal rule to allow either the House Managers or the impeached judge to raise interlocutory questions for the full Senate's consideration prior to the commencement of the actual trial committee proceedings. This change would put all of the participants in a removal proceeding on notice as to the preferred timing for particular motions and would allow the full Senate to make a decision that otherwise might preempt a trial committee's proceedings. The rationale underlying this rule change is that certain pretrial motions have the potential, if granted, of obviating the need for a trial committee. This rule also would permit the full Senate to expedite matters, particularly in cases where prior adjudication of the underlying facts has already occurred in reliable, fair circumstances. Obviously, it would be quite inconvenient and vexing for the members of a trial committee to go through an extensive hearing

process only to have the full Senate later decide it was not necessary for them to do so.

Delegation to Others to Handle Pretrial Matters. All three of the removal proceedings in the 1980s involved impeached judges who had prior criminal trials, and discovery had already been done for these proceedings. Nevertheless, the trial committees had some difficulty dealing with discovery requests and other pretrial disputes between the parties.

Short of what is constitutionally required, the full Senate has discretion to delegate responsibility for the handling of discovery and other pretrial motions. The Senate could consider delegating pretrial matters to a component of a Rule XI trial committee, such as professional staff or specially hired masters (former Senators or outside counsel). The full committee would retain authority to review the discovery and other pretrial findings or rulings.

Some argue that by delegating authority in this way, the Senate would send the wrong signal to the federal judiciary. As one Senator observed, having a "permanent judge-slayer" would signal that the Senate had an overriding interest in trying and perhaps removing federal judges.[26] On the other hand, in civil trials and certain criminal trials, federal judges routinely designate magistrate judges to hear and determine various pretrial matters, to conduct evidentiary hearings, to serve as special masters, and to perform additional duties consistent with the Constitution and the laws of the United States.

If limited delegations of pretrial or evidentiary matters are made to professional staff or specially hired masters, the Senate might further consider the standard of review the committee or the full Senate would apply. A *de novo* proceeding would enable the trial committee to rehear any questions that should receive a full and fair hearing by Senators themselves and to retain the authority to deal with substantive matters and live testimony. A *de novo* determination on the record would limit review and accord with the practice of federal judges in considering rulings of magistrate judges.

> ***The Commission recommends that the Senate consider experimenting with a variety of delegation approaches (including use of masters) to handle pretrial issues (especially discovery) prior to any removal trial.***

Relationship of Trial Committee Vote to Senate Vote. In each of the three trials during the 1980s, Senators who sat on the Rule XI committees were more likely than other Senators to vote against particular articles. On seventeen out of eighteen articles, the committee Senators who heard and saw the evidence firsthand voted to acquit in greater proportions than did the other Senators. On the eighteenth, the committee members and noncommittee members both voted unanimously to acquit.

At the present time, no formal mechanism is available to familiarize the full Senate with committee members' conclusions on contested issues of fact or recommendations to convict or acquit. Views of individual members of the trial committee have not been formally communicated to the full body prior to its deliberation stage. The full Senate remains handicapped in its ability to take advantage of the collective wisdom of the trial committee Senators who see and hear the evidence firsthand.

> ***The Commission recommends that the Senate consider amending its rules to permit a Rule XI Committee to transmit to the full Senate each Committee member's individual views regarding proposed findings of fact and recommendations on individual articles of impeachment.***

The new procedure could be implemented without delaying Senate disposition of impeachment cases. The proposed findings of fact could be brief and take the form of either joint or separate statements of committee members. The recommendations would make clear which committee members favored conviction or acquittal on particular articles. Senators who are not Rule XI committee members would be able to determine whether two-thirds of their colleagues with direct exposure to the witnesses had been persuaded of a respondent judge's guilt on each article of impeachment. The Senate might wish to allow expeditious consideration of a motion to dismiss any article that fails to gain the support of two-thirds of the committee members. The Senate then could exercise the option of promptly deferring to an outcome in the committee that would result in acquittal of the accused on any such article.

A federal judge's credibility as a witness and reputation for veracity may be the judge's greatest assets in an impeachment proceeding. The respondent judge in an impeachment proceeding may be

disadvantaged if the potential impact of actual, direct exposure to the witnesses is diluted. Members of the Senate will be able to take this into account if the Senate considers motions to dismiss when more than one-third of the committee members favor acquittal. Some Commissioners questioned the desirability of this recommendation in light of Senate precedents and rules.

Other Procedural and Evidentiary Reforms

Adoption of certain procedural and evidentiary rules for both the full Senate and the Rule XI Trial Committee, if properly drafted, would contribute to consistent, fair, and expeditious decision-making. Although the Senate in the past has rejected proposals for reforming its removal procedures, its increased workload may make reform advisable. The Senate could differentiate between full Senate rules and rules applicable to the trial committees, although rules could be the same for most matters.

> ***The Commission recommends that the Senate consider adopting rules tailored to impeachment trials in which evidence is heard in a Rule XI Committee.***

Two areas suggest themselves as particularly appropriate for consideration: issue preclusion and standards of proof.

Issue Preclusion. Despite the rejection of the third article of impeachment in the Claiborne removal proceedings, there is continued interest in the Senate in some form of collateral estoppel or issue preclusion. The Senate could (1) adopt a formal rule allowing issue preclusion in certain limited cases or (2) amend its impeachment rules to let the parties to removal proceedings know that they can ask the Senate to consider issue preclusion for a particular impeachment trial.

A constitutional amendment providing for automatic removal of federal judges upon conviction of a felony is unnecessary and unwise. Such an amendment would deprive the Senate of the ability to make an independent judgment whether conduct that has been found to be criminal also warrants removal from office. Redetermination of the facts underlying a criminal conviction, however, is rarely necessary. The Senate's rules should permit an early decision by the full Senate that issue preclusion can apply to matters necessarily determined in the

judge's criminal trial. It would remain for the Senate to decide whether those precluded matters warrant removal.

A Rule XI committee could ask the full Senate for authorization to use issue preclusion. If the Senate voted to authorize issue preclusion, the committee immediately could begin to consider one or more articles of impeachment. The new procedure would relieve the House Managers of the burden of proving the designated facts, and it would foreclose the judge from seeking to controvert those facts. If the evidence-taking continued, both sides would remain free to present evidence of other relevant facts. Moreover, and most important, the Senate would retain its unique constitutional function of determining whether, in the light of all the facts, the judge had committed an impeachable offense.

In considering various practical problems that such a procedure might entail, the Commission was most concerned about the possibility that a substantial minority of the Senate might initially reject the application of issue preclusion. In such circumstances, it would be foolhardy for the House Managers to forgo, or for a Rule XI Committee to dispense with, proof of the designated facts, since that might be the sole reason for the Senate's ultimate failure to convict on the article or articles to which those facts related. For this reason, the Commission suggests that a Rule XI Committee not employ issue preclusion to restrict the scope of any additional evidentiary proceeding unless at least two-thirds of the Senate has voted to authorize issue preclusion. The Commission recognizes that individual Senators might change their minds on the appropriateness of issue preclusion, although they should recognize the costs of doing so.

The Commission understands that in the past some Senators have opposed the use of issue preclusion out of concern that its use would deprive civil officers of what Hamilton referred to as the "double security intended ... by a double trial."[27] The Commission concluded, however, that the protections of a criminal trial, including in particular the requirement of proof beyond a reasonable doubt, are such that, in most cases, the Senate should rely on the products of that process in finding facts. If a determination of guilt is sufficient to deprive an individual of liberty, it is also an appropriate basis upon which to make a determination of fitness to remain in office. In the Commission's view, the important security to be preserved is the independent judgment whether conduct determined to be criminal also warrants removal from office.

When a judge has been convicted of a criminal offense, issue preclusion is a fair and efficient means to reduce the costs of the impeachment process. Unlike automatic removal for conviction of a felony, issue preclusion would not require a constitutional amendment, and it would not strip the Senate of its right to determine whether conduct that is criminal also warrants removal from office.

> ***The Commission recommends that the Senate apply issue preclusion to matters necessarily determined against a judge in a prior criminal trial except in unusual circumstances.***

Standards of Proof. The question remains: What is the appropriate standard of proof for Senate impeachment proceedings? The Senate has declined to establish a standard, leaving it a matter for the conscience of each Senator. The disadvantage of this practice is that the respondent judge, the House Managers, and, indeed, the Senators themselves cannot know in advance what standard the Senate will apply.

The Commission considered whether it would be desirable, as a matter of policy, for the Senate to prescribe a standard to guide participants in their preparations for Senate impeachment trials. The Senate could choose from among three established standards: beyond a reasonable doubt, clear and convincing, and preponderance of, evidence.

Some Senators favor the beyond a reasonable doubt standard because of their concerns about separation of powers and because impeachment proceedings parallel criminal trials. If the Senate is impeaching based on a prior felony conviction (which requires the jury to find commission of an offense beyond a reasonable doubt) then the Senate should use the same standard, some argue.

Others claim that the beyond a reasonable doubt standard is too deferential to the convicted judge and fails sufficiently to recognize the purpose of impeachment -- namely, to defend the community against abuse of power by judges. The purpose of an impeachment proceeding is different from the purpose of a criminal trial, they argue. In a criminal proceeding, a court may take a defendant's life, liberty, or property, whereas an impeachment proceeding involves a respondent's office. Impeachment is a political proceeding, and in their view the lower standard of "preponderance of the evidence" is therefore the appropriate one.

Still others have argued that the appropriate standard of proof is clear and convincing evidence that the respondent has committed an impeachable offense. It gives force to the purpose of remedying judicial abuse of power, while recognizing the competing interests of avoiding unjustified removals and protecting judicial independence.

In the final analysis, the Commission recognizes that each Senator is both judge and juror. As observed by Senate Legal Counsel Michael Davidson, it is the sum of Senators' separate judgments that amounts to either conviction or acquittal: "any member is entitled to establish the highest, the medium, [or] a lower standard to govern his or her analysis of the evidence."[28]

Source Materials on Impeachment Proceedings

The Parliamentarian of the Senate has published a document containing source materials for impeachment trials.[29] But there are other voluminous and disparate documents that provide useful information. Fifteen of nineteen Senators who responded to the Commission's survey indicated they thought the Senate should commission a "complete or comprehensive manual of precedents on impeachment trials."[30]

A compilation of source materials (including constitutional provisions, Senate rules and precedents, Judicial Conference and House rules, and related materials) would help to establish an institutional memory of removal proceedings. In addition, a manual on precedents could save valuable time in removal proceedings by bringing together different sources. The manual would ensure that the full Senate -- and the trial committee Senators -- understand the Senate's duties and responsibilities with regard to impeachments. The compilation also could serve as a briefing book and desk guide for Senators. Finally, it would help impeached officers, their counsels, and House Managers to become better prepared for and informed about removal proceedings.

> ***The Commission recommends that the Senate compile a manual of impeachment source materials for participants in the proceedings and other interested parties.***

LEGISLATIVE OVERSIGHT

The House and Senate, through their Judiciary Committees, oversee the federal courts and the U.S. Department of Justice. Oversight is a political tool employed by the legislative branch to review and study the application, administration, and execution of the law, agencies, and subject matter within a committee's or subcommittee's jurisdiction. Two goals of legislative oversight are public accountability and public understanding of this nation's laws and institutions.

Oversight is not without problems. On one hand, it can become too intrusive; on the other hand, it may not be sufficiently comprehensive. The Commission supports periodic oversight of the judicial discipline and removal processes. In conducting such oversight, Congress must be sensitive to the judiciary's status as a separate and independent branch.

To a certain degree, the Commission has acted as an oversight entity for judicial discipline and removal, and it has benefitted from access to a wealth of information from the three branches. Shortly after the filing of this Report, the Commission will go out of existence, and the continuing review and study of judicial discipline and removal will repose with the Congress and judiciary.

Oversight by the House

The House Judiciary Committee oversees the institutional roles played by the executive and the judiciary in judicial discipline and removal. The House should be sensitive to the possibility that judicial independence could be undermined by the misconduct of state or federal prosecutors. Independence is also diminished by corrupt judges continuing to serve in office. Oversight of the prosecutorial function is, of course, the responsibility of the Attorney General. But, with due respect for executive prerogatives, congressional oversight of the Criminal Division of the U.S. Department of Justice and the Public Integrity Section as well as the Executive Office of U.S. Attorneys and the Federal Bureau of Investigation could be conducted by appropriate congressional committees.

Oversight of the federal judicial branch is properly within the purview of the House Judiciary Committee. Judicial independence would

be diminished by a failure of the judiciary to properly administer the judicial discipline and disability mechanism and other related legislative enactments. The Judicial Conference has gone on record as seeking and cooperating in oversight. The House Committee on the Judiciary, acting through the Judicial Administration Subcommittee, has a proven track record overseeing the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Requested and promised during floor debate on the Act, that oversight has been well received by the judicial branch. House oversight has been responsible for more effective implementation of the Act as well as the amendments to it in 1990. The Administrative Law Subcommittee also has monitored developments in judicial ethics. Examination of the effectiveness and desirability of particular ethics standards should be a routine matter for the judiciary in its self-regulatory capacity, and of concern to the Congress in its adoption and revision of ethics laws. A potential immediate benefit of oversight activities by the two subcommittees would be further exploration of the relationship between judicial discipline and judicial ethics. Finally, given some of the other Commission recommendations that will generate more information about the judicial discipline mechanism and judicial ethics, a continuation of periodic oversight by the House subcommittees could build on this information base.

> ***The Commission recommends that the House Committee on the Judiciary, within its jurisdiction, exercise periodic oversight of judicial discipline, judicial ethics, and criminal prosecutions of federal judges.***

Oversight by the Senate

During recent impeachments, several Senators asked for hearings on the conduct of law enforcement officials in the investigations and prosecutions of federal judges. The Senate should consider postimpeachment oversight as an extremely useful tool for measuring the impact of a prosecution and subsequent impeachment on judicial independence.

Oversight is as important in the Senate as it is in the House, although the constitutional prerogatives of the two institutions differ. The Senate has a unique constitutional role in the judicial appointment process: the President can appoint federal judges subject to the advice and consent of the Senate. The legislative charter of the Commission authorized the study of issues relating to judicial tenure, which could be

said to incorporate the appointment and confirmation procedures. But the Commission lacks authority to make recommendations for change in these areas.

Clearly, the appointment process affects judicial discipline and removal. If only the most highly qualified and honest judges were appointed, the need for disciplinary action would be significantly reduced. In a sense, the best reform of the discipline process would be a more careful appointment process.

Without suggesting that anything did go wrong, the recent prosecutions of federal judges raise the question of whether there were shortcomings in the appointment and confirmation processes. To the Commission's knowledge, neither the Justice Department nor the Senate has tried to determine whether information in the background investigation files suggested the potential for judicial misconduct.

At the very least, the link between the effectiveness of the appointment process and the need for later use of the various mechanisms for judicial discipline and removal should be recognized. The most effective mechanism for ensuring an honest and capable judiciary is to combine the twin goals of quality appointments and public accountability.

> ***The Commission recommends that the Senate review its confirmation proceedings involving judges prosecuted since 1980 to determine whether those proceedings were thorough and whether they revealed any problems suggesting a danger of misconduct by the nominees. The Senate review should be forward-looking, designed to avoid problems in the future.***

Currently, the Senate Judiciary Committee prohibits consideration of any judicial nominee unless a full-field FBI background check has been completed. The Commission approves of this practice.

As regards the federal judiciary, the Senate Judiciary Committee has never conducted oversight of the 1980 Act. Senators who sponsored the Act have spoken of the need to do so, and in the view of the Commission such a need exists. The Senate is, of course, free to set its own oversight agenda, and to a certain extent this Report may alleviate the need for oversight. But, in light of the explosive growth of the

federal judiciary and the fact that the House and Senate do not share oversight findings unless joint hearings are held (a rare occurrence), Senate oversight would be appropriate.

HOUSE-SENATE ISSUES

Each article of impeachment contains a clear statement of facts and a "wherefore" clause that identifies the alleged offense as a high crime or a misdemeanor. In addition, the resolving clause identifies the individual to be impeached, the office, and the House entity that took evidence. It certifies that the evidence sustains the articles of impeachment adopted by the House and that the charges are brought on behalf of the House of Representatives and the people of the United States.

In the past, the House has exercised its authority to impeach for misconduct that does not rise to the level of a high crime but does amount to a misdemeanor offense. For example, nine of the thirteen articles voted against Judge Archbald were for misdemeanors. All five articles against Judge English were misdemeanors. The House also has used the prosecutorial technique of the catch-all count, alleging that the commission of any one of a list of misdeeds undermines the integrity of the judiciary and is the basis for conviction and removal. Regardless of what the House charges, the Senate retains the power to convict or acquit. In fact, the Senate conviction practice has varied with the times and circumstances. For example, Judges Ritter and Claiborne were convicted on "catch-all" counts; Judge Hastings was not. It almost goes without saying that the House should explain carefully its prosecution theory for aggregate articles in the Senate trial. The clearer the charges, the easier will be the job of the House Managers and the Senate triers of fact.

In the past, the House has been inconsistent in identifying the form of relief -- removal or removal and disqualification from future federal office -- that the Senate should impose on a convicted judge. Given recent confusion about the relationship between the two remedies, the House would benefit from clarity in its prosecutorial goals, and the Senate would benefit from being reminded of the scope and nature of the punishment authority.

The Commission recommends that the House determine, in its resolution, whether to seek both removal and disqualification in each impeachment proceeding.

Clarity in the imposed punishment is as important to the court that makes the actual "sentencing" decisions as it is to the prosecutor. Given recent confusion about the relationship between a removal decision and disqualification from holding future office, the Senate should vote on disqualification in all cases.

The Commission recommends that, regardless of whether the House asks for disqualification, the Senate vote on disqualification from holding future office as well as on removal from office of judges convicted in impeachment trials.

The Commission sees no need for establishment of a joint committee or other entity composed of Representatives and Senators. The timing of the delivery of impeachment papers by the House in the Senate can cause, and did cause in a past case, scheduling difficulties due to the busy calendars of both institutions. The Senate leadership should allow House Managers prompt access to the Senate when they seek to initiate an impeachment trial. Open and candid communications between the House Managers and Senate leaders should suffice to avoid misunderstandings and scheduling conflicts.

INTERBRANCH COMMUNICATIONS

The founders provided a sufficient check against overreaching by any of the branches "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[31] As regards judicial discipline and removal, the Commission is recommending numerous improvements within each branch, including some changes that would require legislation. If the recommendations of the Commission are implemented and fail, Congress can later reconsider more comprehensive reforms, such as establishment of a permanent three-branch commission to promote communications and understanding between the legislature, the executive, and the judiciary.

New Institutions

New governmental entities, including linkages between the branches, are not necessary at this time. In an age of fiscal restraint, Congress should be asked to create new governmental bodies only when a compelling case is made and there are no alternatives.

The Commission feels that it has responded to its statutory assignment within the short time-period allocated to it. More research and work could, of course, be accomplished. But existing institutions -- such as congressional committees, the Judicial Conference, the Federal Judicial Center, and the Department of Justice -- are equipped to carry forward.

> ***The Commission concludes that no formal institutional linkages need be established among or between the branches of government. A permanent National Commission on Judicial Discipline and Removal is not necessary.***

Informal Contacts Among the Branches

Although new formal institutions are not needed, periodic gatherings of high-level representatives of the three branches are recommended. Such informal meetings would contribute to mutual understanding of institutional views and pressures. The judicial and legislative branches do not always fully understand and appreciate each other's problems and processes. Communications are a two-way street with messages flowing both ways. Although less concerned with the subject of judicial discipline and removal, the executive branch is also a participant in the process.

> ***The Commission recommends informal meetings of high-level representatives of the three branches of the federal government to promote oversight and understanding of judicial discipline, disability, and impeachment.***

House Committee on the Judiciary

Good communications between the federal judiciary and the House Judiciary Committee are especially important because of the

Committee's role in the impeachment process. The judiciary should routinely provide to the Committee all final orders and accompanying memoranda required by the 1980 Act to be publicly available. With this information, the House will be able to establish cross-references with the complaints it has received. The House can then determine whether to request additional information that will help it decide if impeachment proceedings should be initiated. Without a routine procedure for transmittal of all discipline sanction orders, the House will frequently not be aware of judicial misconduct except for cases prosecuted by the Justice Department.

> ***The Commission recommends that the Administrative Office routinely provide the House Committee on the Judiciary with all final orders and accompanying memoranda required by the 1980 Act to be publicly available.***

GENERAL OBSERVATIONS

As noted by the Twentieth Century Fund Task Force on Federal Judicial Responsibility, "Our nation has been fortunate in its choice of the men and women who have graced the federal bench over the past two centuries: they have, in large measure, exemplified a tradition of distinguished public service."[32] Nonetheless, given the frailty of human character, it is not surprising that a few judges have betrayed the public trust or abused their power; that a few have been convicted of criminal felonies by juries of their peers; and that a few have attempted to adjudicate cases when their mental capacity or physical state would not permit the proper discharge of their duties.

Impeachment is an extremely powerful, but not very often used, political check of such abuses in the judicial and executive branches of government. It is unwieldy and cumbersome and made intentionally so by the Constitution. More than one hundred years ago, a British observer likened the American impeachment process to a "hundred-ton gun which needs complex machinery to bring it into position, an enormous charge to fire it, and a large mark to aim at."[33]

Despite its weight, the hundred-ton gun works. After a half century in cold storage, it operated successfully three times in the 1980s. Further proceedings are on the horizon in the 1990s. The time and

financial costs of impeachment to the House and Senate are great, as they are to the public, especially when prosecutions precede impeachments and judges remain in office for long periods drawing their full salaries until they are eventually removed. But the benefits to the country -- among them, judicial independence and reliance on elected representatives to resolve serious abuses of power -- are even greater. With implementation of the recommendations in this Report, the costs will be reduced and the benefits augmented.

CHAPTER IV
EXECUTIVE BRANCH*

The executive branch has neither a constitutionally specified role nor an inherent management role in the discipline and removal of federal judges. Its role derives from its other, general responsibilities. That role manifests itself most visibly in three ways.

First, the government is a major party litigant before the federal courts. The term "government" will be used here to refer to the executive branch as the legal representative of the U.S. government. Government lawyers are frequent observers of judicial activity. They can be expected to be knowledgeable, as much if not more than most, about the conduct of judges and to be useful contributors to the formal and informal processes of judicial discipline.

Second, the executive branch is responsible for investigating and prosecuting persons alleged to have committed federal crimes. To the extent a federal judge is a target of a federal investigation and prosecution, the government's law enforcement role directly affects the judiciary.

Third, information gathered by the executive branch in the course of an investigation may be of substantial value in an impeachment proceeding. This raises questions about the extent to which it can and should cooperate with Congress in such proceedings.

There is another aspect of the executive branch role that deserves mention: judicial appointments. The saying about an ounce of prevention being worth a pound of cure can probably find no more apt context than this one. The President bears the heavy burden, shared with the Senate, of ensuring, to the extent possible, that those appointed to the federal bench are known to be persons not likely to engage in improper conduct in office.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (hereafter the 1980 Act) provides no explicit role for the executive branch in either the investigations or disciplinary

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* See Chapter Notes.

actions that it authorizes. The 1980 Act assumes that investigations and disciplinary sanctions are to come entirely from within the judicial branch. The executive branch, however, could play a useful role in the implementation of the 1980 Act, and in informal processes as well.

First, because the Department of Justice investigates possible criminal violations by federal judges, it could be a source of referrals to the judicial councils in cases of misconduct or disability that do not rise to the level of prosecutable criminal conduct.

Second, as the most frequent litigant in the federal courts, the Department could be a significant source of information concerning judicial misconduct or disability. In the past, however, the Department of Justice has not played this role.

THE ROLE OF THE DEPARTMENT OF JUSTICE

The Public Integrity Section of the Criminal Division of the Department of Justice is the unit designated to handle cases of judicial wrongdoing. In appropriate circumstances the section has worked closely with the chief judges of the district and circuit courts, whose cooperation it may seek in carrying out an investigation. In turn, a chief judge may pass along to the Public Integrity Section for investigation complaints about judicial officers. Once the Public Integrity Section has completed a criminal investigation of a federal judge, it may, if it finds that the case is not a proper one for prosecution, pass on the results of its investigation to the appropriate chief judge for consideration under the 1980 Act.[1]

According to attorneys in the Public Integrity Section, however, these types of referrals have occurred no more than once or twice a year. None of the Public Integrity Section attorneys who were interviewed on behalf of the Commission knew of any attorney in the section who had ever filed a complaint against a judge before whom that attorney had appeared. These attorneys believe that a Justice Department attorney will not risk souring relations between the Department and a federal judge by making a complaint under the 1980 Act. A 1990 amendment to the 1980 Act permits a chief judge to enter an order identifying a complaint on the basis of information available, thereby dispensing with the filing of a written complaint. The government attorneys did not think this amendment would make Justice Department attorneys more willing to speak out about misconduct by federal judges. The attorneys expressed

doubt that the source of any Department complaint about a judge could long remain anonymous from a judge.

Justice Department attorneys were also skeptical whether the 1980 Act would effectively address their concerns about certain types of judicial conduct. Although various attorneys characterized the problem in different ways, in general they pointed to what they see as the arrogant and arbitrary exercise of authority by judges who had been in office for a long time and felt unaccountable for their actions. Complaints ranged from sexism and racism in the treatment of attorneys to arbitrary and unreasonable decisions on both procedural and substantive issues. Although the former are certainly cognizable under the 1980 Act, the latter are not.

In order to develop a more comprehensive picture of these matters, the Commission sent questionnaires to all litigating divisions within the Department of Justice as well as to the offices of every U.S. Attorney. These questionnaires requested information about the policies of these offices concerning complaints under the 1980 Act. The questionnaires asked whether any attorney in each office had made a complaint under the Act and whether the office had any suggestions for improving the procedures for judicial discipline under the 1980 Act. The Department sent to the Commission a single response for all of the litigating divisions in the Department. In addition, the Commission received responses from eighty-five of the ninety-three U.S. Attorneys.

In general, the responses indicate that the Department of Justice has paid little attention to the 1980 Act. Neither the Department nor any U.S. Attorney's office has a formal policy concerning complaints under the 1980 Act. A number of offices stated that no formal policy was necessary because the 1980 Act was never used. The Department does have a policy that "sensitive" matters routinely be referred to higher authority. A few U.S. Attorneys' offices indicated that complaints of judicial misconduct and disability, like other matters of significance to the office, would be reviewed personally by the U.S. Attorney.

The Justice Department has filed eight complaints under the 1980 Act. Two U.S. Attorneys' offices indicated that complaints had been made concerning the disability of district court judges, but they were unaware whether any formal action had been taken. Two complaints were reported concerning misconduct by district court judges, but the reports did not indicate whether the chief judge or the judicial council

had taken any action. In addition, two offices reported complaints made against magistrate judges, one of whom ultimately resigned as a result of the investigation. Here again, for all practical purposes, the Department has not played a significant role in calling attention to instances of misconduct or disability cognizable under the 1980 Act.[2]

In view of the major litigation role of the Department of Justice, there is no reason why its attorneys practicing before the federal courts should be less able than other attorneys to identify improper conduct by those judges before whom they appear. A few procedural changes might help. First, the Department could adopt an explicit policy concerning complaints under the 1980 Act and how they are to be made. Such a policy would alert the Department's lawyers to the disciplinary mechanisms contained in the 1980 Act and legitimate their use within the Department. This written policy would provide a formal structure through which complaints could be channeled in each office or division.

> ***The Commission recommends that the Justice Department promulgate guidelines and procedures for its attorneys regarding the circumstances under and the manner in which the mechanisms of the 1980 Act are to be utilized.***

Although an explicit formal policy would encourage use of the 1980 Act in appropriate cases, it would not eliminate litigators' understandable reluctance to risk alienating a judge before whom they regularly appear. This problem, not unique to government lawyers, is shared by the trial bar generally. Recommendations made elsewhere in this Report are aimed at enabling attorneys to come forward with meritorious complaints with less concern about possible retaliation.

CRIMINAL PROSECUTION OF JUDGES

In the two hundred years of judicial history prior to 1980, no sitting federal judge was ever prosecuted and convicted of a crime committeed while in office. Judges who were accused of serious wrongdoing resigned rather than face an impeachment, and the resignation of an accused federal judge forestalled not only the impeachment proceeding but any criminal investigation and prosecution as well. Even among those judges who were impeached, or who after

impeachment were convicted and removed, the impeachment charges generally did not involve allegations of violations of the criminal law.

In the 1930s, a number of criminal investigations were initiated against federal judges for corruption while in office. The initial impetus for many of these investigations was the notorious conduct of Chief Judge Martin Manton of the Second Circuit. None of these cases, however, resulted in the prosecution and conviction of a sitting federal judge. Again, the resignation of the judges forestalled impeachment.

In 1971, Judge Otto Kerner became the first federal judge to be indicted and convicted while on the bench. Even then, Judge Kerner's indictment and conviction stemmed from activities that occurred before his appointment to the bench while he was Governor of Illinois. He resigned his judgeship before serving his criminal sentence, thus avoiding impeachment proceedings. This appears to be the first time a sitting judge was effectively forced from office as the result of a criminal conviction.

The stunning fact is that since 1980, five sitting federal judges have been indicted, and four convicted, of crimes committed while in office.

Judge Alcee Hastings of the Southern District of Florida was the first sitting federal judge to be prosecuted for corrupt behavior in office. The Department of Justice believed that he had become involved in a bribery scheme. He was indicted and in February 1982 tried and acquitted.

Subsequently, a special committee of the Eleventh Circuit judicial council conducted an investigation of Hastings's conduct pursuant to the 1980 Act. This investigation eventually resulted in a certification by the Judicial Conference that Hastings had engaged in conduct that might constitute grounds for impeachment. The House impeached Hastings, and the Senate convicted him and removed him from office. The proceedings were marked by charges of racism and other prosecutorial misconduct. Hastings remained in office throughout the criminal and impeachment proceedings. Hastings has since been elected to the U.S. House of Representatives.

In December 1983 Judge Harry Claiborne of the District of Nevada was indicted on seven counts involving misconduct in office,

including bribery and income tax violations. His first trial ended in a mistrial; his second in a conviction on the income tax counts. He was sentenced in 1984 to two years in jail, which he served while still holding office and receiving his federal salary. He was eventually impeached and removed from office.

Judge Walter Nixon of the Southern District of Mississippi was indicted in 1985 for taking an illegal gift to influence a local prosecutor. Testimony before the grand jury by Nixon and the prosecutor differed on essential facts. Nixon was eventually convicted of perjury and sentenced to five years in prison. Like Claiborne, he refused to resign after his conviction. He remained a federal judge until 1988, when he was impeached and removed.

Judge Robert Aguilar of the Northern District of California was tried in 1990 on an eight-count indictment charging various offenses involving cases before the court, as well as lying to the FBI. After two trials he was convicted on several counts. He was sentenced to six months in prison. The sentencing judge explained the light sentence on the grounds that Judge Aguilar was faced with a long and arduous process of appeals and likely impeachment. On appeal, a panel of the Ninth Circuit affirmed the conviction on one count, reversed the conviction on a second count, and remanded for resentencing.[3] Judge Aguilar has not resigned from judicial office.

The fifth judge is Robert Collins of the Eastern District of Louisiana. Judge Collins was indicted in 1991 for bribery, conspiracy, and obstruction of justice. He was ultimately convicted on all three counts. Like Hastings, Judge Collins charged the government with prosecutorial abuse based on race and political considerations. On appeal his conviction was affirmed by the Fifth Circuit, and the Supreme Court denied certiorari in April 1993.[4] He has not resigned from his judicial office and is currently serving a prison term. On May 12, 1993, the Fifth Circuit Judicial Council certified to the Judicial Conference that Judge Collins had engaged in conduct that might constitute one or more grounds for impeachment. On June 22, 1993, the Judicial Conference certified to the House of Representatives its determination under the 1980 Act that Judge Collins had engaged in conduct that might constitute one or more grounds for impeachment.

What caused this dramatic shift in the application of criminal sanctions to federal judges and in the responses of the judges to charges

of serious wrongdoing? Interest in this question was one reason for the appointment of this Commission.

Corruption Within the Federal Judiciary

A comparison of the pre-1980 record of criminal prosecutions with the five prosecutions and four convictions since then also raises another question. Does this dramatic change reflect an equally dramatic increase in criminal misbehavior by members of the judiciary? No evidence points in that direction, and both statistics and experience suggest otherwise. The federal judiciary has grown since its inception from 6 Supreme Court justices and 13 district judges to 9 justices, 177 circuit judgeships, and 649 district judgeships on June 30, 1992. Larger and so far ever increasing numbers may suggest an increased likelihood of some forms of misbehavior. There is no reliable indication, however, that the known instances of serious misconduct in the judiciary have proportionately exceeded, or even matched, the growth in size. The ratio between the number of judgeships and the number of congressional impeachment investigations, for example, has dropped dramatically over the course of U.S. history. Furthermore, officials from both the Public Integrity Section and the Public Corruption Unit of the FBI have stated that they do not believe there is significant corruption within the federal judiciary beyond that which has already come under scrutiny and prosecution.[5] Nevertheless, the prosecution of five federal judges, resulting in four convictions, in less than ten years is troublesome indeed; any instance of such misbehavior is unacceptable.

Pre-Impeachment Prosecution

Constitutionality. The constitutionality of pre-impeachment prosecution -- that is, criminal prosecution of a sitting judge -- has been addressed in an earlier chapter. Of interest here is that courts of appeals recently have rejected challenges brought by sitting judges to the constitutionality of pre-impeachment prosecution (Kerner, Seventh Circuit, 1974; Hastings, Eleventh Circuit, 1982; Claiborne, Ninth Circuit, 1984). The Supreme Court has yet to address the question.

Judging the Judges. In the five recent prosecutions of district judges, the prosecutors informed the chief judge of the district court or the appellate court or both about the investigation as soon as possible. The chief judge was asked to arrange for a judge from a district other

than the one in which the potential defendant was sitting to preside over the grand jury proceedings.

Following each indictment, the Chief Justice designated a trial judge from outside the circuit to preside over the criminal proceedings, and that judge brought marshals, court reporters, and other court staff from outside the circuit. When the criminal convictions were appealed, the appellate panels for the first three prosecutions (Hastings, Claiborne, and Nixon) were composed of judges designated by the Chief Justice from outside the circuit. A later appeal in Judge Claiborne's case was heard by appellate judges from within the circuit, and the appeals in the cases of Judge Collins and Judge Aguilar were also heard by in-circuit panels. The Commission has no reason to believe that the different practices followed in these cases have caused any particular problems.

Sentencing Policy. Since November 1987, the sentencing guidelines promulgated by the U.S. Sentencing Commission have governed sentences imposed on persons convicted of federal crimes. When Judge Aguilar was sentenced in 1990, the government requested the sentencing judge to increase the sentence above the established guideline on the ground that Judge Aguilar had testified falsely numerous times during the trial. Instead, the district court reduced the sentence substantially below the guideline, on the grounds that the convicted judge now faced a long period of appeals and possible impeachment – a form of punishment in itself. The sentencing judge's authority to reduce the sentence has been affirmed on appeal.[6]

The question of whether such a downward departure is permissible under the sentencing guidelines is, of course, a matter for the courts and perhaps the Sentencing Commission, not this Commission. There is, however, a fundamental policy problem with this downward departure approach to sentencing. In effect, it rewards the convicted judge for refusing to resign from office (since if the judge did he or she would probably no longer face impeachment), and it creates a disincentive for judges under these circumstances to voluntarily resign judicial office. It also rewards individuals who do not accept responsibility for their actions. While a judge convicted of a crime is constitutionally entitled to retain the office pending impeachment and removal, there is no reason to reward a judge for doing so and to thus discourage convicted judges from resigning. Such resignation would avoid the spectacle of a convicted judge drawing a full salary for a

lengthy period after conviction. The Commission urges the Sentencing Commission to review the issues involved in the sentencing of judges.

> ***The Commission recommends that convicted judges who fail to accept responsibility for their conduct not receive reduced sentences, and in any event that sentencing judges be sensitive to the effects of their sentences on the decision of a convicted judge to resign voluntarily from judicial office.***

Prosecutorial Abuse

Prosecutorial abuse of any citizen is to be abhorred; in the case of a federal judge, prosecutorial abuse is a threat not only to the individual judge but to the institutional independence of the judiciary.

As previously noted, the Justice Department has vested exclusive responsibility for the prosecution of federal judges in the Public Integrity Section of the Criminal Division. The *United States Attorneys' Manual* expressly requires the U.S. Attorneys' offices to refer any matter involving federal judicial corruption to this section. The Public Integrity Section does not randomly "test" federal judges for evidence of judicial corruption. Rather, it initiates an investigation of a federal judge only in response to a specific allegation of wrongdoing. The section usually receives no more than ten to twelve allegations of criminal behavior by federal judges a year. The vast majority of these allegations prove on early examination to be without merit, and the file is closed.[7]

Before a full-scale investigation is initiated, the FBI's Public Corruption Unit reviews the available information in detail. Thus far, the Director of the FBI has personally made the final decision whether to proceed with the investigation. Although there is no express requirement for approval by the Director, as a practical matter such approval has been sought in each case.

Recommendations to prosecute a judge are set forth in prosecution memos that are sent for final approval to the Assistant Attorney General for the Criminal Division. Career prosecutors familiar with the process have discerned no evidence of political considerations or other considerations not related to the merits of the case.

Despite this careful, high-level decision process, each of the judicial prosecutions during the past decade engendered public criticism of the Justice Department's fairness and objectivity. In the cases of Judges Hastings and Collins, both African-Americans and both appointed by President Jimmy Carter, the criticism included charges that the prosecutions were motivated by racial prejudice and ideological considerations. Judge Nixon alleged a government vendetta against him because of decisions he made in connection with a particular condemnation case. Judge Aguilar, the first Hispanic federal judge when he was appointed by President Carter in 1980, claimed the Department of Justice targeted him because of rulings he made against the government and because of racial and ideological factors. The Department takes the position that these kinds of generalized defensive claims are inevitable in high-profile cases, and it has made no attempt to respond publicly to the charges.

The case of Judge Claiborne raised a different kind of charge of prosecutorial abuse. The charges were not allegations of generalized bias or racism but specific claims of prosecutorial misconduct. In the other cases, later judicial proceedings gave no credence to the claims of prosecutorial abuse; in Judge Claiborne's case, the Nevada Supreme Court found significant parts of the federal investigation and prosecution to have been abusive. Even assuming that certain actions by local FBI agents may have been improper, the Department maintains that the key decisions in the investigation and prosecution were made by high-level officials strictly in accordance with established procedures.

The Commission is not persuaded that any federal judge in the past decade was improperly targeted for criminal prosecution. Although there appears to be little reason to believe that the investigations and prosecutions since 1980 were motivated by anything other than a desire to punish criminal behavior, it is essential that assurances be built into the system to minimize the potential for abuse. There are several things the Department could do to help alleviate concerns about improperly motivated prosecutions of sitting judges. One is to issue explicit procedural guidelines for the investigation and prosecution of federal judges. The guidelines could require that any full-scale investigation of a federal judge be expressly approved beforehand by the Attorney General. The same approval requirement should apply to any intrusive investigative technique now required to be brought before the Undercover Review Operations Committee.

Another positive step would be the promulgation of substantive requirements for the investigation and prosecution of federal judges. Justice Department attorneys have stated that the Department does not attempt to seek out corrupt judges, and it has never conducted a "sting" operation to trap federal judges. Only when substantial evidence of criminal conduct has been brought to the attention of the Department will it initiate an investigation. This could be made express.

> ***The Commission recommends that the FBI and the Justice Department issue explicit guidelines and procedures for the investigation and prosecution of federal judges, and that these guidelines and procedures require the approval of the Attorney General for full-scale investigations and intrusive investigative techniques.***

COOPERATION IN THE IMPEACHMENT PROCESS

The executive branch has no formal, constitutionally defined part to play in impeachment. It has had, however, a major practical effect on the recent impeachment cases. The facts that served as the basis for impeachment proceedings were first developed in criminal investigations and prosecutions by the Department of Justice. There is no indication that the House was informed of, or consulted about, those investigations or any pre-indictment proceedings. The House awaited the final outcome of the criminal proceedings, including the exhaustion of all appeals by the judicial defendant, before initiating its own proceedings. The House may have been awaiting the disposition of appeals by Judges Aguilar and Collins, as well as certifications from the Judicial Conference pursuant to the 1980 Act, before beginning impeachment proceedings against them.

When the House chooses to await the outcome of a criminal prosecution before initiating impeachment, the executive branch is influencing the impeachment process. This role would be even greater if Congress were to adopt rules of issue preclusion, or proposals to make criminal convictions *per se* impeachable offenses. Further, the House practice raises a number of questions relating to information exchange between the executive and legislative branches. These issues include the extent to which the executive branch should share with the House information it collects during an investigation, and whether the House

should have access to protected grand jury and electronic surveillance materials.

Criminal prosecution and conviction of a sitting judge prior to impeachment proceedings may result in long delays between the criminal conviction and, in the case of a judge who refuses to resign, the removal of the judge from office. In Judge Nixon's case, three-and-a-half years elapsed from the time of his criminal conviction until the time he was removed from judicial office by impeachment.

Criminal prosecution before impeachment gives the House and the Senate the benefit of having the issues refined through the course of the criminal prosecution and appeal. There are consequences, however, that may be undesirable. First, pre-impeachment prosecution gives the executive branch the pre-eminent role in developing the case against the judge. Because Congress waits until after the criminal trial and does not proceed even concurrently with the prosecution, the criminal investigation and trial tend to define and circumscribe the later impeachment proceeding. Second, pre-impeachment prosecution magnifies concerns about both the constitutionality and the fairness of executive branch prosecutions. Even though the House and Senate insist that they perform an independent investigation and an independent trial, a criminal conviction nonetheless creates tremendous pressure for both impeachment and removal.

Third, the disconcerting image of a convicted felon continuing to receive the salary of a federal judge damages the credibility of the criminal enforcement process as well as the impeachment process. This disturbing situation results, at least in part, from Congress's decision to defer action until after the Department of Justice has finished its prosecution of the case.

As a result of these concerns, the Justice Department may wish to reexamine its recent practice of pursuing the criminal process without regard to impeachment consequences. At least in some cases, the Department could assist the House in preparing an impeachment case in lieu of criminal prosecution, or before a prosecution is concluded. In the not-too-distant past, federal prosecutors provided investigative information to the House and even served as special counsel for the impeachment proceedings.[8]

At the very least, the time between the conviction of a judge and the commencement of impeachment proceedings should be shortened. Prosecution, including all appeals, need not be concluded before the House begins its work. Reversals of public corruption convictions are rare. If the facts support a charge of corruption, and if Congress is truly going to form its own judgment about the matter, the outcome of an appeal should not ordinarily have a determinative effect on its impeachment decision.

> ***The Commission recommends that the Justice Department consult with the U.S. House of Representatives at appropriate times during an investigation and prosecution of a federal judge, whenever the facts suggest that impeachment is a likely outcome. The timing of impeachment and criminal proceedings should be a matter dictated by the facts and circumstances of each case. Ideally, this decision should be made by mutual agreement of the branches.***

JUDICIAL APPOINTMENT PROCESS

If the appointment process operated perfectly to select only the most highly qualified and honest judges, the need for disciplinary action would be significantly reduced if not eliminated. For this reason it has often been suggested that the solution to the problem of misconduct within the federal judiciary is not an improved disciplinary process but rather a more careful appointment process.

The appointment process is the one area addressed in this Report in which the executive branch has a defined constitutional role. Article II, section 2, states that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Congress has provided explicitly that all circuit and district judges be appointed by the President, by and with the advice and consent of the Senate. The framers required the concurrence of the Senate in order to provide a check on the power of appointment residing in the single person of the President.

The nomination and appointment process has been criticized for being based too much on politics and not enough on the judicial qualities of the candidate. That the process is "political," however, seems hardly surprising. The Constitution specifically delegates the process to the two political branches of government. The relevant question is not who influences the appointments, or even why, but whether the process is carried out so as to identify and eliminate those candidates whose background reveals a risk of future misconduct. Of importance in this regard are the FBI "full-field" investigations conducted on proposed judicial nominees. Both the President and the Senate Judiciary Committee review these FBI reports. It is at the point of these investigations that potentially corrupt judges are most likely to be identified. As a result, it is essential to the effectiveness of the appointment process that FBI investigations be as comprehensive as is reasonably possible.

> ***The Commission recommends that FBI full-field investigations of judicial candidates be as comprehensive as reasonably possible to ensure sound judgments about their integrity and qualifications.***

Without suggesting that anything did go wrong, the Commission believes that it would be useful for the executive branch to know if and how the nomination and confirmation process went wrong in the cases of the five recently prosecuted judges. The purpose of such an inquiry would not be to fix blame but to assess whether there are structural defects in the process and to learn from past mistakes, if any there be. To the Commission's knowledge, the Justice Department has not conducted any formal review of these cases.

CHAPTER V
JUDICIAL BRANCH*

Not all misconduct by federal judges warrants impeachment and removal, and the Constitution leaves unclear whether disability is an apt subject for consideration in the impeachment process. When Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (hereinafter "the 1980 Act") (See Appendix II), it sought to provide a credible formal mechanism within the judiciary as a supplement to the impeachment process. The hope was expressed that, by confirming the judiciary's power to take formal action, Congress would also enhance informal approaches to problems of misconduct and disability.

As with other subjects of the Commission's inquiry, the primary means by which the Commission sought to inform itself about formal and informal methods of discipline within the judicial branch was by reports from outside consultants, interviews, surveys, hearings, and on-site visits to courts to gather data. For example, the Federal Judicial Center (the "FJC"), on behalf of the Commission, conducted a study of the circuits' administration of the 1980 Act. The FJC research team reviewed complaints filed under the Act, and orders issued in response to those complaints, in a sample of eight circuits. Although most of the complaints and some of the orders reviewed were confidential, the circuits granted access, subject to conditions, for purposes of the FJC study. The FJC conducted interviews in the same eight circuits with chief judges, former chief judges, circuit executives, and clerks of courts of appeals. Also, the FJC reviewed statistical data about the filing and disposition of complaints that the thirteen circuits and two courts covered by the Act had submitted to the Administrative Office of the U.S. Courts ("the Administrative Office").

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* See Chapter Notes.

FORMAL MECHANISMS

The 1980 Act

The 1980 Act permits any person to file a complaint alleging that a federal judge (including a bankruptcy or magistrate judge) "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or . . . is unable to discharge all the duties of office by reason of mental or physical disability." Since 1990, the Act has also permitted the chief judge of the circuit to "identify a complaint" (i.e., dispense with the formal filing of a complaint) on the basis of available information.

After considering a complaint, the chief judge may dismiss it, by written order stating reasons, if it is not in conformity with the Act, is directly related to the merits of a decision or procedural ruling, or is frivolous. The Act also authorizes a chief judge to conclude the proceeding if appropriate corrective action has been taken or (since 1990) if action on the complaint is no longer necessary because of intervening events.

If the chief judge does not enter an order dismissing a complaint or concluding the proceeding, he or she must appoint a special committee to investigate the complaint and file a written report with the circuit judicial council containing its findings and recommendations. The council in turn may conduct additional investigation and is required to take "such action as is appropriate to assure the effective and expeditious administration of the business of the courts." The Act specifies by way of illustration some of the actions a council may take, prohibiting, however, the removal from office of any judge appointed to hold office during good behavior.

The Act permits a complainant or judge aggrieved by an order of the chief judge dismissing a complaint or concluding the proceeding to petition the judicial council for review. It also permits a petition for review to the Judicial Conference of any action taken by the council after receipt of a report from a special committee. As authorized by the Act, the Judicial Conference acts in these matters through its Committee to Review Circuit Council Conduct and Disability Orders.

Although Congress did not in so many words require the judicial councils to promulgate rules implementing the Act, the statute's

background and legislative history reveal a clear expectation that they would revise existing rules, as does the Act's requirement that any such rules contain prescribed procedural protections for the subjects of complaint and complainants. Congress also authorized the Judicial Conference to prescribe rules and to modify any rule promulgated by a judicial council.

In aid of the goal of public accountability, Congress provided that rules implementing the Act be a matter of public record and that council orders implementing action following the report of a special committee be available to the public and, unless contrary to the interests of justice, be accompanied by written reasons. Congress also required the Director of the Administrative Office to include in the annual report filed with Congress a summary of the number of complaints filed under the Act, indicating their general nature and any action taken. In promising "vigorous oversight," the Act's sponsors noted that consideration would also be given "to making requests for other reports on the implementation of the act, as well as possible oversight hearings and subsequent perfecting amendments to the statute."[1]

Once the Act became effective, all of the councils revised their rules. These early rulemaking efforts attracted criticism, and in response a committee of the Conference of Circuit Chief Judges, working with the FJC, prepared Illustrative Rules, the substantial adoption of which on an experimental basis was subsequently recommended by the Judicial Conference. Most of the circuit councils followed that recommendation, and they also revised their rules after the Judicial Conference's Committee amended the Illustrative Rules in 1991 to conform to the 1990 amendments to the Act. As a result, there is now considerable uniformity among council rules, and in most circuits the rules themselves seriously and sensitively implement the Act.

Congress's interest in the implementation of the Act, which was reflected in a 1985 oversight hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, increased the judiciary's incentives to respond to criticisms of its rulemaking efforts. Moreover, Congress's oversight and continuing dialogue with the judiciary brought to light other problems that were addressed by statutory amendments in 1988 and 1990.

These efforts notwithstanding, it has heretofore been difficult to evaluate in any rigorous fashion the judiciary's performance in complaint

disposition, as distinguished from rulemaking. Although statistics gathered by the Administrative Office and reported each year to Congress by the Director are more informative than they once were, they tell the reader nothing about the quality of efforts made by chief judges and circuit councils in disposing of complaints, or about the fidelity of their dispositions to the allegations in those complaints or to the Act's standards. The Act's requirement of public availability extends only to council orders issued after the appointment and report of a special committee. Because the overwhelming majority of complaints have been dismissed by chief judges, the orders disposing of them are not subject to the statutory requirement. Moreover, although a large majority of councils have adopted an Illustrative Rule providing for public availability of dismissal orders that have been redacted to preserve confidentiality, the orders have not been easily accessible at the national level. Finally, dismissal orders, even if available, do not always provide reasons, and in any event rigorous evaluation requires that they be compared to and considered together with the complaints to which they are addressed, which have been held confidential in all but one circuit.

Fortunately, the Commission, with the assistance of circuit chief judges and the FJC, was able to overcome these difficulties and for the first time to conduct a thorough examination of experience under the Act.

Substantive Standards. The long legislative process that resulted in the 1980 Act witnessed substantial disagreement about appropriate standards for judicial discipline, reflecting differences about how far Congress and the judiciary could and should go in regulating the conduct of federal judges. There was agreement that misconduct or disability could not be predicated on the merits of a judge's or magistrate's rulings. Similarly, concern for judicial independence had prompted a consensus that any legislative mechanism must provide for the speedy dismissal of frivolous complaints or complaints not within the jurisdiction conferred by the statute. There remained, however, ample room for disagreement about the ambit of that jurisdiction.

The state models drawn on in Senate bills suggested that the regulatory reach was long indeed, extending to a great variety of conduct not directly related to the performance of official functions. On the other hand, the report on the bill passed by the Senate in 1979 seemed to disclaim any such purpose, and Senator Birch Bayh emphasized its limited jurisdiction.

It is not surprising that the House eschewed a detailed elaboration of the standard for disciplinary action in the bill it passed and in the bill's legislative history. The language adopted by the House and agreed to by the Senate -- "conduct prejudicial to the effective and expeditious administration of the business of the courts" -- was familiar to the judiciary and had been sought by the Judicial Conference, which was concerned about clarifying power thought to exist. Substantively, federal judges were required to rely in the future, as they had relied in the past, on their colleagues to protect judicial independence.

Disciplinary and Corrective Actions. According to Administrative Office statistics, 2,405 complaints were filed from the inception of the Act through 1991. Only 40 of the complaints resulted in the appointment of a special committee, and of that number 27 were dismissed by judicial councils after receiving the special committees' reports. According to other data gathered by the Commission's consultants, during the life of the Act, seven complaints have led to reprimands (4 public and 3 private), and one complaint resulted in the suspension of a magistrate judge for the remainder of his term. Three complaints resulted in voluntary retirements. One complaint led finally to the impeachment and removal of a judge. Examples of council actions, as reported by the Commission's consultants, include:[2]

- A bankruptcy judge had his law clerk contact counsel for a Chapter 11 petitioner (without notice to other parties) to notify them of the decision of various contested matters and request drafts of orders implementing those decisions. The judge then released these orders as his own without any change. The Judicial Council directed the chief judge to issue a written public censure. In his letter of reprimand, the chief judge noted that "all of them [the orders] might well be denominated opinions and represent considerable scholarship." Other counsel had no notice even of the rulings. The Council found a violation of Canon 3A(4) of the Code of Conduct for U.S. Judges, noting that "[t]he knowledge that a judge will rule in a particular way is invaluable information to the lawyer and the client, particularly where the other lawyers and their clients do not share in that information." The disciplined judge also resigned his post as chief judge of the court, although he continued to serve as a bankruptcy judge.

• A district judge voluntarily took leave of absence due to difficulties in handling trials. After a complaint of judicial disability was filed, a special committee investigated and found that the judge had suffered a series of physical and emotional problems. Based on information from doctors and an interview with the judge by one of the members of the Committee, it concluded that the judge was disabled. On the basis of the committee's report, the Judicial Council requested that the judge voluntarily retire and that the length of service requirements not apply.

• In response to a complaint of disability of a district judge, the chief judge appointed a special committee which recommended that the Judicial Council find that, due to a debilitating heart condition, the judge was so physically disabled that he was unable to discharge all the duties of a district judge. After the judge responded to this Report, the council concluded that he was permanently disabled and requested that he retire voluntarily with the provision that the length of service requirements not apply.

• A district judge was designated managing judge of a three-judge court handling a voting rights redistricting suit. The judge had served in the state legislature prior to appointment to the federal bench. In connection with a preliminary injunction decision to impose an interim redistricting plan for an upcoming election, the judge had his law clerks use a redistricting computer program operated by the state legislature. While preparing the plan he was to submit to the other two judges on the three-judge court, he conferred with a state legislator he had gotten to know while serving in the legislature and sent this legislator to accompany his law clerk to use the computerized redistricting program to make certain revisions to the redistricting plan regarding a state senate district. The legislator then announced his candidacy for election from this district, leading to complaints that the judge had allowed his former colleague to draw himself a safe senate district.

Having received a complaint, the chief judge initially dismissed it but vacated the dismissal order five days later and appointed a special committee. It found that the judge had involved the legislator because he knew that the legislator was a "computer nut" who could effect changes much more quickly than his law clerk as the time for completion of the interim plan ran short. It found that the judge was reacting to deadline pressure, and controlled the substance of the changes to be made in the redistricting plan. The committee nevertheless concluded that the judge made "a serious mistake in judgement," engaged in improper ex parte communication with a party interested in the pending litigation, and created an appearance of impropriety. "For a judge of the court panel faced with resolving this controversy to privately call upon an elected member of the legislature for assistance in that task, regardless of how limited, would clearly have the appearance of impropriety for any reasonable observer." Based on this Report, the Judicial Council publicly reprimanded the judge, admonished him that his actions were inconsistent with the Code of Conduct, and stated that it was "imperative" that the judge "exercise greater care in such matters in the future."

- A special committee found that a magistrate judge had engaged in conduct constituting serious sexual harassment of court employees, including improper physical contact, sexually suggestive remarks, and retaliation that adversely affected working conditions. The special committee recommended that its report be made public and that the magistrate judge be suspended for the remainder of his term. The Judicial Council adopted the special committee's findings and recommendations.

In assessing the impact that the 1980 Act has had on problems of judicial misconduct and disability, it would be a mistake to attend only to complaints that resulted in council action following the appointment and report of a special committee. Testimony before the Commission and interviews with chief judges indicate that, for many of them, the opportunity to resolve a complaint and conclude a proceeding on the

basis of corrective action is a central feature of the Act. Indeed, 73 complaints -- approximately 3 percent of all complaints filed under the Act through 1991 -- were resolved on that basis. In addition, at least two dismissals by judicial councils were based on corrective action taken. Examples of corrective actions on the basis of which chief judges concluded the proceedings, as reported by the Commission's consultants, include:[3]

- A prison inmate complained that a district judge had delayed seriously in deciding motions in a case and that the delay would affect the ability of witnesses to recall facts. The chief judge requested that the judge respond. The judge responded that the clerk had mistakenly marked the case closed and that the judge would order it reopened and promptly decide all pending matters.

- An attorney complained that in a discrimination trial a judge stated that if one touches "one's breast" (sic) the harm was of only a philosophical nature. According to the complainant, this remark offended complainant's female client. After the chief judge dismissed the complaint on the grounds that it was too ambiguous [presumably because of the reference to "one's breast" rather than "another's breast"] and isolated to constitute misconduct, the named judge responded in writing that he meant to say "psychological," and not "philosophical," in the context of discussing physical versus psychological injury. The judge [apparently interpreting the complaint to mean "another's breast"] indicated that he had been less careful in his language than he should have been and apologized to complainant's client for any dismay his remark may have caused her, saying he had not intended to cause her any distress. On a petition for review, the judicial council found the that the judge's apology, which occurred after the chief judge's dismissal, constituted corrective action.

- A prison inmate complained that a district judge had delayed five months in acting on a mandate from the court of appeals to appoint counsel to assist in

pursuing complainant's habeas corpus case and to schedule an evidentiary hearing. In response to the complaint, the district judge appointed counsel and scheduled a hearing on complainant's claim for injunctive relief. The chief judge concluded that "[e]ven if the judge's delay was conduct prejudicial to the effective and efficient administration of the business of the courts, this presents a record of corrective action taken."

•A female attorney complained that a male district judge had exhibited gender-based bias against her and her client, evidenced by rulings against her client and sanctions imposed on her for allegedly disobeying court orders. The only clear gender-related content of any of the judge's statements on the record occurred when discussing the reasonableness of the $500 fine he had assessed against her personally. She argued that before she would pay, the judge would have to "show that I ha[ve] the ability to pay." He said, "I think that you're a practicing lawyer, . . . that you give every appearance of having at least some funds. You're able to live, exist. You comport yourself in an attractive fashion. I don't think the fine is so unreasonable." The attorney pointed to the "attractive fashion" language as being gender-based. The chief judge, in a public order, reported "discuss[ing] this with the judge. He assures me that he was trying to describe the common-sense evidence available to him as to complainant's ability to pay the sanction; it was not intended as an expression of sexual stereotyping. Of course, the judge appreciates the need for the judiciary to avoid such stereotyping. If the comment by the judge was prejudicial to the effective and efficient administration for the courts, my discussion with the judge presents a record of corrective action taken." After reviewing the record in the underlying litigation, the chief judge dismissed the balance of the complaint on the grounds that the record did not support the allegations of discriminatory treatment of the complainant or her client.

After reviewing the actions taken by judicial councils following the report of a special committee and by chief judges in concluding proceedings on the basis of corrective action, and in light of the results of our surveys of judges, the Commission concludes that, as implemented, the Act's substantive standard has not proved to be a serious threat to judicial independence.

Dismissals. Congress anticipated that the great majority of complaints filed under the Act would and should be dismissed as not in conformity with the Act, frivolous, or directly related to the merits of a decision or procedural ruling. Statistics provided to Congress have consistently vindicated the prediction (95 percent of the complaints filed and not withdrawn through 1991 were dismissed by chief judges); yet, prior to the Commission's studies, it was not possible to assess with any confidence whether those dismissals were appropriate.

Because the Commission had access to both dismissal orders and the complaints to which they related, it was able to overcome the major barrier to a rigorous evaluation noted above. It should be recognized, however, that the Act's substantive ambiguity, which results from the breadth of its conduct standard, is itself a barrier. Nonetheless, the Commission is satisfied that the Act's substantive ambiguity has not created a serious problem by permitting the dismissal of complaints that should have been investigated.

Most complaints filed under the Act have been outside the Act's intended jurisdiction, frivolous, or directly related to the merits of a decision or procedural ruling. Most of the troublesome dismissals identified (which as a whole constituted 2.5 percent of the sample reviewed) were the result of precipitous action, the chief judge having dismissed the complaint at a stage when further investigation was warranted. Although many circuits have on occasion been careless in identifying the proper ground for dismissal, very few of the troublesome dismissals could be laid to the elasticity of the Act's substantive standards. Four problem areas warrant specific attention.

Merits-relatedness. As noted in the FJC study, "[o]ne source of confusion in applying the merits-relatedness standard is the interplay between a 'direct relationship' to the merits and the availability of an appellate remedy." The authors then describe "a number of arguably meritorious complaints that were dismissed as merits-related on the ground that some appellate remedy did, or might exist," arguing that

"some inquiry by the chief judge into the factual support for the complaint might have been more appropriate." As an example of a merits-related dismissal the authors deem clearly incorrect, they cite a complaint by a pro se litigant that the docket entries in the case had been falsified; the complaint specified six specific entries. The authors also discuss two complaints that alleged improper ex parte communications and that were dismissed, in whole or part, as merits-related.

The Commission agrees with the authors of the FJC study that, although the availability of appellate review may be "one reason merits-related complaints are not cognizable," "[t]he core reason for excluding . . . [them] is to protect the independence of the judicial officer in making decisions, not to promote or protect the appellate process." The Commission does not believe, however, that the extent of the problem identified (6 troublesome merits-related dismissals out of 469 complaints in the sample) warrants a statutory amendment or revision in the Illustrative Rules, or indeed, that the problem is readily amenable to formal clarification. Many of the troublesome dismissals arising from an arguably over-expansive view of merits-relatedness might have been avoided if the chief judges of two circuits that accounted for most of the problems had more freely availed themselves of assistance in reviewing the complaints and preparing non-standardized dismissal orders. Such dismissals might also have been avoided if reasoned dismissal orders analyzing this ground of dismissal were easily available and if, as a result, a body of interpretive precedents were to develop. Later in this chapter of the Report, the Commission makes recommendations that are addressed to the questions of assistance for chief judges and developing a body of interpretive precedents. If adopted, they may provide procedural solutions to a problem of substantive ambiguity.

Delay. Far more vexing is the question whether, and in what circumstances, judicial delay constitutes an appropriate ground for complaint under the 1980 Act. The Illustrative Rules provide that "the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose." In commentary, however, the rulemakers note "that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of complaint." Although there is very substantial agreement with the Illustrative Rules' approach in the eight circuits sampled, in seven of which complaints of isolated delay are dismissed as merits-related, testimony before the Commission from lawyers and judges, and surveys

conducted for the Commission, confirm that delay is a difficult issue that deserves attention. The information available also suggests that delay most often lends itself to administrative measures best worked out through informal means and that, therefore, any adjustments in formal mechanisms should be designed primarily as a support for, and backstop to, administrative approaches.

The 1980 Act's substantive conduct standard -- "conduct prejudicial to the effective and expeditious administration of the business of the courts" -- on its face does not exclude delay as a ground for complaint; in fact, it seems to incorporate it. At the same time, it requires little imagination to foresee the potential impact on judicial independence of permitting the routine use of the Act to trigger inquiry concerning delay, let alone its impact on the workload of those responsible for complaint disposition. Even conscientious, efficient judges can get behind. For a chief judge to scrutinize the dockets of fifty or sixty or more district judges in the circuit sufficiently to allocate blame on questions of routine delay would be a daunting prospect. Moreover, a busy district judge has to have leeway to determine docket priorities --- some litigants may have to wait for others. Judges, after all, have no control over whether vacancies are filled or colleagues are taken ill, nor can they control how many lawsuits are brought or ready for trial at one time. Such considerations --- as well, to be sure, as the judge's own ability, efficiency, and work habits --- all play their part in creating delay.

Indeed, although action taken pursuant to the Act may appropriately affect the way in which judicial power is exercised (or whether it is exercised at all) in future cases, the Commission has serious doubts whether a chief judge or a judicial council has the power under the Act to order judicial action in a specific case. Such power is reserved to an Article III court.

The central distinction, then, is that suggested but not fully explained by the Illustrative Rules and commentary. It is not a distinction between isolated and habitual delay but rather one between delay that is an appropriate object of judicial (appellate) as opposed to administrative or disciplinary remedy. Pursuing that distinction, the Commission does not believe that habitual or chronic delay exhausts the universe of situations in which an administrative or disciplinary remedy under the Act may be appropriate. Delay in the decision of a single case or even of a single motion may be a proper ground for complaint if it is founded

on improper animus or prejudice against a litigant -- or if it is so egregious as to constitute a clear dereliction of judicial responsibilities. A judge's refusal to decide because, for reasons unrelated to the case, the judge is biased against the litigant, constitutes conduct "prejudicial to the effective and expeditious administration of the business of the courts." So too does a refusal or persistent failure to decide because a matter is difficult or tedious. The Commission emphatically cautions that a valid complaint would not be made out by mere assertions. Either the specific facts of the situation or the circumstances, or both, must demonstrate judicial impropriety. Delay, even prolonged delay, often occurs for reasons a court cannot control or that fall within the necessarily wide discretion of the court to manage its docket. Remedies under the Act are aimed at conduct falling clearly outside the boundaries of ordinary judicial judgment and discretion.

> ***The Commission recommends that Illustrative Rule 1(e) be revised to provide that the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long; a petition for mandamus can sometimes be used for that purpose. Discipline under the 1980 Act may be appropriate, however, for (1) habitual failure to decide matters in a timely fashion, (2) delay shown to be founded on the judge's improper animus or prejudice against a litigant, or (3) egregious delay constituting a clear dereliction of judicial responsibilities. The Commission also recommends that all councils and the several courts subject to the 1980 Act adopt this Illustrative Rule as revised.***

In making this recommendation, which the judiciary may regard as an invitation to a self-inflicted wound, the Commission recognizes that most of the burden will fall on chief judges and those on whom they rely for assistance in complaint disposition, and that serious complaints could impose substantial burdens on investigating special committees. The Commission would not lightly add to their burdens, but it has concluded that the suggested standard faithfully implements the statute's language and purposes, and that the costs of dismissing complaints of delay that do not satisfy the suggested standard may be outweighed by the standard's benefits.

Chief judges have observed in general that even complaints outside the jurisdiction of the Act may lead to the correction of a problem of judicial administration, and even in circuits that purport to follow the Illustrative Rules' approach to delay, a complaint alleging isolated delay may nonetheless be regarded as an invitation to corrective action. There may be no greater problem of judicial administration today than delay. The Commission hopes that this recommendation, proposing a formal elaboration of the Act's substantive standard, will augment the judiciary's arsenal of informal approaches to deal with delay. In that regard, it may serve as a supplement to a chief judge's power to "identify a complaint" (i.e., dispense with the formal filing of a complaint) of habitual or chronic delay after reviewing reports required by the Civil Justice Reform Act of 1990.

Whatever use chief judges make of CJRA reports, the statutory purposes in requiring the Director of the Administrative Office to prepare semiannual reports that are available to the public and that disclose certain prescribed information for each judicial officer would be better served if the Administrative Office made those reports more readily available to the public. Moreover, the reports themselves should contain the information required by statute (including case names) in a form that permits meaningful public evaluation.

Not in Conformity With the Act. The Commission did identify a handful of complaints within the sample reviewed that may have been inappropriately dismissed as not in conformity with the Act, a ground sometimes referred to as outside the Act's jurisdiction. One subset of the complaints so identified deserves comment.

Two circuits have held that the Act does not cover allegations that a federal judge committed perjury while testifying about matters that occurred before his or her appointment to the federal bench, and two other complaints raised similar issues. Another complaint, alleging that a judge had accepted a bribe from another party and providing some factual support, was dismissed without prejudice to its renewal on the ground that further proceedings under the Act should await the outcome of any criminal prosecution.

Reasonable minds may differ as to whether a federal judge who commits perjury with respect to matters unrelated to the conduct of his or her office nevertheless engages in conduct "prejudicial to the effective and expeditious administration of the business of the courts." It may be

relevant whether such conduct might be an impeachable offense. If so, accepting jurisdiction under the Act in a close case could serve Congress's purpose of enlisting the judiciary's help in easing its impeachment burdens. Moreover, although some criminal conduct by a judge unquestionably does not fall within the Act's jurisdiction, it is useful to recall that the great debates about the scope of that jurisdiction were animated by a concern about overreaching.

No such doubt surrounds the dismissal on this ground (without prejudice) of the complaint alleging bribery in the complainant's case, at least in the absence of any evidence that there was a pending criminal proceeding. Although complaints alleging criminal behavior would also benefit from the development of a body of interpretive precedents, these three matters raise a more pressing concern. In none of them did those dismissing the complaint refer the matter either to federal or state criminal authorities or to the House of Representatives. Granting again that some (non-frivolous) allegations of criminal conduct by a federal judge may be outside the Act's jurisdiction, any such serious allegation should be brought to the attention of other institutions that may have and exercise jurisdiction.

> ***The Commission recommends that a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal or state criminal authorities and of the House Judiciary Committee. In situations where the chief judge or circuit council believe it inappropriate to act as an intermediary, the Commission recommends that they notify the complainant of the names and addresses of the individuals to whose attention the charges might be brought.***

Frivolousness. A few complaints in the sample were dismissed as frivolous where further inquiry appears to have been warranted or where limited inquiry by the chief judge did not substantiate the complaint's allegations. Council review is available to correct dismissals that are simply precipitous, and in fact such action followed in two of four instances identified. The problem of complaints whose allegations are adequate on their face but cannot be substantiated by factual inquiry is qualitatively different, and it has two aspects. First,

there is some doubt about the power of a chief judge to conduct limited factual inquiry prior to taking action on a complaint. Later in this chapter of the Report, the Commission recommends that the Act be amended specifically to recognize such power. Second, the Commission agrees with the authors of the FJC study that "[a] dismissal for frivolousness . . . could readily be misunderstood as an indication that the chief judge did not take the complaint's allegations seriously. This kind of misperception might prove particularly unfortunate where a complaint raises sensitive, factually nonfrivolous allegations (for example, of ethnic or gender bias) that are found unsupported after inquiry."

> ***The Commission recommends that the 1980 Act be amended to include as an additional ground for dismissal by a chief judge that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation.***

Other Issues. There are two other matters implicating the Act's substantive standards that deserve attention. The first concerns the relationship between those standards and the Code of Conduct for United States Judges and other statutes or rules regulating judicial ethics. The second matter concerns the treatment of complaints that allege judicial bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including complaints alleging sexual harassment.

In light of the indeterminacy of the Act's core substantive conduct standard -- "conduct prejudicial to the effective and expeditious administration of the business of the courts" -- it was to be expected that chief judges and circuit councils would seek more concrete guidance in the Code of Conduct. They have done so frequently in dispositions under the Act. Yet, the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act. The same may be true of other statutes and rules establishing ethical norms for federal judges, particularly if they have their own enforcement mechanisms. The Commission believes the subject deserves continuing study and clarification, much of which can be expected to emerge on a case by case basis if dispositions under the Act are circulated and selectively published, as recommended. The Commission can also see room for fruitful study by various committees of the Judicial Conference charged with responsibility for ethics and

discipline issues, and perhaps by appropriate congressional oversight committees.

A few of the troublesome dismissals involved allegations of bias on the basis of race, gender, or sexual orientation, although none of them was predicated on the ground that such allegations are outside the Act's jurisdiction. In addition, testimony before and other information available to the Commission identify bias of this sort as a serious problem in the federal courts that requires prompt and effective action. Later in this chapter of the Report, the Commission recommends that each circuit council initiate a study to assess whether such a problem currently exists and the extent to which the Act and other existing mechanisms, including judicial education, are adequate to deal with it. The Commission also believes that the Code of Conduct should expressly prohibit judicial behavior that reflects or implements bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment.

> ***The Commission recommends that the Judicial Conference of the United States add to the text of Canon 2 or Canon 3 of the Code of Conduct for United States Judges an express prohibition of judicial behavior that reflects or implements bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment. Unless the complaint's allegations are directly related to the merits of a decision or procedural ruling, such behavior in a judicial capacity is an appropriate subject for discipline under the 1980 Act.***

Problems in Implementation and Administration.

Lack of Information and Disincentives to Filing. The number of complaints filed in the entire history of the Act through calendar year 1991 (2,405) is only slightly more than the number of annual filings (2,300) assumed in the Congressional Budget Office estimate at the time the Act was passed. Nevertheless key members of the federal judiciary have resisted proposals that the existence and purposes of the Act be publicized, chiefly out of concern that such an effort might multiply the number of frivolous and other complaints subject to dismissal. Surveys conducted for the Commission demonstrate both widespread ignorance about the Act in virtually every respondent

group and a widely shared perception that some meritorious complaints are never filed.

The Twentieth Century Fund Task Force was correct in recommending various steps designed to increase public awareness of the Act, including the posting of explanatory notices, discussion of the Act at circuit conferences, and explanation of the Act's procedures in internal operating manuals and in the local rules of the district courts and courts of appeals. Public education about the Act is a responsibility that should be shared by the bar and the federal judiciary, and continuing education about judicial discipline and ethics within the judicial branch would serve the interests of both judges and the public.

> ***The Commission recommends that the bar and the federal judiciary increase awareness of and education about the 1980 Act among lawyers, judges, court personnel, and members of the public. As one part of such efforts, each circuit council that has not already done so should publish its rules under the Act in United States Code Annotated, and a reference to the 1980 Act and the circuit council's rules should be included in the local rules of each district court.***

The Act is obviously not serving its purpose to the extent that knowledgeable individuals with meritorious complaints are unwilling to file them because of fear of adverse consequences to themselves or to their clients once their identities are known. Lawyers are more likely to file meritorious complaints than non-lawyers. Yet, testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint. This type of risk aversion is common among those who appear frequently in federal court, notably government lawyers.

Congress was urged to permit anonymous complaints during the legislative process that led to the Act, but the statute is silent on the subject. Fairness to a judge accused of misconduct (or disability) ultimately requires that he or she be permitted to confront an accuser, although there is no logical imperative that an individual witness be identified as the initiator of the process. The Illustrative Rules provide that anonymous complaints "are not handled under these rules" but that they "will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate." Taken together with a 1990

amendment to the Act permitting a chief judge to "identify" (i.e., dispense with the formal filing of) a complaint on the basis of available information, which is now implemented by Illustrative Rule 2(j), the Commission believes this procedure has promise in addressing the bar's unfortunate but understandable reluctance to incur a judge's hostility by filing a complaint of misconduct or disability.

Concern may persist, however, that even if the chief judge identifies a complaint, the ultimate source will be identifiable, particularly if the alleged misconduct is an isolated instance. One way to diminish such concern is through the birth and nourishment of a culture in which the bar stands together with other informed citizens both in defending the judiciary against unjustified attacks and in defending lawyers against retaliation by vindictive judges.

The Commission studied one situation in which a complaint validly alleging unauthorized use of contempt powers by a magistrate judge was filed by two bar associations after the individual attorney who had been held in contempt decided he could not risk filing. The Commission concluded that an informed group of lawyers and lay persons in each circuit could be available to assist in presenting to the chief judge serious complaints against federal judges. Such groups could work with chief judges in efforts to identify problems that may be amenable to informal resolution. They could also help provide anonymity for a complainant concerned about retaliation if the chief judge identifies a complaint, and provide a deterrent against retaliation if the complainant is identified. Such groups, although of course having no decision-making authority, could be especially useful in bringing patterns of alleged misconduct to the attention of the chief judge. Finally, such groups could shoulder some of the responsibility for initiating educational activities about the Act and judicial discipline more generally that lies with the bar as well as with the judiciary.

> ***The Commission recommends that each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints against federal judges. Such groups should also work with chief judges in efforts to identify problems that may be amenable to informal resolutions and should initiate programs to educate***

lawyers and the public about judicial discipline. The Commission also encourages other institutions, including the organized bar, to take an active interest in the smooth functioning and wise administration of formal and informal mechanisms that address problems of judicial misconduct and disability.

Whether or not an individual is reluctant to file a complaint, a chief judge should not insist that the individual do so when information is available on the basis of which a complaint should be identified and it appears that the matter is capable of being resolved through investigation.

Powers of Chief Judges in Complaint Disposition.

Limited Factual Inquiry. Advised that some doubt exists about the power of a chief judge to conduct a limited inquiry into the factual support for a complainant's allegations prior to taking action on a complaint, the Commission decided that such power is necessarily contemplated by the Act's provision authorizing a chief judge to conclude a proceeding. For that and other reasons, the Commission agrees with the Illustrative Rules' treatment of this issue. Illustrative Rule 4(b) authorizes a chief judge to "conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation." It also provides that a chief judge "will not undertake to make findings of fact about any matter that is reasonably in dispute." This represents a sensible accommodation of the policies and interests that are implicated. The existence of such power is, moreover, a necessary predicate for the recommendation earlier in this chapter of the Report that the Act be amended to add as a ground for dismissal by a chief judge "that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation."

The Commission endorses Illustrative Rule 4(b) and recommends that the 1980 Act be amended to provide that a chief judge may conduct a limited inquiry into the factual support for a complainant's allegations but may not make findings of fact about any matter that is reasonably in dispute.

Assistance in Complaint Review and Disposition. Confidentiality emerged as an issue of major concern in the legislative process leading to the Act. It has remained a stumbling block to various efforts to augment public accountability, and even, on occasion, to the use of court personnel to assist in the review and disposition of complaints.

By its terms the Act's confidentiality provision covers only "investigations," leaving open the question whether and to what degree confidentiality should be required if a special committee is not appointed. The Illustrative Rules extend confidentiality to earlier points in the process. The 1990 amendments to the Act dealt only with the power of a judicial council in its discretion to provide a copy of a special committee's report to the complainant and the subject of the complaint and thus did not resolve other disputed issues of confidentiality. Later in this chapter of the Report, the Commision addresses one of the most contentious of such issues, relating to dismissal orders. Here, the Commission notes that some chief judges have expressed unwillingness or inability to involve others in the process of reviewing and disposing of complaints because of confidentiality concerns.

The burdens the Act imposes on chief judges prompted the Twentieth Century Fund Task Force to urge the delegation of "some of the screening work." Because of those burdens and evidence in the FJC study of a causal connection between the failure to enlist assistance and (1) dismissal orders that are troublesome for one reason or another and (2) improvident appointments of special committees, the Commission encourages chief judges to seek assistance from qualified staff in reviewing complaints and preparing orders. It also encourages chief judges to consult with other judges who may be helpful in the process of complaint disposition. The Act, including its provision on confidentiality, does not constitute a barrier to such assistance or consultation.

> ***The Commission recommends that chief judges seek assistance from qualified staff in reviewing complaints and preparing orders. It encourages chief judges to consult other judges who may be helpful in the process of complaint disposition. The Commission does not believe that the 1980 Act, including its provision on confidentiality, constitutes a barrier to such assistance or consultation.***

Corrective Action. Although the 1980 Act established a formal mechanism for filing complaints, perhaps its major benefit has been the facilitation of informal adjustments of problems of judicial misconduct or disability. In some situations, that has occurred without the filing of a complaint; in others it has followed a chief judge's inquiry in response to a complaint. A chief judge's power under the 1980 Act to conclude a proceeding "if he finds that appropriate corrective action has been taken" is a boon to negotiated resolutions.

The Commission's research indicates that in most situations chief judges have been sensitive to the various interests served by the 1980 Act in concluding proceedings on the basis of appropriate corrective action taken. Occasionally, however, their orders have failed (1) to address all of a complaint's concerns, (2) to adequately document the terms of corrective actions, or (3) to explain corrective actions fully to complainants. In addition, a few matters suggest that the opportunity to conclude a proceeding on this ground may cause chief judges (or judicial councils) to disregard the limits of their powers under the Act.

Elsewhere in this chapter the Commission recommends that the supporting memorandum accompanying an order concluding a proceeding on the basis of corrective action "describe, with due regard to confidentiality and the effectiveness of the corrective action, both the conduct that was corrected and the means of correcting it." If implemented, this recommendation should go far to allay any concern that corrective action resolutions are either (1) a means by which chief judges (or judicial councils) sweep serious problems under the rug or (2) an invitation to abuse of power by a chief judge who holds all the cards.

Judicial Council and Special Committee Issues.

Council Review of Chief Judge Orders. Although some question has been raised about the need for or utility of a judicial council's review by petition of a chief judge's action in dismissing a complaint or concluding a proceeding, the Commission does not favor eliminating the opportunity for review. Even if all Commission recommendations concerning confidentiality were adopted, the Commission would be concerned about public perceptions of a process of institutional self-regulation that placed the final word in one colleague. Moreover, although the great majority of petitions for review results in action confirming chief judge orders, Commission consultants unearthed a few that did not or that, although arriving at the same result, did so

through a more appropriate process or only after applying the appropriate substantive standard. The Commission has concluded that the review process imposes tolerable burdens on the councils.

For similar reasons and to encourage maximum participation of district judges in proceedings under the Act, the Commission does not favor the use of panels of the council to consider petitions for review. There is one matter affecting both the councils and chief judges, however, where present arrangements do impose unacceptable costs.

It is unfortunately not unknown for a complainant to treat the process like a game of PAC-MAN, adding to the list of those complained against all judges who take part in any action unfavorable to the complaint. In circuits that regard this as an automatic ground for recusal or disqualification, the phenomenon has on occasion required the extraordinary process of inter-circuit assignment by the Chief Justice of the United States. That is the course reluctantly recommended in the Illustrative Rules. Although the Commission shares the concern for the appearance of propriety and disinterest so sensitively demonstrated by the authors of the Illustrative Rules, it does not believe that the benefits justify the costs.

> ***The Commission recommends that the Illustrative Rules be amended to permit chief judges and judicial councils to invoke a rule of necessity authorizing them to continue to act on multiple-judge complaints that otherwise would require multiple disqualifications.***

Special Committee Investigations. Burdens imposed upon special committees appointed by chief judges to investigate complaints are often substantial and may on occasion be extraordinary. The Act, however, does not require that such committees consist of a set number of judges. Rather, it requires that the chief judge appoint himself or herself and "equal numbers of circuit and district judges." The Illustrative Rules track the statutory language. Although there may in some situations be good reasons to appoint a committee of five (or conceivably more) judges, the use of a three-judge committee could in an appropriate matter save hundreds (or even thousands) of hours for judicial business.

Public Accountability. Although public accountability was a primary goal of the 1980 Act, both the compromises necessary to pass

the legislation and the ambiguity of key provisions put that goal at risk. So also did the judiciary's initial efforts to implement the Act. The Illustrative Rules marked a major advance, but there is still work to be done. Commission studies and surveys, and testimony before the Commission, have highlighted a number of areas where progress can be made without undue risk to other congressional goals, including protecting judicial independence.

Confidentiality. As noted earlier in this chapter of the Report, uncertainty and controversy have surrounded the issue of confidentiality under the Act. As suggested in the discussion of and recommendation concerning assistance to chief judges for the purpose of reviewing complaints and preparing orders, the Commission reads the Act's confidentiality provision narrowly. Moreover, although sensitive to the importance of discretion in these matters, the Commission is apprehensive that the notion of confidentiality can assume a life of its own, at great cost to public accountability.

Illustrative Rule 17 provides that chief judge orders dismissing complaints or concluding proceedings and any supporting memoranda "will be made public when final action on the complaint has been taken and is no longer subject to review." It also provides, however, that "the publicly available materials will not disclose the name of the judge or magistrate complained about without his or her consent." Although most councils have adopted this rule and report no difficulties under it, at least one council declined to adopt it and refuses to make even redacted dismissal or corrective action orders public. They are concerned about the identifiability of the judge or magistrate and about damage to that individual's reputation from publicity of a dismissed complaint's allegations. Moreover, they are not persuaded that the timing of public availability would necessarily solve the problem, because of the tendency of some in the media to highlight, and of the public to remember, that charges were made, not that they were dismissed.

Although understanding such concerns, the Commission believes that the benefits of the Illustrative Rule's approach outweigh the potential costs. In light of experience in circuits that make dismissal orders publicly available, those costs must be regarded as speculative. There are, however, demonstrated benefits. The negotiations necessary for the Commission's research to proceed are proof that public availability facilitates oversight of the implementation of the Act. In that and other ways, public availability enhances the judiciary's accountability for its

performance in self-regulation. The judiciary as an institution benefits when interested parties, including the media, are able to review the results of the major decision point under the Act and to confirm that, indeed, the judiciary has nothing to hide.

In light of the history of this issue, the Commission is convinced that the Illustrative Rule's approach best serves the Act's goal of public accountability and that national uniformity on the issue is itself important to that goal. The Judicial Conference's power to modify any council rule under the Act can be used to bring about a nationally uniform rule. In the absence of council or Conference action, the matter is sufficiently important that the Act should be amended.

> ***The Commission recommends that all judicial councils adopt and strictly adhere to Illustrative Rule 17 as it relates to the public availability of a chief judge's orders dismissing complaints or concluding proceedings and any accompanying memoranda. Care should be taken to eliminate information that would identify the judge or magistrate. If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.***

Although Illustrative Rule 17 is entitled "Public Availability of Decisions," it is in large part a rule about confidentiality. Other Illustrative Rules implicate confidentiality, and Illustrative Rule 16 is specifically concerned with that subject. As noted above, the goal of public accountability is best served by a uniform national approach to confidentiality. In general, the Illustrative Rules strike an appropriate balance between conflicting policies. Illustrative Rule 3, however, directs the clerk of the court of appeals to send a copy of any complaint against a district judge or magistrate judge to the chief judge of the district court, and to send a copy of any complaint against a bankruptcy judge to the chief judges of the district court and of the bankruptcy court. That provision is unnecessarily broad and mechanical in the exception that it creates to confidentiality. Illustrative Rule 4 suggests that a chief judge may release information to individuals, including the chief judge of a district or bankruptcy court, whom the chief judge consults for the purpose of taking action on a complaint -- but that this should be done selectively. The Commission has concluded that a chief judge should be

authorized to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the Act.

> ***The Commission recommends that council rules regarding confidentiality should be nationally uniform. The relevant provisions of the Illustrative Rules should be adopted to that end, but the uniform rules should not provide for automatic transmittal of a copy of complaints to the chief judge of the district court and the chief judge of the bankruptcy court. They should, however, authorize a chief judge to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act. If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.***

Chief Judge Orders. The Act requires that a chief judge's written order dismissing a complaint or concluding a proceeding state the chief judge's reasons. Seven of the twelve complaint dismissals identified as troublesome by the Commission's consultants were concentrated in two circuits in which, at least in past years, the chief judge did not delegate and frequently relied on form dismissals that do not articulate reasons for the stated conclusions. Earlier in this chapter of the Report the Commission recommended that chief judges avail themselves of assistance in reviewing complaints and preparing orders disposing of them, in part because of the causal connection suggested in the FJC study. That is another reason (in addition to the Act's requirement) why chief judge orders dismissing complaints or concluding proceedings, or memoranda accompanying them, should include a non-conclusory statement of the allegations of the complaint and the reasons for the disposition. Still another reason is that such a non-conclusory statement may be critical to a complainant's ability to understand the action taken as well as to the understanding of those engaged in oversight or evaluation (whether or not such orders are, as also recommended, uniformly available). The chief judges interviewed expressed no doubt that non-conclusory orders would facilitate evaluation of the integrity and credibility of the judiciary's implementation of the Act.

The Commission recommends that, as provided in Illustrative Rule 4(f), a chief judge who dismisses a complaint or concludes a proceeding should "prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition." This memorandum should "not include the name of the complainant or of the judge or magistrate whose conduct was complained of." In the case of an order concluding a proceeding on the basis of corrective action taken, the supporting memorandum's statement of reasons should specifically describe, with due regard to confidentiality and the effectiveness of the corrective action, both the conduct that was corrected and the means of correcting it. If action by the judicial councils or Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

Publication of Orders. As noted earlier, problems arising from the Act's substantive ambiguity might best be addressed through the development of a body of interpretive precedents. The dissemination of some decisions might also help other judges to assess their conduct. At present, even those few orders required by the Act to be publicly available may not be easy to locate. Moreover, assuming the Commission's recommendation that chief judge orders dismissing complaints or concluding proceedings be publicly available is adopted, availability does not guarantee ease of access. Early in the implementation of the Act, some orders were published, but many orders have no precedential value, and publication is not otherwise an unmitigated good. What is needed is a system for the dissemination of information about the resolution of complaints, including selective publication, whether in reporters or computerized information systems.

The Commission recommends that the Judicial Conference devise and monitor a system for the dissemination of information about complaint dispositions to judges and others, with the goals of developing a body of interpretive precedents and enhancing judicial and public education about judicial discipline and judicial ethics.

Statistical Reporting. As noted, Administrative Office statistics, although more informative than they once were, are not as useful as they could be. Moreover, the authors of the FJC study experienced serious problems as a result of the manner in which data were reported by the circuits to the Administrative Office. Such problems hamper efforts to engage in oversight or other evaluation of the judiciary's implementation of the Act. In addition, the character of knowledge sought about a system should reflect contemporary concerns based on experience with that system.

> ***The Commission recommends that the Judicial Conference, assisted by the Administrative Office, reevaluate the adequacy of all data and reports gathered and issued concerning experience under the 1980 Act, including the system used to provide such data and reports in each circuit. The Commission also recommends that, as part of such general reevaluation, consideration be given to gathering and reporting data on complaints about bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment.***

Section 332, Title 28, United States Code

Originally enacted in 1939 as part of the reorganization of federal judicial administration, section 332 of Title 28 of the United States Code was for many years the only formal authority to which the circuit councils could point when challenged in their efforts to deal with problems of judicial misconduct and disability. Claims of power under section 332 were disputed, and the Supreme Court's *Chandler* decision raised as many questions as it answered. Although section 332 has been amended in recent years to clarify and augment the councils' powers, with the enactment of the 1980 Act, it appears to have assumed a distinctly secondary role in matters of judicial misconduct and disability. Yet, reliable information is hard to obtain concerning council orders entered under section 332.

> ***The Commission recommends that section 332 of Title 28, United States Code, be amended to require each circuit council to report annually to the Administrative Office of the U.S. Courts the number and nature of***

orders entered thereunder that relate to judicial misconduct or disability (including delay).

There is one area in which the powers of judicial councils under section 332 remain vitally important. Elsewhere in this Report, the Commission concludes that it is constitutional for a circuit council, pursuant to its statutory authority, to control the assignment and reassignment of cases and other judicial functions of a judge during the criminal process.

On those occasions when the Executive investigates and prosecutes a sitting federal judge, tensions can arise as a result of a judge who is a target of the criminal justice system continuing to hear cases, exercising other aspects of judicial power or performing other judicial duties. In these unusual and difficult circumstances, it is important to attempt to insure both that the judge does not impermissibly benefit from his or her judicial status during the criminal process and that judicial independence is not compromised.

When a federal judge is the target of an investigation, past practice has been for the Department of Justice to notify the chief judge either of the circuit or district, or both. The circuit chief judge and judicial council should take whatever measures are appropriate and feasible to insure that the targeted judge does not use his or her position to gain access to non-public information which would be of assistance to the judge in the criminal investigation. Further, a judge under investigation should seriously consider not sitting in criminal matters. First, one consequence of the criminal investigation may be that the judge becomes, or is perceived to be, antagonistic toward the Department of Justice. Second, in some circumstances the public and the parties to a criminal case might reasonably question the capacity of a judge who is suspected of having engaged in criminal behavior to render impartial justice.

When a judge has been indicted, in addition to the constraints already invoked, the judicial council should, in the normal course, relieve the judge of case assignments and other judicial duties. Recent experience suggests that formal action will not often be necessary, as most judges will in these circumstances voluntarily relinquish judicial duties.

When a judge has been convicted of a felony, and whether or not the judge is incarcerated, the judicial council should normally not permit the judge to exercise any judicial power or perform any other judicial duties, pending appeal and the outcome of impeachment proceedings. Of course, if the conviction is reversed on appeal and the cloud of criminal violation removed, the judge may ordinarily be restored fully to duty. Likewise, if impeachment and removal do not follow in due course, then the question of duty assignment should be reconsidered.

Under all of the scenarios discussed, the judge is entitled to receive the prescribed judicial salary. As noted elsewhere in this Report, termination of salary would violate the Constitution absent resignation or removal. The fact, however, that a convicted judge is continuing to receive a salary should cause all who share responsibility for the impeachment process to act as expeditiously as possible.

Other subsidiary issues may arise. Should the judge be allowed continued unfettered access to the courthouse and to courthouse personnel and records? What should happen to the judge's law clerks and secretaries? Should the judge be allowed to travel at government expense to judicial educational projects? During court proceedings is the accused judge addressed as 'Judge' ('Your Honor' seems particularly inappropriate)? Is there any occasion when the accused judge should be permitted to wear a robe during court proceedings? Because there are questions that must be dealt with in every case, promulgation of a uniform set of rules may be beneficial.

> ***The Commission recommends that the Judicial Conference adopt a uniform policy on the limitations a judicial council should impose on a judge who is personally implicated in the criminal process. At a minimum that policy should include ordinarily relieving a judge under indictment from all judicial responsibilities through to the end of the criminal process and imposing appropriate constraints on judicial responsibility where a judge is under investigation.***

Appellate Review

Appellate review, including the extraordinary writ of mandamus, is one of the traditional checks on abuses of judicial independence,

although it is of limited utility for that purpose. Perhaps the most notable recent use of the appellate process as a surrogate for proceedings under the 1980 Act occurred when the Eighth Circuit turned an appeal by a party in a case into a vehicle for finding that a judge had violated the constitutional rights of individuals who were not parties in that case, strongly criticized the judge's actions, and entered an order striking the judge's remarks. The circuit council then dismissed as moot a proceeding that had been brought under the 1980 Act. There may well be other, albeit less obvious, instances where the appellate process has served as a surrogate for proceedings under the Act. For future evaluations of this kind, it would be useful to have a record of such instances. Although it would be relatively easy to collect cases in which appellate courts have issued extraordinary writs, such an effort would not gather all relevant cases.

INFORMAL MECHANISMS

One of the most important findings of this Commission concerns the continuing importance of informal approaches to judicial misconduct and disability even after the 1980 Act. It used to be said that criticism of the circuit councils for inactivity under section 332 missed the point because most problems were resolved informally. Sponsors of the 1980 Act expressed the hope that it would be an approach of last resort, but understandably, the Act's formal process and its implementation received the lion's share of attention in the press, the law reviews, and the Congress in ensuing years.

Informal approaches remain central to the system of self-regulation within the judiciary. The Act itself is regarded by some chief judges as an invitation to informal resolution, and more than 70 complaints filed resulted in the conclusion of the proceedings as a result of corrective actions taken. Equally important, many problems are resolved without the need to file (or identify) a complaint. The extent of the latter phenomenon cannot be measured because, as one judge observed, "you don't keep score," but it is consequential. And a major benefit of the Act's formal process has been to enhance the attractiveness of informal resolutions. The continuing success of informal approaches is due in large part to the system of decentralized self-regulation that long antedated but was fortified by the Act.

The actions of a chief judge or other colleague in persuading a judge with a conduct problem to alter his or her behavior or a judge with a medical problem to seek help or to retire may be the most important examples of informal approaches to judicial misconduct and disability. They are not, however, the only examples. There are other elements that should be considered when the potential of informal mechanisms as a whole is assessed.

Employment Benefits

As previously suggested, the day has long passed when litigants were consigned to the hands of a physically or mentally disabled federal judge because, although willing to cease judicial work, that individual could not afford to do so because provisions for retirement and disability were either non-existent or palpably inadequate. The Commission nevertheless engaged the services of an expert consultant to evaluate the total package of benefits (not including compensation) available to federal judges, to assess whether any of those benefits provides an undesirable incentive for a judge to remain in active service (or disincentive to leave active service), and to make recommendations.

Although measuring total comparability is difficult, the package of benefits available to federal judges is a generous and attractive one. Since, however, one or more of the judges who refused to resign after their felony convictions were affirmed on appeal appeared to have been motivated in part by the hope that they could last long enough to qualify for retirement (and thereby perhaps avoid removal), the Commission considered a change in the retirement statute that might avert a similar situation in the future. Currently, a federal judge who has reached age 65 can retire (or assume senior status) with full pay under the so-called "Rule of 80," which combines age and years of service. (See Appendix II.) If one changed that formula by lowering the age of initial eligibility or lowering the total years (e.g., a Rule of 75), one might thereby enable judges who should leave the bench because of conduct problems, convicted of a crime or not, to do so -- and thus spare Congress the burdens of impeachment.

After careful consideration, the Commission determined not to recommend a change in the Rule of 80. Congress only recently declined to alter it, and although that proposal was advanced for other reasons, presumably any such change would be available to all federal judges. The costs would be obvious and the benefits only speculative. Moreover,

it is not at all clear that Congress would permit a judge, at least one who had been convicted of a felony, to retain retirement benefits and thus to avoid impeachment and removal. In at least one situation in the past, a corrupt federal judge avoided impeachment after retiring only by forswearing retirement benefits.

Still, to the extent that federal judges who have refused to resign after exhausting the criminal process were motivated by the hope of hanging on long enough to qualify for retirement and of avoiding removal (and disqualification), the area deserves further attention. One possibility is a statute providing that, upon conviction of a felony (or more specifically defined crimes), a federal judge would cease accruing credit, through age or years of service, toward retirement under the Rule of 80. Assuming such a statute would be constitutional (as to which some Commissioners have serious doubts) and recognizing that it would have to address numerous practical details such as the possibility of appellate reversal of the conviction, it would have the advantage of being more focused than a general revision of the Rule of 80. The question remains whether it is better to facilitate retirement or make it more difficult. Once a federal judge has exhausted the criminal process, the prospect of retirement probably is not the main disincentive to resignation. Such a judge has little to lose by forcing impeachment and a Senate trial, and the time the process takes is money in his or her pocket (in salary and benefits). Since, however, impeachment counsel may have to be paid, a more powerful influence may be the hope of escaping removal or, if not, of using the process partially to rehabilitate the judge's reputation.

> ***The Commission recommends that Congress consider enacting a statute providing that, upon conviction of a felony (or more specifically defined crimes), a federal judge shall cease to accrue credit, through age or years of service, toward retirement under the Rule of 80.***

If the lure of continuing to draw a salary (and eligibility for benefits such as medical insurance) were thought to be the main influence preventing resignation following exhaustion of the criminal process, consideration might be given to a mechanism that would make that strategy less appealing. One possibility is a statute that would authorize the Senate to bring suit to recoup the costs of an impeachment trial from a judge who was removed from office after previously being convicted of a felony and whose defense to articles of impeachment, given such conviction, was found to be frivolous and vexatious. Commissioners

were divided as to the constitutionality of such a mechanism, and views also differed on its fairness and usefulness. Although no recommendation is offered, the Commission acknowledges that the proposal is an attempt to address a serious problem. If Congress were to consider such a statute, it might also consider a provision permitting a judge, not previously convicted of a crime, who is impeached but not convicted by the Senate, to recoup the reasonable expenses incurred in the impeachment process.

The retirement provisions for federal judges, which are non-contributory, do not provide for any vesting until and unless the Rule of 80 is satisfied or the special provisions of the disability statute in section 372 (see Appendix II) are triggered. The Commission considered a scheme that would give each federal judge a vested right to a pro rata portion of pension benefits after 5 years of service, with commencement of the annuity deferred until the judge's normal retirement eligibility date or at a reduced amount on the date of resignation. The Commission was closely divided on the wisdom of recommending such a scheme. Partial vesting might encourage some federal judges with conduct or disability problems to resign. Against that possible benefit, however, is the possible cost of encouraging perfectly fit federal judges to leave the bench for other pursuits.

In reviewing these issues the Commission also noted an anomaly in existing arrangements for disability retirement which should be examined by the Judicial Conference. Under section 371, the section that provides for retirement of judges, attainment of age 65 is required before a judge may elect retirement (or senior status), regardless of the number of years of service rendered as a judge. If 65 years of age, a judge may retire at full salary provided that the judge has served at least fifteen years. One year of age over age 65 then offsets one year of service, until attainment of age 70, when only ten years of service are required. (A minimum of ten years must be served regardless of age.) (See section 371, title 28, United States Code, in Appendix II.)

Under provisions authorizing retirement for a mental or physical disability which prevents the judge from continuing to perform judicial service, the age and years of service criteria are significantly different. Two types of disability retirement are permitted under the principal disability provisions. In both types the judge with ten or more years of service receives full salary for life; the judge with less than ten years of service receives one-half the salary of office. The judge's age is not a

factor; only years of service are relevant. In the first type, a judge elects disability retirement by personally initiating a certification of permanent disability; when signed by the chief judge of the circuit, the certificate is transmitted to the President by the judge. (See section 372(a), title 28, United States Code, in Appendix II.) In the second type, a judge is "involuntarily" retired for permanent physical or mental disability. If the judge is unable or unwilling to file a certificate, a majority of the members of the judicial council initiates certification. (See section 372(b), title 28, United States Code, in Appendix II.)

Of direct concern to the Commission is a third type of disability retirement which emerges out of the interplay between the regular retirement provisions and discipline under section 372(c). In response to a complaint filed under the 1980 Act, a judicial council may take action by finding a judge disabled and requesting that the judge "voluntarily retire." Two such actions are discussed earlier in this chapter of this Report. In such situations, the 1980 Act authorizes a waiver of "the length of service requirement under section 371," but does not authorize a waiver of the section 371 age requirements. In other words, a judge retired for disability under this procedure who is at least 65 years of age can be granted full salary regardless of years of service. The judge's years of service are not a factor; only age is relevant. (See section 372(c)(6)(B)(iii), title 28, United States Code, in Appendix II.)

After examining the disability retirement actions which have occurred under the 1980 Act, the Commission concluded that the circuit councils have very responsibly used their authority in these cases. The Commission, however, also identified a possible disincentive to use of that valuable authority. Under this third type of disability retirement arrangement, waiving only the years-of-service requirement does not permit, for example, a 63 year old disabled judge who has served nine full years to be retired at full salary. The Commission believes that may be a significant disincentive to a judge faced with years of expensive medical care. The record of cases to date should be examined by the Judicial Conference and possible modifications evaluated. Consideration should be given to the addition of authority for a judicial council to waive the age requirements, as well as service requirements, under section 371, or to waive the section 372 disability retirement ten-years-of-service requirement. Such waivers should only be available in instances in which a decision to "voluntarily retire" is found to be necessary by a judicial council acting under section 372(c) (the 1980 Act). The number of such instances under the 1980 Act provision should

continue to be very few, and the financial costs quite small, but the advantage of having a humane mechanism for removing a disabled judge from active service could be great.

Judicial Evaluation and Education

In testimony before and communications to the Commission, lawyers have noted strong interest in the states in a variety of means to provide feedback to judges concerning their performance, conduct, and demeanor. Commission studies revealed that in at least one circuit the chief judge uses judicial evaluation in the process of informal resolution of complaints:

> If there was a complaint that a judge was mistreating witnesses or lawyers, I'd have the judge come to my chambers and sit and talk. We have a useful device, the self evaluation questionnaire. Judges often have a perception of things; they think that everyone loves them. We'd say, "Try this, hand out this questionnaire." Our better judges do it every several years. The individual judge does it for himself; the completed questionnaire doesn't go to anyone else. Almost all judges think they gain something from it. Most responses are laudatory, a positive ego feedback. But judges learn that they're covering their mouth with their hand or picking their nose, and they're glad to learn of it. But the incorrigible judges haven't used the questionnaire. They know better. A number of times the self-evaluation questionnaire was the corrective action. It's very useful, specific, an easy out for the judge. I can't remember the subsequent feedback from those in specific complaint cases, but in general the vast majority thought it was useful.[4]

> ***The Commission recommends that the Judicial Conference and the circuit councils consider programs of judicial evaluation for adoption in the federal courts.***

There are numerous models available, and with the aid of the Federal Judicial Center (whose Director, as a federal judge, has found evaluation questionnaires useful), the Conference could recommend a few of them for experimental use on a regional basis.

Programs of judicial evaluation are another means of using education to address problems of judicial misconduct or disability. The

bar and the judiciary share responsibility for educating attorneys, judges and the public about the 1980 Act. Each group should devote more time and energy to that task. The education of federal judges about judicial ethics and about such matters as the role that stress may play in creating situations of perceived misconduct should start with programs for new judges, and it should continue at circuit judicial conferences and at programs organized by the FJC. Advisory opinions issued by the Conference's Committee on Codes of Conduct could be used to make abstract norms come to life. The development and dissemination of a body of precedents interpreting the 1980 Act, as recommended, could serve the same purpose. The federal judiciary is capable of devising approaches to education about judicial ethics that are as creative as the approaches devised by individual chief judges to correct problems after they have occurred. The Commission believes that more education will lead to less need for corrective actions.

Self Reporting

Federal judges remain the best guarantors of their own ethical conduct. As societal expectations have changed, however, the number and particularity of the substantive norms applicable to federal judges have increased, as has the risk of inadvertent noncompliance even by the conscientious. One of the enforcement strategies favored both by Congress and by the judiciary involves self-reporting. Reports of such matters as a judge's financial holdings and extramural activities can serve a number of purposes, including focusing the judge's attention on an area of concern and alerting others to the existence of a problem.

Federal judges are required to make financial disclosures both by statute and by the Code of Conduct, and their disclosure forms are required to be publicly available. A request for access to such a form is also a matter of public record. In addition, requests for access to a judge's financial disclosure forms and the identity of persons making such requests are specifically reported to the judge concerned. Without speculating about why such a policy or practice may have been implemented, the Commission questions its advisability in light of the goal of public accountability.

> ***The Commission recommends that the Judicial Conference reexamine the practice of specifically notifying a federal judge when a request for access to the judge's financial disclosure forms is made, to***

determine if valid security or other concerns justify continuation of the practice.

Canon 2(c) of the Code of Conduct for United States Judges provides that "a judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." The Commentary recognizes that:

> Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.[5]

A majority of the Commission believes that self-reporting would assist judges in that regard and also increase public accountability in an area of special sensitivity. Judges and their families, however, should not be stripped of their privacy or made the victims of a standard whose meaning is avowedly contextual.

Both privacy interests and the indeterminacy of the Canon thus suggest the wisdom of giving a judge a choice, in a document available to the public, either to certify that to the best of his or her knowledge, information, and belief, the judge is in compliance with Canon 2(c), or to disclose organizational memberships.

The Commission recommends that the public disclosure requirements under federal law be amended to require a federal judge either (1) to certify that, to the best of his or her knowledge, information and belief, the judge does not, except as permitted by Canon 2(c), hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin or (2) to list all organizations not

exempted under Canon 2(c) of which the judge is a member.

Research on state systems of judicial discipline reveals widespread concern that state officials are not informed on a timely basis about criminal investigations or litigation involving state judges. Although the Commission believes that some of the same concerns are warranted in the federal system, those concerns do not extend to judges involved in civil litigation. Presumably, the indictment of a federal judge would quickly come to the attention of the judge's colleagues. A judge's arrest or receipt of a target letter, however, might not so quickly become known. In the Commission's view, the appropriate authorities within the judicial branch should be informed, on a confidential basis, when a federal judge is seriously implicated in the criminal process.

The Commission recommends that the Judicial Conference adopt a mandatory self-reporting rule that requires federal judges to inform designated authorities (e.g., the circuit chief judge), on a confidential basis, whenever they have been indicted, arrested, or informed that they are the target of a federal or state criminal investigation. Such a rule should not apply to minor offenses.

THE SUPREME COURT

The Justices of the Supreme Court are protected by the same constitutional guarantees of judicial independence as are all other federal judges, and they too are subject to impeachment and removal from office under Article II. The Court itself, however, enjoys special constitutional status, a consideration that has rendered the extension of additional checks on abuses of judicial independence to the Justices a delicate and difficult business.

Fortunately, in a group of public servants distinguished for integrity, the Justices have set a particularly high standard. It is also true, however, that the controversy surrounding Justice Fortas's financial dealings played a part in changing societal expectations and in the development of supplements to the impeachment process. Many of those supplements do not by their own terms apply to members of the Court, which reflects the unique position of the institution and the difficult legal

and practical issues that the techniques of judicial self-regulation adopted would raise if applied to the Court. Congress has been sensitive to the problem of subjecting Supreme Court Justices to processes controlled by members of inferior federal courts. The Judicial Conference has been understandably reluctant to assert authority over members of the Court.

Fortunately, as well, the Court itself has been sensitive to the importance of appearances in these matters and through voluntary action has filled most of the gaps. Although the Code of Conduct for United States Judges, which was adopted by the Judicial Conference, is not formally binding on members of the Court, the Commission has been informed that the Court and the Justices use it for guidance on applicable ethical standards, that as a matter of practice, Supreme Court Justices consult the Court's Legal Counsel, as well as the General Counsel of the Administrative Office, for advice and guidance on ethical matters, and that both of these individuals typically look to the Code of Conduct, among other sources, in providing that advice and guidance.

Similarly, the Commission has learned that in January 1991 the Court in Conference passed a resolution stating that Justices, Retired Justices, and Officers of the Court would comply with the substance of Judicial Conference regulations concerning outside earned income, honoraria, and outside employment. This followed the March 1990 action of the Judicial Conference delegating to the Chief Justice its authority under the Ethics Reform Act of 1989 to adopt regulations for the Supreme Court. An internal procedure has been established whereby the Chief Justice exercises supervisory authority over the Court's adherence to these ethical standards.

The Commission considered whether, even though Congress chose not to subject Supreme Court Justices to the 1980 Act, the Court itself should consider the development and dissemination of policies and procedures regarding complaints of misconduct or disability against the Justices. Under current practice a complaint is referred to the Justice to whom it relates.

The Commission assumes that any publicly made (non-frivolous) allegation of serious misconduct or disability against a Supreme Court Justice would receive intense scrutiny in the press and would come to the attention of the House Judiciary Committee. On the other hand, the importance and visibility of the Court's judicial work prompt numerous letters that might be construed as complaints, although they are directly

related to the merits of the Court's decisions. The Commission also realizes that because of the personal relationships required among the nine Justices, it may not be easy to design a workable internal disciplinary mechanism.

Commission members did not reach a consensus on whether a formal process for the Supreme Court would be desirable. One concern is that a formal process seems likely to attract a flood of improper complaints going to the merits of the important national issues in litigation before that Court. Nonetheless, it may be in the Court's best interest, as contributing to the public's perception of accountability, to devise and adopt some type of formal procedure for the receipt and disposition of conduct and disability complaints.

> ***The Commission recommends that the Supreme Court may wish to consider the adoption of policies and procedures for the filing and disposition of complaints alleging misconduct against Justices of the Supreme Court.***

GENERAL OBSERVATIONS

The system of formal and informal approaches to problems of misconduct and disability within the federal judicial branch is working reasonably well. It is by no means a perfect system, and the Commission identified numerous areas where it believes improvements could and should be made. It is, however, a system that both in design and execution strives to accommodate core constitutional values -- judicial independence and judicial accountability -- that are in tension. Any alternative system proposed for the federal judiciary should be evaluated according to its potential to strike that balance. The Commission is not aware of any that would do it as well.

The 1980 Act, which is the principal formal mechanism within the judicial branch, has yielded substantial benefits both in those few instances where it was necessary for the judicial councils to take action and, more importantly, in the many instances where the existence of its formal process enabled chief judges to resolve complaints through corrective action and, indeed, to resolve problems before a complaint was filed. These benefits have entailed costs, to be sure, but in the Commission's view those costs have been acceptable.

The main concern of the federal judiciary during the legislative process that led to the 1980 Act was the impact of any supplement to the impeachment process on judicial independence. The Commission has found no substantial evidence that the 1980 Act has threatened or impaired judicial independence. Nor has the implementation of the 1980 Act imposed burdens on federal judges or court staffs so great as to call for fundamental revision.

It would be surprising if a rigorous evaluation of experience under the 1980 Act had unearthed no instances where those charged with its implementation failed to treat complaints with the seriousness they deserved. The Commission identified such instances, but not many. Promoting information, education, and dialogue -- including the dialogue that occurs when a body of interpretive precedents develops and is available for professional and public assessment -- seems to the Commission the best strategy to prevent future interpretations of the 1980 Act or failures of process that betray its purposes. Moreover, information, education, and dialogue are integral to the creation and nurture of a culture that encourages meritorious complaints of misconduct or disability while disposing with dispatch of those that do not belong in the system. Many of the Commission's recommendations are designed to implement such a strategy and to create such a culture.

Those recommendations also reflect the conviction that perhaps the greatest benefit of the 1980 Act has been the support it has provided, and the impetus it has given, to informal approaches to problems of federal judicial misconduct and disability. No evaluation of the 1980 Act should neglect its influence in this regard nor the likely relationship between the continuing importance of informal mechanisms in a decentralized system of self-regulation and the general perception that federal judicial independence is alive and well.

Indeed, these considerations convinced the Commission that an alternative scheme of discipline for federal judges modeled on one of the systems in place in the states is neither necessary nor desirable. Apart from the fact that the existing federal system is working reasonably well and is capable of improvement, the reliance on a central enforcement authority that is characteristic of state systems might entail unacceptable costs to judicial independence, as it surely would to effective informal approaches to misconduct and disability.

The success of the 1980 Act in accommodating constitutional values that are in tension was due in no small part to the patience, diligence, and willingness to compromise of members of Congress. The ultimate shape of the legislation reflects an awareness of the special role that federal judges play in our scheme of government and the special burdens that such a role entails. The Commission is concerned, however, that a quest for ethical "parity" among the three branches of government, which is generally appropriate, may on occasion obscure relevant differences among those branches. Congress and the President should, in the future, give appropriate consideration to such differences in fashioning statutory ethics requirements.

The federal judiciary has made substantial progress in adapting to changing societal expectations regarding judicial ethics, judicial misconduct, and judicial disability, including those captured in the 1980 Act and other legislation. Too often, however, the judiciary has been reactive, responding to criticism, rather than taking the initiative. The Commission is well aware of the burdens of federal judges, but judicial discipline is not simply a question of appearances and not only a problem of public accountability. There are problems of misconduct and disability in the federal courts, and not all of them are being addressed under current arrangements. Commission recommendations to this point have sought to remedy failures arising from substantive ambiguity, inadequate attention, lack of information, and risk aversion. If adopted, they will both bring most meritorious complaints within the system and enable those charged with administering it efficiently to separate the wheat from the chaff.

Some problems, however, will remain impervious to the measures recommended because creating a consensus of values relating to them is especially difficult. In the absence of effective action, some meritorious complaints will not be filed, others will not be handled properly, and the institution will suffer. The federal judiciary should take a proactive stance in attempting to identify and address such issues, and it should start with problems of judicial misconduct involving bias based on race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment. The Commission has noted that the Judicial Conference recently endorsed a provision in S.11 (the Violence Against Women Act of 1993) that encourages the circuit judicial councils to conduct studies of gender bias in their respective circuits.

The Commission recommends that each circuit that has not already done so conduct a study (or studies) of judicial misconduct involving bias based on race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment, and of the extent to which the 1980 Act and other existing mechanisms and programs, including judicial education, are adequate to deal with it. The Judicial Conference should monitor the implementation of this recommendation and when such studies have been completed, consideration should be given both locally and nationally within the judiciary to such changes in policies, procedures, and programs as are warranted.

In addition, the Commission believes that the judiciary would be well served by a standing committee of the Judicial Conference to monitor and periodically evaluate experience under the 1980 Act and other formal and informal mechanisms for dealing with problems of judicial misconduct and disability. Although making no specific recommendation in that regard, the Commission did note the current dispersion of authority regarding judicial ethics and judicial misconduct and disability among a variety of Conference committees and the lack of any group responsible for coordinating the collection and analysis of relevant data and the development of policy proposals.

Since 1991 the Conference's Committee to Review Circuit Council Conduct and Disability Orders, in addition to its statutory review functions under the 1980 Act, has been assigned the duty to monitor and report on judicial discipline legislation, to serve as liaison and clearinghouse for the circuits on their experiences with the Illustrative Rules, and to make recommendations to the Conference on desirable legislative and rule changes. The Committee currently consists of two former circuit chief judges and two former district chief judges. It is not clear whether the statutory responsibilities or the composition of that committee would make it the ideal vehicle for an even broader charge. In any event, any such group should include a substantial representation of district judges as well as of (current or former) circuit chief judges and, as on some other Conference committees, lawyers who are not judges could make a useful contribution.

The Twentieth Century Fund Task Force recommended that the Judicial Conference establish a representative oversight committee to

review experience under the 1980 Act and publish a "summary national accounting on a periodic basis." This Commission's studies and recommendations, if implemented, coupled with periodic reevaluations by the Judicial Conference and oversight by Congress, meet the needs to which the Task Force's recommendation was addressed. Public accountability is not the only value at stake. Unjustified suspicion of the ethics and conduct of federal judges or of the federal judiciary's commitment to effective self-regulation is harmful to the rule of law and a threat to judicial independence. The judiciary thus has a direct institutional interest in a system of self-regulation that is not only effective but perceived to be effective.

AFTERWORD

In reviewing the experience of impeachment and removal of federal judges and judicial administration under the 1980 Act, as well as the efforts by members of the United States House of Representatives and the United States Senate in connection with the impeachment trials that occurred in the 1980s, this Commission has been extraordinarily impressed by the commitment and dedication of those involved to the fair working of judicial administration and the constitutional processes. The very creation of the Commission by a Congress concerned that its mechanisms could use possible improvement further evidences the dedication of those entrusted with this awesome constitutional responsibility.

The Commission hopes that in making these recommendations it has acted in a manner consistent with the conscientiousness and high level that have characterized the work of others in this area. Our recommendations reflect the product of extensive research conducted by many able consultants, public hearings, and considerable thought and colloquy among us, all with a view to arriving at a resolution of very difficult issues.

The Commission has come to the realization that it is a small part of a process, now over 200 years old, by which those entrusted with the responsibility for governing this country attempt to ensure that the constitutional framework within which such governance takes place is the correct one. It turns out that none of the Commission's recommendations contemplates any constitutional revisions. In a sense that is a tribute both to the original writers of the Constitution as well as to the manner in which it has been implemented.

The Commission is confident, however, that the non-constitutional changes that have been recommended will, if adopted, streamline and make more efficient the impeachment and removal process and improve the manner in which federal judges are disciplined. At the same time, the Commission realizes that the last pages in these particular chapters of constitutional history and judicial administration may not have been written. Others, either in the near or the distant future, may feel differently than we. This is as it should be; the Constitution is, after all, a living document.

SEPARATE VIEWS OF SENATOR HOWELL T. HEFLIN

Our present system for removing federal judges runs dangerously close to violating their Fifth Amendment due process rights. This exacerbates the need for reform. The Fifth Amendment provides that individuals may not be deprived of life, liberty, or property without due process of law. Federal judges have such a property right to their jobs, and that right warrants due process protections.

The Supreme Court, in *Cleveland Board of Education v. Loudermill,* determined that public employees have a property right to continued employment.[1] This case set the legal precedent that public employees cannot be fired without due process of law. In another decision, the Court held that the disbarment of attorneys is a punishment or penalty, which entitles them to due process protections.[2] It follows that federal judges have constitutional property rights to their continued employment as officers of the court.

In a due process analysis, the question remains, once a constitutional right has been established, what process is due the individual possessing this right. I believe that our current system for removing federal judges does not provide the procedural protections envisioned by the Framers of the Fifth Amendment.

I have been present on the floor of the Senate at all times during three judicial impeachment trials. I have made it a point to observe the number of members present. Many times, during each of the trials, fewer than 50 Senators were actually present. At no time during any of the trials did this number rise above the low sixties, always less than the two-thirds actually needed for impeachment. In fact, there were never 67 Senators present at any time, in each of the trials, other than at the vote itself. In my judgment, fewer than 25 members heard all of the presentations in any one trial. Most of the absences were unavoidable. There were committee meetings occurring at the same time as well as other official demands that necessitated absences.

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[1] 480 U.S. 532 (1985).

[2] *In re Ruffalo,* 390 U.S. 544, 550, *reh'g denied,* 391 U.S. 961 (1968).

Since the Fifth Amendment was adopted after the original Constitution, it has the effect of amending the impeachment provisions of the original document. The Supreme Court has provided guidance in the methodology of analyzing due process rights. Although my application of this analysis to the impeachment process is somewhat unique, I believe it is fully warranted and accurately supports my fear that due process rights are being infringed by the current system used to remove federal judges from office.

In determining the scope of due process, the Supreme Court currently follows the guidelines articulated in *Matthews v. Eldridge*.[3] The Court prescribed a balancing test to determine what process is due an individual with a constitutional interest at stake. The Court outlined three factors that must be weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.[4]

Applying these three factors makes it apparent that the current impeachment procedures used by the Senate are highly suspect.

First, the private interest at stake is the individual's ability to continue to sit as a federal judge. Those who sit on the federal bench are held in great respect. For many, to sit on the federal bench is to reach the pinnacle of the legal profession. Obviously, impeachment affects an important and highly prized private interest. I believe the case of *Cleveland Board of Education v. Loudermill* illustrates this proposition.[5]

Second, the risk of an erroneous deprivation of this interest is made abundantly clear when we recognize that more than a third of the senators will hear little or nothing of the deliberations before the full Senate prior to casting their votes on whether to dismiss a judge. Although the Constitution requires a two-thirds vote for removal, it is

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[3] 424 U.S. 319 (1976).

[4] *Id.* at 335.

[5] 480 U.S. 532 (1985).

troublesome that some senators are making their decisions without the benefit of hearing the full debate.

Frequently, half of the senators were not present during the full Senate deliberations. Can anyone question the deprivation of an accused's due process rights if the jury box was only half full during the major portion of a trial?

While *Nixon v. United States*[6] allows the Senate great latitude in impeachment proceedings, specifically the use of "Rule Eleven Committees," it does not address the issue of due process rights of the accused before the full Senate. Although a committee may be used to gather and report its findings to the Senate, the defendant has a right to a full and attentive jury box when his removal procedure is before the full Senate.

Finally, the full Senate comes to a virtual standstill during an impeachment proceeding. Considering such logistical burdens, it is, therefore, more cost-effective and administratively efficient to establish temporarily appointed, independent panels composed of non-senators, possibly retired federal judges and/or former members of the Senate hearing the case. The cost for establishing such a panel would likely be minimal compared to the cost of operation of this full Senate.

Time and again, the Supreme Court has spoken about the basic fairness of our legal system. More than once the Court has found that "[i]t is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."[7]

Basic black-letter law recognizes the need for fairness through an impartial jury. The Supreme Court further described it this way: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."[8]

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[6] *Nixon v. United States*, 113 S.Ct. 732 (1993).

[7] *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940).

[8] *In re Murchison*, 349 U.S. 133, 136 (1955).

The requisite for impartiality has two essential elements. The first requirement -- the need for a representative cross-section of a community -- arguably does not apply to the impeachment process. However, the second requirement is fully applicable.

Under the second prong of the impartiality rule, jurors must be unbiased and willing to decide the case on the basis of the evidence presented at trial. Although I believe that my colleagues in the Senate have been unbiased in their review of the impeachment cases, I also believe that the many demands placed on them, such as requiring their attendance at other places, precludes them from hearing and thoughtfully considering the evidence presented at an impeachment trial.

In describing the importance of fairness, the Supreme Court has noted that the "failure to accord an accused a fair hearing violates even the minimal standards of due process." [9] Therefore, since an essential component of impartiality is not fully present in the Senate's current impeachment practices, it follows that the Senate may be violating the due process rights of judges called before it to answer articles of impeachment.

A final analogy is helpful in describing the constitutional principles at work in an impeachment proceeding. During a trial, a judge has the responsibility to ensure that a fair and impartial jury hears a case. Federal case law provides that, in exercising this duty, a judge may remove a juror for sleeping during a trial,[10] being drunk during a trial,[11] or suffering some other type of impairment.[12] Obviously, the purpose of removal is to protect the integrity of the trial. Case law clearly recognizes the judicial responsibility to remove a juror when facts are presented, such as a juror's sleeping, indicating that the juror's ability to perform his or her duty will be impaired.[13]

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[9] *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

[10] *United States v. Smith*, 550 F.2d 277, 285 (5th Cir.), *cert. denied*, 434 U.S. 841 (1977).

[11] *United States v. Jones*, 534 F.2d 1344, 1346 (9th Cir.), cert. denied, 434 U.S. 841 (1977).

[12] *Green v. Zant*, 715 F.2d 551, 555-56 (11th Cir. 1983), *cert. denied*, 469 U.S. 1098 (1984).

[13] *United States v. Cameron*, 464 F.2d 333, 335 (3d Cir. 1972).

An absent senator or juror is much like a sleeping juror. The constitutional principles of due process, impartiality, and fairness require the Senate to protect the rights of individuals who face the prospect of an impeachment trial.

Consequently, after sitting through the current impeachment practices, I have come to believe that the methods of impeachment and removal from office are cumbersome and antiquated. The Congress that functions today is very different from the institution that was created over 200 years ago. It is much larger and carries an extremely diverse and complex workload. Further, the demands on a senator's time have increased dramatically. Senators no longer have the option of devoting all their time to the lengthy and complicated impeachment trial of a federal judge.

Being cognizant of these factors and the need to protect the rights of those brought before the Senate to face an impeachment trial, I believe a change is necessary. To respond to this need, in the past, I have introduced two Senate Joint Resolutions to amend the constitutional procedures for impeachment.[14]

One of these resolutions is long and delineates a sophisticated and complex means for disciplining federal judges. The heart of the proposal is a bifurcated system in which two independent groups function as a grand jury and a trial court. This system allows for appointed individuals to make the necessary decisions regarding the discipline of federal judges. This would relieve the already heavily burdened schedules of members of the Senate. Furthermore, such a system would allow for a range of punishments for judicial officers that would vary depending on the seriousness of the wrongdoing in question. This proposal is modeled on various state systems of judicial discipline, including the one used in my home state of Alabama.

The second resolution provides that Congress can establish procedures for disciplining and removing federal judicial officers. This authorizing provision is valuable in that it gives Congress a great deal of flexibility in establishing a system to use in judicial discipline or removal, and preempts some current constitutional requirements.

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[14] S.J. Res. 232, 101st Cong., 1st Sess., 135 *Cong. Rec.* S16816-18 (1989). S.J. Res. 233, 101st Cong., 1st Sess., 135 *Cong. Rec.* S16816-18 (1989).

In recent years, Congress has concluded three difficult and time-consuming impeachment trials, and further actions loom on the horizon. Given that the number of federal judges will continue to increase dramatically, we may face an ever-increasing problem.

Therefore, I hope that public debate on this issue will enable Congress to devise a constitutional method for the removal of federal judges that is fair to the individual and also protects an essential characteristic of our federal system – the independent judiciary. It is time for the process of meaningful reform to begin.

CHAPTER NOTES

PREFACE

1. 135 *Cong. Rec.* S16817-18 (daily ed. Nov. 21, 1989).
2. Arlen Specter, *Impeachment: Another Look?*, Nat'l L.J. 13, 13 (November 27, 1989).
3. *Id.* at 14.
4. *Id.*
5. *Hearing on Impeachment of Article III Judges* (before the Subcommittee on the Constitution, Senate Committee on the Judiciary), 101st Cong., 2d Sess. (1990).
6. J. Brooks, J. Bryant, & A. Baron, *Justice for Judges, and the 'National Inquest'*, 13 Legal Times 28 (May 6, 1991).

CHAPTER I: BACKGROUND

1. John S. Goff, *Old Age and the Supreme Court*, in *Selected Readings Judicial Discipline and Removal* 31 (Glenn R. Winters ed., 1973), *quoting* 1 Hampton L. Carson, *The History of the Supreme Court of the United States* 281 (1892).
2. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970).

CHAPTER II: CONSTITUTIONAL ISSUES

The Commission arranged for a study of the main constitutional issues before it by Professor Peter M. Shane of the University of Iowa School of Law, who is a distinguished scholar of constitutional and public law with special expertise in government structure and separation of powers. The Commissioners discussed the preliminary draft of the paper at considerable length with Professor Shane. In addition, the Commission conducted a round-table discussion of the draft and related issues with Professor Shane and four other leading scholars: Professor Akhil Reed Amar of the Yale Law School, Professor Walter Dellinger of the Duke University School of Law, Professor Peter Charles Hoffer of the University of Georgia, an historian, and Professor Phillip Kurland of the University of Chicago Law School.

Before the Supreme Court decided the *Nixon* case, Thomas H. Odom and Carolyn F. Corwin of Covington & Burling, Washington, D.C., discussed with the Commission the issues and arguments in the case. Following the decision, 113 S.Ct. 732 (1993), Mr. Odom and Ms. Corwin met again with the Commission to further analyze the decision and its legal and policy implications.

Elizabeth B. Bazan and Jerome M. Marcus wrote helpful analytical reports for the Commission on the constitutionality and correct interpretation of the 1790 Act, which provides that a federal judge convicted of bribery will be forever disqualified from holding any office of honor, trust, or profit under the United States. Janice Sumler-Edmond, a Judicial Fellow at the Supreme Court, assisted the Commission by preparing an annotated bibliography on the judicial tenure and salaries clause of the Constitution.

The Commission discussed constitutional questions throughout its deliberations and in virtually every aspect of its work. It devoted a substantial part of its public meeting of February 25, 1993, to constitutional matters, in particular the issues discussed in Chapter II.

1. "The Judges... shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, sec. 1. "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected." U.S. Const., art. II, sec. 1.

2. *The Federalist* No. 78, at 503 (Alexander Hamilton) (Modern Library, 1937).

3. *See* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992).

4. 113 S. Ct. 732 (1993).

5. "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const., art. I, sec. 3.

6. *See* Stephen B. Burbank, *Alternative Career Resolution*, 76 Ky. L.J. 643, 667-71 (1987-88); 2 Joseph Story, *Commentaries on the Constitution of the United States* 779-85 (1833).

7. *Accord*, *United States v. Claiborne*, 727 F.2d 842, 846 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

8. Memorandum from Peter M. Shane, Professor of Law, Univeristy of Iowa Law School, to Robert W. Kastenmeier, Chairman, National Commission on Judicial Discipline and Removal 1-3 (April 26, 1993) (forthcoming in compilation of Commission's consultant papers to be published in 1993).

9. "The Judges... shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, sec. 1.

10. *See, e.g.*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1810); *Carrington v. Rash*, 380 U.S. 89 (1965).

11. Pub. L. No. 96-458, 94 Stat. 2035 (1980). H.R. Rep. No. 1313, 96th Cong., 2d Sess. (1980); S. Rep. No. 362, 96th Cong., 2d Sess. (1980).

12. These proposals are discussed in more detail in William H. Rehnquist, *Testimony before the Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery*, 135 *Cong. Rec.* S15270 (Apr. 9, 1970) and Testimony of Representative Henry J. Hyde before the National Commission on Judicial Discipline and Removal (May 15, 1992).

13. *The Federalist* No. 78, at 503 (Hamilton) (Modern Library, 1937).

14. *Id.*, No. 77, at 496 (Hamilton).

15. *See, e.g.*, Governeur Morris in 5 *The Debates in the Several States on the Adoption of the Federal Constitution* 481 (Jonathan Elliot ed., 1836).

16. Raoul Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111, 1123-55 (1973-74).

17. Act of Apr. 30, 1790, ch. 9, sec. 21, 1 Stat. 112 (1790).

18. Memorandum from Peter M. Shane 4, n. 2.

19. *Id.* at 4.

20. Act of Apr. 30, 1790, ch. 9, sec. 21, 1 Stat. 112, 117 (1790).

21. Act of March 3, 1791, ch. 15, 1 Stat. 199 (1791).

22. U.S. Const., art. I, sec. 3.

23. Jerome M. Marcus, *The 1790 Statute and Control of a Judge's Tenure in Office* 5 (April 30, 1993) (Consultant's Report for the National Commission on Judicial Discipline and Removal); Elizabeth B. Bazan, *Disqualification of Federal Judges Convicted of Bribery--An Examination of the Act of April 30, 1790 and Related Issues* (November 27, 1992) (Congressional Research Service Report for Congress).

24. *See Judicial Discipline and Removal*, Policy Statement of the American Bar Association (adopted February 1993).

25. *Id.* at Appendix.

26. *Id.* at 8.

27. Memorandum from Peter M. Shane 5-6.

28. Testimony of Senator Strom Thurmond before the National Commission on Judicial Discipline and Removal (May 15, 1992).

29. *See, for example*, S.J. Res. 232, 101st Cong., 1st Sess., 135 *Cong. Rec.* S16816-8 (1989) (Joint Resolution proposed by Senator Howell Heflin).

30. S.J. Res. 233, 101st Cong., 1st Sess., 135 *Cong. Rec.* S16816-8 (1989) (Joint Resolution proposed by Senator Howell Heflin).

31. *See, e.g.*, Testimony of Senator Warren B. Rudman before the National Commission on Judicial Discipline and Removal (May 15, 1992).

32. 2 *The Records of the Federal Convention of 1787* 550 (Max Farrand ed., 1937).

33. Samuel Stillman in 2 *The Debates in the Several States on the Adoption of the Federal Constitution* 169 (Jonathan Elliot ed., 1836).

34. *The Federalist* No. 65, at 423 (Hamilton) (Modern Library, 1937).

35. Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 725 n. 95 (1987-88).

CHAPTER III: LEGISLATIVE BRANCH

The Commission retained as consultants two law professors: Warren S. Grimes, a former counsel to the House Judiciary Committee who teaches at the Southwestern University School of Law; and Michael J. Gerhardt, an associate professor at the Marshall-Wythe School of Law, College of William and Mary. Professors Grimes and Gerhardt are recognized authorities on impeachment and removal.

Professor Grimes prepared a report for the Commission on the role of the House of Representatives in impeaching federal judges. In compiling his report, he relied on primary and secondary sources on impeachment. *Precedents of the House*, published in three series (Hinds', Cannon's, and Deschler's), and the published House proceedings for particular impeachment investigations, provided comprehensive detail on the House's role.

To gain a sense of current views, Professor Grimes, working with the Commission, prepared a survey form that was mailed to each of the eighteen current or former members of the House of Representatives who served as a Manager during one of the three impeachment trials of the 1980s. Each of the Managers was, during the period in question, also a member of the House Judiciary Committee and was involved in the conduct of one or more of the House impeachment investigations. The survey sought the respondents' views concerning the House impeachment investigation and, separately, concerning the conduct of the trial in the Senate. Eleven responses were received, and answers to follow-up questions were received from four of the respondents.

Peter Barton Hutt II and Gary B. Born of the law firm of Wilmer, Cutler & Pickering, Washington, DC, on behalf of the Commission, were given access to complaints of judicial misconduct sent to the House Judiciary Committee's Subcommittee on Intellectual Property and Judicial Administration. Mr. Hutt used this material to compile a statistical profile of the nature of those complaints. The House Judiciary Committee also supplied him with information on the costs of the three impeachments in the 1980s. Professor Grimes used the statistical profile and cost information in writing his report on the role of the House in impeachment proceedings.

Professor Gerhardt wrote a report on the Senate's process for removing federal judges. The report draws on published records of all impeachment trials as well as an historical, scholarly, and political commentary on the Senate's removal process. Working with the Commission (particularly its members Senators Howell Heflin and Arlen Specter), Professor Gerhardt developed a questionnaire that was sent to all incumbent senators. Responses were received from twenty-one senators, and several follow-up interviews with staff were conducted. In his research, Professor Gerhardt was assisted by David H.

Resnicoff, Frederick S. Young, and David B. Isbell of the law firm of Covington & Burling, Washington, DC.

The reports of both Professor Grimes and Professor Gerhardt were further aided by written and oral testimony submitted to the Commission during Capitol Hill hearings on May 1 and May 15, 1992. Of particular usefulness was the oral testimony of Representative Don Edwards, Senator Dennis DeConcini, Senator Carl Levin, former Senator Charles McC. Mathias, Jr., Senate Legal Counsel Michael Davidson, former House Counsel Alan Baron, Special House Counsel Peter Keith, and former House Parliamentarian Peter Robinson. Written statements were received from Representative Henry Hyde, Representative George Sangmeister, Representative Douglas Applegate, Senator Strom Thurmond, and Senator Warren Rudman.

1. 2 *The Records of the Constitutional Convention* 65 (M. Farrand ed. 1911).
2. 113 S.Ct. 732 (1993).
3. *The Federalist* No. 79, at 514 (Alexander Hamilton) (Modern Library, 1937).
4. *Id.;* No. 78, at 504 (Hamilton).
5. *See* Peter Charles Hoffer & N.E.H. Hull, *Impeachment in America: 1635-1805* (1984).
6. The text of the impeachment clauses is set forth in Appendix II.
7. For more information about these impeachments, *see* Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* (1992).
8. *See* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992).
9. W. Plumer, Jr., *Life of William Plumer* 325 (1857) (quoting Thomas Jefferson); *see also* 1 Charles Warren, *The Supreme Court in United States History* 295 (1926).
10. For more discussion of these proposals, *see* Appendix II.
11. H.R. Rep. No. 1639, 79th Cong., 2d Sess. (1946).
12. For more information, including a trend analysis, of House impeachment activity, *see* Warren E. Grimes, *The Role of the United States House of Representatives in Proceedings to Impeach and Remove Federal Judges* (March 24, 1993) (Consultant's Report to the National Commission on Judicial Discipline and Removal); *see also* Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. Rev. 1209 (1991).
13. Findings and Conclusions of Robert W. Kastenmeier on Citizen Petitions to Impeach Three Federal Judges (Sept. 25, 1986); *Ouster of Judges for Rulings Denied*, N.Y. Times, Oct. 26, 1986, at 31, col. 1.
14. *Id.*
15. *But cf., for example, In re Request for Access to Grand Jury Materials*, 833 F.2d 1438 (11th Cir. 1987).
16. *See, e.g.*, sections 2517 and 2518(8)(b), title 18, United States Code.
17. 116 *Cong. Rec.* H3113-14 (April 15, 1970).
18. 113 S.Ct. 732 (1993).

19. *Id.*

20. 132 *Cong. Rec.* 58746 (daily ed. June 26, 1986); Written Statement of Senator Warren Rudman before the National Commission on Judicial Discipline and Removal (May 15, 1992).

21. Testimony of Senator Carl Levin before the National Commission on Judicial Discipline and Removal (May 15, 1992).

22. *Id.*; Testimony of Charles McC. Mathias, Jr. before the National Commission on Judicial Discipline and Removal (May 15, 1992).

23. Howell Heflin, *Impeaching Federal Judges: Making the Case for Change*, Trial 32 (November 1990).

24. Arlen Specter, *Impeachment: Another Look?*, Nat'l L.J. 13, 14 (November 27, 1989).

25. *See* Michael J. Gerhardt, *The Senate's Process for Removing Federal Judges* (March 16, 1993) (Consultant's Report to the National Commission on Judicial Discipline and Removal).

26. *Id.*

27. *See* Statement of Senator Charles McC. Mathias, Jr. (Chairman of the Senate Rule XI Trial Committee), *reprinted* in Proceedings of the United States Senate in the Impeachment of Harry E. Claiborne, a Judge of the Unted States District Court for the District of Nevada, 99th Cong., 2d Sess. 342-43 (1986); *see also The Federalist* No. 65, at 426 (Hamilton) (Modern Library, 1937).

28. Testimony of Michael Davidson before the National Commission on Judicial Discipline and Removal (May 15, 1993).

29. *See* Procedure and Guidelines for Impeachment Trials in the United States Senate (Revised Edition), 99th Cong., 2d Sess. (1986).

30. Gerhardt, *supra.*

31. *The Federalist* No. 51, at 336 (Hamilton or James Madison) (Modern Library, 1937).

32. *The Good Judge*, Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility 3 (Background Paper by Thomas E. Baker) (1989).

33. 1 James Bryce, *American Commonwealth* 212 (1910).

CHAPTER IV: EXECUTIVE BRANCH

The report prepared for the Commission by Professor Todd Peterson of The National Law Center, The George Washington University, provided much of the information in this chapter. Professor Peterson's work included preparation, with the Commission, of a survey of Justice Department divisions and all U.S. Attorneys' offices, as well as interviews of prosecutors and investigators, and analysis of the results. His report examines various constitutional issues (e.g., the constitutionality of pre-impeachment prosecution of federal judges) and legal and policy issues relating to the prosecution of federal judges and relating to the Justice Department's role in the impeachment of federal judges, as well as their discipline under the 1980 Act. In addition,

Professor Peterson's report addresses the judicial appointment and confirmation process.

1. Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges* (April 26, 1993) (Consultant's Report for the National Commission on Judicial Discipline and Removal).
2. *Id.*
3. *United States v. Aguilar*, __ F.2d __ (9th Cir. 1993).
4. *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992), *cert. denied*, __ U.S. __ (1993).
5. Peterson, *supra*.
6. *Aguilar* at __.
7. Peterson, *supra*.
8. *Id.*

CHAPTER V: JUDICIAL BRANCH

The Federal Judicial Center study was conducted by Thomas E. Willging, a Researcher with the Federal Judicial Center, and Jeffrey N. Barr, a Staff Attorney with the U.S. Court of Appeals for the First Circuit, in tandem with another study of the 1980 Act prepared by Professor Richard L. Marcus of Hastings College of the Law. Professor Marcus, who played a role in the design of the FJC study, independently reviewed the FJC researchers' written summaries of interviews and the results of their examination of complaint files. He also read approximately 1,175 public dismissal orders under the 1980 Act on file at the FJC.

Professor Charles Geyh of Widener Law School studied means of judicial discipline other than the 1980 Act, including circuit judicial council orders under 28 U.S.C. § 332, circuit judicial council certifications of disability, informal actions by circuit chief judges, the Civil Justice Reform Act provisions regarding decision-making delay, appellate court orders of reversal and mandamus, and peer judge influence. Professor Geyh was assisted by Katherine J. Henry of the Washington, DC, firm of Mayer, Brown & Platt (with Mark Gitenstein) and now of the firm of Winthrop & Stimson, Washington, DC (with David Schwartz). Professors Geyh and Marcus also drafted a questionnaire with the Commission that was distributed to all current and former circuit chief judges. The questionnaire propounded sixteen questions concerning both informal and formal means of judicial discipline. Over thirty current and former circuit chief judges responded to the questionnaire.

In addition to the Geyh-Marcus survey of circuit chief judges, William Slate II and Lucy White of the Justice Research Institute distributed, on behalf of the Commission, seven separate but related surveys to more than five hundred

individuals. These surveys were designed to determine the level of knowledge and awareness among various groups about the 1980 Act and about judicial discipline and disability matters in general.

Professor Beth Nolan of The National Law Center, The George Washington University (who was subsequently appointed to the Commission by President Clinton to replace outgoing Commissioner John Harrison) surveyed relevant statutes, regulations, and case law on issues of judicial ethics. She also analyzed the wisdom and effectiveness of current ethical restrictions on federal judges.

Further developing those issues, Abe Krash, James S. Portnoy, Erica Frohman Plave, and Sarah Kahn Saunders of the law firm of Arnold & Porter, Washington, DC, prepared a study for the Commission on the tensions that exist between actual and perceived ethical standards and rights that are available to federal judges and those that apply to all other United States citizens.

FJC Associate Historian Emily Field Van Tassel and the staff of the Federal Judicial History Office collected and compiled historical and biographical information on all federal judges who resigned or were removed from office from the creation in 1789 of the federal judiciary through 1992. Professor Van Tassel reviewed and analyzed the reasons for judicial resignations as well as the history of interbranch investigations and prosecutions of federal judges. In addition, she reviewed and summarized the history of retirement and disability legislation relative to the federal judiciary.

Professor Dan McGill of the University of Pennsylvania's Wharton School of Economics analyzed issues concerning the benefits, including pension and retirement options, available to federal judges. His report to the Commission identified possible incentives and disincentives to judges remaining in office or resigning from office.

Ernest Gellhorn, Kathryn M. Fenton, Barbara McDowell, and J. Peter Wang of the law firm of Jones, Day, Reavis & Pogue, Washington, DC, prepared a study for the Commission on judicial discipline and removal in Article I courts, including the U.S. Court of Federal Claims, the U.S. Court of Military Appeals, the U.S. Tax Court, and the U.S. Court of Veterans' Appeals.

Finally, the Commission benefited from the prior literature in this area. The body of such literature is not great, however, and before the studies solicited by the Commission, no thoroughgoing analysis of the circuits' experience under the 1980 Act had ever been attempted.

CHAPTER NOTES

1. *See, e.g.*, Statement of Senator Dennis DeConcini, 126 *Cong. Rec.* S13,858 (daily ed., September 15, 1980); Statement of Representative Caldwell Butler, 126 *Cong. Rec.* H8788 (daily ed., September 15, 1980).

2. *See* Jeffrey N. Barr and Thomas E. Willging, *Administration of the Federal Judicial Conduct and Disability Act of 1990* (March 15, 1993) (Federal Judicial Center Report to the National Commission on Judicial Discipline and Removal) and Richard L. Marcus, *Who Should Regulate Federal Judges, and How?* (March 10, 1993) (Consultant's Report to the National Commission on Judicial Discipline and Removal).

3. *Id.*

4. *See* Charles Geyh, *Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. § 372(c)* (February 19, 1993) (Consultant's Report to the National Commission on Judicial Discipline and Removal).

5. Commentary to Canon 2C, *Code of Conduct for United States Judges* (September 1992).

LIST OF CONCLUSIONS AND RECOMMENDATIONS

CONSTITUTIONAL ISSUES

The Commission concludes that Article III judges constitutionally may be prosecuted, convicted, and punished, and that the punishment may lawfully include incarceration.

The Commission concludes that Article III judges constitutionally may be subjected to state prosecution and incarceration. Although Congress has power to create some privileges against such prosecutions, the Commission concludes that such statutory privileges would be unwise.

The Commission concludes that a circuit council constitutionally may use its statutory authority to assign and reassign cases, and otherwise control the judicial duties, of a judge who has become disabled.

The Commission further concludes that a circuit council constitutionally may use its statutory authority to control the assignment and reassignment of cases and other judicial functions of an implicated judge during the criminal process, from investigation and indictment through the expiration of sentence, including a term of probation.

The Commission concludes that a statute providing for the removal from office of judges who serve on good behavior under Article III by means other than impeachment and conviction would be unconstitutional.

The Commission recommends that section 201 of title 18, United States Code, be amended to make clear that it does not authorize the removal of any judicial officer who serves during a term specified in the Constitution.

The Commission concludes that a statute under which a judge's compensation would be suspended on the basis of a criminal conviction would be unconstitutional.

The Commission recommends adoption of a statute under which a judge who has been convicted of a felony shall not hear or decide cases unless the circuit council determines otherwise.

The Commission recommends retaining the political mechanism of impeachment by the House and trial by the Senate as now provided in the Constitution. The impeachment process is the sole appropriate means for the removal of life-tenured judges.

The Commission recommends against a constitutional amendment under which convicted judges would be removed automatically.

The Commission recommends against the creation of a new organ of government that would have the authority to discipline and remove federal judges.

The Commission opposes the suggestion that Congress should be able to determine by statute the way in which federal judges are removed.

The Commission opposes any proposal under which the Supreme Court would participate in the removal of federal judges.

The Commission concludes that the current constitutional standard for impeachment, as interpreted over the years, has been adequate to its purpose and recommends that it not be amended.

LEGISLATIVE BRANCH

The Commission recommends that the House Committee on the Judiciary continue to acknowledge every judicial discipline complaint. In serious cases involving potentially impeachable conduct, the Committee should conduct a follow-up inquiry or solicit the aid of the Justice Department in such an inquiry. The Committee should continue to keep a record of the number and nature of these complaints, and report these data each Congress.

The Commission recommends that the House ensure that its Committee on the Judiciary has the resources to deal with judicial discipline matters, and the resources and institutional memory necessary to deal with impeachment cases as they arise.

The Commission recommends that the House Committee on the Judiciary and the Justice Department -- upon obtaining information that a federal judge has committed criminal acts that may be inconsistent with continued service on the bench -- work cooperatively to resolve the removal issue, including, if desirable, postponing criminal proceedings.

The Commission recommends that the executive and judicial branches share with Congress information that might be useful to it when it considers whether to impeach a federal judge, subject to exceptions necessary to the law enforcement function and to protect serious confidentiality interests. Congress should enact legislation, with proper safeguards, to facilitate the exchange of this information in appropriate circumstances.

The Commission recommends that the House avoid repetition of prior fairly conducted proceedings. When impeachment proceedings follow criminal convictions, issue preclusion should be used except in unusual circumstances.

The Commission recommends that the House dispense with the filing of a "replication" to a respondent judge's answer.

The Commission recommends that the Senate consider experimenting with a variety of delegation approaches (including use of masters) to handle pretrial issues (especially discovery) prior to any removal trial.

The Commission recommends that the Senate consider amending its rules to permit a Rule XI Committee to transmit to the full Senate each Committee member's individual views regarding proposed findings of fact and recommendations on individual articles of impeachment.

The Commission recommends that the Senate consider adopting rules tailored to impeachment trials in which evidence is heard in a Rule XI Committee.

The Commission recommends that the Senate apply issue preclusion to matters necessarily determined against a judge in a prior criminal trial except in unusual circumstances.

The Commission recommends that the Senate compile a manual of impeachment source materials for participants in the proceedings and other interested parties.

The Commission recommends that the House Committee on the Judiciary, within its jurisdiction, exercise periodic oversight of judicial discipline, judicial ethics, and criminal prosecutions of federal judges.

The Commission recommends that the Senate review its confirmation proceedings involving judges prosecuted since 1980 to determine whether those proceedings were thorough and whether they revealed any problems suggesting a danger of misconduct by the nominees. The Senate review should be forward-looking, designed to avoid problems in the future.

The Commission recommends that the House determine, in its resolution, whether to seek both removal and disqualification in each impeachment proceeding.

The Commission recommends that, regardless of whether the House asks for disqualification, the Senate vote on disqualification from holding future office as well as on removal from office of judges convicted in impeachment trials.

The Commission concludes that no formal institutional linkages need be established among or between the branches of government. A permanent National Commission on Judicial Discipline and Removal is not necessary.

The Commission recommends informal meetings of high-level representatives of the three branches of the federal government to promote oversight and understanding of judicial discipline, disability, and impeachment.

The Commission recommends that the Administrative Office routinely provide the House Committee on the Judiciary with all final orders and accompanying memoranda required by the 1980 Act to be publicly available.

EXECUTIVE BRANCH

The Commission recommends that the Justice Department promulgate guidelines and procedures for its attorneys regarding the circumstances under and the manner in which the mechanisms of the 1980 Act are to be utilized.

The Commission recommends that convicted judges who fail to accept responsibility for their conduct not receive reduced sentences, and in any event that sentencing judges be sensitive to the effects of their sentences

on the decision of a convicted judge to resign voluntarily from judicial office.

The Commission recommends that the FBI and the Justice Department issue explicit guidelines and procedures for the investigation and prosecution of federal judges, and that these guidelines and procedures require the approval of the Attorney General for full-scale investigations and intrusive investigative techniques.

The Commission recommends that the Justice Department consult with the U.S. House of Representatives at appropriate times during an investigation and prosecution of a federal judge, whenever the facts suggest that impeachment is a likely outcome. The timing of impeachment and criminal proceedings should be a matter dictated by the facts and circumstances of each case. Ideally, this decision should be made by mutual agreement of the branches.

The Commission recommends that FBI full-field investigations of judicial candidates be as comprehensive as reasonably possible to ensure sound judgments about their integrity and qualifications.

JUDICIAL BRANCH

The Commission recommends that Illustrative Rule 1(e) be revised to provide that the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long; a petition for mandamus can sometimes be used for that purpose. Discipline under the 1980 Act may be appropriate, however, for (1) habitual failure to decide matters in a timely fashion, (2) delay shown to be founded on the judge's improper animus or prejudice against a litigant, or (3) egregious delay constituting a clear dereliction of judicial responsibilities. The Commission also recommends that all councils and the several courts subject to the 1980 Act adopt this Illustrative Rule as revised.

The Commission recommends that a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal or state criminal authorities and of the House Judiciary Committee. In situations where the chief judge or circuit council believe it inappropriate to act as an intermediary, the Commission recommends that they notify the complainant of the names

and addresses of the individuals to whose attention the charges might be brought.

The Commission recommends that the 1980 Act be amended to include as an additional ground for dismissal by a chief judge that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation.

The Commission recommends that the Judicial Conference of the United States add to the text of Canon 2 or Canon 3 of the Code of Conduct for United States Judges an express prohibition of judicial behavior that reflects or implements bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment. Unless the complaint's allegations are directly related to the merits of a decision or procedural ruling, such behavior in a judicial capacity is an appropriate subject for discipline under the 1980 Act.

The Commission recommends that the bar and the federal judiciary increase awareness of and education about the 1980 Act among lawyers, judges, court personnel, and members of the public. As one part of such efforts, each circuit council that has not already done so should publish its rules under the Act in United States Code Annotated, and a reference to the 1980 Act and the circuit council's rules should be included in the local rules of each district court.

The Commission recommends that each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints against federal judges. Such groups should also work with chief judges in efforts to identify problems that may be amenable to informal resolutions and should initiate programs to educate lawyers and the public about judicial discipline. The Commission also encourages other institutions, including the organized bar, to take an active interest in the smooth functioning and wise administration of formal and informal mechanisms that address problems of judicial misconduct and disability.

The Commission endorses Illustrative Rule 4(b) and recommends that the 1980 Act be amended to provide that a chief judge may conduct a limited inquiry into the factual support for a complainant's allegations but may not make findings of fact about any matter that is reasonably in dispute.

The Commission recommends that chief judges seek assistance from qualified staff in reviewing complaints and preparing orders. It encourages chief judges to consult other judges who may be helpful in the process of complaint disposition. The Commission does not believe that the 1980 Act, including its provision on confidentiality, constitutes a barrier to such assistance or consultation.

The Commission recommends that the Illustrative Rules be amended to permit chief judges and judicial councils to invoke a rule of necessity authorizing them to continue to act on multiple-judge complaints that otherwise would require multiple disqualifications.

The Commission recommends that all judicial councils adopt and strictly adhere to Illustrative Rule 17 as it relates to the public availability of a chief judge's orders dismissing complaints or concluding proceedings and any accompanying memoranda. Care should be taken to eliminate information that would identify the judge or magistrate. If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

The Commission recommends that council rules regarding confidentiality should be nationally uniform. The relevant provisions of the Illustrative Rules should be adopted to that end, but the uniform rules should not provide for automatic transmittal of a copy of complaints to the chief judge of the district court and the chief judge of the bankruptcy court. They should, however, authorize a chief judge to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act. If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

The Commission recommends that, as provided in Illustrative Rule 4(f), a chief judge who dismisses a complaint or concludes a proceeding should "prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition." This memorandum should "not include the name of the complainant or of the judge or magistrate whose conduct was complained of." In the case of an order concluding a proceeding on the basis of corrective action taken, the supporting memorandum's statement of reasons should specifically

describe, with due regard to confidentiality and the effectiveness of the corrective action, both the conduct that was corrected and the means of correcting it. If action by the judicial councils or Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

The Commission recommends that the Judicial Conference devise and monitor a system for the dissemination of information about complaint dispositions to judges and others, with the goals of developing a body of interpretive precedents and enhancing judicial and public education about judicial discipline and judicial ethics.

The Commission recommends that the Judicial Conference, assisted by the Administrative Office, reevaluate the adequacy of all data and reports gathered and issued concerning experience under the 1980 Act, including the system used to provide such data and reports in each circuit. The Commission also recommends that, as part of such general reevaluation, consideration be given to gathering and reporting data on complaints about bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment.

The Commission recommends that section 332 of Title 28, United States Code, be amended to require each circuit council to report annually to the Administrative Office of the U.S. Courts the number and nature of orders entered thereunder that relate to judicial misconduct or disability (including delay).

The Commission recommends that the Judicial Conference adopt a uniform policy on the limitations a judicial council should impose on a judge who is personally implicated in the criminal process. At a minimum that policy should include ordinarily relieving a judge under indictment from all judicial responsibilities through to the end of the criminal process and imposing appropriate constraints on judicial responsibility where a judge is under investigation.

The Commission recommends that Congress consider enacting a statute providing that, upon conviction of a felony (or more specifically defined crimes), a federal judge shall cease to accrue credit, through age or years of service, toward retirement under the Rule of 80.

The Commission recommends that the Judicial Conference and the circuit councils consider programs of judicial evaluation for adoption in the federal courts.

The Commission recommends that the Judicial Conference reexamine the practice of specifically notifying a federal judge when a request for access to the judge's financial disclosure forms is made, to determine if valid security or other concerns justify continuation of the practice.

The Commission recommends that the public disclosure requirements under federal law be amended to require a federal judge either (1) to certify that, to the best of his or her knowledge, information and belief, the judge does not, except as permitted by Canon 2(c), hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin or (2) to list all organizations not exempted under Canon 2(c) of which the judge is a member.

The Commission recommends that the Judicial Conference adopt a mandatory self-reporting rule that requires federal judges to inform designated authorities (e.g., the circuit chief judge), on a confidential basis, whenever they have been indicted, arrested, or informed that they are the target of a federal or state criminal investigation. Such a rule should not apply to minor offenses.

The Commission recommends that the Supreme Court may wish to consider the adoption of policies and procedures for the filing and disposition of complaints alleging misconduct against Justices of the Supreme Court.

The Commission recommends that each circuit that has not already done so conduct a study (or studies) of judicial misconduct involving bias based on race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment, and of the extent to which the 1980 Act and other existing mechanisms and programs, including judicial education, are adequate to deal with it. The Judicial Conference should monitor the implementation of this recommendation and when such studies have been completed, consideration should be given both locally and nationally within the judiciary to such changes in policies, procedures, and programs as are warranted.

APPENDIX I

STATUTORY PROPOSALS AND PROPOSED CONSTITUTIONAL AMENDMENTS ON JUDICIAL DISCIPLINE AND REMOVAL

Many times in the more than two hundred years of its history, Congress has ventured into the constitutional thicket of judicial discipline and removal. The First Congress passed a law providing that a judge convicted of a bribe "shall forever be disqualified to hold an office of honour, trust or profit under the United States." The 101st Congress established this National Commission on Judicial Discipline and Removal. In the intervening years, while the basic constitutional text relating to judicial independence and accountability remained unchanged, Congress passed numerous laws relating to judicial councils of the circuits, discipline, ethics, disqualification, retirement, and disability.

This appendix reviews diverse legislative proposals to modify discipline and removal arrangements that Congress has not enacted. Reform proposals have generally fallen into two distinct categories: (1) statutory proposals to create an alternate forum (perhaps within the judiciary) to determine whether and how a federal judge should be disciplined; and (2) proposed constitutional amendments to provide for automatic removal of any federal judge convicted of a felony offense, to delegate removal authority to others, or to eliminate lifetime tenure altogether.

Statutory proposals described in the appendix are designated S. for Senate or H.R. for House of Representatives, according to the body of Congress that originated the bill. Constitutional amendments proposed by a Member of Congress take the form of a joint resolution (S.J. Res. or H.J. Res. This appendix describes some of the major proposals that have been made. None of the proposed statutes or constitutional amendments described below has received enough support to pass both houses of Congress. They are important, however, because they reveal elected officials' diverse opinions on the subject of judicial discipline and removal.

Statutory Proposals

In 1991 Senator Strom Thurmond introduced a bill providing that a justice or judge convicted of a felony (punishable by death or imprisonment for a term exceeding one year) shall be suspended from office without pay pending impeachment proceedings (S. 135, 102nd Cong., 1st Sess.). The Senate did not take action on this legislation.

Different approaches had been suggested half a century earlier. Following the impeachment and removal of District Judge Halsted Ritter in 1936, two bills providing for removal of problem judges without impeachment were introduced. Senator William McAdoo proposed the establishment of a special High Court for the Trial of Judicial Officers that would have jurisdiction over all federal judicial misbehavior cases, except those involving justices of the Supreme Court. The Department of Justice was authorized to fill the role of prosecutor, and the decisions of the High Court could be appealed to the Supreme Court. The sole sanction was removal. This bill (S. 4527, 74th Cong., 2d Sess.) failed to pass, as did S. 476, introduced by Senator McAdoo in the 75th Congress, 1st session.

Representative Hatton W. Sumners, Chairman of the House Judiciary Committee who had served as a House Manager in impeachment trials, introduced several bills that would have eliminated the Senate, but not the House, from the impeachment process. In 1937, he introduced H.R. 2271, which directed that proceedings to remove a judge would be heard by a court selected by the Chief Justice, consisting of three judges of the circuit courts of appeals. Charges would be initiated by a House resolution directed to the Chief Justice, stating that "in the opinion of the House there is reasonable ground for believing that the behavior of a judge [has] been other than good behavior within the meaning of that term" in the Constitution. If the court determined that the behavior was not "good behavior" within the meaning of the Constitution, the judge would be removed from office, although no other penalty could be imposed. The judgment could not be appealed. This proposal applied only to district judges, and specifically did not apply to circuit judges or Supreme Court justices.

On October 22, 1941, the House passed H.R. 146, which was quite similar to the earlier H.R. 2271. Again, the House was to initiate proceedings by directing a resolution to the Chief Justice, and the Chief Justice had the authority to convene a special court. However, this

proposal applied to all judges of the United States, except Supreme Court justices, and the Chief Justice had somewhat less discretion in choosing who would compose the court. The Attorney General was to represent the United States in the removal proceeding. If the court determined that the judge did not meet the "good behavior" standard in the Constitution, the court would order removal of the judge. The accused judge would then have a right of appeal to the Supreme Court. The accused also was given the right to object to the judges selected by the Chief Justice to serve on the special court, and to state the reasons for the objections. If the reasons appeared adequate to the Chief Justice, he was to select a different designee.

Shortly after the House passed H.R. 146 in October 1941, a subcommittee of the Senate Judiciary Committee held hearings. Representative Sumners presented his proposal, and Supreme Court Justice Robert H. Jackson and Attorney General Francis Biddle testified in support of the bill. The Judicial Conference adopted the following resolution regarding this legislation: "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" the proposed legislation. Despite the support of many prominent individuals, the bill died in subcommittee.

In 1969, Senator Joseph Tydings introduced the Judicial Reform Act, S. 1506, which proposed a novel legislative approach to the removal of federal judges: misbehavior would be investigated and action for removal would occur within the federal judiciary. Allegations of misbehavior would be investigated by a commission on judicial disabilities and tenure composed of five federal judges with authority to dismiss a complaint, or, in the event the evidence warranted, to recommend the removal of the accused judge to the Judicial Conference. The matter would then be taken up by the Judicial Conference in a trial-like procedure.

A subsequent proposal patterned after the Tydings bill became the Judicial Tenure Act, introduced by Senator Sam Nunn in the 93rd and 94th Congresses. The Judicial Tenure Act differed from the Judicial Reform Act, in bringing the justices of the Supreme Court within its scope, although their removal would be accomplished only by impeachment. In the 95th Congress, the bill -- with cosponsorship by Senator Dennis DeConcini -- passed the Senate although staunchly opposed by Senators Birch Bayh and Charles McC. Mathias, Jr. as being

unconstitutional and a threat to the independence of the judiciary. The bill died in House subcommittee. In the 96th Congress, House and Senate reform efforts merged with enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

Proposed Constitutional Amendments

Joint resolutions calling for amendments to the Constitution illustrate the broad spectrum of views about judicial discipline, impeachment, and removal from office. Recent resolutions can be grouped into four categories: (1) those that would limit judicial appointment to a term of years; (2) those that would limit judicial appointment to a term of years but would allow reappointment by the President or reconfirmation by the Senate; (3) those that would establish an automatic removal scheme for federal judges (and other civil officers) convicted of felonies; and (4) those that would provide for the involuntary retirement of federal judges and for their removal or censure without resort to impeachment.

In 1991, Representative Douglas Applegate proposed to limit the term of office of a federal judge or justice to six years with the possibility of one reappointment (H.J. Res. 85, 102nd Cong., 1st Sess.). Later that year, Representative Andy Jacobs proposed that no federal judge (or Senator or Representative) serve for more than ten years in a twelve-year period (H.J. Res. 119, 102nd Cong., 1st Sess.). A resolution by Representative Jack Fields would have restricted the judicial term of office to ten years (H.J. Res. 71, 102nd Cong., 1st Sess.).

Senator Thurmond proposed an amendment to the Constitution that would require federal judges and other officers of the United States to forfeit their offices upon conviction of a felony (S.J. Res. 17, 102nd Cong., 1st Sess.). Similarly, Representative George Sangmeister proposed a constitutional amendment that would provide for the automatic removal of federal judges upon their conviction of a crime punishable by more than one year's imprisonment (H.J. Res. 209, 102nd Cong., 1st Sess.).

To provide for the involuntary retirement of federal judges as well as for their removal or censure without resort to impeachment, Senator Howell Heflin introduced a proposal in 1989 (S.J. Res. 232, 101st Cong., 1st Sess.). It proposed a Judicial Inquiry Commission and a Court of the Judiciary. The Commission would receive complaints and

investigate allegations of wrongdoing or incompetency on the part of federal judges. The court would adjudicate all cases brought before it, and it would have the power to discipline and remove federal judges. S.J. Res. 232 also would have prohibited federal judges convicted of a felony from collecting their salaries otherwise due for services as judges.

H.J. Res. 74 (102nd Cong., 1st Sess.) was introduced in 1991 by Representative James Sensenbrenner. It authorized Congress to provide by law that the Supreme Court may remove from office any Article III judge, if the Court determines that such judge has been convicted of a criminal offense. Senator Warren Rudman proposed an amendment to grant authority to the Supreme Court to remove an Article III judge from office (other than a Supreme Court justice), by a two-thirds vote of the justices, for treason, bribery, or other high crimes or misdemeanors. Under the proposal, if removal from office were ordered by the Supreme Court, the judge would have the right to appeal the order to the Senate, under Senate rules and regulations. A vote of two-thirds of the Senate would be necessary to sustain the order of the Supreme Court. If the House voted an article of impeachment against the accused, then the proceedings before the Supreme Court would be terminated.

In terms of current political support, proposals in the third category have garnered the most adherents within the House and Senate. But all proposals to amend the Constitution have been historically short-lived.

APPENDIX II

RELEVANT PROVISIONS OF THE CONSTITUTION AND STATUTES

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Art. I, sec.1.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Art. I, sec. 2.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

Art. I, sec. 3.

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

Art. I, sec. 3.

The Congress shall have Power . . .
To constitute Tribunals inferior to the supreme Court;

Art. I, sec. 8.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Art. I, sec. 8.

The President ... shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Art.II, sec. 2.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Art. II, sec. 4.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Art. III, sec. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Art. III, sec. 2.

COMMISSION ENABLING ACT

Public Law 101-650, Dec. 1, 1990 (104 Stat. 5122)

An Act

To provide for the appointment of additional Federal circuit and district judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Improvements Act of 1990".

TITLE IV -- JUDICIAL DISCIPLINE AND JUDICIAL REMOVAL

SEC. 401. SHORT TITLE.

This title may be cited as the "Judicial Discipline and Removal Reform Act of 1990".

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Subtitle II -- National Commission on Judicial Discipline and Removal

SEC. 408. SHORT TITLE.

This subtitle may be cited as the "National Commission on Judicial Discipline and Removal Act".

SEC. 409. ESTABLISHMENT.

There is hereby established a commission to be known as the "National Commission on Judicial Discipline and Removal" (hereinafter in this subtitle referred to as the "Commission").

SEC. 410. DUTIES OF COMMISSION.

The duties of the Commission are-

(1) to investigate and study the problems and issues involved in the tenure (including discipline and removal) of an article III judge;

(2) to evaluate the advisability of proposing alternatives to current arrangements with respect to such problems and issues, including alternatives for discipline or removal of judges that would require amendment to the Constitution; and

(3) to prepare and submit to the Congress, the Chief Justice of the United States, and the President a report in accordance with section 415.

SEC. 411. MEMBERSHIP.

(a) NUMBER AND APPOINTMENT. -- The Commission shall be composed of 13 members as follows:

(1) Three appointed by the President pro tempore of the Senate.

(2) Three appointed by the Speaker of the House of Representatives.

(3) Three appointed by the Chief Justice of the United States.

(4) Three appointed by the President.

(5) One appointed by the Conference of Chief Justices of the States of the United States.

(b) TERM. -- Members of the Commission shall be appointed for the life of the Commission.

(c) QUORUM. -- Six members of the Commission shall constitute a quorum, but a lesser number may conduct meetings.

(d) CHAIRMAN. -- The members of the Commission shall select one of the members to be the Chairman.

(e) VACANCY. -- A vacancy on the Commission resulting from the death or resignation of a member shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

(f) CONTINUATION OF MEMBERSHIP. -- If any member of the Commission who was appointed to the Commission as a Member of Congress or as an officer or employee of a government leaves that office, or if any member of the Commission who was appointed from persons who are not officers or employees of a government becomes an

officer or employee of a government, the member may continue as a member of the Commission for not longer than the 90-day period beginning on the date the member leaves that office or becomes such an officer or employee, as the case may be.

SEC. 412. COMPENSATION OF THE COMMISSION.

(a) PAY. -- (1) Except as provided in paragraph (2), each member of the Commission who is not otherwise employed by the United States Government shall be entitled to receive the daily equivalent of the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day (including travel time) during which he or she is engaged in the actual performance of duties as a member of the Commission.

(2) A member of the Commission who is an officer or employee of the United States Government shall serve without additional compensation.

(b) TRAVEL. -- All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

SEC. 413. DIRECTOR AND STAFF OF COMMISSION; EXPERTS AND CONSULTANTS.

(a) DIRECTOR. -- The Commission shall, without regard to section 5311(b) of title 5, United States Code, have a Director who shall be appointed by the Chairman and who shall be paid at a rate not to exceed the rate of basic pay payable for level V of the Executive Schedule under section 5316 of such title.

(b) STAFF. -- The Chairman of the Commission may appoint and fix the pay of such additional personnel as the Chairman finds necessary to enable the Commission to carry out its duties. Such personnel may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the annual rate of pay for any individual so appointed may not exceed a rate equal to the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of such title.

(c) EXPERTS AND CONSULTANTS. -- The Commission may procure temporary and intermittent services of experts and consultants under section 3109(b) of title 5, United States Code.

SEC. 414. POWERS OF COMMISSION.

(a) HEARINGS AND SESSIONS. -- The Commission or, on authorization of the Commission, a member of the Commission may, for the purpose of carrying out this subtitle, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(b) OBTAINING OFFICIAL DATA. -- The Commission may secure directly from any department, agency, or entity within the executive or judicial branch of the Federal Government information necessary to enable it to carry out this subtitle. Upon request of the Chairman of the Commission, the head of such department or agency shall furnish such information to the Commission.

(c) FACILITIES AND SUPPORT SERVICES. -- The Administrator of General Services shall provide to the Commission on a reimbursable basis such facilities and support services as the Commission may request. Upon request of the Commission, the head of any Federal agency is authorized to make any of the facilities and services of such agency available to the Commission to assist the Commission in carrying out its duties under this subtitle.

(d) EXPENDITURES AND CONTRACTS. -- The Commission or, on authorization of the Commission, a member of the Commission may make expenditures and enter into contracts for the procurement of such supplies, services, and property as the Commission or member considers appropriate for the purposes of carrying out the duties of the Commission. Such expenditures and contracts may be made only to such extent or in such amounts as are provided in appropriation Acts.

(e) MAILS. -- The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

(f) GIFTS. -- The Commission may accept, use, and dispose of gifts or donations of services or property.

SEC. 415. REPORT.

The Commission shall submit to each House of Congress, the Chief Justice of the United States, and the President a report not later

than August 1, 1993. The report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislative or administrative action as it considers appropriate.

SEC. 416. TERMINATION.

The Commission shall cease to exist on September 30, 1993.

SEC. 417. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated the sum of $751,000 to carry out the provisions of this subtitle.

SEC. 418. EFFECTIVE DATE.

This subtitle shall take effect on the date of the enactment of this Act.

For purposes of this presentation several provisions in this Act have been revised to reflect amendatory language enacted in Pub. L. No. 102-27, Apr. 10, 1991 (105 Stat. 136); Pub. L. No. 102-198, Dec. 9, 1991 (105 Stat. 1623); Pub. L. No. 102-368, Sep. 23, 1992 (106 Stat. 1118); and Pub. L. No. 102-395, Oct. 6, 1992 (106 Stat. 1858).

Under section 410(f) of this Act, as amended, Commissioner John C. Harrison resigned his appointment in April 1993. Under section 410(e) of this Act, the vacancy created by that resignation was filled in April 1993 when Commissioner Beth Nolan was appointed by the President of the United States.

RELATED JUDICIARY CODE PROVISIONS TITLE 28, UNITED STATES CODE

§ 332. Judicial councils of circuits

(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he or she may designate, a meeting of the judicial council of the circuit, consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges of the circuit, as such number is determined by majority vote of all such judges of the circuit in regular active service.

(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

(3) Only circuit and district judges in regular active service shall serve as members of the council.

(4) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

(5) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

(6) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the semiannual reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of

the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council. In the case of failure to comply with an order made under this subsection or a subpoena issued under section 372(c) of this title, a judicial council or a special committee appointed under section 372(c)(4) of this title may institute a contempt proceeding in any district court in which the judicial officer or employee of the circuit who fails to comply with the order made under this subsection shall be ordered to show cause before the court why he or she should not be held in contempt of court.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

(4) Each judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review.

(e) The judicial council of each circuit may appoint a circuit executive. In appointing a circuit executive, the judicial council shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(2) Administering the personnel system of the court of appeals of the circuit.

(3) Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

(8) Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshal's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(9) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(10) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

(f)(1) Each circuit executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level IV of the Executive Schedule pay rates under section 5315 of title 5.

(2) The circuit executive shall serve at the pleasure of the judicial council of the circuit.

(3) The circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

(4) The circuit executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health benefits program) of title 5, United States Code.

§ 371. Retirement on salary; retirement in senior status

(a) Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.

(b)(1) Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (f).

(2) In a case in which a justice or judge who retires under paragraph (1) does not meet the requirements of subsection (f), the justice or judge shall continue to receive the salary that he or she was receiving when he or she was last in active service or, if a certification under subsection (f) was made for such justice or judge, when such a certification was last in effect. The salary of such justice or judge shall be adjusted under section 461 of this title.

(c) The age and service requirements for retirement under this section are as follows:

Attained age:	Years of service:
65	15
66	14
67	13
68	12
69	11
70	10

(d) The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires under this section.

(e) Notwithstanding subsection (c) of section 5532 of title 5, if a regular or reserve member or former member of a uniformed service who is receiving retired or retainer pay becomes employed as a justice or judge of the United States, as defined by section 451, or becomes eligible therefor while so employed, such retired or retainer pay shall not be paid during regular active service as a justice or judge, but shall be resumed or commenced without reduction upon retirement from the judicial office or from regular active service (into senior status) as such justice or judge.

(f)(1) In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs:

(A) The justice or judge must have carried in the preceding calendar year a caseload involving courtroom participation which is equal to or greater than the amount of work involving courtroom participation which an average judge in active service would perform in three months. In the instance of a justice or judge who has sat on both district courts and courts of appeals, the caseload of appellate work and trial work shall be determined separately and the results of those determinations added together for purposes of this paragraph.

(B) The justice or judge performed in the preceding calendar year substantial judicial duties not involving courtroom participation under subparagraph (A), including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is assigned. Any certification under this subparagraph shall include a statement describing in detail the nature and amount of work and certifying that the work done is equal to or greater than the work described in this subparagraph which an average judge in active service would perform in three months.

(C) The justice or judge has, in the preceding calendar year, performed work described in subparagraphs (A) and (B) in an amount which, when calculated in accordance with such subparagraphs, in the aggregate equals at least 3 months work.

(D) The justice or judge has, in the preceding calendar year, performed substantial administrative duties directly related to the operation of the courts, or has performed substantial duties for a Federal or State governmental entity. A certification under this subparagraph shall specify that the work done is equal to the full-time work of an employee of the judicial branch.

(E) The justice or judge was unable in the preceding calendar year to perform judicial or administrative work to the extent required by any of subparagraphs (A) through (D) because of a temporary or permanent disability. A certification under this subparagraph shall be made to a justice who certifies in writing his or her disability to the Chief Justice, and to a judge who certifies in writing his or her disability to the chief judge of the circuit in which

the judge sits. A justice or judge who is certified under this subparagraph as having a permanent disability shall be deemed to have met the requirements of this subsection for each calendar year thereafter.

(2) Determinations of work performed under subparagraphs (A), (B), (C), and (D) of paragraph (1) shall be made pursuant to rules promulgated by the Judicial Conference of the United States. In promulgating such criteria, the Judicial Conference shall take into account existing standards promulgated by the Conference for allocation of space and staff for senior judges.

(3) If in any year a justice or judge who retires under subsection (b) does not receive a certification under this subsection (except as provided in paragraph (1)(E)), he or she is thereafter ineligible to receive such a certification.

(4) In the case of any justice or judge who retires under subsection (b) during a calendar year, there shall be included in the determination under this subsection of work performed during that calendar year all work performed by that justice or judge (as described in subparagraphs (A), (B), (C), and (D) of paragraph (1)) during that calendar year before such retirement.

§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline

(a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

Any justice or judge of the United States desiring to retire under this section shall certify to the President his disability in writing.

Whenever an associate justice of the Supreme Court, a chief judge of a circuit or the chief judge of the Court of International Trade, desires to retire under this section, he shall furnish to the President a certificate of disability signed by the Chief Justice of the United States.

A circuit or district judge, desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his circuit.

A judge of the Court of International Trade desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his court.

Each justice or judge retiring under this section after serving ten years continuously or otherwise shall, during the remainder of his lifetime, receive the salary of the office. A justice or judge retiring under this section who has served less than ten years in all shall, during the remainder of his lifetime, receive one-half the salary of the office.

(b) Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge, or by the Chief Justice of the United States in the case of the Chief Judge of the Court of International Trade, or by the chief judge of his court in the case of a judge of the Court of International Trade, is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled. Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court.

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may--

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intenening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly--

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council--

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior may have engaged in conduct--

(i) which might constitute one or more grounds for impeachment under article II of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8)(A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representative shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial

Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

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

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

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

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

Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that--

(A) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

(17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect anv other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(18) The United States Claims Court, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

APPENDIX III

STATE AND FOREIGN SYSTEMS FOR REMOVING OR DISCIPLINING JUDGES

The federal judicial system differs substantially from most state and foreign judicial systems. Although the Commission focused on the performance of the existing federal system for removing or otherwise disciplining federal judges with life tenure, it also studied those other judicial systems.

State Systems

The federal system and state systems have a similar separation of governmental powers and usually a similar judicial appointment process and judicial appeals process. Despite these similarities, state constitutions tend to balance judicial independence and judicial accountability differently for state courts than the U.S. Constitution does for the federal judiciary. In general, state judges have somewhat more public accountability but somewhat less judicial independence than federal judges have.

Two major differences between the federal judicial system and most state judicial systems create this different balance. First, unlike the federal system of life tenure, almost all states establish a fixed term of years for judges; many states also have a mandatory retirement age for judges. Second, unlike the federal system in which the only method for removal is through the impeachment process, the great majority of states provide alternative mechanisms. Indeed, based on information compiled by the American Judicature Society, only eight states and the District of Columbia have a single method for removing judges (two states allow removal only through the impeachment process, six states allow it only through a formal process in the judiciary, and the District of Columbia allows it only through a formal process in a special commission appointed to punish judicial misconduct). All of the other forty-two states authorize the removal of judges through the impeachment process (typically with a broad definition of impeachable conduct) <u>and</u> at least one of the following alternative methods:

- a formal process in the judiciary (allowed in thirty-three of the forty-two states);
- a formal process in a special commission appointed to punish judicial misconduct (allowed in six states);
- a simplified method of removal of a judge by the state legislature, usually known as removal by "address," in which there is no formal trial (allowed in fifteen states); and
- a recall election (allowed in six states).

Most states authorize their judiciaries to remove judges who have misbehaved or to impose a lesser punishment on them. In addition to the six states and the District of Columbia that authorize special commissions to remove judges, another thirty-three states have established special commissions that formally participate in the judicial discipline process by making recommendations to appropriate state authorities for the discipline and removal of state judges. In addition, a number of the states have adopted procedures and devices, such as judicial evaluation programs, that are used effectively to promote judicial accountability.

By limiting terms and by providing both political and judicial mechanisms to remove judges, most of the states have given greater weight to judicial accountability than is given to it by the U.S. Constitution or by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Any constitutional amendment affecting the tenure of federal judges or the removal mechanism would affect not only that feature but also judicial independence, judicial accountability, and the existing federal balance between judicial independence and judicial accountability.

Timothy R. Murphy, consultant to the National Center for State Courts, prepared a research report that assisted the Commission in examining interbranch relationships and cooperation within state systems. This report was particularly helpful to the Commission in formulating recommendations for interbranch cooperation within the federal system. This report was funded by the State Justice Institute.

Foreign Systems

At the Commission's request, the Law Library of Congress, with Kersi B. Shroff as coordinator, prepared a very useful comparative report and comparative summary entitled *Judicial Tenure: Removal and Discipline in Selected Foreign Countries*. Published in 1993, this report describes the system of judicial tenure in twenty-six countries and five international judicial organizations (the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the Central American Court of Justice, and the Court of Justice of the European Community). The report analyzes several common law countries that have followed the English practice of appointing judges to serve during good behavior. The report also discusses judicial accountability in "civil law" systems in which the judges are "career judges" and are generally more insulated from political pressure than judges in "common law" systems. The Law Library of Congress study further describes socialist judicial systems in China and Vietnam, in which judicial independence is severely constrained.

In addition, William K. Slate and Lucy White of the Justice Research Institute, with funding by the State Justice Institute, prepared a report for the Commission on the judicial systems and the judicial discipline systems in Australia, Canada, France, and Germany. All four countries impose mandatory retirement ages on judges.

Removal of judges in Australia involves the process known as "address," whereby an executive official (the Governor General, who is the representative of the British Crown) removes a judge upon an address by both houses of the Australian Parliament. This system is less cumbersome than impeachment/removal because no actual trial is needed for removal. Under the Australian system, removal may occur for a judge's "misbehavior" or "incapacity."

In Canada, the Parliament in 1971 established the Canadian Judicial Council, whose members are all judges. One of the Council's responsibilities is to make recommendations on the removal of judges for age, infirmity, misconduct, failure to properly execute their offices, or for having been placed in a position incompatible with the due execution of office. Upon "address" by both houses of the Canadian Parliament, the Governor General may remove federally appointed judges. In some Canadian provinces, a judicial council may remove provincially appointed judges.

In France, the president of the court on which a judge in question sits may refer complaints about the judge to the Minister of Justice, who may suspend the judge with pay for up to two months while charges are considered. The High Council of the Judiciary, comprised of seven judges and two non-judges selected by the President of the Republic, then decides in appropriate cases whether to impose punishment. Punishment can range from a reprimand to removal without the right to a pension. A judge has a limited right of appeal from such punishment.

The German system contains both "indirect" and formal disciplinary mechanisms. The indirect method involves a three-year probationary period for new judges, with further tenure conditioned upon satisfactory performance. The formal disciplinary mechanisms may take several forms. Upon the request of the German legislature, the Federal Constitutional Court may decide by a two-thirds majority that a federal judge -- for infringing the principles of the German Basic Law or the constitutional order of a state -- will be given a different function, or retired, or dismissed (if the infringement was intentional). There is also a Disciplinary Court, which may discipline or remove judges for other violations, such as bribery, failure to perform one's duties, and "prevarication."

In addition, these four foreign judicial systems contain other mechanisms -- including some used in a number of the American states -- that may affect judicial discipline, such as an annual performance evaluation with an opportunity for public comment (France and Germany), the suspension of judicial duties during investigations of misconduct (France and Australia), a centralized complaint system (Canada), the involvement of non-judges in a more public discipline process (Germany, France, and Canada), and mandatory judicial education (France). Combined with the other particular features of the foreign systems, these mechanisms establish a balance between judicial independence and judicial accountability.

GLOSSARY

adjournment sine die: Adjournment of a legislative body without a fixed date for reconvening.

Administrative Office of the U.S. Courts: Created by Congress in 1939, the Office operates under the direction of the Judicial Conference of the United States. The Office is responsible for supervising the administration, pay, and employee benefits of the support personnel of the federal court system, except for the Supreme Court. It also reports on the procedures and caseloads of all federal courts beneath the Supreme Court. The director and deputy director are appointed by the Chief Justice of the United States. See sections 604-12, title 28, United States Code.

circuit council: Each federal circuit has a circuit council of a number of judges of the circuit court of appeals and the district courts in the judicial circuit. Circuit councils make necessary orders for judicial administration within the circuits, and consider certain complaints of judicial misconduct and disability. See sections 332 and 372 (c), title 28, United States Code. Throughout this Report, when the terms circuit council or judicial council are used in connection with the 1980 Act, those terms, as appropriate, refer not only to the thirteen circuits, but also to the two courts (The United States Claims Court and The Court of International Trade) covered by provisions in the 1980 Act. See section 372 (c) (18), title 28, United States Code.

collateral estoppel: Being stopped from making a claim in one court proceeding that has already been disproved by the facts raised in a prior proceeding. See also *issue preclusion, infra.*

contingency fund of the House: A mechanism that allows the Committee on House Administration to provide funding for the unexpected needs of other House committees.

de novo: Anew; afresh; a second time.

disability: The absence of adequate physical or mental powers necessary to serve as a federal judge.

evidentiary rules: The rules governing whether evidence can be admitted at trial and how to evaluate its importance at trial. These rules are distinct from procedural rules, which govern how the courts operate.

Federal Judicial Center: Created by Congress in 1967, the Center serves as the research, development, and training arm of the federal judiciary. See sections 620-29, title 28, United States Code.

full-field FBI background check: An investigation that goes beyond a review of available records and involves a review conducted by FBI field offices.

House Managers: Members of the House of Representatives who are chosen to prosecute an impeachment trial in the Senate.

identification of a complaint by a chief judge: A 1990 amendment to the 1980 Act allows identification of a complaint by a circuit's chief judge based on information made available to the chief judge, as an alternative to a written and signed complaint from an individual filed with that circuit's clerk. See section 372(c)(1), title 28, United States Code.

Illustrative Rules: The Rules endorsed by the Judicial Conference to assist in the administration of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, and particularly the handling of complaints against judges. As their name indicates, the Illustrative Rules are meant to be guidelines that a circuit may follow; they are not compulsory, but each judicial circuit is statutorily required to adopt rules for use in the circuit. Most circuits have adopted the Illustrative Rules without substantial modification. See section 372(c), title 28, United States Code.

issue preclusion: When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. See also *collateral estoppel, supra.*

Judicial Conference of the United States: Founded in 1922, the Conference is charged with the administration of the federal judicial system. Its membership includes the Chief Justice of the United States, the chief judges of the federal circuits, and designated district judges. The Administrative Office of the U.S. Courts operates under the

direction of the Conference. See sections 331 & 604, title 28, United States Code.

Mandamus, Writ of: An order issued by a court of competent jurisdiction, commanding an inferior court or public official to perform a duty imposed by law. Writs of mandamus have traditionally been utilized by appellate courts in response to abuses of judicial power.

memorial: A written statement of facts or a formal petition introduced by a Member of Congress.

1980 Act: In this Report, the Commission uses this short reference to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which provided the judicial discipline and disability mechanism administered by the federal judiciary. See section 372(c), title 28, United States Code.

replication: A pleading filed by the prosecution during an impeachment trial in response to the defendant's answer.

Rule of 80: Providing that, if a federal judge has served for at least 10 years and is at least 65-years-old, that judge is entitled to his or her full salary upon retirement, but only if the sum of the judge's age and years of service equals at least 80 years (for example, 65 years of age with 15 years service, or 70 years of age with 10 years service). See section 371, title 28, United States Code.

BIOGRAPHIES
COMMISSION MEMBERS, STAFF, CONSULTANTS

MEMBERS

ROBERT W. KASTENMEIER, of Arlington, Virginia, was elected to the United States House of Representatives in 1958 to represent the Second District of Wisconsin. He served continuously until 1991, becoming ranking majority member of the House Committee on the Judiciary and the chairman of its Subcommittee on Courts, Intellectual Property, and the Administration of Justice. He also served as a member of the House Intelligence Committee and was appointed by Chief Justice Rehnquist to serve on the Federal Courts Study Committee. While in Congress, Mr. Kastenmeier participated in several impeachments, drafting the rules of procedure in the Watergate (President Nixon) inquiry and the articles of impeachment against one federal judge. He also was the author of the Judicial Conduct and Disability Act of 1980. Mr. Kastenmeier is a graduate of the University of Wisconsin and the University of Wisconsin Law School. Prior to his service in Congress, he served in the U.S. Army, practiced law in Wisconsin, and was a justice of the peace for Jefferson and Dodge Counties. He has received national recognition for his legislative work on court reform, civil rights, intellectual property, and peace issues.

S. JAY PLAGER, of Washington, DC, has served since 1989 as a circuit judge on the United States Court of Appeals for the Federal Circuit. Previously, he served on the law faculties of the University of Florida, University of Illinois, University of Wisconsin, University of Indiana-Bloomington (where he was Dean for seven years), Cambridge University in England, and Stanford University (where he was a visiting scholar). He served in the Executive Branch as Administrator of the Office of Information and Regulatory Affairs (OIRA), which is part of the Executive Office of the President, and as Associate Director of the Office of Management and Budget. Previously, he served as Counselor to the Under Secretary of Health and Human Services. Judge Plager is a graduate of the University of North Carolina and the University of Florida College of Law, where he graduated with high honors. Following undergraduate school, he entered on duty in the U.S. Navy; after his tour of active duty, he continued in the Navy Reserve, ultimately becoming a Commander. After graduating from law school, he was awarded a Charles Evans Hughes Fellowship at Columbia University School of Law, where he completed a post-graduate LL.M. degree in law.

STEPHEN B. BURBANK, of Philadelphia, Pennsylvania, is the Robert G. Fuller, Jr., Professor of Law at the University of Pennsylvania. A graduate of Harvard College and Harvard Law School, Professor Burbank served as law clerk to Justice Robert Braucher of the Supreme Judicial Court of Massachusetts and to Chief Justice Warren Burger. He was General Counsel of the University of Pennsylvania from 1975 to 1980. The author of numerous articles on judicial discipline, federal court rule-making, complex litigation, and international civil procedure, he was the principal author of *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (American Judicature Society, 1989). Professor Burbank has testified three times before congressional subcommittees on issues relating to judicial discipline, and he served as co-reporter for the Third Circuit Judicial Council's rules implementing the Judicial Conduct and Disability Act of 1980. Formerly a consultant to the Federal Courts Study Committee and to the United States Trade Representative, Professor Burbank presently consults for the law firm of Dechert, Price & Rhoads, serves as a mediator, and is a special master in asbestos litigation.

LEVIN H. CAMPBELL, of Cambridge, Massachusetts, has been a member of the United States Court of Appeals for the First Circuit since 1972 and was chief judge of that circuit from 1983 to 1990. He became a Senior Judge in 1992. After graduating from Harvard College and Harvard Law School, Judge Campbell served during the Korean War in the U.S. Army Judge Advocate General Corps, practiced law, was elected to the Massachusetts House of Representatives, and served in the Massachusetts Attorney General's Office. He served briefly as U.S. District Judge for the District of Massachusetts and, before that, as an associate justice of the Massachusetts Superior Court. Judge Campbell was a member of the United States Judicial Conference from 1983 to 1990 and a member of its Executive Committee from 1984 to 1990. He continues to serve on Conference committees, having chaired the Committee to Review Circuit Council Conduct and Disability Orders since 1989. Judge Campbell was also a member of the Federal Courts Study Committee, appointed by Chief Justice Rehnquist in 1988.

STEPHEN L. CARTER, of Hamden, Connecticut, is the William Nelson Cromwell Professor of Law at the Yale Law School, where he has taught since 1982. His fields of expertise include constitutional law, intellectual property, and contracts. Professor Carter served as a law clerk to Judge Spottswood W. Robinson of the United States Court of Appeals for the District of Columbia Circuit and to Justice Thurgood

Marshall of the United States Supreme Court. He is the author of three books, *Reflections of an Affirmative Action Baby* (1991), *The Culture of Disbelief* (1993), and *The Confirmation Mess* (forthcoming). Professor Carter has also written numerous law review articles about separation of powers in the federal government and other areas of constitutional law. He is a member of the Federal Judicial Center History Program Advisory Committee, the National Board of Contributors of American Lawyer Media, and the Board of Directors of the Human Rights Project Group. He is a graduate of Stanford University and the Yale Law School.

CHARLES J. COOPER, of McLean, Virginia, a partner in the Washington, DC, law firm of Shaw, Pittman, Potts & Trowbridge, specializes in civil litigation and federal administrative law practice. Having graduated with honors from the University of Alabama and the University of Alabama School of Law, Mr. Cooper served as a law clerk, first to Judge Paul H. Roney of the U.S. Court of Appeals for the Fifth (now Eleventh) Circuit, and then to Justice (now Chief Justice) William H. Rehnquist. After his clerkships, he engaged in the private practice of law in Atlanta, Georgia, for two years. From 1981 until 1988, he served in three high-level posts in the U.S. Department of Justice: Special Assistant to the Assistant Attorney General, Civil Rights Division; Deputy Assistant Attorney General, Civil Rights Division; and Assistant Attorney General in the Office of Legal Counsel. While in the Reagan Administration, he also served as Chairman of the Domestic Policy Council's Working Group on Federalism. Mr. Cooper has written extensively in the areas of constitutional law, separation of powers, and the federal courts.

ROGER C. CRAMTON, of Ithaca, New York, is the Robert S. Stevens Professor of Law at Cornell Law School. An honors graduate of Harvard University and The University of Chicago Law School, he began his legal career by serving as law clerk successively to two federal judges, Sterry R. Waterman of the United States Court of Appeals for the Second Circuit (1955-56) and Harold H. Burton of the Supreme Court of the United States (1956-57). Professor Cramton has been engaged in law teaching since 1957, having served on the faculties of University of Chicago, University of Michigan, and Cornell University, where he also served as Dean for seven years. His scholarship has been primarily in the fields of administrative law, conflict of laws, legal profession, and torts. Professor Cramton also served as Chairman of the Administrative Conference of the United States from 1970 to 1972, as Assistant Attorney General in the Office of Legal Counsel of the Department of

Justice from 1972 to 1973, as President of the Association of American Law Schools (1985), and as editor of the Association's publication, *The Journal of Legal Education*, from 1981 to 1987. He also was the first chairman of the Board of Directors of the Legal Services Corporation from 1975 to 1978, as an appointee of President Ford.

HAMILTON FISH, JR., of Millbrook, New York, represents the 19th District of New York in the U.S. House of Representatives. First elected to the House in 1968, he has been reelected to each succeeding Congress. Congressman Fish is the ranking Republican on the House Committee on the Judiciary and on the Subcommittee on Economic and Commercial Law. He is also a member of the Subcommittee on Intellectual Property and Judicial Administration. Mr. Fish has received national recognition for his work on civil rights and disabilities, criminal justice, bankruptcy, immigration, and refugee law. Previously, he served in the U.S. Navy and in the U.S. Foreign Service. He is a graduate of Harvard College and the New York University School of Law, and he has been awarded honorary degrees from numerous institutions of higher learning. He is a member of the Board of Visitors of the U.S. Military Academy, West Point, and the Board of Directors of the New York State Martin Luther King, Jr., Institute for Non-Violence.

GORDON R. HALL, of Salt Lake City, Utah, has served as Chief Justice of the Supreme Court of Utah since 1981. He became a state trial judge in 1969 and was later elevated to the Supreme Court in 1977. Chief Justice Hall engaged in the private practice of law as a sole practitioner in Tooele, Utah, from 1952 until 1969. During that time, he served in various public service capacities: Attorney-Advisor to the Commanding Officer of the Tooele Army Depot; City Attorney of Grantsville; Town Attorney of Wendover and Stockton; and Tooele County Attorney. Chief Justice Hall has also served as Chairman of the National Center for State Courts (1988-89), and Member of the Board of Directors (1986-89); President of the Conference of Chief Justices (1988-89), and Member of the Board of Directors (1984-1989); Chairman of the Utah Judicial Council (1983 to present); and Chairman of the Utah Judicial Nominating Commissions; Member of the United States President's Advisory Board for O.E.O. (1966-68); and President of the Utah Association of Counties (1965). He holds both an undergraduate degree and a law degree from the University of Utah.

JOHN C. HARRISON, of Charlottesville, Virginia, is an Associate Professor of Law at the University of Virginia School of Law (effective

September 1993). Appointed to the Commission while serving as Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, he previously served in other high-level posts in the Department including Special Assistant to the Attorney General and Associate Deputy Attorney General. Professor Harrison also was a law clerk to Judge Robert H. Bork, United States Court of Appeals for the District of Columbia Circuit. Professor Harrison is a graduate of The University of Virginia and Yale Law School. After law school, he engaged in the private practice of law in Washington, DC, for two years.

HOWELL T. HEFLIN, of Tuscumbia, Alabama, was elected to the United States Senate in 1978 and reelected in 1984 and 1990. He was Chief Justice of the Alabama Supreme Court from 1971 to 1977 and was chairman of the Conference of State Chief Justices in 1976-1977. A senior member of the Senate Judiciary Committee and chairman of its Subcommittee on Courts and Administrative Practice, Senator Heflin also serves on the Senate Agriculture Committee and chairs its Subcommittee on Rural Development and Rural Electrification. He is also a member of the Small Business Committee, and for thirteen years chaired or co-chaired the Senate Ethics Committee. A member of the Senate committees that received evidence in two recent impeachment trials, he was appointed by Chief Justice Rehnquist to serve on the Federal Courts Study Committee. Senator Heflin has received numerous awards for his leadership on national issues relating to the justice system and agricultural policy reforms. He is a graduate of Birmingham Southern College and the University of Alabama Law School.

BETH NOLAN, of Washington, DC, is Associate Counsel to the President, Office of Counsel to the President. She also is a tenured Associate Professor of Law at The National Law Center, The George Washington University. Currently on leave, she ordinarily teaches constitutional law, professional responsibility and ethics, and jurisprudence. Professor Nolan is a graduate of Scripps College, Claremont, California, and the Georgetown University Law Center, where she served as Editor in Chief of the law review. Professor Nolan was a law clerk to Judge Collins J. Seitz of the U.S. Court of Appeals for the Third Circuit. From 1981 to 1985 she was an Attorney-Adviser in the Office of Legal Counsel, U.S. Department of Justice. She recently chaired the American Bar Association Committee on Attorneys Employment and Practice, Section of Administrative Law and Regulatory Practice, and is the author of numerous articles on ethics in government and conflicts of interest.

ARLEN SPECTER, of Philadelphia, Pennsylvania, is the senior United States Senator for the State of Pennsylvania. First elected in 1980 and reelected in 1986 and 1992, he began his public service career as an Assistant District Attorney for the City of Philadelphia. In 1964, he was appointed counsel to the Warren Commission to investigate the assassination of President Kennedy. His legal achievements led to his initial election as District Attorney of Philadelphia and his reelection to a second term of office. In the Senate, Senator Specter has established himself as a leader on issues related to criminal justice, drugs, terrorism, and civil rights. He is a longtime member of the Senate Committee on the Judiciary and also serves on the Committees on Appropriations, Veterans' Affairs, Aging, Energy, and Natural Resources. A former member of the Senate Intelligence Committee, he authored legislation to create an independent CIA Inspector General. He served as Vice-Chairman of the Senate Impeachment Trial Committee in the case of Alcee Hastings. Senator Specter is an honors graduate of the University of Pennsylvania and Yale Law School, where he was on the Board of Editors of the law review.

FRANK M. TUERKHEIMER, of Madison, Wisconsin, is a Professor of Law at the University of Wisconsin. He is a graduate of Columbia College and the New York University Law School, where he was a Root Tilden Scholar and Note Editor of the law review. He clerked for the Honorable Edward Weinfeld, United States District Judge for the Southern District of New York, and he then worked as a legal assistant to the Attorney General of Swaziland. From 1965 to 1970, he was an Assistant U.S. Attorney in the Southern District of New York. Among the many cases he prosecuted were securities and white collar frauds and civil rights act violations. He joined the Wisconsin law faculty in 1970, and then served as an Associate Special Prosecutor to the Watergate Special Prosecution Force from 1973 to 1975. From 1977 to 1981 he was United States Attorney for the Western District of Wisconsin, taking leave from his faculty position. Since 1985, he has been "of counsel" with the Madison law firm of LaFollette and Sinykin. Since 1981, he has prosecuted disciplinary cases against judges and attorneys on behalf of state regulatory agencies, has represented the Wisconsin Civil Liberties Union and indigent defendants, and has been engaged in civil litigation.

STAFF

MICHAEL J. REMINGTON, of Arlington, Virginia, is Director of the Commission. Previously, he was Chief Counsel of the House Judiciary

Subcommittee on Courts, Intellectual Property, and the Administration of Justice, where he specialized in matters relating to the federal courts, impeachment, and intellectual property. Mr. Remington was a liaison and advisor to the Federal Courts Study Committee. He also served as Deputy Legislative Affairs Officer in the Administrative Office of the United States Courts and as an Honors Program Attorney in the Criminal Division of the United States Department of Justice. He holds an undergraduate degree and a law degree from the University of Wisconsin. After graduating from law school, he served as a law clerk to Judge John W. Reynolds, U.S. District Court for the Eastern District of Wisconsin, and as a Fulbright Scholar at the Conseil d'Etat in Paris, France.

WILLIAM J. WELLER, of Arlington, Virginia, is Deputy Director of the Commission. He is a former Legislative Affairs Officer for the Administrative Office of the United States Courts, where he served as counsel to the Judicial Conference Committee on Court Administration during development and implementation of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Mr. Weller also served as Staff Counsel to the Senate Committee on the Judiciary. He is a graduate of the Maxwell School of Public Affairs at Syracuse University, and a graduate of the Syracuse University Law School, where he served as a Law Review Editor and Student Instructor. Between undergraduate studies and law school, he served in the United States Navy.

MICHAEL STRAIGHT, of Edgewater, Maryland, serves as Assistant Director to the Commission. A graduate of Yale University and the Georgetown University Law Center, he served as a Legislative Assistant (House Judiciary Committee) to United States Representative John F. Seiberling, where he worked with the national commissions that reviewed federal wiretap laws and federal antitrust laws. He then served as staff attorney in the Federal Trade Commission's Bureau of Competition, and as Assistant Attorney General and Chief of the Division of Law for the National Government of the Federated States of Micronesia (1988-90). Prior to his employment by the Commission, Mr. Straight served as a consultant to the Commission.

CONSULTANTS

JEFFREY N. BARR* is a Staff Attorney for the U.S. Court of Appeals for the First Circuit, Boston, Massachusetts, where he has worked extensively on judicial discipline matters. Previously, he served as a law clerk for Judge Bailey Aldrich of the U.S. Court of Appeals for the First Circuit, and he practiced law in Boston, Massachusetts. Mr. Barr holds a law degree from the Harvard Law School.

ELIZABETH B. BAZAN* is an Attorney-Advisor (General) and Legislative Attorney for the American Law Division of the Congressional Research Service, Library of Congress, Washington DC Previously a law clerk to Judge R. Dorsey Watkins of the United States District Court for Maryland, she also served as Vice Chairperson for the Federal Bar Association's Administration of Justice Section. Ms. Bazan is a graduate of the University of Maryland School of Law.

MICHAEL J. GERHARDT is an Associate Professor at the Marshall-Wythe School of Law, the College of William and Mary, Williamsburg, Virginia, where he teaches constitutional law, civil liberties, and constitutional decision-making. Previously, he was a law clerk to Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit, and he practiced law in Washington, DC, and Atlanta, Georgia. Professor Gerhardt is a graduate of the University of Chicago Law School.

CHARLES G. GEYH is an Assistant Professor of Law at Widener University School of Law, Harrisburg, Pennsylvania. A graduate of the University of Wisconsin School of Law, he previously served as a law clerk to Judge Thomas A. Clark of the U.S. Court of Appeals for the Eleventh Circuit, practiced law at the Washington, DC, law firm of Covington & Burling, and served as counsel to the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

WARREN S. GRIMES is a Professor of Law at Southwestern University School of Law in Los Angeles, California, where he teaches legislation, antitrust, and business and corporate law. Prior to teaching, he served in various capacities for the United States Government,

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* An asterisk indicates government employees whose time was made available by their respective agencies or offices.

including the Office of Legal Counsel in the U.S. Department of Justice, Office of General Counsel, Federal Trade Commission, and the House Judiciary Committee Subcommittee on Monopolies and Commercial Law (where he was Chief Counsel). Professor Grimes is a graduate of the University of Michigan School of Law.

JEROME M. MARCUS is a practicing attorney in the law firm of Berger & Montague in Philadelphia, Pennsylvania. Previously, he served as an Assistant United States Attorney for the Eastern District of Pennsylvania, worked as Special Assistant to the Legal Advisor, U.S. Department of State, and practiced law in Washington, DC, for Mayer, Brown & Platt. After graduation from the University of Chicago Law School, Mr. Marcus served as a law clerk to the Honorable Edward R. Becker, U.S. Court of Appeals for the Third Circuit.

RICHARD L. MARCUS is a Professor of Law at the University of California's Hastings College of Law, San Francisco, California. A former law clerk to Justice Raymond Peters, California Supreme Court, and Judge Alphonso J. Zirpoli, U.S. District Court for the Northern District of California, he has taught at the University of Illinois and the University of Michigan and he has practiced law in the San Francisco, California, area. Professor Marcus, who also served as Associate Reporter to the Federal Courts Study Committee, is the author of numerous articles and casebooks about federal procedure. He is a graduate of the University of California, Berkeley, School of Law.

DAN M. McGILL is a Professor of Insurance, Wharton School of Business, University of Pennsylvania, Philadelphia, Pennsylvania, where he holds the Frederick H. Ecker Chair (first occupant of the second endowed chair of insurance in the United States) and served as Department Chairman from 1965 to 1989. He has taught throughout the United States, including at the University of Tennessee, the University of North Carolina, and Stanford University. Professor McGill is the author of numerous books, journal articles, and government publications about insurance and pensions. He holds a Ph.D. from the University of Pennsylvania and is the recipient of many honors, including the Founder's Award from the International Insurance Society.

TIMOTHY R. MURPHY is a consultat to the National Center for State Courts in Williamsburg, Virginia, where he previously worked as a senior staff attorney. A former law clerk to Judge Edward L. Filippine of the Eastern District of Missouri, Mr. Murphy also served from 1981

to 1987 as an Assistant Prosecuting Attorney, Office of the Circuit Attorney, in St. Louis, Missouri. He holds a law degree from the St. Louis University School of Law.

BETH NOLAN is a tenured Associate Professor of Law at The National Law Center, The George Washington University, Washington DC. After completion of her consultancy, she became Associate Counsel to the President at The White House and was appointed to the Commission by President Clinton. (See her member biography.)

TODD D. PETERSON is an Associate Professor of Law at The National Law Center, The George Washington University, Washington, DC, where he teaches constitutional law, federal courts, and civil procedure. Previously, he served as an Attorney-Advisor at the Office of Legal Counsel, U.S. Department of Justice, and practiced law in Washington, DC Professor Peterson holds a law degree from the University of Michigan School of Law.

PETER M. SHANE is a Professor of Law at the University of Iowa College of Law, Iowa City, Iowa. He teaches constitutional law, administrative law, and comparative administrative law. Previously, he served as a law clerk for Judge Alvin B. Rubin of the U.S. Court of Appeals for the Fifth Circuit and as an Attorney-Adviser in the Office of Legal Counsel, U.S. Department of Justice, in Washington, DC He is co-author of recently published casebooks on presidential power and on administrative law. Professor Shane has a J.D. degree from the Yale Law School.

KERSI B. SHROFF* is a Senior Legal Specialist of the American-British Law Division of the Law Library of Congress in Washington, DC Mr. Shroff is a Barrister-at-Law from Lincoln's Inn in London. He received his LL.B. from the University of Karachi, Pakistan, and a Master of Comparative Law from The National Law Center, The George Washington University.

WILLIAM K. SLATE II is the President of the Justice Research Institute in Philadelphia, Pennsylvania. Previously, he served as the Director of the Federal Courts Study Committee, Project Director for the Public Committee on the Federal Court Report, the Executive Director of the Virginia State Bar, and as a Circuit Executive of the Third Judicial Circuit of the United States. Mr. Slate, who is a graduate of the

University of Richmond Law School, has taught law at Seton Hall, University of Richmond, and Virginia Commonwealth University.

EMILY FIELD VAN TASSEL* is an Associate Historian in the Federal Judicial History Office of the Federal Judicial Center, Washington, DC Previously, she taught history at the University of Maryland, College Park, and served as a Congressional Fellow with the Senate Committee on the Judiciary. She will be a Visiting Associate Professor of Law at the Widener University School of Law beginning in the Fall of 1993. Professor Van Tassel has a J.D. degree from the University of Wisconsin Law School, and she is a Ph.D. candidate at the University of Chicago.

THOMAS EUGENE WILLGING* is a Researcher at the Federal Judicial Center, Washington, DC Previously, he was a Professor of Law at the University of Toledo in Ohio, where he also practiced law in the firm of Lackey, Nussbaum & Harris. He is the author of several publications concerning court procedure. Mr. Willging has a J.D. degree from The Catholic University of America and an LL.M. degree from Harvard University Law School.

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testified about issues of bias, particularly gender bias, including sexual harassment, in the federal courts.

Following the issuance of its draft report and tentative recommendations, the Commission conducted field hearings in Philadelphia, Chicago, and San Francisco, at which the Commission received many constructive suggestions. The witnesses who testified at those hearings were Robert M. Landis (Chairman of the American Bar Association Task Force on Judicial Removal); Judge John M. Walker, Jr. (U.S. Court of Appeals for the Second Circuit and President of the Federal Judges Association); Judge Norma L. Shapiro (U.S. District Court for the Eastern District of Pennsylvania); Chief Judge Dolores K. Sloviter (U.S. Court of Appeals for the Third Circuit); Judge Jon O. Newman (U.S. Court of Appeals for the Second Circuit); Professor Ronald Rotunda (College of Law, University of Illinois); Collins Fitzpatrick (Circuit Executive of the U.S. Court of Appeals for the Seventh Circuit); John Simon (President of the Chicago Bar Association); Judge Vivi L. Dilweg (Circuit Court, State of Wisconsin and Co-Chair of the American Bar Association Subcommittee on Judicial Discipline); Thomas Shriner (President of the Seventh Circuit Bar Association); Frederick B. Lacey (former federal judge, U.S. Attorney, independent counsel); Judge Michael S. Kanne (U.S. Court of Appeals for the Seventh Circuit); Dr. Frances Kahn Zemans (President of the American Judicature Society); Barry Miller (President of the Chicago Council of Lawyers); Chief Judge J. Clifford Wallace (U.S. Court of Appeals for the Ninth Circuit); and Fred Blum (Regional President of the American Jewish Congress). Numerous other individuals and organizations wrote or telephoned the Commission with suggestions or comments on the draft report and recommendations.

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Individuals

Professor Kathryn Abrams
Alfred Adask
William W. van Alstyne
Honorable James A. Anderson
Professor Stanley Anderson
Professor Terence J. Anderson
Dean Judith C. Areen
Honorable Richard S. Arnold
Nan Aron, Esq.
Representative Douglas Applegate
Jeannette Aspden
George Francis Bason, Jr., Esq.
Honorable Edward R. Becker
Milner Benedict, Esq.

Representative Howard Berman
Honorable James R. Browning
Professor Eleanore Bushnell
Andre Carrington
Richard Charlton
Representative Howard Coble
Honorable John C. Coughenour
Professor Karen Czapanskiy
W.H. Dillahunty, Esq.
John P. Frank, Esq.
Daniel Freeman, Esq.
Professor Fred W. Friendly
Steven G. Gallagher, Esq.
Professor John H. Garvey
Honorable John F. Gerry
Francis X. Gindhart, Clerk
Oscar Goodman, Esq.
Professor Joel Grossman
Cynthia Gray
Hayden Gregory, Esq.
Professor Angela P. Harris
Honorable A. Leon Higginbotham, Jr.
Honorable Daniel H. Huyett, 3rd
Representative Henry Hyde
Honorable Dale E. Ihlenfeldt
Shahsultan Jaffer
Onofre Jusino
George Kassouf, Esq.
Robert A. Katzmann, Esq.
Dixie K. Knoebel
Lawrence M. Lesser
Professor A. Leo Levin
Rae Lovko
Beverly Mann, Esq.
Dean Howard T. Markey
Thomas Mooney, Esq.
Honorable Diana E. Murphy
Honorable Brenda P. Murray
Marilyn Nejelski
Robert J. Neville
Ralph Oman, Esq.
Honorable Robert M. Parker
John Podesta, Esq.
Scott Rafferty, Esq.
Tom Railsback, Esq.
Honorable Sylvia H. Rambo
Professor Judith Resnik
Honorable John W. Reynolds
Peter W. Rodino. Jr., Esq.
Joseph R. Ross
Alexander Russo
Representative George E. Sangmeister
George, Doris and Elena Sassower
Scott Schell, Esq.
Honorable Mary M. Schroeder
Honorable Collins J. Seitz
Professor Jeffrey M. Shaman
Alan Slobodin, Esq.
Honorable Charles Z. Smith
Honorable Loren A. Smith
Ronald K. Somerville
Honorable Stanley Sporkin
David Overlook Stewart, Esq.
Honorable Deanell Reece Tacha
Representative Frank Tejeda
Honorable Betty Weinberg Ellerin
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Organizations

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Pro Bono Law Firms and Individuals

Kathryn M. Fenton, Esq.
Ernest Gellhorn, Esq.
Barbara McDowell, Esq.
Peter J. Wang, Esq.
Jones, Day, Reavis, & Pogue
Washington, DC

Mark Gitenstein, Esq.
Curtis Hane
Katherine J. Henry, Esq.
Mayer, Brown, & Platt
Washington, DC

Katherine J. Henry, Esq.
David M. Schwartz, Esq.
Winthrop, Stimson, Putnam & Roberts
Washington, DC

Gary B. Born, Esq.
Peter B. Hutt II, Esq.
Wilmer, Cutler & Pickering
Washington, DC

Abe Krash, Esq.
Erica F. Plave, Esq.
James S. Portnoy, Esq.
Sarah K. Saunders, Esq.
Arnold & Porter
Washington, DC

David B. Isbell, Esq.
Carolyn F. Corwin, Esq.
Thomas H. Odom, Esq.
David H. Resnicoff, Esq.
Frederick S. Young, Esq.
Covington & Burling
Washington, DC

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