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ARTICLE: REGULATING JUDICIAL MISCONDUCT AND DIVINING "GOOD BEHAVIOR" FOR FEDERAL JUDGES.

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SUMMARY:
... In recent years, we have witnessed an unprecedented number of instances in which federal judges have been accused of criminal behavior and other serious acts of misconduct. ... In defining "good behavior" for federal judges, and in seeking solutions for judicial misconduct and disability, I start with the principle of judicial independence. ... I think that the congressional enactment at issue in Hastings raises grave concerns because it cannot easily be squared with traditional notions of judicial independence and separation of powers. ... But if a judge can be made to answer outside of the criminal and impeachment processes for judicially related activities, pursuant to a loosely constructed congressional act regulating judicial "misconduct," one wonders about the sanctity of separation of powers and the inviolability of judicial independence. ... Aside from this change -- which, ironically, produced no real clarity in the definitions of either impeachable conduct or "good behavior" -- the debates focused generally on how to best ensure an independent judiciary; in fact, judicial removal was of little concern to the Framers. ... Thus, while acknowledging the existence of "bad behavior," the "good behavior" clause gives Congress no additional removal power beyond impeachment. ... It means, precisely, that one branch should not perform another's function. ...

TEXT:
[*765] PROLOGUE

In recent years, we have witnessed an unprecedented number of instances in which federal judges have been accused of criminal behavior and other serious acts of misconduct. This raises major concerns regarding the scope and enforcement of canons of conduct for members of the judicial branch. It would be presumptuous for anyone to suggest a complete understanding of the notion of "good behavior" for federal judges, or to claim a fully satisfactory prescription for the problem of "judicial misconduct." That is not my object.

In reflecting on these issues, however, I have come to realize that I may not share certain assumptions that appear to underlie recent legislative enactments, scholarly proposals, and judicial initiatives directed at the regulation of judicial conduct.

In defining "good behavior" for federal judges, and in seeking solutions for judicial misconduct and disability, I start with the principle of judicial independence. At the birth of our nation, Alexander Hamilton charted one of the fundamental precepts upon which our system of government is founded:

[The] independence of the judges is . . . requisite to guard the constitution and the rights of individuals [against legislative encroachments and] from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves. . . . n1

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n1. THE FEDERALIST NO. 78, at 527 (A. Hamilton) (J. Cooke ed. 1961).

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For the nearly 200 years that have passed since Hamilton wrote these words, we have endeavored to preserve an independent judiciary as a "citadel of the public justice and the public security." n2 Our Founding Fathers were clear in their determination to reject the English tradition which had fostered legislative interference with the regular courts [*766] of justice. n3 And, regardless of differences in legal philosophy, proponents of judicial activism and judicial restraint alike have long agreed that, in order to fulfill its designated constitutional role, the judiciary must be independent in all ways that might affect substantive decisionmaking. n4

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n2. Id. at 524.

n3. P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA 1635-1805, at xi (1984).

n4. Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1104 (D.C. Cir. 1985) ("Hastings I") (Edwards, J., concurring), cert. denied, 477 U.S. 904 (1986).

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This principle of judicial independence must be considered in conjunction with the separation of powers doctrine n5 in any effort to address the problems of judicial misconduct and disability. Together, judicial independence and separation of powers make clear that the only constitutionally permissible way to regulate judicial misconduct and disability that does not involve impeachable action is through a system of judicial self-regulation unencumbered by any form of congressional interference.

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n5. See infra Part II.B.

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I. JUDICIAL INDEPENDENCE AND JUDICIAL MISCONDUCT: THE PROBLEM IN CONTEXT

The principle of judicial independence is embodied in article III, section 1 of the Constitution, which says that "[t]he 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." n6 Although the Constitution does not explicitly say that federal judges are appointed for life, the Framers contemplated "permanency in office" and rejected the possibility that judges might be required to stand for reelection or reappointment. n7 The Framers also explicitly rejected the English system of monarchical and legislative interference with the courts. n8

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n6. U.S. CONST. art. III, @ 1.

n7. THE FEDERALIST No. 78.

n8. See J. GOULDEN, THE BENCHWARMERS 10 (1974) (noting the colonists' grievance, as recited in the Declaration of Independence, that King George had "made judges dependent on his will alone for the tenure of their office"); P. HOFFER & N. HULL, supra note 3, at xi.

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The nondiminishable salary provision is also clearly intended to buttress the independence of individual judges. As explained by Alexander Hamilton, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." n9 The Framers also considered and rejected a permanent salary. They chose instead to make it nondiminishable in the [*767] event that inflation would later render "penurious and inadequate" a salary considered high when set; thus, the salary provision "afford[ed] a better prospect of [the judges'] independence than is discoverable in the constitutions of any of the states[ ] in regard to their own judges." n10

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n9. THE FEDERALIST, supra note 1, No. 79, at 531.

n10. Id. at 532.

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Moreover, the Framers designed a deliberately cumbersome removal mechanism, impeachment by the House of Representatives n11 and removal upon conviction by two-thirds of the Senate, n12 to provide additional protection of the judiciary against congressional politics. The Senate was chosen as the adjudicator, because, according to Hamilton, the Senate's "confidence . . . in its own situation" would enable it to be impartial by remaining "unawed and uninfluenced" by either the accused or his accusers. n13 And of course, the

two-thirds majority needed for conviction was considered an important deterrent to conviction on spurious charges.

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n11. U.S. CONST. art. I, @ 2, cl. 5.

n12. U.S. CONST. art. I, @ 3, cl. 6.

n13. THE FEDERALIST, supra note 1, No. 65, at 441 (emphasis in original).

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This principle of judicial independence is actually an outgrowth of the separation of powers doctrine. As James Madison put it in The Federalist,

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others. . . .

It is equally evident that members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. n14

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n14. Id. No. 51, at 348-49. Madison was speaking on the importance of the judiciary's independence from the appointing authority.

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Thus, under our constitutional scheme, judges are given broad independence through life tenure without salary diminution and protection against arbitrary removal from office. That independence is checked, however, by the requirement of article III that the holder of a judicial office serve with "good Behavior." n15 But an anomaly inheres in this arrangement. Under article II, a judge is subject to impeachment and removal only upon conviction by the Senate of "Treason, [*768] Bribery or other high Crimes and Misdemeanors." n16 Consequently, a judge may remain in office -- and not be subject to impeachment -- even in the face of serious misconduct or disability. In other words, even though the Constitution imposes a standard of "good Behavior," it does not sanction the removal of a judge from office for every serious act of misconduct.

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n15. U.S. CONST. art. III, @ 1.

n16. U.S. CONST. art. II, @ 4.

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This constitutional void has been magnified in the public view in recent years, as several judges have been accused of egregious misconduct and official wrongdoing. In 1986, for the first time in fifty years, a federal judge was removed from office through impeachment. n17 In the last three years, three federal judges have faced impeachment charges: one has been impeached and convicted; one has been impeached and is now awaiting trial before the Senate; and one case is still pending before the House of Representatives. n18 Prior to 1986, only ten federal judges had ever been impeached by the House, and only four of those judges were convicted and removed from office. n19

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n17. That judge was Nevada District Court Chief Judge Harry Claiborne. See, e.g., Senate Convicts Judge of "High Crimes," Wash. Post, Oct. 10, 1986, at A1, col. 3. Before Claiborne, the last judge impeached was Florida District Court Judge Halsted L. Ritter in 1936, for improprieties in a receivership case. J. BORKIN, THE CORRUPT JUDGE 199-200, 243-44 (1962).

n18. See Impeachment in the House, Wash. Post, Aug. 9, 1988, at A19, col. 1.

n19. See id.

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The recent news is indisputably troubling. Aggravating the spectacle of the impeachments has been the fact that two of the cited judges went to prison while still in office, one for tax fraud n20 and the other for perjury. n21 Both of these judges continued to draw their salaries while in prison pending their impeachments. n22

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n20. See United States v. Claiborne, 727 F.2d 842, 843 (9th Cir.), cert. denied, 469 U.S. 829 (1984).

n21. This was Southern District of Mississippi Chief Judge Walter Nixon. See U.S. Judge Convicted of Perjury; Cleared of Accepting Illegal Gift, N.Y. Times, Feb. 10, 1986, at A1, col. 3.

n22. See Panel To Seek Impeachment of Judge, N.Y. Times, July 8, 1988, at A8, col. 3; Impeachment Hearing Is Urged for U.S. Judge, N.Y. Times, Mar. 17, 1988, at A21, col. 5.

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Probably the most noteworthy case among these recent instances of alleged judicial misconduct is the one involving Judge Alcee Hastings of the Southern District of Florida. Judge Hastings has been involved in extended and unusual litigation, attracting the most press interest. In 1983, Hastings was acquitted by a jury of criminal bribery charges; n23 yet, in 1988, Hastings was impeached by the House of Representatives on seventeen articles of impeachment, covering, among other things, the bribery and perjury charges of which he was acquitted [*769] in 1983. n24 From a theoretical standpoint, Hastings' situation

raises important constitutional questions, not only about the impeachment standard, but also more generally about the grant of life tenure to federal judges, the required standard of conduct for members of the judiciary, and the appropriate regulators of breaches of this ethic. In 1985, and again in 1987, Judge Hastings challenged the constitutionality of the statute that authorized the Judicial Conference to investigate him after his criminal acquittal. n25 Thus far, all of his challenges have failed. But the problems highlighted by the Hastings case suggest questions of the greatest significance in any consideration of judicial misconduct.

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n23. See Hastings I, 770 F.2d at 1097; see also Judge Acquitted in 1983 Says Panel Wants Him Impeached, N.Y. Times, Aug. 27, 1986, at A14, col. 5.

n24. See REPORT OF THE HOUSE COMM. ON THE JUDICIARY TO ACCOMPANY H. RES. 499, IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, H.R. REP. NO. 810, 100th Cong., 2d Sess. 1-5 (1988); Impeachment in the House, Wash. Post, Aug. 9, 1988, at A19, col. 1.

Hastings was the first black to be appointed to the federal bench in Florida, and most media attention has been on Hastings' allegations that his prosecution was the result of racial discrimination by the Justice Department. See, e.g., The Perplexing Case of Judge Alcee Hastings, Wash. Post, July 7, 1988, at C1, col. 1; 60 Minutes: Alcee Hastings (CBS television broadcast, Aug. 14, 1988) (transcript available through 60 Minutes).

n25. See Hastings I, 770 F.2d at 1093; Hastings v. Judicial Conference of the United States, 829 F.2d 91 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1487 (1988) ("Hastings II").

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Nineteen years ago, in an oft-quoted dissent in Chandler v. Judicial Council, n26 Justice Black expressed his fear that the Supreme Court was allowing "the hope for an independent judiciary" to become "no more than an evanescent dream." n27 Chandler involved an order issued by the Tenth Circuit Judicial Council that Judge Chandler, a federal district judge, "take no action whatsoever in any case or proceeding now or hereafter pending" n28 in his court because of his allegedly unacceptable performance. In a separate dissenting opinion, Justice Douglas, with whom Justice Black concurred, argued that "there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge." n29 The majority opinion in Chandler ducked the issues raised by Justice Douglas and Justice Black by declaring that the Court had no authority to consider the petitioner's claim because he had failed to make out a case for the extraordinary relief of mandamus or prohibition. n30

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n26. 398 U.S. 74, 141 (1970) (Black, J., dissenting).

n27. 398 U.S. at 143.

n28. 398 U.S. at 78.

n29. 398 U.S. at 137 (Douglas, J., dissenting).

n30. 398 U.S. at 89.

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The dissenting opinions in Chandler are important because they suggest, without apparent challenge from the Court's majority, that judicial independence protects a judge not only from external legislative [*770] and executive censors and sanctions, but also from regulation by colleagues on the bench. Under this view, an individual judge may not be regulated except through impeachment or criminal prosecution. This is a startling notion if it is true that there are serious acts of misconduct that do not rise to the level of impeachable conduct. Indeed, even if one were to accept the proposition that any act of misconduct is subject to impeachment, the Black/Douglas position is still quite extreme, because we know from history that Congress is loathe to invoke the impeachment process against federal judges. Thus, adoption of the view espoused by Justices Black and Douglas would mean that individual judges would be left to define "good behavior" in all cases not involving criminal or impeachable conduct. The problem with this approach is that it leaves untended a wide category of judicial misconduct and virtually all forms of judicial disability, save through self-regulation by individual judges. Nonetheless, the Black/Douglas position raises a compelling point that cannot be ignored. Individual judges must be afforded an enormous measure of independence to ensure that, in the words of John Marshall, each will have "nothing to influence or control him but God and his conscience." n31 The dissenting opinions in Chandler fortify this precept.

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n31. Evans v. Gore, 253 U.S. 245, 250 (1919) (quoting John Marshall, cited at Debates, Va. Conv. 1829-1831, 616, 619).

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With the idea of judicial independence as a goal, the Framers fashioned constitutional devices to protect judges against the "will of [the] masses, or the will of the national legislature, [or] the will of the national executive." n32 Because judges needed to be confident that they could decide each case before them without fear of reprisal, their tenure had to be independent of any other opinion. But it does not necessarily follow that individual judges must be left to determine for themselves the meaning of "good behavior" or be free from all but self-regulation to deal with serious misconduct and disability that does not rise to the level of impeachable action. It is at this juncture in the analysis that I part company with Justice Douglas and Justice Black.

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n32. Otis, A Proposed Tribunal: Is It Constitutional?, 7 U. KAN. CITY L. REV. 3, 42 (1938).

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In considering the problem of judicial misconduct and disability, I start with the principles of judicial independence and separation of powers. In general terms, I reach the following conclusions: first, no judge may be removed from office except through impeachment; second, Congress may define and execute the Constitution's impeachment provisions as it sees fit, and the other branches of government have no control over Congress in its exercise of this authority; and, third, for improper behavior that does not reach the high, "impeachable" [*771] threshold, the judiciary alone has the constitutional authority to regulate its own members. In my view, this interpretation of the Constitution is the only one faithful to the language of the document, to the ideals that prompted that language, and to the few cases that have addressed it.

Although recent events (involving Judges Claiborne, Nixon, and Hastings) have focused attention on unfortunate instances of alleged judicial misconduct, I have no reason to doubt the integrity of the federal judiciary as a whole. Indeed, I believe that most of my colleagues would agree that corruption is a typical among federal judges. n33 However, I am willing to accept that there may be a few dishonorable judges. I also believe that in order to maintain the high level of public confidence crucial for the judiciary's continued vitality, n34 individual judges must maintain a standard of conduct that is, perhaps, less forgiving than that to which the average citizen is held. n35 These dual beliefs in the integrity of the judiciary and in its uncompromising ethical standard support my assertion that members of the federal bench are uniquely well-qualified to judge their peers fairly.

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n33. See, e.g., the remarks of Justice John Paul Stevens at the Stetson University College of Law's 1983 Inns of Court Banquet: "I have no doubt that virtually all of [the 1,000 federal and more than 26,000 state judges] are rendering judicial service that is entitled to the highest respect." Stevens, Reflections on the Removal of Sitting Judges, 13 STETSON L. REV. 215, 220 (1984). See also Kaufman, Chilling Judicial Independence, 88 YALE L.J. 681, 682 (1979).

n34. See, e.g., THE FEDERALIST, supra note 1, No. 78, at 523 ("The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment.") Cf. id. No. 65, at 441 ("[I]t is . . . to be doubted whether [the Supreme Court] would possess the degree of credit and authority, which might, on certain occasions, be indispensable, towards reconciling the people to a decision, that should happen to clash with an accusation brought by their immediate representatives."); J. GOULDEN, supra note 8, at 11 (remarking at the fact that the judiciary is obeyed in controversial decisions even in the face of potentially violent resistance).

n35. See generally Lubet, Judicial Ethics and Private Lives, 79 NW. U. L. REV. 983, 985-88 (1985).

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It is with these ideas in mind that I view the Hastings case to be a truly significant one. After he was acquitted of criminal charges, Judge Hastings faced "charges" brought by his judicial colleagues pursuant to a congressional

enactment allowing for the prosecution of individual judges before a Judicial Council for alleged acts of misconduct. n36 What is noteworthy about the Hastings case is not that his colleagues saw fit to proceed against him, but that they did so pursuant to a congressional statute that seeks to proscribe a wide range of [*772] judicial misconduct, and to endorse disciplinary sanctions short of impeachment.

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n36. See Judicial Councils Reform and Judicial Conduct and Disability Actof 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. @@ 331, 332, 372, 604 (1982)); see also infra Part III.

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I think that the congressional enactment at issue in Hastings raises grave concerns because it cannot easily be squared with traditional notions of judicial independence and separation of powers. In its zeal for efficiency and moral purity in the judicial ranks, Congress may have indulged "a cavalier assumption that the independence of the judiciary will not suffer significantly from 'minor' legislative encroachments." n37 But if a judge can be made to answer outside of the criminal and impeachment processes for judicially related activities, pursuant to a loosely constructed congressional act regulating judicial "misconduct," one wonders about the sanctity of separation of powers and the inviolability of judicial independence. I do not think we can afford to shy away from this problem merely because it involves delicate and difficult questions of constitutional law. Too much is at stake. In the sections that follow, I will address this issue and offer what I view as a viable framework for dealing with judicial misconduct.

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n37. Hastings I, 770 F.2d at 1105 (Edwards, J., concurring).

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II. THE CONSTITUTIONAL STANDARDS

A. The Relationship Between "Good Behavior" and Impeachable Conduct

As indicated in Part I, the Constitution contains three provisions related to judicial tenure: the impeachment clauses in articles I n38 and II, n39 and the good behavior clause in article III. n40 Article I establishes that the impeachment power lies only with Congress; article II states that the President, Vice President, and all civil Officers of the United States may be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors; and article III ensures that judges shall serve for life during good behavior.

Although the ambiguity arising from these provisions has caused much debate about, for example, whether or not impeachment is the exclusive constitutional means for removing federal judges, n41 several matters are beyond dispute. First, Congress, and only Congress, has the constitutional authority to execute the impeachment procedures, [*773] including defining what amounts to a "high crime[] and misdemeanor[]." While the definition Congress sets for this

term obviously impacts on the "good behavior" standard insofar as it sets the threshold across which conduct is to be disciplined by Congress alone, this definition is not for the judiciary or anyone else to determine. The standard does not admit of easy definition, and scholarly attempts have been all but futile. Notwithstanding the difficult hypothetical scenarios generated by commentators, however, history has shown that Congress rarely if ever has been inclined to abuse its power in defining "high crimes and misdemeanors" or in acting to impeach.

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n38. U.S. CONST. art. I, @ 2, cl. 5; art. I, @ 3, cl. 6.

n39. U.S. CONST. art. II, @ 4.

n40. U.S. CONST. art. III, @ 1.

n41. Compare Otis, supra note 32, at 13-16 (impeachment is the only constitutional way to remove judges) and Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. CHI. L. REV. 665 (1969) (same) with R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 122-80 (1973) (impeachment is not an exclusive remedy) and Shartel, Federal Judges -- Appointment, Supervision, and Removal -- Some Possibilities Under the Constitution, Part III: Judicial Removal of Unfit District and Circuit Judges, 28 MICH. L. REV. 870, 879 (1930) (same).

For interesting discussions of judicial discipline and impeachment, see generally, Symposium on Judicial Discipline and Impeachment, 76 KY. L.J. 633 (1987-1988).

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Second, it has never been disputed that judges were to be considered "civil officers" subject to impeachment under article II. This is perhaps because of the commentary published contemporaneously with the adoption of the Constitution:

The precautions for [federal judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, [they] may be dismissed from office and disqualified from holding any other. This is the only provision on the point[] which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges. n42

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n42. THE FEDERALIST, supra note 1, No. 79, at 532-33 (A. Hamilton). From the time of the first Congress, it was assumed that judges were impeachable. During the debate on the Judiciary Act of 1789, Congressman Smith of South Carolina stated that "[t]he judges are to hold their commissions during good behavior, and after they are appointed they are removable only by impeachment. . . ." 1 ANNALS OF CONG. 797 (J. Gales ed. 1834).

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The ambiguities of the Constitution nonetheless persist. For example, it has been argued that, because there is a "hiatus" between impeachable behavior and conduct that does not satisfy the standard of "good behavior" enunciated in article III, there must be remedies other than impeachment for disciplining and removing federal judges. n43 In other words, there is the question of how to deal with "not good" behavior that is neither criminal nor impeachable. Furthermore, the Constitution is unclear with respect to matters of criminal conduct. It has never been determined whether the reference to "treason, bribery, and other high crimes and misdemeanors" is intended to cover all (and only) criminal conduct. Just as there is arguably conduct that would be impeachable but not criminal, there may be conduct that is criminal but not impeachable.

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n43. See Otis, supra note 32, at 32-33.

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[*774] Thus, the Constitution suggests three theoretical categories of judicial misbehavior -- criminal, impeachable, and not good. Logically, all impeachable behavior is not good, and all criminal behavior is not good; but not all "not good" behavior is criminal, nor is it impeachable. The important question becomes: if there is a "hiatus" between impeachable behavior and other conduct that does not satisfy the standard of "good behavior" under article III, must the "not good" behavior go unregulated?

Examination of the debates at the Constitutional Convention does not offer much clarification. The Framers had originally used the term "maladministration" in place of the reference to "high crimes and misdemeanors." But "maladministration" was withdrawn by George Mason after Madison's objection that the term was so vague as to be virtually meaningless. n44 Aside from this change -- which, ironically, produced no real clarity in the definitions of either impeachable conduct or "good behavior" -- the debates focused generally on how to best ensure an independent judiciary; in fact, judicial removal was of little concern to the Framers. The impeachment provisions, which affect the President and Vice President as well as judges, were intended to act as a check primarily on executive rather than judicial activity. n45

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n44. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 550 (M. Farrand ed. 1911) [hereinafter M. FARRAND].

n45. R. BERGER, supra note 41, at 146-47.

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It is hard to say definitively whether all judicial impeachments have been for indictable conduct, or whether "high crimes or misdemeanors" has actually been interpreted to set a higher standard of conduct for judges than for citizens not holding public office. Some impeachments have been for acts considered criminal no matter the actor, such as accepting bribes, treason

(supporting the Secession), fraud or tax evasion, n46 others for conduct which is criminal when a judge is the perpetrator, such as favoritism towards or maltreatment of litigants. n47 It has been argued that some judges have been impeached, and in some cases convicted, for conduct that would not have been grounds for indicting an average, non-office-holding citizen. n48 Some [*775] scholars also contend that not all criminal conduct is impeachable. Ninth Circuit Judge J. Clifford Wallace, at a Senate Hearing on judicial discipline, recently suggested that not all crimes are considered so serious that they should mandate automatic forfeiture of office. n49 For example, destruction of a mailbox is a federal felony. n50 Similarly, adultery is a felony in some states. n51 Yet, it might be argued that these crimes are not of a magnitude to justify the disqualification of an otherwise competent judge.

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n46. Judge Claiborne was impeached for tax evasion, see Note, In Defense of the Constitution's Judicial Impeachment Standard, 86 MICH. L. REV. 420, 421 (1987); Judge Halsted Ritter for accepting kickbacks and for income tax evasion, see J. BORKIN, supra note 17, at 243-44.

n47. See, e.g., J. BORKIN, supra note 17, at 231-32 (Judge George English resigned before his impeachment on favoritism charges in 1925; Judge James Peck was acquitted on impeachment articles of mistreatment of counsel in 1830, id. at 240-41; Judge Harold Louderback was acquitted by the Senate in 1932 of charges of favoritism in appointment of incompetent receivers and allowing them excessive fees, id. at 238).

n48. See ten Broek, Partisan Politics and Federal Judgeship Impeachments Since 1903, 23 MINN. L. REV. 185 (1939). Ten Broek argues that Judges Ritter and Archbald were convicted of articles of impeachment that did not amount to indictable offenses. In 1936, Judge Ritter took a $ 4500 fee from a former law partner which was nevertheless held not to be a bribe. Archbald had "corrupt alliances" with coal mine owners and railroad officials. New Hampshire District Judge John Pickering has also come to be seen as impeached and convicted for drunkenness and profanity on the bench, when in fact Congress wanted to oust a judge who had gone insane. See J. BORKIN, supra note 17, at 242-43; THE FEDERALIST NO. 79, at 529 n.1 (P. Ford ed. 1898) (editor's note).

n49. See Hearings on S.J. Res. 364 and S.J. Res. 370 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 17 (1986), quoted in Note, supra note 46, at 451 n.175 (prepared statement of Judge J. Clifford Wallace).

n50. 18 U.S.C. @ 1705 (1982).

n51. See, e.g., IDAHO CODE @ 18-6601 (1987).

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The foregoing comments may seem a bit tangential here, because of my original statement that the definition of "treason, bribery, and other high crimes and misdemeanors" is a matter solely for Congress. n52 Yet, the potential existence of a "hiatus" between impeachable behavior and conduct that is not "good behavior" has broad analytical repercussions upon a finding of "not good" behavior. If to "hold office during good behavior" under article III simply

means that a judge is guaranteed life tenure so long as he or she avoids the commission of treason, bribery, or other high crimes and misdemeanors, then the hiatus does not exist, and the constitutional equation is fairly easy. Good behavior, as a constitutional matter, will be, tautologically, any conduct that will not support impeachment. But if "good behavior" is not the complete converse of "high crimes and misdemeanors," then a constitutional category of "not good" behavior must exist that is not subject to impeachment. If a judge cannot be impeached for this bad behavior, what kind of discipline may be used? Article III's "hold office" language could be read to instruct that a judge's continued tenure be contingent upon maintenance of "good" behavior. Syllogistically, a judge could be removed for bad behavior. Thus, one potential implication of the "hiatus" line of reasoning is that an alternative to impeachment must exist for removing a misbehaving [*776] judge if Congress chooses not to impeach for mere bad behavior. n53

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n52. But see Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 FORDHAM L. REV. 1, 57 (1970) (arguing that Congress does not retain the sole discretion to define impeachable offenses).

n53. This "exclusivity of removal" question has long been debated in the literature. See supra note 41 and accompanying text.

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While there may be some merit in this version of the "hiatus" theory, I nevertheless side with those who believe that impeachment is an exclusive means to remove federal judges. n54 Federal judges are guaranteed life tenure to protect their independence. The cumbersome impeachment mechanism is an important weapon against political winds. It protects the independence of federal judges as surely as does the guarantee of life tenure. If an easier alternative were available for removing federal judges, that independence would be threatened.

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n54. As I said in Hastings I, 770 F.2d at 1107 (Edwards, J., concurring).

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This need for judicial independence has apparently conquered competing concerns over time. No judge ever has been removed from office save through the formal impeachment process. Significantly, most congressional attempts to expedite removal have assumed that a constitutional amendment would be necessary first. n55 This point is dramatized by the case of Judge Nixon, who has continued to draw his judicial salary while in prison; no one has suggested that there is any legal way to stop paying him unless he is impeached.

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n55. See Kurland, supra note 41, at 697; Note, supra note 46, at 431.

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Even the ambiguous constitutional text, with its two judicial tenure clauses, can be read to be consistent with this conclusion. n56 If the good behavior clause actually "amplifies" the impeachment clause, "[e]ach borrow[ing] cogency and light from the other," n57 then the good behavior language may have been inserted to differentiate the standard for impeachment of judges from the standard for other civil officers. No other subset of the impeachable "civil officers" class is mentioned anywhere in the Constitution, perhaps because the terms of other civil officers are not constitutionally set. "Hold office during good behavior" may simply reinforce that "other officers shall hold their offices during a limited time, or according to the will of some [*777] person." n58 Thus, while acknowledging the existence of "bad behavior," the "good behavior" clause gives Congress no additional removal power beyond impeachment.

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n56. A more common structural argument derives from the maxim of statutory construction, expressio unius est exclusio alterius (the expression of one thing is the exclusion of another). It is significant that the Constitution mentions only impeachment when the Framers had a number of other removal procedures available to them from English precedent. See, e.g., Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 SUP. CT. REV. 135. One of these, by application of Congress to the Executive, was debated and rejected, M. FARRAND, supra note 44, at 428-29, and others had fallen into a disuse that rendered them "fossil" rather than precedent. Ziskind, supra, at 138. The Convention also rejected trial of impeachment by the judiciary. See Feerick, supra note 52, at 15-23. This context supports the argument that, had alternative removal means been intended, they would have been mentioned.

n57. W. BROWN, IMPEACHMENT -- A MONOGRAPH OF THE IMPEACHMENT OF THE FEDERAL JUDICIARY 10 (1914) (published as S. DOC. NO. 358, 63d Cong., 2d Sess. (1914)).

n58. 1 ANNALS OF CONGRESS 482 (J. Gales ed. 1834) (remarks of Congressman Lawrence). Congressman Lawrence continued, "[I]f all persons are to hold their offices during good behaviour, and to be removed only by impeachment, then this particular declaration in favor of the judges will be useless." Id.

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Of course, another line of reasoning doubts that this theoretical "hiatus" can actually exist in practice. In order to give rise to a "hiatus," "treason, bribery and high crimes and misdemeanors" must be interpreted literally to encompass a narrow class of bad acts; this approach reveals other bad acts that fall short of "treason, bribery and high crimes and misdemeanors," but for which some sort of sanction besides impeachment is appropriate. Examples of this could range from indecent personal habits inside or outside the courtroom, to substandard judicial performance, to mental or physical incapacity. But if "high crimes and misdemeanors" is defined more broadly, to encompass less grievous ethical infractions, then the gap between "not good" behavior and impeachable behavior disappears; they are merely two different ways of expressing the same type of conduct. Some scholars have embraced this alternative approach, n59 pointing to several judicial impeachments that arguably were based on this broader definition of high crimes. n60 They claim that, in fact, any "not good" behavior is impeachable, leaving a standard as

expressed by then-Congressman Ford that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history." n61

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n59. See, e.g., Yankwich, Impeachment of Civil Officers Under the Federal Constitution, 26 GEO. L.J. 849, 852-61 (1938).

n60. Cf. ten Broek, supra note 48, at 193 ("By [Judge Archbald's impeachment] conviction the Senate approved the doctrine that the constitutional provision that judges shall hold their offices 'during good behavior' is attended with the corollary that they may be removed by impeachment for behavior which is not good.").

n61. 116 CONG. REC. 11913 (1970).

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Yet, despite these arguments, it is generally fair to say that "judges cannot be removed for political reasons or mere misbehavior, but only for the 'gravest cause.'" n62 The undisputed fact that the Framers envisioned impeachment for "malconduct" to be a limited exception to the permanent tenure of judges makes it almost inconceivable that they designed the impeachment provision to be anything but a narrow stopgap against very serious abuses. Modern Congresses, no doubt mindful that the impeachment power ensures the accountability of the judges as well as their independence, have always wielded the responsibility with caution: no one ever has been impeached for less than serious [*778] malconduct. The cumbersome impeachment process itself has served to discourage its use for minor offenses. n63 Then-Congressman Ford's flippant statement asserts too much: in order to carry a majority of the House, any suggested standard for defining impeachable conduct must, as a political matter, find some support in the literal terms of the Constitution. Congress would not invoke the cumbersome impeachment process on a whim, without some defensible standard against which to judge an accused officeholder. The process requires too much of Congress' scarce time, n64 thus ensuring that the House will be unlikely to pursue impeachment for less than very serious charges.

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n62. Feerick, supra note 52, at 30.

n63. See Shenon, Impeachment of Judges: A "Cumbersome Tool," N.Y. Times, Apr. 2, 1986, at A16, col. 3; Nunn, Judicial Tenure, 54 CHI.-KENT L. REV. 29, 30 (1977) (impeachments take weeks of House and Senate time).

n64. See Note, supra note 46, at 447.

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History has thus left us with a rough consensus on two constitutional conclusions: first, that a constitutional hiatus between "bad behavior" and impeachable "high crimes and misdemeanors" exists, and, second, that impeachment is the only removal mechanism for federal judges. Even if the hiatus is not constitutionally derived, and "bad behavior" was intended to be coextensive

with "high crimes and misdemeanors," there will nonetheless always remain a category of potential judicial misconduct for which Congress, as a practical matter, will not impeach. With this said, the problem reemerges: If a judge may not be removed for anything short of impeachable conduct, and only Congress may impeach, the bad behavior that does not alarm Congress must be dealt with through an alternative method. Of course, some truly exceptional misconduct draws adverse publicity, and a judge may be shamed into resigning before impeachment is even considered. Thus, in today's electronic age, the media itself can perform limited triage on miscreant judges. n65 However, the truly difficult question is what other official remedies exist, and who may execute them.

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n65. I do not want to make too much of this point. I recognize that the impact of the media on public officials is a matter of some controversy. I only assert that a number of judges have been "publicized" out of office since the press became a potent force in American life. See, e.g., J. BORKIN, supra note 17, at 204; Battisti, An Independent Judiciary or an Evanescent Dream, 25 CASE W. RES. L. REV. 711, 743 (1975).

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B. Self-Regulation and Separation of Powers

Let me make clear just what I mean by behavior or disability that is arguably unimpeachable but not "good." As with everything else in the law, there are easy cases and hard cases. The easy cases are immediately quantifiable and call into question the judge's impartiality, dependability, [*779] or capacity to conduct official business. Examples might include harassment or abuse of counsel or litigants in the courtroom; blatant case mismanagement; inability or unwillingness to handle a reasonable caseload; inadequate or sloppy work product due to lack of intelligence or effort; or a public political endorsement. The cases become more difficult to assess, either as "misconduct" or "disability," when the conduct or incapacity does not consistently and directly affect judicial business. Examples might include alcoholism; infirmity due to age or illness; offensive behavior towards colleagues; breach of confidentiality, such as leaking information to the press or political allies; or even offensive personal behavior such as aberrant sexual conduct off the bench that comes into the public spotlight.

In this broad category of unimpeachable conduct and disability, especially with respect to the so-called "easy cases," I would submit that the ideal of judicial independence is not compromised when judges are monitored and even regulated by their peers. The principal limit to any system of judicial self-regulation is that it may not include any form of removal from office. This means that individual judges may not be sanctioned by their peers through discharge, imprisonment, n66 or salary reduction. n67 An argument also can be made that an individual judge may not have her judicial docket suspended by colleagues, for this, too, would amount to a form of removal from office. n68 But this argument sweeps too broadly because it would prevent a court from shifting case assignments to deal with situations in which a judge is either unable or unwilling to keep up with a reasonable caseload. Indeed, I believe that most members of the judiciary would readily agree that a court may temporarily remove a judge from the docket to allow or require him to catch up

in his work.

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n66. See Catz, Removal of Federal Judges by Imprisonment, 18 RUTGERS L.J. 103, 115-16 (1986); Note, supra note 46, at 425, 457. But see Burbank, Alternative Career Resolution: An Essay on the Removal of Federal Judges, 76 KY. L.J. 643, 671-72 & n.130 (1987-1988) (the Framers meant only "the formal termination of a commission or of tenure in office" when they wrote "removal from office" in art. I, @ 3, cl. 7).

n67. Cf. Hastings I, 770 F.2d at 1110-11 (Edwards, J., concurring) (to interpret the Act to preclude government payment of defendant judges' legal fees effectively diminishes judicial salaries); Hastings II, 829 F.2d at 103 (same).

n68. See Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 YALE L.J. 1117, 1131-33 (1985); Chandler v. Judicial Council, 398 U.S. 74, 84 (1970) (there is a "line defining the maximum permissible [discipline] intervention consistent with the constitutional requirement of judicial independence").

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Obviously, any system of peer control will produce some questionable cases. Nonetheless, as a general proposition, judicial self-regulation is the logical constitutional remedy for compelling "good behavior," and it offers the best commonsense approach to maintaining [*780] both judicial independence and judicial accountability. Constitutionally, self-regulation is compelled by separation of powers concerns, which, as I shall explain, require that the judiciary alone be responsible for regulating its own conduct short of impeachment and that neither Congress nor the Executive may meddle in the definition or regulation of behavior that is not otherwise impeachable conduct. It is of no real consequence whether we label unimpeachable bad behavior a "constitutional" category derived from the hiatus theory, or a practical manifestation of the fact that Congress will not, realistically, impeach a judge for every ethical infraction. The category and my analysis remain the same.

Pragmatically, self-regulation can work because judges are uniquely well-equipped to be fair in assessing claims of misconduct and disability. Though some have questioned whether any member of the judiciary could remain impartial when judging another judge because of the miscreant's "tarnishing effect" on the judiciary as an institution, n69 these commentators overlook a judge's ability to recuse himself from cases in which he n70 or a litigant n71 feels that the judge may not be able to maintain impartiality. More importantly, judges must put remote personal involvements behind them daily and decide cases on their merits rather than on personal bias. Just as most judges can separate issues of fact from issues of law, they also can winnow out issues of personal predilection from those of law and fact. They will easily be able to refer impeachable offenses to Congress and to deal internally with less serious ones.

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n69. See Note, supra note 46, at 453 ("there is arguably no judge in the federal system who could adjudicate another judge's trial without struggling

with objectivity").

n70. See 28 U.S.C. @ 455 (1988).

n71. See 28 U.S.C. @ 144 (1988).

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Not only is it the job of judges to be fair, they cannot afford to be cavalier in their execution of any system of self-regulation. In Chandler, Justice Douglas argued that we should never allow "federal judges to ride herd on other federal judges. This is a form of 'hazing' having no place under the Constitution." n72 His point was that the "idiosyncrasies" of individual judges "may be displeasing to those who walk in more measured, conservative steps[,] [b]ut those idiosyncrasies can be of no possible constitutional concern to other federal judges." n73 This is a powerful point and, in my experience on the bench, I have found that the force of the point made by Justice Douglas has never been lost on me or my colleagues. Every judge must live by the same [*781] standard. Judges cherish the principle of judicial independence. Every judge understands that judicial independence would be lost if individual judges were allowed to be dominated by the group. If one individual must forfeit her or his independence, a precedent is established that will threaten every member of the group. Judges will not tolerate this; thus, no member of the group is likely to discipline another without great caution.

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n72. Chandler, 398 U.S. at 140 (Douglas, J., dissenting).

n73. 398 U.S. at 141 (Douglas, J., dissenting).

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It could be suggested that this empathy between judges will make them act too quickly on behalf of the accused. This is not an insignificant concern, but I believe that this "bonding" instinct will be tempered by two factors. First, there will be an equal and opposite natural impetus by judges to be harsh with their peers because the misbehavior of one federal judge arguably has a ripple effect on the reputation of the judiciary as a whole. In a branch that depends heavily on public respect for its continued vitality, the image of a crooked judge can jeopardize the entire group. Second, in part due to this interdependence of reputations, judges will be reluctant to appear to be bestowing preferential treatment upon a misbehaving colleague. n74 Overall, judges' naturally empathetic and disapproving impulses will blunt each other, leaving them as the best people, from a practical standpoint, to carry out the judicial policing function.

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n74. See United States v. Claiborne, 781 F.2d 1327, 1331-32 (9th Cir. 1986) (Reinhardt, J., dissenting from denial of hearing en banc).

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This theory of judicial self-regulation derives from the constitutional language that gives rise to the separation of powers doctrine. The Constitution says nothing about separation of powers per se; it speaks only of the assignment of powers. Article I, section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States"; article II, section 1 vests "[t]he executive Power . . . in a President of the United States of America"; and article III, section 1 vests "[t]he 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." Yet, this simple assignment is the basis for the important constitutional doctrine of separation of powers. The Framers were aware that a well-functioning democracy required distinct governmental departments. No fewer than four of The Federalist papers defended the principle. n75 James Madison went so far as to state that "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty" than the separation of powers. n76 But [*782] the Framers also realized that separating powers did not necessitate isolating the branches of government. In fact, a democracy could not be sustained without interactive branches for common support and common restraint. The Federalist No. 48 explained that separating powers between the departments of government meant only "that the powers properly belonging to one of the departments[] ought not to be directly and compleatly administered by either of the other departments," n77 not that the branches had no power to check the actions of each other.

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n75. See THE FEDERALIST NOS. 47, 48, 49, and 51.

n76. THE FEDERALIST, supra note 1, NO. 47, at 324.

n77. Id. No. 48, at 332 (J. Madison).

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Thus, the Framers chose to assign powers, instead of ordaining "separateness," so as to maintain a careful balance between intrusion and isolation. Separation of powers does not mean that there is no constitutional interplay among the departments of government. It means, precisely, that one branch should not perform another's function. One branch's interference may occasionally be valuable to help another branch perform its own function. In fact, the Constitution mandates certain areas of interbranch oversight. Congress has some authority to ensure the efficient operation of the judiciary through the Necessary and Proper Clause, n78 as well as explicit authority to "ordain and establish" courts inferior to the Supreme Court, n79 and to make "[e]xceptions" and "[r]egulations" limiting the Supreme Court's appellate jurisdiction. n80 And, of course, the Constitution gives Congress the sole power of judicial removal through the impeachment clauses. n81 But there is nothing in the Constitution that authorizes Congress to meddle in the substance of judicial business.

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n78. U.S. CONST. art. I, @ 8, cl. 18.

n79. U.S. CONST. art. III, @ 1.

n80. U.S. CONST. art. III, @ 2, cl. 2.

n81. U.S. CONST. art. I, @ 2, cl. 5; art. I, @ 3, cl. 6.

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It might be contended that defining "good behavior" and disciplining judges for bad behavior involves something other than the substantive business of the courts. This position should be rejected on two grounds. First, the Constitution indicates only that Congress regulates judicial misconduct that involves the impeachment process and removal for impeachable offenses. There is no other constitutional authority justifying further congressional involvement in the regulation of good and bad behavior by members of the judiciary. Second, discipline short of removal from office directs how a judge will perform his or her job. We allow each branch to monitor infractions within its ranks to the extent that it can because the fundamental nature of its duties can be protected only by its own responsibility for day-to-day [*783] oversight functions. n82 However, if one branch meddles often in the daily functions of another, the boundaries between the two branches' substantive duties will be obscured. The Constitution's grant of impeachment power to Congress does not "trickle down" to reach and prevent other, nonimpeachable, conduct.

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n82. Some have argued that judges may be "disciplined" solely through impeachment. The ultimate position of Senator Mathias is that "impeachment is not only the sole constitutional means of removing miscreant judges, it is the sole constitutionally permissible means of disciplining federal judges." Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. 154 (1980), quoted in Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. PA. L. REV. 283, 295 n.42 (1982). I disagree. The Constitution does not give any indication that impeachment is the sole means to discipline judges. It only indicates that impeachment is the sole way to remove them.

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Precedent supports this functional analysis of the separation of powers doctrine. In INS v. Chadha, n83 the Supreme Court, speaking of the one-House legislative veto, noted that in order to preserve the checks on each branch of government and thus "maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." n84 Chadha teaches that only interbranch encroachments that exceed "functionally identifiable" n85 powers violate separation of powers. While not finding the one-House veto to be a judicial act, the Court acknowledged that if Congress did perform an act the substance of which was judicial in character, it would overstep its constitutional bounds. n86

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n83. 462 U.S. 919 (1983).

n84. 462 U.S. at 958.

n85. 462 U.S. at 951.

n86. 462 U.S. at 957 n.22.

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In the recent decision upholding the special prosecutor law, the Court again stressed a functional approach to the duties of the different governmental branches in analyzing whether the separation of powers doctrine had been violated. n87 Although finding that as a factual matter the statute providing for appointment of an independent counsel did not instruct or cause the legislative and judicial branches to overstep their constitutional boundaries, the Court's analysis turned on whether the Act "impermissibly interfer[ed] with the functions of the Executive Branch." n88

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n87. Morrison v. Olson, 108 S. Ct. 2597 (1988).

n88. 108 S. Ct. at 2622.

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As these cases suggest, the separation of powers doctrine is reciprocal in its application, insofar as it seeks to protect each branch of government to allow it to be functionally effective in the exercise of its assigned authority. Thus, the judiciary has regularly refused to interfere with the daily operations of the other branches when presented [*784] with the opportunity to do so. For example, lower federal courts have declined to decide cases that involved internal congressional affairs even though jurisdiction for judicial action might otherwise be found:

Prudential considerations present in . . . suits [involving internal congressional affairs] prompt[] judicial restraint in the exercise of the federal court's remedial powers under Article III. Congressional actions pose a real danger of misuse of the courts by members of Congress whose actual dispute is with their fellow legislators. We are reluctant to meddle in the internal affairs of the legislative branch, and the doctrine of remedial discretion properly permits us to consider the prudential, separation-of-powers concerns posed by a suit for declaratory relief against the complainant's colleagues in Congress. n89

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n89. Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985).

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This theory has been approved in such disparate matters as House Committee appointments procedures, n90 the constitutionality of new legislation when challenged by members of Congress who voted against it, n91 and most recently in a challenge to the seating in the House of the winner of a recount election.

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n90. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983).

n91. See, e.g., Moore, 733 F.2d 946; Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

n92. Morgan v. United States, 801 F.2d 445 (D.C. Cir. 1986), cert. denied, 480 U.S. 911 (1987).

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Even the Supreme Court has addressed the issue. In Roudebush v. Hartke, n93 the Court settled a limited question regarding the state of Indiana's power to prescribe the time, place, and manner of elections. The Court was careful to note, however, that it was "without power to alter the Senate's judgment" about seating its own members. n94 On this point, the Court noted that the determination as to "[w]hich candidate is entitled to be seated in the [United States] Senate is, to be sure, a nonjusticiable political question -- a question that would not have been the business of this Court even before the Senate acted." n95 Generally, it has been assumed that the Court will not examine the internal workings of the legislature except when an individual is or may be denied a constitutional right, most often a due process or first amendment right. n96 Otherwise, attention to separation of powers concerns, as manifested by the political question or remedial discretion doctrines [*785] ensures that the judiciary will not instruct Congress on how to keep its own house in order.

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n93. 405 U.S. 15 (1972).

n94. 405 U.S. at 18-19 (citing Reed v. County Commrs., 277 U.S. 376 (1928)).

n95. 405 U.S. at 19 (citing Powell v. McCormack, 395 U.S. 486 (1969)).

n96. See Powell v. McCormack, 395 U.S. 486 (1969) (compelling Congress to judge the "qualifications of its members" under article I, section 5 in a way that is true to the text of the Constitution).

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In my view, "[r]eciprocal respect for the courts suggests that Congress should, and arguably must, be equally reluctant to impose its preferences on the judiciary's governance of its internal affairs." n97 This reading of the separation of powers doctrine commands that Congress has no role to play in the handling of judicial misconduct that falls short of impeachable conduct.

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n97. Hastings I, 770 F.2d at 1108 (Edwards, J., concurring).

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At one time I was inclined to think that "the constitutional guarantee of an independent judiciary [was] . . . intended to secure the independence of individual judges as well as of the judiciary as an entity . . . [and that] [i]f independent decisionmaking is to be protected, then, individual judges must be shielded from coercion." n98 However, upon reconsideration of the necessary implications of the good behavior clause, specifically in conjunction with separation of powers concerns as I have delineated them, I now believe that individual judges are subject to some measure of control by their peers with respect to behavior or infirmity that adversely affects the work of the court and that does not rise to the level of impeachable conduct. I do not entirely reject the Black/Douglas position in Chandler, n99 for I believe that judicial independence must include significant independence for individual judges as a protection against what Justice Douglas calls "hazing" n100 by the peer group. But if "good behavior" is to have any real content and if we are to ensure that the judiciary remains independent from other branches of government, then judges alone must regulate individual cases of bad behavior and disability that do not amount to impeachable action. This limited system of judicial self-regulation raises no constitutional dilemma as long as removal power remains with Congress alone.

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n98. Hastings I, 770 F.2d at 1106, 1107 (Edwards, J., concurring) (emphasis in original).

n99. Chandler v. Judicial Council, 398 U.S. 74, 129-43 (1970).

n100. Chandler, 398 U.S. at 140 (Douglas, J., dissenting).

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C. Postscript on the Constitutional Issues

The foregoing analysis admits of a minor complication if one does not accept the hiatus theory. Under my principal approach, I assert that the Constitution creates a hiatus of "bad behavior," i.e., conduct that is neither "good behavior" under article III nor impeachable conduct under article II. I argue that the judiciary alone should monitor this bad behavior through a system of self-regulation. In response to [*786] those who reject the hiatus theory, I offer an alternative theory. Under the alternative approach I assert that, even if one were to accept the untenable position that all conduct that is not "good behavior" is impeachable, there would still be a de facto gap of bad behavior, because we know that Congress will not act to impeach in every case of misbehavior. I argue that judicial self-regulation should also be used to deal with this de facto category of bad behavior.

Under my principal approach, a question might be raised with respect to impeachable conduct that does not result in any congressional action. In other words, the House may elect not to proceed against a judge who is guilty of an impeachable offense, or the Senate may fail to convict. The question is whether there is any place for judicial self-regulation with respect to impeachable

conduct that does not result in impeachment. Obviously, such behavior will be a matter of great concern to the judiciary. Nonetheless, consistent with my view of the reciprocal aspects of separation of powers, I maintain that it is for Congress, not the judiciary, to deal with impeachable offenses. The judiciary may, of course, refer such matters to Congress for action, but congressional inaction will not justify judicial self-regulation.

A somewhat perplexing analytical problem arises, however, under the alternative approach, which assumes that any conduct not satisfying the constitutional standard of "good behavior" is impeachable conduct. Separation of powers theory might suggest that the judiciary cannot regulate such behavior because it is within the exclusive province of congressional authority. But this would leave wholly unattended the de facto category of bad behavior. Analytically, the only reasonable way to deal with this problem is to assume that, even if Congress may elect to impeach with respect to any conduct that is not "good behavior," no separation of powers concerns arise if Congress declines to act. In other words, if Congress does not act to impeach, then there can be no conflict between the branches and the de facto category of bad behavior should be subject to judicial self-regulation.

Both the principal and alternative approaches produce defensible results, although the former approach makes more sense in analytical terms. History has shown that Congress tends to define impeachable conduct narrowly, so the judiciary will rarely encroach on territory that is constitutionally reserved for congressional regulation. The greatest concern that we face is the hiatus (or de facto gap) of judicial misconduct that will remain unattended in the absence of judicial self-regulation. The principal approach deals with this concern in a manner that is consistent with the language of the Constitution and that averts any analytical confusion.

[*787] III. THE STATUTORY DIRECTIVE VERSUS THE CONSTITUTIONAL STANDARD

Given that, as a constitutional matter, Congress should stay out of the business of regulating judicial conduct that does not amount to impeachable behavior, it is difficult to comprehend the congressional enactment embodied in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. n101 The Act purports to "create a mechanism and procedures within the judicial branch of government to consider and respond to complaints against Federal judges." n102 Section 372(c) of the Act describes procedures for investigation and correction of judicial behavior, n103 and section 332 provides the circuit Judicial Councils with general authority to issue orders "necessary and appropriate . . . for the effective and expeditious administration of justice within its circuit." n104

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n101. Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified at 28 U.S.C. @@ 331, 332, 372, 604 (1982 & Supp. IV 1986)).

n102. H.R. REP. NO. 1313, 96th Cong., 2d Sess. 1 (1980).

n103. 28 U.S.C. @ 372(c) (1982).

n104. 28 U.S.C. @ 332(d)(1) (1982).

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The Act's purported "delegation" of power to the judiciary is seriously misguided for several reasons. There are at least two provisions in the Act that are questionable because they raise serious concerns regarding unlawful delegations of impeachment/removal power to the judiciary: one is the provision that instructs the judiciary to make recommendations to Congress about the impeachment of a judge; n105 the other is the provision that purports to authorize a Judicial Council effectively to "suspend" a judge from further work by removing his case docket. n106 Both of these provisions have been severely criticized by some scholars, n107 but they do not go to the heart of my concern with the Act. In my view, the most significant flaw in the Act is Congress' attempt to "delegate" power it never had.

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n105. 28 U.S.C. @ 372(c)(8) (1982).

n106. 28 U.S.C. @ 372(c)(6)(B)(iv) (1982) (a Judicial Council may order "that, on a temporary basis for a time certain, no further cases be assigned to any judge . . . whose conduct is the subject of a complaint").

n107. See, e.g., Catz, supra note 66; Comment, Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Act, 74 CALIF. L. REV. 1071 (1987); Note, supra note 68. But see Hastings II, 829 F.2d at 101-03 (no constitutional defect in allowing the Judicial Conference to determine that impeachment may be warranted and to certify such determination to the House of Representatives).

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Of course, Congress' attempt to "authorize" judges to utilize their inherent power to self-regulate is well intentioned. As stated in the Senate Report on the Act, "[j]ust as the legislative and executive branches have the means to discipline their respective officials, it is [*788] imperative that the judiciary implement its own disciplinary procedure." n108 Yet, the judiciary already could, and did, implement this power -- albeit informally -- before 1980. Thus, the Act could be no more than a redundant affirmation of constitutionally mandated jurisdiction. But to the extent that the Act "delegates" powers Congress never had, it endangers constitutional doctrine by making the judiciary's continued jurisdiction in this area dependent on Congress' continued consent.

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n108. S. REP. NO. 362, 96th Cong., 1st Sess. 5, 7, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 4315, 4321.

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This idea was expressed well in Myers v. United States, n109 a case that has been narrowed considerably by subsequent decisions n110 but that is still good law on this point. In Myers, the Supreme Court held that, in its attempt to make the President's constitutionally granted removal power dependent upon the Senate's consent to his decisions, a statute granting the President

appointment and removal power over postmasters with the advice and consent of the Senate was unconstitutional. After concluding that the Senate's responsibility to advise and consent to the appointment of executive officers n111 did not extend a corollary right to remove them, the Court reasoned that since the removal power over postmasters already lay with the President, Congress' grant of this right falsely implied that Congress could legislatively withdraw it. n112 Because Congress could not eliminate a constitutionally derived privilege through mere legislation, the statute was unconstitutional.

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n109. 272 U.S. 52 (1926).

n110. See Humphrey's Executor v. United States, 295 U.S. 602 (1935); Weiner v. United States, 357 U.S. 349 (1958).

n111. U.S. CONST. art. II, @ 2, cl. 2.

n112. Myers, 272 U.S. at 119-25.

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Applying the foregoing principles, the 1980 Act is arguably twice flawed: first, Congress cannot delegate broad judicial oversight powers it never had; second, under Myers, this attempted delegation creates the false impression that Congress could, by withdrawing its assent to the grant of the right, also withdraw the right itself.

Admittedly, the Act tries to accommodate separation of powers concerns in one way: rather than detailing the exact procedures the Judicial Councils must follow when investigating allegations against a judge, section 372(c)(11) directs that the Councils "may prescribe such rules for the conduct of proceedings . . . including the processing of petitions for review, as each considers to be appropriate." n113 This accommodation does not cure the facial constitutional problem, however [*789] because the Act otherwise purports to require the judiciary to follow intricate procedures in many areas, including written complaints and decisions, n114 nearly absolute confidentiality, n115 and no judicial review, n116 as well as setting specific lines of authority and review.

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n113. 28 U.S.C. @ 372(c)(11) (1982).

n114. 28 U.S.C. @ 372(c)(1), 372(c)(4)(C), 372(c)(6)(C) (1982).

n115. 28 U.S.C. @ 372(c)(14) (1982).

n116. 28 U.S.C. @ 372(c)(10) (1982).

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The Act reinforces my belief that each branch should self-regulate: each branch knows best its own problems and how to correct them. There are a myriad of concrete difficulties with the Act that go beyond its unconstitutionality

and reflect the legislature's naivete about judicial problems. Most importantly, the Act institutes formal procedures intended to promote and expedite legitimate complaints against errant judges. In theory, formality will encourage complainants, by assuring them that their petitions will be considered seriously. However, in reality, the formality only encourages disappointed litigants to make unfocused, nonlegally grounded charges.

In late 1987, each circuit was asked to submit a report to the United States Judicial Conference on its experiences under the 1980 Act since its inception. These reports show that most complaints come from litigants who have lost cases before the accused judge. Most complaints are dismissed as patently frivolous, or as falling outside the jurisdictional scope of the Act. The Act thus has increased the number of frivolous complaints of judicial misconduct, increasing the workload of the Chief Judge and support staff accordingly. But it does not appear that the Act has resulted in the processing of charges that would have escaped scrutiny in the past. On this point, Chief Judge Wald of the D.C. Circuit observed that the Act "has not yet proven its worth as a vehicle for unearthing real judicial misconduct"; the experience of the D.C. Circuit in responding to complaints "has almost universally been with disappointed litigants or national organizations." n117

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n117. P. Wald, Report on Experience Under Judicial Conduct and Disability Act 9 (Sept. 25, 1987) (unpublished Memorandum of Chief Judge, United States Court of Appeals District of Columbia Circuit, to Judge Elmo Hunter, Chairman, Court Administration Committee of the Judicial Conference of the United States, on file with the Michigan Law Review) [hereinafter D.C. Circuit Report].

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Chief Judge Wald acknowledges that the Act "may well constitute an important safety valve for such complainants," n118 but this function simply is not a goal of the Act. In fact, this "safety valve" function may be antagonistic to one of the stated goals of the Act, that of promoting [*790] judicial efficiency and expediency, n119 because of the large numbers of frivolous charges that now must be formally entertained. In the D.C. Circuit, for example, 26 of the 28 cases filed between 1981 and 1987 were dismissed as frivolous at the outset by the Chief Judge. The two cases she did not dismiss were subsequently terminated at the next stage of investigation without resulting in any formal charges. Yet, as Judge Wald describes it, the 26 frivolous cases required considerable work by the Chief Judge:

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n118. Id.

n119. See 1979 U.S. CODE CONG. & ADMIN. NEWS, supra note 108, at 4315.

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Because . . . the vast number of . . . complaints in this Circuit as elsewhere have been meritless, their disposition does add an average of several hours per month to the Chief Judge's workload. . . . [I]n order to evaluate the claim it is usually necessary to call for and go through extensive portions of

the record of the court proceedings out of which the vast majority of complaints emerge. The confidentiality requirements of the Act demand that the number of courthouse personnel who know of the filing of such a complaint be kept to an absolute minimum. . . . It is not altogether clear whether the Chief Judge may use a law clerk to research the record for purposes of reporting to the Chief Judge exactly where and what the relevant portions may be. Since most frequently the perennial litigators are also the perennial complainants, these records can be sizeable indeed and encompass proceedings over many years, with numerous appeals from motions, etc. It might bear consideration to permit a Chief Judge, who is now solely responsible for the gatekeeping function on frivolous complaints, to be able to delegate that responsibility to other judges on occasion, and to make it clear that (s)he can use staff to aid in the mechanics of the process. n120

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n120. D.C. Circuit Report, supra note 117, at 3-4. But see Rieger, The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?, 37 EMORY L.J. 45 (1988) (arguing that the judiciary's own mishandling of the charges leads to the large number labelled "frivolous").

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Ironically, the busiest Judge on each circuit is the only person the Act appears to permit to handle even the most trivial tasks associated with its process, especially when considering that the figures from other Circuits show that the ratio of complaints immediately dismissed by the Chief Judge to total complaints mirrors those of the D.C. Circuit. Frivolous complaints make up between 88% and 99.5% of the total complaints filed in each Circuit. n121 Complainant attributes underscore the needless waste of time associated with the processing of complaints. In the First Circuit, for example, over 30% of the 81 complaints that were processed in the six-year period from 1981-1987 [*791] were filed by the same person. n122

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n121. See Reports of the Circuit Courts of Appeals on the Experience Under the Judicial Conduct Act for the Years 1981-1987, submitted to Judge Elmo Hunter, Chairman, Court Administrative Committee of the Judicial Conference of the United States. These calculations assume that each complaint not investigated was frivolous. The data vary mainly by the size of the Circuit -- the larger the Circuit, the more complaints filed.

n122. D. Gallup, First Circuit Report on the Operation of Local Judicial Discipline Rules Implementing the Judicial Conduct and Disability Act 1-2 (Sept. 16, 1987) (unpublished report of First Circuit Executive to Judge Elmo Hunter, Chairman, Court Administration Committee of the Judicial Conference of the United States, on file with the Michigan Law Review).

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Judge Wald's description also embodies what I call the restrictive effect of the Act. The Chief Judge of the D.C. Circuit justly feels bound to follow the most stringent possible interpretation of the confidentiality portion of the Act, even at the expense of efficiency. This is one of the harmful practical

consequences of the Act's improperly focused strictures. Even an Act that purports to do nothing more than institutionalize judicial self-regulation may induce the judiciary to follow the letter of the statute. Congress' affirmation of the judiciary's inherent self-regulatory role may in fact stifle the old informal ways of discipline, notwithstanding some scholarship to the contrary. n123 Indeed, the Act may encourage the judiciary to ignore cases that fall between the cracks of the statute, but that would have been addressed before the Act was passed. It does not matter that the Act neither explicitly preempts the area, nor instructs the judiciary to act as if the statute occupied the field. The effect is the same as if it did. For instance, in another example suggested by Judge Wald, the D.C. Circuit did not know how to handle a case in which a formal complaint was never filed, but an allegation was made by a reputable source that a judge may have "committed some impropriety worthy of consideration." n124 Judge Wald asks, "Should the court ignore [such an allegation] until a formal complaint is filed? Is it appropriate for the court to contact the possible complainant to see if he/she wishes to file a complaint? Can an investigating committee be appointed sua sponte to see if there is fire, not just smoke?" n125 I suggest that in cases such as these, the Act actually restricts the judicial policing function, contrary to its intent, because of judges' impulses to follow it literally. Before the Act set formal procedures, informal internal means could have enabled the Chief Judge to consider such charges as appropriate. Now, doing so could be seen as violating the statute.

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n123. See Burbank, Politics and Progress in Implementing the Federal Judicial Discipline Act, 71 JUDICATURE 13 (1987); Fitzpatrick, Misconduct and Disability of Federal Judges: The Unreported Informal Responses, 71 JUDICATURE 282 (1988). Even those who assert that the Act has reinforced rather than preempted the informal methods of disciplining judges admit that the press has played an enormous role in prompting disciplinary measures -- an admission that could support either side of the argument. Id.

n124. D.C. Circuit Report, supra note 117, at 7.

n125. Id.

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Oddly enough, the Act may thus function as somewhat of a "security blanket" under which a circuit can justify its disregard of a [*792] claim of misconduct. This result may occur despite the fact that no circuit suggests that it could not have addressed informal complaints before the Act was passed and that the Act does not prohibit circuits from addressing them now. By virtue of the passage of the Act, judges now focus on Congress' prescription instead of the mechanisms that will best resolve serious problems of misconduct. In other words, in relying on the Act, judges may fail to use their intrinsic authority to monitor themselves, and thus avoid dealing with some significant and difficult problems of judicial misconduct and disability.

The Act is a classic example of how Congress, in its attempt to remedy one set of problems, may simultaneously exacerbate others if it does not foresee the full effect of proposed legislation. Congress passed the 1980 Act in response to a perceived need to make judges accountable for serious misconduct -- that is, conduct for which impeachment might be appropriate -- without resort to

impeachment. n126 Yet, most claims under the Act have involved allegations of nonimpeachable bad behavior.

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n126. See, e.g., 126 CONG. REC. 28090-93 (1980) (remarks of Sen. DeConcini); id. at 28091 ("Today's public demands that all branches of government be made accountable for their actions, including the Federal judiciary."); id. at 28093 (remarks of Sen. Nunn) ("This legislation represents a decadehs struggle for . . . much needed judicial improvement.").

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The ultimate effect of the 1980 Act has been to badly complicate the existing Administrative Office Act of 1939. n127 The 1939 Act empowered the Councils to take "such action . . . as may be necessary" to ensure "that the work of the district courts shall be effectively and expeditiously transacted." n128 Unlike that of the 1980 Act, the 1939 language was very broad, setting goals without setting specific procedures like those detailed in the 1980 counterpart. In fact, even before the 1939 enabling statute, the circuits were meeting informally to discuss overall administration. n129

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n127. Act of Aug. 7, 1939 (Administrative Office Act of 1939), ch. 501, @@ 306-07, 53 Stat. 1223, 1224-25 (codified as amended at 28 U.S.C. @ 332 (1982)).

n128. Act of Aug. 7, 1939, ch. 501, @ 306, 53 Stat. 1223, 1224.

n129. See Note, supra note 68, at 1120. Although then-Judge Burger has stated that the Department of Justice had oversight over judicial housekeeping machinery before the 1939 Act, see Burger, The Courts on Trial, 22 F.R.D. 71, 76 n.5 (1958), this is contradicted by historians. See, e.g., P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 145-52 (1973).

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The informal disciplinary measures that were used before 1980 were criticized not for their ineffectiveness, n130 but, rather, because they were employed pursuant to "secretive" proceedings; it was claimed that because informal actions were not pursued in public, they were [*793] not available to Congress and citizens-at-large. n131 In my view, however, Congress' resort to statutory procedures to cure a perceived need for public access to avenues of judicial discipline is ill-conceived. For one thing, the Act does not address the alleged problem of secretive proceedings, because the Act itself mandates confidentiality with respect to most proceedings. More importantly, the Act's design to allow citizen-initiated "prosecutions" of judges is an approach that was flatly rejected by the Framers when they adopted a cumbersome impeachment procedure to protect judicial independence. And, as I have shown, the general public's increased accessibility has induced frivolous charges of misconduct while perhaps even discouraging investigation of valid charges that are not made through the formal channels.

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n130. But see Burbank, The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?, 67 JUDICATURE 183 (1983) (stating without any convincing authority that "[t]he judicial councils of the circuits, which some claimed had the power to discipline judges, had not proved to be effective").

n131. J. Browning, Report on the Implementation of the Judicial Conduct and Disability Act of 1980 in the Ninth Judicial Circuit 4 n.3 (Oct. 21, 1987) (unpublished report of Chief Judge, Ninth Circuit, to Judge Elmo Hunter, Chairman, Court Administration Committee of the Judicial Conference of the United States, on file with the Michigan Law Review).

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Moreover, those with a right and duty to have access to disciplinary means are untouched by the Act. Congress has always known that the impeachment remedy was available and has used it when needed. Those in the public with valid complaints -- usually lawyers, the press, and others with legitimate information that should be brought to the attention of the circuit -- have always managed to do so without additional congressional directive. Although it would be exceedingly difficult to substantiate, I would strongly suspect that the number of annual corrective actions before and after implementation of the 1980 Act has remained roughly the same. Yet, the judiciary as a whole is now burdened with the needless work generated by disaffected litigants whom the Act inadvertently encourages.

In short, the Act raises serious constitutional concerns by treading on judicial territory, and it results in practical misuses of judicial resources. Not only should the judiciary guard its internal operations as a constitutional matter, it also is the most logical body for ensuring adherence to a standard of "good behavior," because it is familiar with exactly what good behavior means as a practical matter and how to expedite its own procedures towards this goal.

IV. JUDICIAL ALTERNATIVES

The informal procedures I propose are much the same as those that were used before the 1980 Act and that are still used today, albeit more restrictively, in some circuits. Admittedly, the use of writs of mandamus and direct reversal are constant specters over judges; they [*794] may function as a de facto reprimand for judicial mistakes. n132 But it has never been assumed that mandamus or reversal are useful tools to deal with the ongoing problems of judicial misconduct. n133 Mandamus and reversal are used mainly to counter the types of "honest error" that, unless intentional or belligerent, do not call for punishment so much as correction, or "setting straight." The areas of "honest disagreement" that result in reversal are hardly appropriate for sanction; in fact, I suggest that it is precisely with respect to these areas of disagreement that we see the numerous frivolous claims under the Act.

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n132. For comments on the use of direct reversal as a sanction, see, e.g., Berkson & Tesitor, Holding Federal Judges Accountable, 61 JUDICATURE 442, 449-50 (1978).

n133. See, e.g., Ward, Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils, 1980

B.Y.U.L. REV. 233, 238-47.

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Instead, I favor informal means based on judicial persuasion and peer pressure. Informal measures may range from the subtle, such as counselling by the Chief Judge, to the drastic, such as prompting adverse publicity within the Bar or even in the general public. These measures can be extremely effective. According to Northern District of Ohio District Judge Frank Battisti, his Circuit Council passed a resolution in 1975 labelling a judge "'incompetent' and 'asking' him to retire. The resolution somehow found its way to the press, and a deliberate and humiliating campaign ensued to force this judge of 30 years' experience off the bench." n134 Notably, Judge Battisti dubbed these informal mechanisms "sledgehammer tactics," and "cruel," because of the public humiliation to which the judge was subjected. n135 I do not condone the public humiliation of an elderly judge, and I agree that the episode probably could have been better handled with more discretion. However, I submit that these procedures, when used correctly, are effective and far less cruel than other weapons that Congress could wield that would necessarily threaten removal. I am not alone in my support of these options: other judges have written on the effectiveness and relative grace of informal approaches. n136

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n134. Battisti, supra note 65, at 743.

n135. Id. at 744.

n136. See Kaufman, supra note 33, at 706-12; Dobie, A Judge Judges Judges, 1951 WASH. U. L.Q. 471.

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Additionally, there is no real problem with the Circuit Councils' independently adopting their own regulations for defining bad behavior and establishing procedures and penalties for sanctioning miscreants. Setting definite procedures could add some predictability to the process. n137 Possible penalties include warnings from the group or the [*795] Chief Judge; removal of a judge from a particular case; changing committee assignments; changing case assignments (for example, temporarily removing a judge from the calendar if he or she is unwilling or unable to keep current); recommending criminal investigation; or even recommending impeachment proceedings. n138 Concrete judicial rules could reinforce the pressure naturally exerted by judges over one another to the point that most misconduct would be handled without resort to the harsh publicity Judge Battisti appropriately deplores.

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n137. Cf. Burbank, supra note 82 (the Judicial Conference could fashion uniform procedures that nevertheless permit some flexibility within the circuits); see also Burbank, supra note 123.

n138. See also Berkson & Tesitor, supra note 132, at 447-50.

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Some would challenge a procedure that allows a Judicial Council to sanction judges, especially if no judicial review is possible (as under the 1980 Act). n139 In fact, Judge Hastings made such a due process challenge to his investigation, n140 based on the fact that the Council could recommend to Congress that he forfeit his job without benefit of a judicial forum. This argument seems meritless because article III judges are assigned to hear any charges in a Council proceeding. While there may be fine lines to draw regarding whether a Judicial Council forum is truly judicial or administrative, n141 it seems that an accused judge will doubtless receive a truly fair and impartial forum through the Councils for the reasons outlined in Part II.B. above.

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n139. See 28 U.S.C. @ 372(c)(10) (1982).

n140. Hastings II, 829 F.2d at 107-08.

n141. Although the Supreme Court has suggested in dicta that these are administrative fora, see Chandler v. Judicial Council, 398 U.S. 74, 84-86 & n.7 (1970), it has been argued that these are, in fact, judicial proceedings. Note, supra note 68, at 1137.

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Judicial self-regulation is an effective tool to deal with misconduct because peer pressure can be a powerful force within the ranks of the judiciary. It should not be underestimated. A judge who has been derelict in her or his performance usually knows it and does not look forward to serious admonition from colleagues. Admonition may call into question one's fairness, honesty, intelligence, judgment, wisdom, or commitment -- the precise characteristics that mark a distinguished career on the bench. It is the height of humiliation to be graded poorly in these areas, or to be accused by one's own peers of demeaning the dignity of the office, especially pursuant to a charge of misconduct. The threat of peer condemnation tempers even the most arrogant judge, so we can be sure that individual independence does not insulate a judge from effective peer regulation.

V. CONCLUSION

In 1930, Professor Burke Shartel published a seminal series of articles outlining his proposals for reorganization of the federal bench, [*796] setting the stage for much of the ensuing debate on impeachment including the questions of the exclusivity of impeachment, and the "hiatus" ambiguity. Shartel argued for increased judicial involvement at all stages of judges' tenure: appointment, supervision, and removal. He argued further that his proposals were constitutional. n142 Scholars have debated on his terms ever since, usually either accepting or rejecting his premise of increased judicial involvement in its entirety. I have taken a different tack, building on the premise that increased judicial involvement will promote a more efficient and accountable judiciary, but limiting my recommendations in deference to the Framers' separation of powers concerns. My proposal embraces a conclusion that only Congress may constitutionally remove a federal judge, but it also offers

a theoretical underpinning for judicial compulsion of good behavior. On this latter point, I argue that the constitutional reference to "good behavior" amplifies, rather than overrides, the impeachment clauses. In my view, a proposal of this sort will result in a judiciary monitored more effectively than the 1980 Act mandates. In addition, this approach is more solidly grounded in the formal concepts of separation of powers and judicial independence.

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n142. Shartel, Federal Judges -- Appointment, Supervision and Removal -- Some Possibilities Under the Constitution (pts. 1-3), 28 MICH. L. REV. 485, 723, 870 (1930).

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During the entire history of our nation, we have endeavored to preserve an independent judiciary as a "citadel of the public justice and the public security." n143 I conclude with the belief that judicial self-regulation over matters that do not involve impeachable or criminal action is the proper approach to uphold that tradition of judicial independence.

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n143. THE FEDERALIST, supra note 1, No. 78, at 524.

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