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SPARE THE ROD AND SPOIL THE JUDGE? DISCIPLINE OF FEDERAL JUDGES AND THE SEPARATION OF POWERS

Paula Abrams*

He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.¹

INTRODUCTION

In 1980, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act ("Act" or "1980 Act"),² a judicial disciplinary statute. The 1980 Act empowers federal judges to review and investigate complaints against fellow judges and, where appropriate, impose sanctions, including the removal of caseloads and private or public reprimands. The Act does not authorize removal of Article III judges. It does, however, require the investigating judges to determine whether the judge under investigation may have engaged in impeachable conduct and to forward such determination to the House of Representatives.³

The 1980 Act is the product of long-standing congressional efforts to increase the accountability of federal judges. It authorizes substantial judicial-branch discretion to discipline both minor and serious judicial misconduct. In fact, the Act was intended to serve as an alternative to impeachment for serious judicial misconduct.⁴

The limited political accountability of the federal judiciary has troubled

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¹ The Declaration of Independence para. 10 (U.S. 1776). British judges in 1776 were not as vulnerable as colonial judges. Both the salary and tenure of British judges were protected from interference by the King. See Martha Andes Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 Sup. Ct. Rev. 135, 137 (Framers wanted to balance King's executive influence in England with states' legislative influence in America); infra text accompanying note 14.


³ Id. Article III judges include the Supreme Court Justices and the judges of the "inferior Courts" established by Congress (as opposed to Article I "inferior Tribunals"). U.S. Const. art. I, § 8, cl.9; U.S. Const. art. III, § 1.

⁴ See infra notes 166-68 and accompanying text (noting that Congress intended the Act to allow the Judicial Conference to screen and define impeachable conduct).

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* Assistant Professor, Northwestern School of Law of Lewis and Clark College, Portland, Oregon. J.D., 1979, University of California at Berkeley (Boalt Hall).

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1. The Declaration of Independence para. 10 (U.S. 1776). British judges in 1776 were not as vulnerable as colonial judges. Both the salary and tenure of British judges were protected from interference by the King. See Martha Andes Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 Sup. Ct. Rev. 135, 137 (Framers wanted to balance King's executive influence in England with states' legislative influence in America); infra text accompanying note 14.


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scholars, politicians, and the public since the Constitution was ratified. The dilemma posed by judicial-branch discipline goes to the heart of the tension between judicial independence and judicial accountability: at what point does judicial accountability impermissibly undermine judicial independence? Indeed, one of the paradoxes of our system of government is that limited accountability for the judiciary is the means provided in the Constitution to secure judicial independence.5

The judiciary, as an institution, has an obvious interest in judicial misconduct. Judicial misconduct may jeopardize both the fairness and efficiency of the judicial process and ultimately threaten the judicial system’s credibility. To what extent may the judiciary therefore participate in the discipline of judges? The judiciary’s strong interest in judicial misconduct suggests that disciplinary authority should be broad. Separation of powers concerns also support regulation by the judiciary of judicial misconduct since the Executive and Congress have limited authority over judicial branch misconduct.6

Two constitutional principles, however, limit the potential scope of judicial branch disciplinary power: the importance of judicial independence in the Constitution’s framework, and the function of the impeachment power. The Constitution’s mandate of judicial independence limits not only the permissible scope of judicial disciplinary authority, but also the means by which discipline is achieved. Although judicial discipline may be a legitimate goal of the judiciary, the disciplinary process must not undermine impartial judicial decision-making. The impeachment function restricts judicial authority to discipline serious judicial misconduct. Impeachment is the one constitutional means available to assure accountability of an unelected, life-tenured judiciary. Serious misconduct should be addressed in a public forum, not in the chambers of the judiciary.

Additionally, the judiciary’s interest in regulating misconduct must be defined precisely and distinguished from executive or legislative interests in judicial discipline. Congress has an interest in assuring public accountability by impeachment for serious abuses of public offices. The Constitution grants the executive branch authority to prosecute impeachable offenses that may be crimes.7 The judicial interest in regulating judicial misconduct is not derived from public accountability, but arises directly from its mandate of assuring a fair judicial process. Therefore, a judicial-branch disciplinary process that authorizes public accountability for minor misconduct confuses the judiciary’s legitimate administrative needs with the other branches’ public accountability interests in judicial discipline.


6. See infra text accompanying note 102 (noting that Congress has authority to impeach judges and the Executive may prosecute a judge who commits a crime).

7. U.S. Const. art. II, § 4; see infra text accompanying note 34 (noting that, in the last 20 years, there have been numerous proposals for constitutional amendments that would allow removal of judges by means other than impeachment).
This Article examines the constitutional legitimacy of judicial-branch discipline of federal judges, including the disciplinary process established by the 1980 Act, and the Article concludes that the Act is seriously flawed. The Act authorizes judicial discipline as an alternative to impeachment for serious misconduct. This authority threatens to undermine the values secured by the Constitution's impeachment clause. The Act also impermissibly undermines judicial independence by authorizing public accountability for minor judicial misconduct.

Section I of this Article discusses the significance of judicial independence within the Constitution's framework. Judicial independence secures impartial decision-making, the essential function of the judiciary, and a critical component of the separation of powers. Section II traces the development of federal judicial-branch discipline from its origins in the judicial administration reform movement. Section III analyzes the scope of constitutionally permissible disciplinary power, assesses the legitimacy of removal by means other than impeachment and forms of discipline short of removal. The correlation of impeachable offenses to misconduct under the 1980 Act is also examined. Sections IV and V of the Article examine the relationship between judicial discipline and the separation of powers, and the extreme importance of independence to the judiciary. The Article concludes in Section VI with a discussion of the 1980 Act.

I. JUDICIAL INDEPENDENCE VERSUS ACCOUNTABILITY

The delegates who met in Philadelphia in May 1787 to revise The Articles of Confederation envisioned a republic enriched by a truly independent judiciary. An independent judiciary serves as a possible check on the excesses of the executive and legislative branches. Judicial independence also secures fair and impartial administration of the laws. Alexander Hamilton wrote that an independent judiciary is an "excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws." The Framers' vision of judicial independence had roots both in the English

8. Joseph Story noted that, "having provided amply for the legislative and executive authorities, [the Framers] established a balance-wheel, which, by its independent structure should adjust the irregularities, and check the excesses of the occasional movements of the system." JOSPEH STORY, COMMENTARIES ON THE CONSTITUTION, reprinted in part in 4 THE FOUNDERS' CONSTITUTION 200, 207 (Philip B. Kurland & Ralph Lerner eds., 1987).

9. The relationship between judicial independence and justice was well recognized by 1787. For example, the Delaware Constitution, adopted in September 1776, proclaimed "[t]hat the Independence and Uprightness of Judges are essential to the impartial Administration of Justice, and a great Security to the Rights and Liberties of the People." DELAWARE DECLARATION OF RIGHTS AND FUNDAMENTAL RULES § 22. reprinted in 4 THE FOUNDERS' CONSTITUTION, supra note 8, at 132, 132 [hereinafter DELAWARE DECLARATION].

judicial system and in its colonial offspring. Before 1701, English judges served at the pleasure of the Crown. Judges who displeased the King found their patents of office revoked. In 1701 Parliament passed the Act of Settlement, which provided that "[j]udges Commissions be made quandiu se bene gesserint [during good behavior], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them." The Act of Settlement thus made judges less dependent on the Crown. Judges could nonetheless be removed by Parliament for any reason. Impeachment, firmly established in England during the reign of Henry IV (1399-1413), was the preferred method for removing judges for misconduct.

Similarly, in the American colonies, judges generally served at the pleasure of the royal governors. Attempts by several colonial legislatures to limit the governors' removal power led to the 1761 royal proclamation that judicial tenure in the American colonies be at the pleasure of the Crown. The dependency of judges upon the will of the King was one of the complaints listed in the Declaration of Independence.

The delegates to the 1787 Constitutional Convention were familiar with several models of judicial tenure and removal. At the time, several states granted judicial tenure during good behavior. Others limited tenure to a specified term of years. Most states authorized removal by impeachment for misconduct while in office. A few states also provided for removal by the governor upon address of the legislature.

The Framers perceived the judiciary as the weakest branch of government. Hamilton noted that "the natural feebleness of the judiciary [is] in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches
The Framers believed that the proper functioning of the judiciary could only be secured through a constitutional structure designed to protect judicial independence. The cornerstones of this structure are the constitutional guarantees of tenure during good behavior and the protection from diminution of salary. Hamilton proclaimed the importance of guaranteed tenure to the protection of judicial independence in the Federalist Papers:

"[A]s nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." 2

Periodic appointments could not sufficiently secure independence because:

If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws. 3

For similar reasons, the judiciary needed protection against arbitrary or "at will" removal. The Framers overwhelmingly rejected a proposal providing for removal by the Executive upon address of both Houses of Congress because it would unacceptably weaken the independence of judges. 4

The protection of judges from diminution in salary was adopted in Article

20. The Federalist No. 78 (Alexander Hamilton), supra note 10, at 466. The Framers considered the legislature to be the most powerful branch of government. At the Constitutional Convention, Madison commented that "experience in all States has evinced a powerful tendency in the legislature to absorb all power into its vortex." Ziskind, supra note 1, at 144 (quoting Fletcher M. Green, Constitutional Development in the South Atlantic States, 1776-1860, at 25 (1930)).

21. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

22. The Federalist No. 78 (Alexander Hamilton), supra note 10, at 466. Thomas Jefferson, who later came to believe the judges were too independent, first argued that "[t]he judges . . . should not be dependent upon any man or body of men." Merrill E. Otis, A Proposed Tribunal: Is It Constitutional?, 7 U. Kan. City L. Rev. 3, 6 (1938).

23. The Federalist No. 78 (Alexander Hamilton), supra note 10, at 471. At the Pennsylvania Ratifying Convention, James Wilson noted complaints that the "independence of the judges is not properly secured" were frequently voiced in Pennsylvania. Debate in Pennsylvania Ratifying Convention, in 4 The Founder's Constitution, supra note 8 at 139, 139 (emphasis omitted). In states where appointment had been for less than good behavior, Wilson noted that independence had not been adequately protected. He commented, "It may appear too professional to descend into observations of this kind; but I believe that public happiness, personal liberty, and private property depend essentially upon the able and upright determination of independent judges." Id.

24. 2 The Records of the Federal Convention of 1787, at 428-29 (Max Farrand ed., rev. ed. 1937) [hereinafter Convention Records]; infra text accompanying note 111 (noting that the Framers referred to the offices of the judiciary department as continuing "for life").
III of the Constitution as an additional means to secure the independence of the judiciary from Congress. Moreover, James Madison worried that allowing Congress the authority to increase judicial compensation would render judges too dependent upon the legislature. Hamilton wrote:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

The passage of time has not diminished the significance of an independent judiciary to impartial decision-making. Impartial decision-making can be achieved only by freedom from political pressures. Political independence is particularly critical when the judiciary is called upon to assess the constitutionality of actions by the other branches of government. Justice Felix Frankfurter wrote that "[c]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society." The justification for protecting judicial independence is apparent in the role that courts play in articulating governmental responsibilities and individual rights. Federal court calendars read like a compendium of the most sensitive political issues of our times. Judges must be free to decide these issues without fear of retribution or hope of favor for their judgments.

Analysis of the constitutionally permissible scope of judicial discipline must take into account the priority placed by the Framers on judicial independence. Experience taught the Framers the dangers of a judiciary beholden to its coordinate branches. In the legislative and executive branches, political accountability could be expected to secure efficient operations and assure the integrity of public officials. By contrast, the Framers believed that independence, not accountability, was the best means of ensuring an effective judiciary free from corruption by political pressures. To this end, the Framers intended to provide for limited judicial accountability. The impeachment clause affords protection

25. Records of the Federal Convention, in THE FOUNDER'S CONSTITUTION, supra note 8, at 133, 137. Madison was not alone in voicing this concern. The Virginia Plan proposed by Edmund Randolph initially provided that the judges receive compensation "in which no increase or diminution shall be made." 1 CONVENTION RECORDS, supra note 24, at 21-22. However, Governor Morris moved to strike the phrase "or increase" from the Plan, arguing that this was necessary to attract quality candidates to the bench. The motion passed 6-2. See Records of the Federal Convention, supra, at 137.


27. Hamilton argued that "[t]he complete independence of the courts of justice is peculiarly essential in a limited constitution" because the judiciary is responsible for preserving the constitutional limitations. THE FEDERALIST No. 78 (Alexander Hamilton), supra note 10, at 466.

against criminal or corrupt judicial conduct. Greater accountability was rejected by the Framers because it would subvert the very goals safeguarded by independence.

The Congress and judiciary of 1789 are a far cry from their modern-day counterparts. Today there are over 730 federal judges. The daily crush of business of the Congress has led some observers to conclude that impeachment is such a "cumbersome" process that the judiciary is rendered effectively unaccountable for its conduct. The Watergate scandal reinforced a general distrust of government institutions, and undoubtedly has contributed to demands for increased governmental accountability. In addition, as the judiciary has become increasingly prominent in deciding social issues, the public increasingly has viewed judges as political officials who should be held accountable for their decisions.

Since the early 1970s, the quest for increased accountability engendered proposals for constitutional amendments allowing removal of judges by means other than impeachment and increased demands for discipline short of impeachment. These proposals are the latest innovations in a long history of attempts to impose greater accountability upon the federal judiciary.

29. See infra note 42 (describing significant increases in caseloads in courts of appeals since 1891).


32. Senator Deconcini remarked that "the American people have replaced respect for public officials with tolerance" and claimed that there is a "need to restore public confidence in our institutions." Id.

33. The recall of Chief Justice Rose Byrd and other California Supreme Court justices for their "liberal" views exemplifies the perception that judges are political officials who should be selected for their views on particular issues. See generally Irving R. Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681 (1979) (stating that recent judicial removal practices destroy the independence created by the Framers who relied upon the impeachment process for disciplinary purposes); Larry G. Simon, The Supreme Court's Independence: Accountability, Majoritarianism and Justification. Comments on Seidman, 61 S. Cal. L. Rev. 1607, 1615 (1988) (commenting that Seidman's proposal of electing Supreme Court Justices creates as many problems as it solves).

34. House of Representatives Joint Resolution 454 is an example of one of the more recent attempts to amend the Constitution. The resolution proposed an amendment providing that "The Congress may by law provide that the Supreme Court may remove from office any judge of a court ordained and established under article II of this Constitution, if the Supreme Court determines that such judge has been convicted in a Federal court of a criminal offense." H.R.J. Res. 454, 101st Cong., 1st Sess., 135 Cong. Rec. H9713 (daily ed. Nov. 21, 1989). The resolution responded to Judge Claiborne's conviction and imprisonment for tax fraud before Congress got around to impeachment proceedings.
II. HISTORY OF JUDICIAL DISCIPLINE

A. Background

Judicial independence has been subject to attack almost from the time the Constitution was ratified. The first constitutional amendment to provide a statutory alternative to removal by impeachment was proposed in Congress in 1791. In 1803, Thomas Jefferson instigated a movement to use impeachment to remove Federalist judges from the bench and replace them with Republican judges. When the Senate failed to convict Supreme Court Justice Samuel Chase in 1805, Congress again debated alternatives to impeachment. Between 1807 and 1812, Congress considered no less than nine such proposed alternatives. During the early twentieth century, the populist movement tried to increase the political accountability of federal judges through proposals to change the selection process and limit judicial power and jurisdiction. The impeachment and removal of Judge Halstead Ritter in 1936 provoked a new round of congressional efforts to establish statutory alternatives to impeachment. President Roosevelt's "court-packing" plan of 1937 briefly shifted congressional attention to the defense of judicial independence. By 1939, however, Congress returned its focus to increasing judicial accountability.

These congressional proposals shared a common feature: Each was intended to increase the political accountability of federal judges by establishing means of removal other than impeachment. None was successful because Congress was concerned that legislative alternatives to impeachment were unconstitutional, and Congress could not be convinced that it was wise to amend the Constitution to facilitate removal of federal judges. At the time, little atten-

35. See AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, JUDICIAL DISCIPLINE AND TENURE PROPOSALS 3 (1979) [hereinafter JUDICIAL DISCIPLINE AND TENURE PROPOSALS]. The First Congress provided in Section 21 of the Act of April 30, 1790, that a judge convicted of accepting a bribe "shall forever be disqualified to hold any office of honor, trust or profit under the United States." Id.

36. See id.


39. The impeachment clauses are the only constitutional provisions that explicitly authorize the discipline of federal judges. Article II, § 4 provides, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art II, § 4. Judges are "civil officers" for purposes of the impeachment clause. See Kaufman, supra note 33, at 691 (citing dictum in Shurtleff v. United States, 189 U.S. 311, 316 (1903)). The House "shall have the sole Power of Impeachment" and the Senate the "sole Power to try all Impeachments". U.S. CONST. art I, § 2, cl. 5; U.S. CONST. art I, § 3, cl. 6. Conviction following impeachment requires "the Concurrence of two thirds of the Members present." The only sanctions provided are removal and disqualification from ever holding federal office. U.S. CONST. art I, § 3, cl. 7. The party convicted "shall nevertheless be liable and subject to indictment, Trial, Judgment and Punishment according to Law." Id. The presidential pardon power does not extend to cases of impeachment. U.S. CONST. art II, § 2, cl. 1.

40. See Re, supra note 31, at 231-42.
tion was paid to discipline by means other than removal from office.41

While Congress debated judicial accountability, a parallel development was occurring in the administration of courts that would have a significant effect on this debate. In the beginning of the twentieth century, a vigorous drive to improve the administration of the court system began. As America was transforming from a predominantly rural society into an urban one, the structure of the court system also changed. The lone circuit rider was replaced by multi-judge metropolitan courts. The caseload of the courts also increased substantially.42 In 1906 Dean Roscoe Pound delivered an address to the annual meeting of the American Bar Association, urging that significant attention be paid to the management of the courts in order to bring greater efficiency and justice to the judicial system.43 Pound contended that cumbersome procedures and inefficient judicial administration delayed and ultimately denied justice. One way to assure greater accountability, he suggested, was to impose rules for administering judicial business. Pound argued that "[p]ublic opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration."44 Pound’s address has shaped the parameters of court reform to this day. In the eyes of many court reformers, judicial independence became an excuse used by headstrong judges to justify their opposition to management restraints.45 In fact, the court reformers viewed mismanagement as a primary threat to judicial independence.46 The reformers touted a "hierarchically organized and tightly adminis-

41. Congressional attention to greater judicial accountability coincided with similar overtures in the state legislatures. The first part of the 19th century saw significant efforts to limit state judges to fixed terms and, later, to require popular election. These changes were sought to make judges more responsive to public opinion in their decision-making. By the beginning of the 20th century, the pendulum in the states had swung toward independence. Early court reformers, troubled by the effects of partisan politics on judicial independence, tried to improve the selection process and tenure of state judges so as to better protect independence. See Wheeler & Levin, supra note 38, at 14-15. One of the most esteemed proposals was the "Missouri Plan," which provided for the establishment of state "merit selection" boards to submit recommendations of meritorious candidates to the appointing authority (generally the governor). See Dorothy W. Nelson, Variations on a Theme—Selection and Tenure of Judges, 36 S. Cal. L. Rev. 4, 41-46, (1962). Despite these efforts, political accountability through popular election remained the prevailing policy in most states. Id.

42. This trend has continued. In 1891, the first year of the federal courts of appeals, a total of 841 cases were filed. In 1988, 37,524 cases were filed in the federal courts of appeals. The federal district courts also have experienced significant caseload increases. Between 1904 (the first year in which district court filing statistics are available) and 1988, filings have increased from 33,376 to approximately 285,000. Case filing increases have outpaced the increases in federal judges. See 1 Federal Courts Study Committee, Papers and Subcommittee Reports 24-31 (July 1, 1990).

44. Id. at 180.
46. Id. at 5-7 (noting that the court system’s inability to efficiently manage itself has resulted in other branches of government asserting financial and administrative control over the courts).
tered unified court system." Reformers also assumed that an integral component of centralized management would be institutionalized judicial disciplinary authority. The Model Judicial Act, proposed by the American Judicature Society in 1917, provided for a judicial council with the power to remove from office any judge (other than the chief judge), to reprove (publicly or privately) or transfer any judge for "inefficiency, incompetence, neglect of duty, lack of judicial temperament, or conduct unbecoming a gentleman and a judge."

This "model" implicitly assumed that, once the judiciary was organized in a traditional bureaucratic hierarchy, discipline would be an appropriate function of management. Self-regulation was viewed as a desirable alternative to legislative interference. Although the Model Judicial Act underwent several transformations, it consistently retained the notion that the judiciary should tend to the misconduct or incapacity of its own.

The federal judicial system began to transform into a judicial bureaucracy in 1922 when Congress established the Judicial Conference, a body comprised of the Chief Justice of the Supreme Court, and the chief judge from each circuit. The Conference was charged with improving the administration and operations of the federal courts. It is authorized to prepare court rules for the operation of the federal system, including temporary re-assignment of judges, to prepare and comment on legislation affecting the courts and to submit suggestions to the various courts "to promote uniformity of management..."  

47. WHEELER & LEVIN, supra note 38, at 17. This proposal was consistent with the general fervor for unifying and streamlining government. In 1912, President Taft's Commission on Economy and Efficiency proposed "the integration of all administrative agencies of the Government ... into a unified organization for the most effective and economical dispatch of public business." FISH, supra note 37, at 20. Chief Justice Taft, in fact, was one of the leading proponents of an integrated and centralized judiciary. Id. at 24-25.

48. WHEELER & LEVIN, supra note 38, at 17 (recommending that a judicial council was preferable to relying on the legislature in handling administrative matters concerning errant or incapacitated judges).

49. Id.

50. This thread was taken up by the states in revising their court systems. In 1947 New Jersey amended its constitution to revise its article on the judiciary and establish a new unified court system that became a model for court reform throughout the country. The New Jersey "plan" established a state-wide managerial court organization under the authority of the chief justice of the New Jersey Supreme Court. The New Jersey Supreme Court made the American Bar Association Canons of Judicial Ethics binding on judges and used its Bar disciplinary authority to discipline judges. The New Jersey experience further contributed to the belief that the judiciary should be responsible for discipline of judges. Today 47 states and the District of Columbia have created discipline systems that provide for discipline and removal either by a judicial branch or an independent commission. Most of these states established disciplinary authority by constitutional amendment. See id. at 20-21; see also FRIESEN ET AL., supra note 45, at 34-35 (noting that the New Jersey Constitution gives the state supreme court the authority to make rules governing the administration of all courts of the state).

procedures and the expeditious conduct of court business.”

The federal judicial reaction to the creation of the Conference was mixed. Since the Conference lacked authority to mandate change, compliance with Conference “suggestions” was erratic. The Chief Justice relied upon “appeals to the conscience” to pressure recalcitrant judges. Indeed, Chief Justice William Taft characterized the power of the Conference as one which brought “all the district judges within a mild disciplinary circle.”

President Roosevelt presented the court reorganization plan of 1937 as a populist reform measure aimed at eradicating “the growing impression that the courts are chiefly a haven for the well-to-do.” Roosevelt explicitly sought to impose upon the judiciary the “same kind of reorganization . . . as has been recommended . . . for the Executive Branch of the Government.” Roosevelt’s plan included a proposal for a federal proctor to monitor judicial efficiency and expose “laggard judges.” Federal judges, alarmed at such proposals, acted to devise their own plan for administrative reform. The Administrative Office Act of 1939 responded to Roosevelt’s failed proposal.

The Administrative Office Act of 1939 fundamentally changed federal judicial administration. Previously, federal judicial administration was decentralized, with each district judge responsible for court management within the district. The 1939 Act created an umbrella administrative agency, the Administrative Office of the United States Courts, and a judicial council in each circuit to improve caseload management. The early judicial councils were comprised of the members of the circuit courts of appeals. Each judicial council was charged with making “all necessary and appropriate orders for the effective and expeditious administration of the justice within its circuit.” All judicial officers and employees of the circuit, including the district courts, were to “promptly carry into effect all orders of the judicial council.” These broad grants of responsibility and authority vested the councils with substantial power. Congress contemplated that the councils would use these powers to re-

52. 28 U.S.C. § 331 (1988). This current statutory language has changed little from the original terminology.
53. FISH, supra note 37, at 88-90.
54. Id. at 90 (quoting William Howard Taft, Memorandum to Robert A. Taft (Oct. 2, 1927) (manuscript on file with the Library of Congress, Washington D.C)).
55. Id. at 115 (quoting 6 THE PUBLIC PAPERS OF THE PRESIDENTS. FRANKLIN D. ROOSEVELT 52 (1936)).
56. Id. (quoting 6 THE PUBLIC PAPERS OF THE PRESIDENTS: FRANKLIN D. ROOSEVELT 35 (1936)).
57. Id. at 119 (quoting Judge William Denman, Hearings on S. 1392, at 482 (1937), before the Senate Committee on the Judiciary).
60. Id. §§ 601-611.
61. Id. § 332(d)(2).
assign judges to improve case-flow, address backlog problems, order judges to decide cases held too long under advisement, and set standards of judicial ethics. Congress also intended the councils to attend to the judiciary’s business “in its broader or institutional sense, such as preventing ... any stigma, disrepute, or other element of loss of public confidence.”

The extent to which the councils were authorized to discipline or coerce compliance was unclear and initially was a matter of substantial controversy. By the 1950s, however, the councils’ broad mandate to attend to the “business of the courts” was widely accepted as including authority to deal with inappropriate judicial conduct. The councils entertained complaints alleging disability or unethical or criminal misconduct. The councils had the authority to order a judge to take corrective action, but they were without the authority to impose sanctions for failure to comply. The councils instead relied upon a judge’s respect for the law to obtain voluntary compliance with its orders. Many judges, however, questioned whether reliance upon such voluntary compliance was adequate.

The institution of significant management reform eliminated much of the administrative autonomy of the federal courts. The judiciary’s acceptance of such a change was perhaps more politically astute than may be initially obvious. The judiciary was able to appease public opinion through reforms aimed at improving the administration of justice and thereby diffuse more drastic reform efforts that would have struck more closely at substantive judicial authority.

The scope of the councils’ coercive powers became an active issue in Chandler v. Judicial Council of the Tenth Circuit. Judge Stephen Chandler was Chief Judge of the United States District Court for the Western District of Oklahoma. Judge Chandler frequently clashed with the Judicial Council of the Tenth Circuit regarding backlogs in his docket, his failure to disqualify himself in the face of claims of bias, and his personal involvement as a defendant in lawsuits. In December 1965, the council, relying upon its power to issue “orders for the effective and expeditious administration of justice within its circuit,” ordered that Judge Chandler take no further action in pending

63. Id. at 214 (quoting H.R. REP. NO. 201, 87th Cong., 1st Sess. 7 (1961)).
64. Fish, supra note 37, at 401.
65. The councils were given the power to certify the permanent mental or physical disability of a district or circuit judge who refused to retire. If a majority of the circuit court certifies disability, the President is authorized by statute to appoint a new judge who will be senior in position to the disabled judge. The disabled judge receives full salary. 28 U.S.C. § 372(b). This provision has rarely been invoked. Most disabled judges resign voluntarily.
66. Testimony before the House on the Act of 1939 by various federal judges emphasized the effectiveness of coercion through persuasion and peer pressure rather than sanctions. See Fish, supra note 37, at 209.
67. Id. at 420.
cases and that no new cases be assigned him until otherwise ordered.  

Judge Chandler sought leave before the Supreme Court to file a writ challenging the order, alleging that the council's action "usurped the impeachment power" committed to Congress by the Constitution. Chief Justice Burger, writing for the majority, questioned whether the council's action was reviewable by the Court. But the Court failed to decide this jurisdictional issue; instead, it concluded that Judge Chandler had not made a case for the "extraordinary relief of mandamus or prohibition." The Court recognized that the "ultimate question on which review [was] sought" was whether the council's action crossed the line of "maximum permissible intervention consistent with the constitutional requirement of judicial independence." The Court also acknowledged that there can "be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."  

At the same time, however, the Court recognized the judiciary's need to establish administrative standards governing the assignment and disposition of cases. The Court suggested that the councils may have the power to coerce action because "if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse." The failure of the Chandler majority to consider the permissible reach of council authority contributed additional confusion and uncertainty to the judicial discipline debate.

Justices Douglas and Black dissented, arguing that the constitutional guarantee of independence protects a federal judge from censorship by fellow judges. Justice Douglas argued that the umbrella of "administrative oversight" could serve as an excuse to keep a particular judge from hearing a particular kind of case. Justice Douglas urged:

It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of hazing having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance that other federal judges have over those aberrations. Some of the idiosyncrasies may be displeasing to those who walk in more measured, conservative steps. But those idiosyncra-

70. Chandler, 398 U.S. at 78.
71. Id. at 82.
72. Id. at 89.
73. Id. at 84.
74. Id. (dictum).
75. Id. at 85 (dictum).
76. Id. at 129 (Douglas, J. dissenting).
77. Id. at 141 (Black, J., dissenting).
78. Id. at 136 (Douglas, J. dissenting).
79. Id. at 137.
cies can be of no possible constitutional concern to other federal judges.\textsuperscript{80}

The Court's failure to resolve the "liveliest, most controversial contest involving a federal judge in modern United States history"\textsuperscript{81} caught the attention of Congress. Once again, the debate on judicial accountability echoed in the congressional halls. Senator Sam Nunn, responding to the Chandler decision in the era of Watergate, introduced a federal discipline proposal in 1974 modeled on state judicial conduct commission legislation that authorized removal by the Judicial Conference for misconduct.\textsuperscript{82} Controversy over vesting removal authority in an entity other than Congress led to numerous revisions of the proposal.\textsuperscript{83}

**B. The 1980 Act**

In 1980, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act,\textsuperscript{84} a compromise measure that authorizes the discipline, but not the removal, of federal judges. The 1980 Act enhances the powers of the judicial councils and the Judicial Conference by granting them specific authority to sanction and discipline all federal judges, excluding Supreme Court Justices.\textsuperscript{85} This expanded authority is carefully framed in the context of improving judicial administration. The Act provides that "[a]ny person" may file a written complaint alleging that a judge "has engaged in

\begin{itemize}
  \item \textsuperscript{80} Id. at 140-41.
  \item \textsuperscript{81} Id. at 130.
  \item \textsuperscript{82} The proposal provided for the establishment of a commission empowered to investigate, charge, and try judges, and to recommend removal to the Judicial Conference. After modifications, the Judicial Tenure Act was reintroduced in 1977 in the 95th Congress, co-sponsored by Senators Nunn and DeConcini. See S. 1423, 95th Cong., 1st Sess. (1977).
  \item \textsuperscript{83} The Judicial Conference initially supported the Nunn proposal "in principle." Stephen B. Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. PENN. L. REV. 283, 293 & n.32 (1982). Concerns over removal authority eventually led the Conference to go on record disapproving any legislation authorizing removal by means other than impeachment. Id. at 293 n.33. The Conference proposed that the authority of the judicial Councils be increased to encompass more formal disciplinary power. Id. at 294 n.37.
  \item \textsuperscript{84} Pub. L. No. 96-458, 94 Stat. 2035 (1980).
  \item \textsuperscript{85} H.R. REP. No. 1313, 96th Cong., 2d Sess. 10 n.28 (1980). The legislative history provides an interesting insight on this exclusion. The House Report comments: There are two reasons for this intentional exclusion. First, high public visibility of Supreme Court Justices makes it for [far] more likely that impeachment can and should be used to cure egregious situations. Second, it would be unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the Supreme Court, to sit on cases involving the highest ranking judges in our judicial system. The independence and importance of the Supreme Court within our justice system should not be diluted in this fashion. Id.
\end{itemize}

The report does not explain why the independence of other federal judges may be so diluted. The Constitution makes no distinctions between the power and prestige of the Supreme Court and the rest of the federal judiciary.
conduct prejudicial to the effective and expeditious administration of the business of the courts." 88 The chief judge of the circuit reviews the complaint. 87 The chief judge may dismiss the complaint if it does not meet the statutory requirements, if it relates directly to the merits of a decision, or if it is frivolous. 88 The chief judge also has the authority to informally dispose of a complaint "if he finds that appropriate corrective action has been taken." 89

The complainant or the judge may petition the judicial council of the circuit for review of any action by the chief judge under this section. 90 If the complaint is not dismissed or handled informally, the chief judge must appoint a special committee consisting of the chief judge and equal numbers of circuit and district judges of the circuit to investigate the complaint and submit its report and recommendation to the judicial council of the circuit. 91 The council may conduct any further investigation it considers necessary and "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 92 The council's authority includes, but is not limited to, ordering that no new cases be assigned the judge for a temporary period, issuing a public or private reprimand, certifying the disability of the judge, requesting that the judge retire, or issuing any other appropriate order. 93 Removal of an Article III judge is expressly prohibited. 94 The complainant or the judge may petition the Judicial Conference for review of the action taken by the judicial council. 95

The judicial council also has broad discretion to defer action and refer the complaint to the Judicial Conference for further consideration. 96 The judicial council must refer the complaint to the Judicial Conference if it determines that an Article III judge has engaged in conduct "which might constitute one or more grounds for impeachment under Article II of the Constitution . . . [or] which, in the interest of justice, is not amenable to resolution by the judicial council." 97 The Judicial Conference is authorized to investigate the complaint and take appropriate action. 98 The Conference is required to determine whether impeachable conduct may be involved and forward its conclusion to

87. See id. § 372(c).
88. Id. § 372(c)(3)(A).
89. Id. § 372(c)(3)(B).
90. Id. § 372(c)(10).
91. Id. § 372(c)(4)-(5).
92. Id. § 372(c)(6).
93. Id.
94. Id. § 372(c)(6)(B)(vii)(I). Magistrates and bankruptcy judges may be removed pursuant to procedures established in the Act. Id.
95. Id. § 372(c)(10).
96. Id. § 372(c)(7)(A).
97. Id. § 372(c)(7)(B). The Act provides no guidance on how the judicial council is to determine whether or not the judge engaged in conduct which "might" be an impeachable offense. See infra Section III for a discussion of the problems with the judiciary deciding what may be an impeachable offense.
the House of Representatives. All orders, including denials of petitions for review, are considered final, and judicial review is not available.

The Act vests the councils and the Judicial Conference with virtually unlimited discretion to discipline federal judges as long as they do not order removal. Jurisdiction over serious judicial misconduct is authorized if the conduct is "prejudicial to the effective and expeditious administration of the business of the courts." Judicial discipline of serious misconduct poses a threat, however, both to judicial independence and to the impeachment function.

III. THE PERMISSIBLE SCOPE OF DISCIPLINARY POWER

A. Removal By Means Other Than Impeachment

Impeachment is not the only sanction authorized by the Constitution for judicial misconduct. A judge who commits a crime may be prosecuted, convicted, and incarcerated just like any other criminal. A judge may even be prosecuted and incarcerated prior to impeachment. Considerable controversy has centered on whether the Constitution permits other forms of sanctions against judges, including removal by means other than impeachment.

99. Id. Section 372(c)(8) provides in part:
If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

Id.

100. Id. § 372(c)(10).
101. Id. § 372(c)(1).

102. The Constitution states that a party convicted following impeachment "shall nevertheless be liable and subject to indictment, Trial, Judgment and Punishment according to law." U.S. CONST. art. II, § 2, cl. 1.

103. The Ninth Circuit rejected the claim that the Constitution immunizes a sitting federal judge from criminal prosecution prior to removal by impeachment. United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984); accord United States v. Hastings, 681 F.2d 706, 709-11 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.) (per curiam), cert. denied, 417 U.S. 976 (1974). Scholars have debated whether impeachment and conviction must precede prosecution in a court of law. Some argue that imprisonment prior to impeachment constitutes removal in violation of the impeachment clause. These commentators support a stay of execution of sentence or immunity prior to removal. See, e.g., Robert S. Catz, Removal of Federal Judges by Imprisonment, 18 Rutgers L.J. 103 (1986); Steven W. Gold, Note, Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement, 53 Brooklyn L. Rev. 699 (1987). Hamilton asserted, "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law." The Federalist No. 69 (Alexander Hamilton), supra note 10, at 416. Hamilton's assertion suggests impeachment and conviction should precede prosecution.

104. It is unclear exactly what "removal" means. Some commentators argue that the 1980 Act unconstitutionally authorizes removal of a federal judge because the Act sanctions removal of a
Article III judges hold their office “during good Behaviour.” The relationship of “good Behaviour” to the impeachment standard of “high crimes and misdemeanors” has been extensively debated. If “good behaviour” describes life tenure, subject to impeachment, then behavior that is “not good” must be limited to impeachable conduct. Alternatively, the “good behaviour” clause may not be linked exclusively to impeachment, but may establish an additional standard of conduct to which Article III judges are held. Behavior that is “not good” does not necessarily rise to the level of an impeachable offense. Thus, judges engaging in “not good” behavior less egregious than an impeachable offense could be subject to sanction. Proponents of this theory are divided on whether the good behavior standard allows removal of an Article III judge by methods other than impeachment, or merely permits discipline for misbehavior not rising to the level of “high crimes and misdemeanors.”

The debates at the Constitutional Convention strongly suggest that “good Behaviour” was intended to describe life tenure subject to impeachment, and was not intended as a separate standard of conduct authorizing removal or discipline by a means other than impeachment. Governor Edmund Randolph’s Virginia Plan provided for the establishment of a national judiciary to hold offices “during good behaviour.” At the time, several state constitutions also provided for judicial tenure during good behavior. Charles Pinckney of South Carolina, debating a proposal to exclude members of the First Congress...
from government office, referred to the offices of the judiciary department as continuing "for life."\(^{111}\) This standard contrasted with the fixed terms established for the President, the Vice-President, and members of Congress. While considering impeachment of the Executive, Rufus King of New York commented:

> It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places, not for a limited time, but during good behaviour. It is necessary therefore that a forum should be established for trying misbehaviour . . . . [The Executive] ought not to be impeachable unless he hold his office during good behaviour . . . . \(^{112}\)

King later remarked that for those who hold office for life, "impeachments are proper to secure good behaviour."\(^{113}\)

The link between good-behavior tenure and impeachment is compelling in light of the Framers' desire to protect judicial independence. Given the Framers' significant and well documented interest in judicial independence, it hardly seems likely the Framers intended to undermine independence by making it easier to remove judges. The very language of "good behavior" is the most persuasive evidence that it was not intended as a separate standard of conduct. The ambiguity inherent in "good behavior" would provide a basis for almost unlimited legislative control over the judiciary. Hamilton stressed the importance of ensuring that removal would never be an easy process. In the Federalist Papers he wrote:

> The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision may be safely pronounced to be a virtual disqualification."\(^{114}\)

\(^{111}\) 2 CONVENTION RECORDS, supra note 24, at 491.

\(^{112}\) 2 id. at 66-67.

\(^{113}\) 2 id. at 68. Both Alexander Hamilton and John Rutledge of South Carolina unsuccessfully proposed amendments to the judicial article which would have specifically provided for removal of judges by impeachment. 3 CONVENTION RECORDS, supra note 24, at 625; 2 id. at 367. Toward the end of the Convention, James Mason complained, "No mode of impeaching the Judges is established." 4 Id. at 56. The Convention never addressed this point further. Ziskind suggests that there is a "legitimate textual question" as to whether judges were subject to the impeachment provisions. Ziskind, supra note 1, at 151. She concludes that rejection by the Constitutional Convention of removal by direct address and state constitutional practice at the time compel the conclusion that federal judges were subject to the Article II impeachment clause. Id.

\(^{114}\) THE FEDERALIST NO. 77 (Alexander Hamilton), supra note 10, at 474. Hamilton's state-
Hamilton preferred to endure some incompetency on the bench rather than jeopardize judicial independence.

The delegates explicitly rejected removal by address because it compromised judicial independence. John Dickinson of Delaware moved to amend the judicial article to insert, after the words "good Behaviour," the words "provided that they may be removed by the Executive on the application by the Senate and House of Representatives." The British system and several state constitutions permitted removal by address. Governor Morris of Pennsylvania opposed the motion because he thought it contradictory for the judges to hold office during good behavior, yet be removable without a trial. James Wilson of Pennsylvania feared that judges "would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our government." Randolph opposed the motion, arguing that it would "weaken[] too much the independence of the Judges." The motion was defeated 7-1.

Constitutional history is replete with references to impeachment as the sole means of removal of judges. Hamilton's comments in the Federalist Papers probably are the best known:

The precautions for their responsibility are comprised in the article respecting impeachments. [Judges] are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.

The Antifederalists also believed the Constitution limited removal to impeachment.

ment regarding "virtual disqualification" for insanity has baffled many commentators. Some of them conclude that this statement supports removal by means other than impeachment. See Berger, supra note 11, at 139. At most, Hamilton's comment simply distinguishes disability from misconduct. It has always been doubtful whether impeachment is appropriate for disability, although Judge John Pickering allegedly was impeached while he was insane. See Feerick, supra note 12, at 27.

115. Delaware Declaration, supra note 9, at 138.
116. See Ziskind, supra note 1, at 138-47.
117. Id. at 150.
118. 2 Convention Records, supra note 24, at 429.
119. 2 id.
120. 2 id. A number of states whose constitutions allowed removal by address voted against the proposal. Ziskind, supra note 1, at 151.
121. The Federalist No. 79 (Alexander Hamilton), supra note 10, at 474.
122. According to the AntiFederalists:

The only clause in the constitution which provides for the removal of the judges from office, is that which declares, that 'the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors'. By this paragraph, civil officers, in which the judges are included are removable only for crimes.
The debates of the First Congress are important sources for interpreting the Constitution. During the 1789 debate on the establishment of district courts, Congressman William Smith of South Carolina declared, "[I]t will not be easy to alter the system when once established. The judges are to hold their commissions during good behavior, and after they are appointed, they are only removable by impeachment." Elbridge Gerry, a Massachusetts delegate to the Convention and future Vice-President, commented, "[G]entlemen have said, that the Federal Judiciary will be disagreeable to the citizens of the United States." After noting that few states protected the independence of the judiciary to the extent of the federal system, Gerry added, "The judges of the Federal court are to be removed only by impeachment and conviction before Congress.

The Constitutional Convention impeachment debates focused primarily on the President. Judicial removal was not a significant issue for the delegates because independence for the judiciary, not accountability, was their priority. The Framers did not discuss, and probably did not even contemplate, removal of judges by the judiciary. Multiple means of removal would, however, threaten judicial independence. It is precisely the "cumbersome" and limited nature of the impeachment process which secures the independent judiciary the Framers envisioned.

Brutus No. 15, reprinted in part in 2 The Founders' Constitution, supra note 8, at 160 [hereinafter Brutus].

123. See Bowsher v. Synar, 478 U.S. 714, 724 n.3 (1986) (naming 20 members of the First Congress who also participated in drafting the Constitution).


125. Id. at 159.

126. Id. at 160. William Rawle wrote that "[a] commission granted during good behaviour can only be revoked by [impeachment]." William Rawle, A View of the Constitution of the United States 210-19 (2d ed. 1829), reprinted in 2 The Founders' Constitution, supra note 8, at 168, 170.

127. Professor Burke Shartel argues that removal is a proper judicial function—a necessary and logical extension of the authority to administer and supervise the affairs of the judicial branch. Burke Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, 28 Mich. L. Rev. 870, 884 (1930). Shartel argues that the impeachment power is merely a special exception to the separation of powers—a special legislative power that does not negate the judiciary's power to remove its own members. Id. at 892.

128. Some commentators argue that the passage of the 1790 Act, discussed supra note 35 and accompanying text, by the First Congress shows that the Framers intended to allow removal of judges by means other than impeachment. See Berger, supra note 11, at 150. The Act provided that, upon conviction in federal court for bribery, a judge shall "forever be disqualified to hold any office." See supra note 35. Professor Berger argues that "disqualification" is the equivalent of removal. See Berger, supra note 11, at 150; see also Michael J. Gerhardt, The Constitutional Limits to Impeachment and Its Alternatives, 68 Tex. L. Rev. 1, 31 (1989) (arguing that "impeachment is not the sole means of disqualifying federal judges from holding future offices"). The 1790 Act has never been applied to a federal judge. See Irving R. Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 702 n.127 (1979). The Supreme Court, interpreting a similar statute applicable to Congress, saw the issue a little differently. The Court held that the statute itself did not operate to remove a senator. That action, the Court held, remained the sole preroga-
B. Sanctions Other Than Removal

If impeachment is the only permissible means of removing a federal judge, what disciplinary action, short of removal, is permissible? There are several possible justifications for alternative disciplinary authority. First, the "good behavior" clause potentially authorizes discipline, other than removal, against judges who engage in "not good" behavior. Supporters of this "hiatus" theory claim that judges are accountable for bad behavior as long as removal does not occur by means other than impeachment. Second, the judicial branch has, ostensibly, the inherent housekeeping authority to discipline judges for misconduct. This proposition accepts judicial discipline as a legitimate component of judicial administration. Third, discipline of judges (other than Supreme Court Justices) may be authorized as a "necessary and proper" extension of congressional authority under Article III, Section 1 to establish inferior courts.

All three of these approaches fail to resolve the question of permissible disciplinary action. The "good behavior" hiatus theory does not justify judicial discipline any more than it justifies judicial removal, because "good behavior" defines tenure subject to impeachment, not an independent standard of conduct. The "housekeeping" theory and the "necessary and proper" theory pose legitimate rationales for judicial-branch discipline. Unfortunately, they provide little insight into the permissible scope of disciplinary authority. The principle of judicial independence necessarily limits judicial disciplinary authority. For example, a disciplinary oversight process that requires a judge to submit to fellow judges each judicial ruling or decision for review for bias or other misconduct serves the judicial interest in a fair judiciary, but it clearly poses a significant risk to impartial decision-making.

Judicial discipline also must not interfere with the congressional impeachment power. Congress clearly has exclusive authority over the impeachment process, including the definition of an impeachable offense. The judiciary should not be in the business of disciplining impeachable offenses. Such discipline would be without the public accountability built into the impeachment process. Burton v. United States, 202 U.S. 344, 369-70 (1906). Under the Burton rationale, the 1790 Act cannot be interpreted as operating independently of impeachment.

See, e.g., Edwards, supra note 108, at 775-77.

Id. at 775.

See, e.g., Kastenmeier & Remington, supra note 30, at 767.

U.S. Const. art. I, § 8, cl. 18.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1. Congress is expressly authorized to establish inferior courts, and has the power to enact legislation “necessary and proper” to do so. Therefore, Congress must implicitly have the authority to enact legislation ensuring smooth administration of such courts. Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (interpreting the “Necessary and Proper” clause).

See U.S. Const. art. I, § 2, cl. 5 (stating that the House shall have the sole power of impeachment); U.S. Const. art. I, § 3, cl. 6 (stating that the Senate shall have the sole power to try all impeachments).
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process. Therein lies the problem posed by the 1980 Act. It authorizes judicial-branch discipline of the serious misconduct associated with impeachable offenses. Consequently, judicial-branch discipline either becomes a substitute for impeachment or an additional layer of accountability. Either result is impermissible.

C. The Meaning of an Impeachable Offense

Impeachable conduct is not easily, or narrowly, defined.\textsuperscript{135} Treason is defined in the Constitution as "levying War" against the United States, or giving "Aid and Comfort" to its enemies.\textsuperscript{136} Bribery is well understood by reference to common and statutory law. The meaning of "other high crimes and misdemeanors" has been the subject of considerable dispute. Constitutional history clearly suggests that this standard should not be limited to indictable offenses, but instead includes a broad range of abuses of public office. Any serious judicial misconduct may be an impeachable offense. Alexander Hamilton referred to impeachment of judges for "malconduct."\textsuperscript{137} Hamilton elaborated in The Federalist:

> The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.\textsuperscript{138}

The first provision proposed to the Constitutional Convention provided that the Chief Executive "be removable on impeachment and conviction of malpractice or neglect of duty."\textsuperscript{139} This standard was intended to include various acts constituting corruption or misuse of office. At times during the Convention, the terms "maladministration" and "corruption" were interchanged with the

\textsuperscript{135} Impeachment was first used on this continent by the colonists as a means of checking abuses of the monarchy. PETER C. HOFFER & N. E. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 68 (1984). John Adams viewed impeachment as a means to prevent corruption. In 1776, Adams wrote, "For Misbehaviour the grand inquest of the Colony, the House of Representatives, should impeach before the Governor and Council." \textit{Id.} at 65 (insertion omitted). Most of the new states included impeachment provisions in their constitutions. \textit{Id.} at 68. Impeachment provisions in the early state constitutions were commonly based upon "mal-administration," "misbehaviour," or "corruption." In other words, impeachment provisions in early state constitutions envisioned some form of misuse of official power. Pennsylvania specified "mal-administration," New Jersey provided for impeachment upon "misbehavior," while North Carolina and Virginia included "corruption." \textit{Id.} at 68-70. Impeachments were not uncommon in the post-Revolutionary War atmosphere. Bribery, extortion, and misuse of funds were the most common impeachable offenses in the new states. \textit{Id.} at 79. Willful misconduct, as opposed to negligence, appeared to be a prerequisite to finding impeachable conduct. \textit{Id.}

\textsuperscript{136} U.S. CONST. art III, § 3, cl. 1.

\textsuperscript{137} THE FEDERALIST NO. 79 (Alexander Hamilton), \textit{supra} note 10, at 474.

\textsuperscript{138} THE FEDERALIST NO. 65 (Alexander Hamilton), \textit{supra} note 10, at 396.

\textsuperscript{139} 2 CONVENTION RECORDS, \textit{supra} note 24, at 61. Hugh Williamson of North Carolina proposed this amendment to the executive article on June 2, 1787. 1 \textit{id.} at 24.
initial language. 140

On August 6, 1787, The Committee of Detail reported out a revised executive article that provided an impeachment standard of treason, bribery, or corruption. 141 This standard later was limited to "treason or bribery." 142 On September 8, debate centered on the scope of impeachable offenses. 143 George Mason objected to the limited standard of "treason or bribery," stating, "Treason as defined in the Constitution will not reach many great and dangerous offences . . . . Attempts to subvert the Constitution may not be Treason . . . ." 144 When Mason moved to add "maladministration" after "bribery," Madison objected, arguing that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." 145 Mason withdrew "maladministration" and substituted "other high crimes and misdemeanors against the state." 146 This language passed 8-3 without any discussion of its meaning. 147

Although the delegates did not specifically define impeachable offenses, Mason's willingness to substitute "other high crimes and misdemeanors" for "maladministration" and the vote in favor of this substitution suggest that the delegates viewed this language as including corruption, neglect of duty, and other offenses relating to maladministration. The delegates' experience with state constitutional definitions of impeachable conduct that included "maladministration," "misbehaviour," and "corruption" is further evidence the delegates intended to include such conduct in the federal standard. 148

140. As late as August 20, 1787, the standard reported was "neglect of duty, malversation, or corruption." 2 id. at 337. During debate on the desirability of presidential impeachment, Colonel Mason spoke of the need to punish "great crimes" and "corruption." 1 id. at 65. The special nature of impeachment as a proceeding against abuses of office was noted by Governor Morris who stated that for an impeachable offense, the President should "be punished not as a man, but as an officer." 1 id. at 69.

141. 1 id. at 172.
142. 2 id. at 550.
143. 1 id. at 544-54.
144. 2 id. at 550.
145. 2 id.
146. 2 id.
147. 2 id.

148. James Wilson, a delegate to the Convention, described impeachment as "confined to political characters, to political crimes and misdemeanors, and to political punishments." James Wilson, Legislative Department, Lectures on Law, in 2 THE FOUNDERS' CONSTITUTION, supra note 8, at 166. The question of whether "high crimes and misdemeanors" is limited to only indictable offenses seems settled by the verdict of history. Professor Berger argues that "high crimes and misdemeanors" was a term of art in England defining purely political offenses. See BERGER, supra note 11, at 59. However, neither English nor American practice has limited impeachment to indictable offenses. See Feerick, supra note 12, at 7, 25-47. Many of the public officials that have been brought before Congress for impeachment have argued that impeachment must be limited to indictable offenses, but Congress has never been persuaded. See id. at 25-47. Rawle wrote that the "involutions and varieties of vice are too many, and too artful to be anticipated by positive law." RAWLE, supra note 126, at 168. Story concurred that "political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it." Story, supra note 8, at 178.
The "high crimes and misdemeanors" standard can be traced back to English impeachment law. It was used in England to refer to offenses involving either criminal conduct, treason, or serious misuse of official position. British law considered "malversation" a "high misdemeanor." Although none of the American state constitutions used the "high crimes and misdemeanors" terminology, the convention delegates were likely to be familiar with the term. The English impeachment of Warren Hastings, former Governor-General of India, for "high crimes and misdemeanors" commenced on May 11, 1787, three days before the delegates met in Philadelphia. Mason specifically referred to Hastings' impeachment when he protested limitation on the impeachment standard to treason and bribery. Mason argued, "Why is the provision restrained to treason & bribery only? ... Hastings is not guilty of treason." While considering a provision requiring that a fugitive charged with treason, felony, or high misdemeanor be returned to the state from which he fled, the delegates struck the words "high misdemeanor" and inserted "other crime" because of their concern that "high misdemeanor" had a "technical meaning too limited." The delegates accepted the "high crimes and misdemeanors" standard without discussion, which strongly suggests their familiarity with the British formulation.

Serious abuses of judicial office constitute impeachable judicial conduct. Blackstone described grounds for impeachment of a judge as including a deliberate disregard of the law. Regarding the perceived danger of judicial encroachment on legislative function, Alexander Hamilton wrote:

There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.

John Ewing Calhoun of South Carolina, during debate in the Senate in 1802, opined:

We all fully and at once understand what is good behaviour in a judge, the oath he takes and the very nature of his office show it; to act with justice, integrity, ability and honor, and to administer justice speedily and impartially, is good behaviour; if he acts contrary, it would be misbehaviour, and

149. Feerick, supra note 12, at 49.
150. Wilson, supra note 148, at 166.
152. 2 CONVENTION RECORDS, supra note 24, at 550.
153. 2 id. at 443.
154. 2 id. at 443.
155. For example, Blackstone argued that a jury instruction falsely "and corruptly given, (and not the mere effect of mistake and misapprehension) ... [a]nd any other gross misconduct of a judge in the execution of his office" would be an impeachable offense. BLACKSTONE'S COMMENTARIES, reprinted in part in 4 THE FOUNDER'S CONSTITUTION, supra note 8, at 181, 184.
156. THE FEDERALIST No. 81 (Alexander Hamilton), supra note 10, at 485.
the Constitution in that case has given a remedy by impeachment.\textsuperscript{157}

The element of wilful misconduct runs through most early discussions of impeachable offenses. James Iredell, during debate in the North Carolina Ratifying Convention, forcefully argued that wilfulness is a prerequisite to impeachable conduct. Iredell averred:

God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. . . . Whatever mistake a man may make, he ought not to be punished for it . . . . But if a man be a villain, and wilfully abuse his trust, he is to be held up as public offender and ignominiously punished.\textsuperscript{158}

The Antifederalists concurred on this point:

Errors in judgment, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, high crimes and misdemeanors. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges committed the error from wicked and corrupt motives.\textsuperscript{159}

The records of the few successful judicial impeachments demonstrate that impeachable judicial conduct encompasses a wide array of abuses of office.\textsuperscript{160}

\textsuperscript{157} Senate, Judiciary System, in 4 \textit{The Founders' Constitution}, supra note 8, at 167, 173-74.

\textsuperscript{158} Debate in North Carolina Ratifying Convention, in 2 \textit{The Founders' Constitution}, supra note 8, at 160, 165.

\textsuperscript{159} Brutus, supra note 122, at 160. Rawle, writing in 1829, commented, "If a judge should be incapacitated by infirmity or age, or be otherwise, without any fault of his own, prevented from performing his duties, he would not be a proper subject for removal by impeachment." Rawle, supra note 126, at 197. The question of whether impeachment is appropriate for cases of disability and incapacity remains unresolved. There was some mention during the Constitutional Convention that impeachment could be used in cases of incapacity. Hamilton ambiguously referred to insanity as a "virtual disqualification." \textit{The Federalist No. 77} (Alexander Hamilton), supra note 10 at 474. In treating presidential succession, the Constitution distinguishes between removal of the President for death, resignation, or inability to discharge the powers and duties of office. U.S. CONST. art. II § 1, cl. 6. The First Congress debated other forms of removing executive officers, agreeing that "madness is no treason, crime or misdemeanor." Berger, supra note 11, at 186 (quoting 1 \textit{Annals of Cong.} 487 (Joseph Gales ed.,1798)). Indeed, medical or physical disability is inconsistent with the wilful misconduct necessary for impeachable conduct. Putting an insane person on trial is also inconsistent with our law.

Judge John Pickering was impeached allegedly while he was insane. See Feerick, supra note 12, at 27. During his impeachment proceedings, Congress extensively debated whether an insane person could be impeached. \textit{id.} at 27-28. The Senate resolved the issue by deleting the language "high crimes and misdemeanors" from the Articles of Impeachment and asking its members merely to determine whether he was "guilty" of the acts alleged. See \textit{id.}; Hoffer & Hull, supra note 135, at 217. If judicial disability is not subject to impeachment, then the judiciary has greater discretion and authority in dealing with such problems than it has in dealing with misconduct that may be subject to impeachment.

\textsuperscript{160} The House has initiated more than 50 impeachment proceedings since adoption of the
Several principles may be garnered from this historical overview. First, the Framers believed it undesirable even to attempt to catalogue impeachable offenses for fear of limiting congressional discretion. "High crimes and misdemeanors" is a standard providing the broad flexibility needed by Congress to define political offenses. Second, an impeachable offense cannot be tidily analyzed and defined precisely because it is largely a political determination, and not one of positive law. Although impeachable offenses roughly may be defined as some form of serious abuse of office, Congress defines impeachable offenses in reference to political and historical standards. 161

It is difficult, if not impossible, to attempt to distinguish categories of impeachable offenses from nonimpeachable offenses. While an isolated instance of abuse of process may not rise to the level of an impeachable offense, a pattern of such behavior certainly would, as would a single incident of egregious nature. Despite these interpretive difficulties, it is fair to say Congress has acted to impeach and convict only in cases involving serious wilful misconduct.

Congress' plenary authority over the impeachment process means that only Congress can define exactly what constitutes an impeachable offense. This point is critical when considering the separation of powers issues inherent in judicial discipline. If Congress has exclusive authority over the impeachment process, what authority does the judicial branch have over conduct which may be impeachable? The Constitution explicitly grants the executive branch au

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161. The language of "great injuries" or "great offenses" appears repeatedly. James Iredell told the North Carolina Convention that impeachment will occur only from "acts of great injury to the community." Letters on Reorganization of the Supreme Court, in 4 The Founders' Constitution, supra note 8, at 163, 165-66. At the Constitutional Convention, Mason said that impeachment was to be for "great crimes." 2 Convention Records, supra note 24, at 65.
authority to prosecute impeachable offenses which may be crimes.\textsuperscript{162} The Constitution provides no explicit authority for the judicial branch to act against conduct which may be impeachable. The 1980 Act purportedly authorizes judicial-branch discipline over what may be impeachable offenses.

\textbf{D. Misconduct Under The 1980 Act}

Congress passed the 1980 Act in response to demands for greater judicial accountability, amidst complaints that the impeachment process was too "cumbersome" and antiquated to be considered an effective means of accountability.\textsuperscript{163} Congress intended the Act to "supplement" the little-used impeachment process.\textsuperscript{164} Congress clearly intended discipline under the Act to address misconduct that may be impeachable.\textsuperscript{165} For example, "an accusation that a number of judges have been bribed in exchange for favorable opinions" is given in the legislative history of the type of offense that might merit immediate referral to the Judicial Conference.\textsuperscript{166}

The directives in the Act requiring the council or the Judicial Conference to determine and refer to Congress what may be impeachable conduct are further indications the Act empowers the judiciary to define and discipline impeachable conduct. The Act was intended to provide an "orderly procedure for screening complaints of impeachable offenses and then forwarding them to the House of Representatives for consideration."\textsuperscript{167} The Act does not, however, prohibit judicial-branch discipline if the allegations are referred to the House of Representatives.

The principle disciplinary standard applied to federal judges is the ABA Code of Judicial Conduct.\textsuperscript{168} The Code provides a laundry list of ethical "dos and don'ts" for judges, including descriptions of obligations and abuses of office in matters of conflict of interest, appearance of impropriety, and political activity.\textsuperscript{169} Generally, only wilful violations of the Code of Conduct are grounds for discipline.\textsuperscript{170} Wilful violations of the Code are subject to discipline

\begin{itemize}
  \item \textsuperscript{162} U.S. Const. art. I, § 3, cl. 6.
  \item \textsuperscript{163} S. Rep. No. 362, 96th Cong., 2d Sess. 4, reprinted in 1980 U.S.C.C.A.N. 4315, 4318. The Senate Report claims that impeachment has "fallen into disuse because the legislature cannot divert time from [its] ever increasing and relatively more important legislative assignments." Id.
  \item \textsuperscript{164} Id. at 4317. The Report recommends the Act as a positive alternative to congressional inaction. Id.
  \item \textsuperscript{165} The House Report states that the disciplinary standard of "conduct that is inconsistent with the effective and expeditious administration of the business of the courts [clearly] incorporates complaints regarding impeachable behavior [and] violations of the criminal law." H.R. Rep. No. 1313, 96th Cong., 2d Sess. 10 (1980).
  \item \textsuperscript{166} Id. at 12. This example illustrates "group criminal activity" subject to discipline under the Act. Id.
  \item \textsuperscript{167} Mitch McConnell, Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change, 76 Ky. L.J. 739, 752 (1988). Senator McConnell also writes that the Act was intended to provide the judiciary a means of keeping its own house in order. Id.
  \item \textsuperscript{168} See Model Code of Judicial Conduct (1990).
  \item \textsuperscript{169} See id., Canons 2, 3, 5, & 7.
  \item \textsuperscript{170} Wheeler & Levin, supra note 38, at 63.
\end{itemize}
under the 1980 Act. This type of wilful misconduct is precisely the type of conduct that may form the basis for impeachment.

A special committee of the Conference of Chief Judges promulgated procedural rules that provide further insight into conduct actionable under the 1980 Act. The rules proscribe such conduct as “use of the judge’s office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office.” Clearly, the Act contemplates discipline for only serious acts of misconduct—the same types of acts that may constitute impeachable offenses.

By granting disciplinary authority to the judicial councils and Judicial Conference, the Act essentially establishes “concurrent” jurisdiction between the judicial branch and the legislative branch over impeachable conduct. Only Congress may remove a judge for impeachable conduct. The judiciary, however, may discipline a judge for the very same conduct. The legitimacy of this concurrent jurisdiction must be assessed under principles of separation of powers.

IV. JUDICIAL DISCIPLINE AND THE SEPARATION OF POWERS

The purposes of the separation of powers are to prevent tyranny and to assure efficient operation of government. The Framers’ attention to judicial independence is directly related to the prevention of tyranny. Constitutional history highlights the importance of an independent judiciary to the proper functioning of government. However, the Framers never specifically consid-


173. Many of the delegates to the Constitutional Convention were well acquainted with the work of Baron de Montesquieu. Montesquieu distinguished between the legislative, executive, and judicial branches and argued for the need to delineate power between the branches to avoid tyranny. See CHARLES DE SECONDAT MONTEESQUIEU, THE SPIRIT OF LAWS 152 (Nugent ed., 1823) (originally published in 1748). The state constitutions following the American Revolution relied heavily upon separation of powers principles. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 548-52 (1969). Madison wrote, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” THE FEDERALIST No. 47 (James Madison), supra note 10, at 301.

174. Montesquieu stated that “there is no liberty, if the judiciary power be not separated from the legislative and executive powers.” See STORY, supra note 8, at 200. Hamilton referred to the judiciary as “beyond comparison, the weakest of the three departments of power” and argued that “all possible care is requisite to enable it to defend itself against” the attacks of the other two departments. THE FEDERALIST No. 78 (Alexander Hamilton), supra note 10, at 465-66.

175. The Supreme Court has trod an uneven path through formalism and functionalism in separation of powers analysis. In Myers v. United States, the Court held that the President has complete authority to remove subordinates performing executive functions. 272 U.S. 52, 119-25 (1926). Faced with President Roosevelt’s attempt to remove a member of the Federal Trade Commission without cause, however, the Court held that Congress could limit presidential removal of
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ered whether the judiciary may remove or discipline its own members.

The Supreme Court recently has decided two cases relevant to judicial-branch disciplinary authority. In *Morrison v. Olson* the Court rejected "rigid categories" of analysis in separation of powers cases in favor of a balancing test directed toward determining whether congressional "restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." The Court in *Morrison* concluded that the key question in separation of powers cases is whether the activities of one branch interfere with the ability of a coordinate branch to perform its constitutional functions.

those officers who were not "purely executive" but who also performed "quasi-legislative" and "quasi-judicial" functions. *Humphrey's Executor v. United States*, 295 U.S. 602, 624, 628, 629, 631 (1935). The Court gave no guidance on distinguishing such officials or why such distinctions were relevant. The outcome of the case was correct, however. The opinion implicitly recognized that the separation of powers is not threatened by protecting the independence of certain officials from arbitrary executive removal so long as the President's ability to perform constitutionally assigned functions is not jeopardized. *Id.* at 629-30. In *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the Court struck down a House of Representatives' legislative veto of the Attorney General's decision to suspend the deportation of an alien, characterizing it as a "legislative act" requiring bicameralism and presentment under the Constitution. *Id.* at 951. The Court failed to convincingly explain why the legislative veto was a legislative act any more than actions by other branches that have the "effect of altering the legal rights, duties, and relations of persons." *Id.* at 952. The opinion rests on the assumption that any acts taken by the legislature necessarily are "legislative acts" subject to the bicameralism and presentment requirements without considering whether the legislative veto was inconsistent with the purposes of the separation of powers. Subsequently, in *Bowsher v. Synar*, the Court obscured the real issue of whether the Congress can insulate certain arguably executive decisions from presidential control. *478 U.S. 714* (1986). *Bowsher* involved a challenge to the Gramm-Rudman-Hollings Act, which authorized the Comptroller General to calculate percentage budget reductions contained in the Act. However, the Court focused on whether the Comptroller General was independent of Congress. *Id.* at 727-32. The Court relied upon a rigid and simplistic interpretation of the statute allowing Congress to remove the Comptroller General for cause by joint resolution (subject to presidential veto) and found that the Comptroller General was an agent of Congress and could not constitutionally exercise the budget reduction functions. *Id.* at 732-33. The Court considered the very existence of the removal provision dispositive, despite the Comptroller General's historical independence. *Id.* at 773 (White, J., dissenting). By contrast, in *Nixon v. Administrator of General Services*, the Court focused "on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 430. The Court returned to this test more than ten years later in *Morrison v. Olson*, 487 U.S. 654 (1988). *See infra* notes 176-82 and accompanying text (describing and analyzing *Morrison*).


177. *Id.* at 691 (upholding provisions of the Ethics in Government Act, 28 U.S.C.§§ 591-599 (1988)). The Court in fact discounted the "quasi-legislative, quasi-judicial" distinctions made in *Humphrey's Executor* as an inadequate means of ensuring that the purpose of separation of powers is achieved, i.e., that one branch does not interfere with the constitutionally assigned functions of another branch. *Id.* at 689-90.

178. *Id.* at 695. Justice Kennedy recently suggested that this balancing test is appropriate only when the power at issue "was not explicitly assigned by the text of the Constitution" to one of the branches of government. *See Public Citizen v. United States*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring). Kennedy argued that the balancing test was inappropriate for a power expressly
The Morrison decision also considered the permissible scope of activities of Article III judges. One challenge made to the independent counsel provisions contained in the Ethics in Government Act was to the authority of the Special Division, a “court” comprised of Article III judges, to select independent counsel, define the counsel’s area of inquiry, and ultimately terminate the position when the counsel’s work is completed. The Court stated a general rule that “executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the Constitution.”

The purpose of this rule was to protect the independence of the judiciary and ensure that judges did not “undertake tasks that are more properly accomplished by those branches.”

Mistretta v. United States decided the following term, provided additional insight into the Court’s view of the permissible scope of activities of Article III judges. Mistretta involved an unsuccessful challenge to provisions of the Sentencing Reform Act of 1984. The Sentencing Reform Act created an independent United States Sentencing Commission, comprised in part of at least three Article III judges, and charged with promulgating sentencing guidelines. The constitutional issues raised in Mistretta included whether Congress had improperly delegated legislative authority to fix sentences, and whether delegating rulemaking authority to the judicial branch and assigning the extra-judicial duties to Article III judges violated the separation of powers doctrine.

The Court quickly disposed of the delegation challenge, noting the well-established rule that Congress may obtain “the assistance of its coordinate Branches,” as long as Congress lays down an “intelligible principle” of direction. The Court found the Act provided ample legislative guidance to the Sentencing Commission.

In addressing the separation of powers challenges, the Court, following Morrison, relied upon a “flexible understanding of the separation of powers,” emphasizing that the Court has not hesitated to “strike down provisions of law that either accrete to a single branch powers more appropriately diffused among separate branches or that undermine the authority and inde-
pendence of one or another coordinate Branch."

The Court focused on two specific factors relevant to judicial separation of powers: ensuring the independence of the judicial branch, and assuring that the judicial branch is not "assigned or allowed" tasks that are more properly accomplished by "[other] branches." A guiding principle is whether the duties assigned are "appropriate to the central mission of the Judiciary." In concluding that judicial promulgation of sentencing guidelines was permissible, the Court noted other legitimate examples of judicial rulemaking. The Court emphasized that the inquiry into permissible judicial responsibilities must focus on the "unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." The Court concluded that judicial promulgation of sentencing guidelines did not, as a practical matter, undermine judicial independence or impermissibly expand judicial power.

Notably, the Court in Mistretta had problems with the argument that the judiciary's involvement in the formulation of sentencing policy taints the image of impartiality and nonpartisanship so critical to its credibility. The Court was persuaded, however, that the judiciary's integrity was not tarnished because promulgating sentencing policy was primarily a "neutral endeavor and one in which judicial participation is peculiarly appropriate."

Both Morrison and Mistretta are relevant to the question of judicial discipline for several reasons. First, the Court recognized that separation of powers issues ultimately must be resolved by references to the purposes of the constitutional structure. Questions on the permissible scope of activities of Article III judges therefore must be answered, in part, by whether the activity undermines the independence of the judiciary. Second, the congressional assignment of functions to the judicial branch must be analyzed by examining whether the assignment encroaches upon the prerogatives of another branch or interferes with the key function of the judiciary—the impartial administration of justice. Finally, the Court has applied these criteria in a flexible manner and appears willing to uphold a variety of congressional innovations on the use of Article III judges so long as these activities do not compromise independence or present encroachment problems.

189. Id. at 382.
190. Id. at 383 (quoting Morrison v. Olson, 487 U.S. 654 (1988)).
191. Id. at 388.
192. For example, the Court noted the judicial councils' authority to "make all necessary orders for the effective and expeditious administration of the business of the courts." Id. at 388 (quoting 28 U.S.C. § 332 (1939)).
193. Id. at 393 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986)).
194. Id. at 396-97.
195. Id. at 407.
hold the creation of an independent counsel to perform clearly executive functions of investigation and prosecution exemplifies the Court's rejection of formalism in favor of functionalism.\textsuperscript{197}

The Court's functionalist analysis, while perhaps an improvement on the formalist approach, presents its own problems as applied to separation of powers issues. If the principal criterion is whether the statute in question prevents the designated branch from performing its constitutionally assigned functions, then the only clear lines of demarcation are those functions explicitly granted by the Constitution to the respective branches.\textsuperscript{198} A functionalist analysis therefore must consistently consider whether the purposes of the separation of powers are being served or hindered by the activity in question. Without active consideration of these principles, a functionalist analysis of separation of powers may be reduced to an ad hoc evaluation of the practical effectiveness of a proposed innovation in achieving the purpose intended by Congress.

V. THE OVERRIDING SIGNIFICANCE OF INDEPENDENCE TO THE JUDICIARY

The importance of institutional independence of the judicial branch is clear from the constitutional history discussed in Section II of this Article. However, the principle of an independent judiciary extends beyond the structural independence of the judicial branch. Independence of the judicial branch does not exist for its own sake. Independence secures the impartial, personalized decision-making that forms the basis of common law adjudication. Impartial decision-making results only from the independence of each individual judge who renders a decision. The guarantee of independence therefore is meaningless if not extended to individual judges.\textsuperscript{199} The constitutional guarantees of life tenure and undiminished compensation secure the independence of individual

\footnotesize{Mistretta, 39 DePaul L. Rev. 299 (1989)(arguing that such uses of judges constitutes an impermissible assignment of nonadjudicating functions to the judiciary).}

\footnotesize{197. The Court in deciding Morrison most likely grappled with the possible ramifications of striking down the Independent Counsel Act, 28 U.S.C. §§ 591-598 (1988): the perception that high-ranking executive officials in effect would be immune from criminal prosecution for criminal acts committed in furtherance of presidential policy, leaving impeachment as the sole constitutional sanction. See Dean Alfange, Jr., The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?, 58 Geo. Wash. L. Rev. 668, 742 (1990).}

\footnotesize{198. Under Justice Kennedy's approach, these explicitly defined functions would not be subject to balancing; rather, they would be strictly enforced. See supra note 178.}

\footnotesize{199. Blackstone recognized that the notion of judicial independence includes structural and individual components. Blackstone wrote:

In America . . . [the judiciary] is rendered absolutely independent of, and superior to the attempts of both, to control, or crush it: First, by the tenure of office, which is during good behavior . . . Secondly, by the independence of the judges, in respect to their salaries, which cannot be diminished. Thirdly, by the letter of the constitution which defines and limits the powers of the several co-ordinate branches of the government; and the spirit of it, which forbids any attempt on the part of either to subvert the constitutional independence of the others.

Blackstones Commentaries, supra note 155, at 182.}
judges from political pressure.\textsuperscript{200} Story wrote that:

even with the most secure tenure of office, during good behaviour, the danger is not that the judges will be too firm in resisting public opinion and in defence of private rights or public liberties; but, that they will be too ready to yield themselves to the passions, and politics, and prejudices of the day.\textsuperscript{201}

The Supreme Court, as recently as 1982, recognized the need to protect the independence of individual judges, declaring, "The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism."\textsuperscript{202}

The modern federal judiciary is an intricate network of connected courts, organized under an umbrella of centralized management. However, this popular perception of the federal judiciary as a form of unified bureaucratic model has contributed to the acceptance of a disciplinary structure within the administrative framework.\textsuperscript{203} The perception of the judiciary as a bureaucracy also has obscured the significance of protecting the independence of individual judges.\textsuperscript{204}

\textsuperscript{200} Rawle wrote:

It is supposed to be the natural disposition of man, when placed above control, to abuse his power, or, if no corrupt motives produce this consequence, there sometimes are found a laxity, a carelessness, a want of sufficient exertion and deliberate judgment in the exercise of it. On the other hand, if instead of availing himself of his own knowledge and capacity, the judge submits to be governed by the opinions of others; if he allows the desire to retain his office, the fear of giving offence, or the love of popularity, to form any part of the ingredients of his judgment, an equal violation of his trust is apparent. \textsuperscript{201} \textsuperscript{STORY, supra note 8, at 200, 206.}

\textsuperscript{202} The Court in \textit{Marathon Pipe} also described the meaning of the "good behavior" clause, stating, "The 'good Behavior' Clause guarantees that article III judges shall enjoy life tenure subject only to removal by impeachment." \textit{Id.} at 59.

\textsuperscript{203} See \textit{Wheeler} & \textit{Levin, supra} note 38, at 69-70.

\textsuperscript{204} Proponents of the 1980 Act argue that judicial branch discipline protects the judiciary's independence precisely because it is the judiciary and not another branch imposing discipline. Senator DeConcini stated, "This legislation protects the fragile independence of the judiciary since the creation of a measure to investigate and discipline judges does not interfere with the doctrine of separation of powers, nor the theory of judicial independence, if the judicial branch has sole control over the proceedings." 126 CONG. REC. 28,092 (1980). The district court in \textit{Hastings v. Judicial Conf. of the United States}, 593 F. Supp. 1371 (D.D.C. 1984), \textit{aff'd in part and rev'd in part}, 770 F.2d 1093 (D.C. Cir. 1985), \textit{cert. denied}, 477 U.S. 904 (1986), in upholding the constitutionality of the 1980 Act, similarly found that limitations may be placed on the independence of individual judges "in order to assure the integrity and independence of the judicial branch." \textit{Id.} at 1379. Both these statements accept the concept of the judiciary as a bureaucracy and entirely miss the point that the independence of the judicial branch can only be assessed in relation to the independence of individual judges. \textit{But see Hastings v. Judicial Conf. of the United States}, 770 F.2d 1093, 1107 (D.C. Cir. 1985) (Edwards, J., concurring) (asserting that "[i]f inde-
The question of the constitutionality of federal judicial-branch discipline must be answered in part by considering whether discipline short of impeachment impermissibly interferes with the individual independence of federal judges. The justifications for the disciplinary authority exercised by the legislative and executive branches over its members do not equally support judicial-branch discipline. First, the Constitution explicitly grants Congress the authority to discipline its members.205 The Constitution grants no such authority to the judiciary.406 Second, the rationale for executive authority to discipline its members does not apply to judicial-branch discipline.207 The executive branch is by design a unified authority, whose members are subordinate to the President and are charged with helping the President carry out executive responsibilities under the Constitution. The judicial branch, unlike the executive, is not a unified, hierarchical power. Each judge is autonomous in constitutional function. The institutional unifier is the mechanism of appellate review, which assures consistency in judicial precedent but provides no basis for discipline of individual judges.

Certainly the judiciary has inherent authority to manage case flow and daily administration of the courts. This authority enables the judiciary to perform its constitutional function of deciding cases. The Supreme Court, in Chandler
v. Judicial Council of the Tenth Circuit, recognized the validity of limited judicial management authority, but also cautioned that there is a "line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence." Justice Douglas, in dissent, accepted the authority of the courts to regulate case flow through the assignment process but argued "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." 208

VI. THE 1980 JUDICIAL DISCIPLINE ACT

The 1980 Act attempts to walk the fine line of "permissible intervention." 210 The disciplinary standard set forth by the Act is conduct "prejudicial to the effective and expeditious administration of the business of the courts." 211 Thus, all actions taken by either a judicial council or the Judicial Conference are couched in the language of administrative necessity.

Certainly some degree of judicial-branch discipline is a legitimate component of judicial administration. Judicial independence does not mandate that a judge who persistently accumulates large backlogs or engages in profanity on the bench be left alone to continue inappropriate conduct. The judiciary clearly has a legitimate interest in protecting its credibility as an institution of government. This legitimate judicial interest supports some degree of authority within the judicial branch to rectify inefficiencies and public image problems created by inappropriate judicial conduct.

The issue posed by the Act, therefore, is not whether the judiciary has any inherent disciplinary authority. Instead, the essential issue is to what extent the Constitution permits judicial-branch discipline as part of the judiciary's legitimate authority to manage judicial business. Proponents of the Act argue broad disciplinary authority is justified because it is impossible to distinguish between permissible judicial administration and potentially impermissible judi-

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208. 398 U.S. 74, 84 (1970). The types of appropriate administrative responsibilities discussed by the Court included "when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters." Id. at 84-85. The Court also approved as "reasonable, proper, and necessary" court rules that prohibit assignment of further cases to a judge until that judge's backlog is reduced or eliminated. Id. at 85. These mechanisms are a far cry from those contained in the 1980 Act, which allow reprimand or removal of caseload as sanctions to be imposed for inappropriate conduct without limitation to the appropriate corrective response. See 28 U.S.C. § 372(c)(b)(B).

209. Chandler, 398 U.S. at 137 (Douglas, J., dissenting). Justice Douglas also argued that "[o]nce a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge." Id. at 136.

210. Chandler, 398 U.S. at 84; see also supra text accompanying note 208 (quoting Chandler further).

211. 28 U.S.C. § 372(c)(1). Similarly, the basis for action by a judicial council or the Judicial Conference is to take such action "as is appropriate to assure the effective and expeditious administration of the business of the courts." Id. § 372(c)(6)(B).
cial discipline.212

The judiciary may be faced with two types of judicial misconduct: minor misconduct, not falling into the category of great offenses generally considered as potentially impeachable conduct; and serious misconduct, which could properly be considered a basis for impeachment. Judicial self-regulation over minor misconduct is advisable for two reasons. First, attention to such misconduct legitimately fits within the judiciary’s administrative concerns. Second, neither Congress nor the Executive has any express constitutional authority to regulate judicial misconduct that is neither impeachable nor criminal.

Is the 1980 Act therefore a permissible means of regulating minor judicial misconduct? First, the Act is unnecessary to the extent it authorizes discipline of minor misconduct prejudicial to judicial business. The chief judge and the councils already have authority under the 1939 Act to issue “all necessary orders for the effective and expeditious administration of the business of the courts within [their] circuit.”213 Before the Act, minor misconduct was handled informally, through discussions with concerned colleagues, or with the chief judge of the circuit. Supporters of the Act argue that formalized procedures serve the judge’s due process interests as well as public accountability concerns. The Act offers the investigated judge and the complainant an opportunity to petition for review of an adverse decision.214 It is questionable whether public accountability of judges other than by impeachment or prosecution for crimes is constitutionally permissible, given the constitutional priority placed on independence.

Even assuming, for a moment, that public accountability for minor misconduct is a constitutionally permissible goal, the Act only minimally serves the goals of due process and accountability. The overwhelming majority of complaints are handled by the chief judge without creation of a special committee to investigate and report to the judicial council. Most of the claims handled by the chief judge are concluded by dismissal without further review.215 Most

214. Id. § 372(c)(10).
215. See, e.g., 1989 DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANNUAL REPORT 93 [hereinafter 1989 ANNUAL REPORT]. Three hundred and four complaints were filed in 1989. See id. The chief judges concluded 214 (79%) of them. Id. Of these concluded complaints, 204 were dismissed. Permissible grounds for dismissal under the Act are frivolity, failure to conform to the statutory standard, or direct relation to the merits of the case out of which the complaint arose. Id. at 92. Most of the complaints that were dismissed were based on allegations of judicial bias or abuse of judicial power. Of the 58 complaints sent to the judicial councils in 1989, 55 were disposed of by denying the complainant’s petition for review. Id. at 93. Only one recommendation of discipline, a public reprimand, resulted from judicial council actions. On review of this recommendation, the Judicial Conference ordered private rather than public reprimand. Id. at 92-96. Statistics from other years demonstrate similar patterns. See Edwards, supra note 108, at 791; see also Collins T. Fitzpatrick, Misconduct and Disability of Federal Judges: The Unreported Informal Responses, 71 JUDICATURE 282 (1988) (indicating that many
complaints submitted pursuant to the Act are therefore disposed of in precisely the same manner as complaints submitted before the Act. They are privately resolved by the chief judge of the circuit without review.

Confidentiality of these proceedings and dispositions are protected. Thus, the Act does not really satisfy the goals of public accountability. Furthermore, public accountability for minor judicial misconduct is simply inconsistent with the principle of judicial independence. The Framers mandated life tenure for judges, subject to impeachment for great offenses, precisely to reduce the potential of corruption inherent in extensive public accountability. The true justification for judicial-branch discipline of minor misconduct is not to satisfy public accountability, but to ensure that the judicial system operates efficiently and effectively. Public accountability is not a permissible goal in disciplining minor judicial misconduct.

The Act requires the chief judges and the judicial councils to devise elaborate mechanisms for reviewing the conduct and decisions of their colleagues. Although the overwhelming majority of complaints filed are either frivolous or improperly based on the merits of a decision, each complaint must be reviewed and investigated by the chief judge, the special committee of judges, or the judicial council until disposition is made. Each disposition is subject to further review. The very existence of a formalized complaint procedure tends to encourage citizen complaints. The fact that nearly all of these complaints are groundless underscores the fact that the Act effectively undermines one of its intended purposes, the promotion of judicial efficiency, by imposing significant investigative and administrative responsibilities on the judiciary to process meritless complaints.

Nor does the mere existence of the Act assure that all misconduct matters will be processed pursuant to the procedures mandated by the Act. If no formal “complaint” is submitted, misconduct can still be handled outside the Act. Many instances of alleged misconduct may simply never materialize in the form of a “complaint” under the Act. Institutionalizing judicial discipline therefore fails to augment due process and public accountability, as intended by the Act. The Act interferes needlessly with the institutional independence

216. Rule 16 of the Illustrative Rules, promulgated by a special committee of the Conference of Chief Judges, protects the confidentiality of all information relating to consideration of the complaint. ILLUSTRATIVE RULES, supra note 171, at 49-52. Rule 17 provides for public availability of the “docket sheet record” of “orders” of the chief judge regarding disposition of a complaint and memoranda in support of such orders, but prohibits the release of the name of the judge without the judge’s consent when disposition is by the chief judge or by dismissal by the judicial council. Id. at 52-53.

217. Frivolous complaints may comprise between 88% and 99.5% of the total complaints filed in each circuit. See Edwards, supra note 108, at 790.

218. The number of complaints filed has increased substantially since passage of the Act. For example, the number of complaints filed has increased from 177 filed in 1984 to 304 filed in 1989. 1989 ANNUAL REPORT, supra note 215, at 93.

219. See Fitzpatrick, supra note 215, at 283.
of the judiciary, particularly in regard to minor misconduct, because the legislative scheme is both unnecessary and burdensome.

The Act also impermissibly threatens the independence of individual judges. Impartial decision-making is the core constitutional function performed by the judiciary. The Framers were very familiar with the subversion of impartial decision-making that occurs when the executive or legislative branches are able to exercise power over the tenure or compensation of judges. The Framers were able to anticipate this threat to impartial decision-making and therefore devised a structure designed to protect judicial independence. However, the Framers did not anticipate the growth of a large judiciary where the management of judicial business would become a necessary activity of the courts. Consequently, they did not provide explicit protection against erosion of independence from within the judicial branch. The principle of protecting impartial decision-making is no less relevant because the threat comes from within the judiciary itself.

The trend toward centralized management in the judiciary has, if anything, only reinforced the need to protect independent decision-making. Coercion can occur from within the judicial branch as well as from the actions of the other branches. The contemporary, and perhaps misleading, view of the judiciary as a bureaucracy has tended to emphasize conformity and uniformity over independence. The 1980 Act only aggravates these tendencies by formalizing procedures that authorize judges to initiate complaints and pursue investigations against fellow judges. The Act’s problem is not that the judiciary should be completely precluded from performing investigatory and prosecutorial functions. The problem is that the Act assumes that judges can serve as complainant, investigator, prosecutor, and judge over their colleagues without undermining judicial independence. The inherent fallacy of such an approach is patently obvious. The judges exercising disciplinary authority generally will be other judges within the same circuit as the judge under investigation. The concentration of such authority over a fellow judge is inconsistent with impartial decision-making, even if the authority is not actually abused to intimidate or harass a judge. The Framers rejected a proposal to try impeachments in the Supreme Court in part because the power of impeachment should not be entrusted to a small number of persons.

The sanction powers under the Act, although not as drastic as impeachment, are potent and can profoundly affect a judge. A judge under investigation pursuant to the Act may think twice before issuing a controversial opin-

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220. See Gerhardt, supra note 128, at 77 (asserting that this assumption risks the independence each judge must have in order to make decisions without fear of reprisal or harassment).

221. Judge Harry Edwards expressed concern in his Hastings concurrence that the Act might be “misused to pressure or intimidate the nonconformist, the judge whose judicial style or legal philosophy are [sic] repugnant to the majority of his or her colleagues.” Hastings v. Judicial Conf. of the United States, 770 F.2d 1093, 1107 (D.C. Cir. 1985) (Edwards, J., concurring), cert. denied, 477 U.S. 904 (1986).

222. THE FEDERALIST NO. 65 (Alexander Hamilton), supra note 10, at 398.
ion. That "thinking-twice" risks impartial decision-making. Of course, in the absence of the Act, a judge may still be the subject of an inquiry by the chief judge and may still be subject to influences which may affect impartial decision-making.

The review opportunity in the Act offers the investigated judge some assurance that the judge who is the subject of a formal complaint will not be at the mercy of improper and private coercion regarding substantive decision-making. The price of that assurance, however, is a process that poses a greater threat to impartial decision-making because it requires the chief judge and the councils to supervise the conduct of fellow judges. The Act, of course, does nothing to protect the judge who may be the subject of an informal inquiry outside the statutory process. Abuses can occur both with and without the Act. The ostensible protection in the Act simply does not justify the threat to impartial decision-making posed by the statutory scheme.

Judicial self-regulation of serious misconduct is even more troublesome. Judicial self-regulation of serious misconduct is the true raison d'etre of the Act. Congress clearly intended to require that the judiciary screen complaints for impeachable conduct and to authorize an alternative to impeachment for serious judicial misconduct. The undermining of judicial independence discussed with regard to the Act's regulation of minor misconduct applies as well to regulation of serious misconduct.

Judicial self-regulation of serious misconduct presents significant additional concerns, however. The responsibilities assigned to the judiciary by the Act impair the impeachment function assigned to Congress in several ways. First, the Act asks the respective judicial council or the Judicial Conference to determine whether the judge has engaged in conduct for which impeachment might be warranted, and asks it to forward such decision to the House of Representatives. Congressional delegations to a coordinate branch must be accompanied by an "intelligible principle" to guide the delegation. Current delegation doctrine indicates that Congress' authority to delegate is nearly unlimited. However, the 1980 Act may be a rare example where Congress cannot provide an "intelligible principle" to guide congressional delegation because the definition of an impeachable offense is necessarily a political determination that must be left to Congress. Congress cannot legitimately delegate a responsibility that, by its nature, requires congressional judgment. The judiciary therefore lacks constitutional authority to decide what may be an im-

224. See supra pp. 35-36.
225. 28 U.S.C. § 372(c)(8).
227. The Court has found impermissble delegations of legislative authority only twice, and not since 1935. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (authority to prohibit the transportation in interstate commerce of petroleum products produced in excess of state law); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (authority to promulgate and impose codes of fair competition in order to rehabilitate an industry).
Congress is free, under the Act, to disregard a judicial determination that impeachment may or may not be warranted. The fact that the judiciary's determination is not binding, however, does not resolve the constitutional problem. If the Judicial Conference determines that an impeachable offense may have been committed, Congress will make its own determination whether the judge has engaged in impeachable misconduct. If, however, the Judicial Conference concludes a judge has not engaged in impeachable conduct, Congress is unlikely to evaluate the misconduct independently to determine whether impeachment is warranted, because Congress intends that the judiciary screen complaints for impeachable conduct. Thus, in many cases involving serious misconduct, the judiciary's decision that the misconduct does not rise to the level of an impeachable offense will, in fact, be conclusive.

The second reason the Act impairs the impeachment process is that it impermissibly authorizes judicial discipline over what may be impeachable offenses. Self-regulation of serious judicial misconduct requires the unelected, unrepresentative judiciary to perform a function reserved for Congress, the branch of government most directly responsible to the people. The Constitution explicitly authorizes executive-branch prosecution of impeachable offenses which may be crimes. There is no constitutional support, however, for judicial-branch jurisdiction over impeachable offenses.

Judicial disciplinary authority over impeachable offenses is impermissible for two reasons. First, such authority is incompatible with judicial independence. The Act legitimizes an additional layer of accountability for conduct already governed. The Act allows both Congress to impeach and the judiciary to discipline for the same misconduct. Congress certainly is free to impeach a judge who has already been disciplined by the judiciary. Moreover, the Act does not limit judicial disciplinary authority in the face of congressional impeachment proceedings.

Second, vesting control over serious judicial misconduct in the hands of unelected life-tenured judges seriously affronts the principles of public accountability inherent in the impeachment process. Whereas public accountability should not be relevant with regard to minor judicial misconduct, public accountability is the critical issue when assessing judicial-branch discipline of serious misconduct. Jurisdiction over serious public misconduct was vested in Congress because the Framers believed the representatives of the people should be the ones to evaluate the conduct of public officials.

228. See supra note 134 and accompanying text (noting that Congress has exclusive authority over the impeachment process).

229. See supra text accompanying note 102.

230. Hamilton argued that impeachment is a "method of NATIONAL INQUEST into the conduct of public men . . . . If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves?" The Federalist No. 65 (Alexander Hamilton), supra note 10, at 397. Hamilton doubted whether the Supreme Court "would possess the degree of credit and authority" to sit as a court of impeachment. Id. at 398.
The division of impeachment responsibility into investigation by the House and trial by the Senate provides protection against one body serving both as accuser and judge on questions of violation of the public trust. Judicial-branch housekeeping jurisdiction should not extend to serious misconduct because this form of self-regulation is simply inconsistent with the public accountability required for serious misconduct. The remedies explicitly authorized by the Constitution—impeachment and prosecution—are vested in public accountability. Even assuming that these remedies are not exclusive, a permissible alternative remedy must reflect the public accountability principles inherent in impeachment and prosecution. The sanctions authorized by the Act, while substantial enough to deal satisfactorily with minor misconduct, clearly do not provide sufficient means of disciplining serious misconduct. Reprimand or temporary removal of caseload is an inadequate sanction for serious misconduct. The Act allows the judiciary to insulate allegations of serious misconduct from public scrutiny and severe sanction in the absence of aggressive congressional oversight.

At this point, the argument of necessity must be made. For if the judiciary has inherent authority to regulate minor judicial misconduct, but lacks the authority to regulate serious judicial misconduct, then minor misconduct may, in fact, be adequately regulated, while serious misconduct escapes regulation by falling into the gap between legitimate judicial authority and congressional inaction. The perceived need for replacing the impeachment process does not, however, provide the constitutional authority to create an alternative in the judicial branch which derogates the impeachment function, while impairing the integrity of the judicial branch.

The Act attempts to allow Congress to “have its cake and eat it too.” The Act was intended to provide a substitute for impeachment, and to compensate for congressional inactivity. Congress may well believe that the choice of impeachment or “doing nothing” is unsatisfactory for handling the majority of cases of judicial misconduct. The Act ostensibly offers the option of dealing with serious misconduct by means other than impeachment. But, by providing

231. Id. at 402.
232. The Act requires that “[e]ach written order to implement any action” by the judicial council or the Judicial Conference be “made available to the public through the appropriate clerk’s office of the court of appeals for the circuit.” 28 U.S.C § 372(c)(15). Rule 17 of the Illustrative Rules requires a “docket sheet record of orders of the chief judge and the judicial council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the judicial council” be made available in the clerk’s office when final action is taken on the complaint, provided the action has been the subject of an order, and the action taken was “public” action by the council. See Illustrative Rules, supra note 171, at 52-53. If private reprimand or censure is imposed, neither the judge’s name, nor the text of the reprimand will be publicly available. If the complaint is disposed of by the chief judge, or dismissed by the council for reasons other than mootness, the judge’s name cannot be disclosed without consent. Id. Information regarding a complaint referred to the Judicial Conference will be disclosed only as may be ordered by the Judicial Conference. Id. Given the percentage of complaints which are handled by the chief judge, or which may not result in an “order,” public information is minimal.
a viable substitute for impeachment in all but the most egregious cases, Congress almost certainly ensures that impeachment will fall into further disuse in favor of judicial-branch discipline. The practical effect of the Act, therefore, is to shift responsibility for disciplining serious misconduct from Congress to the judiciary. Congress will increasingly rely upon judicial-branch discipline to relieve Congress of what is perceived as the onerous chore of impeachment. The value of impeachment as a constitutional check upon the judiciary is destined to erode. The ultimate effect of that erosion will be the loss of public accountability for serious misconduct perpetrated by life-tenured judges. In effect, then, the Act is self-defeating.

**CONCLUSION**

The 1980 Act unconstitutionally attempts to use the vehicle of judicial administration to impose an extensive disciplinary system upon the judiciary. While efficient judicial administration is clearly an appropriate goal, the exercise of disciplinary authority must be confined to assure that judicial independence is not undermined by burdensome and intrusive procedural requirements.

The most serious problem with the Act is its authorization of judicial-branch discipline for impeachable offenses. Because the Act shifts disciplinary responsibility from Congress to the judicial branch of government, Congress will increasingly rely upon judicial-branch discipline as a substitute for impeachment in all but the most egregious cases. The effectiveness of impeachment as a check upon the judiciary will deteriorate, leaving the judiciary with extensive disciplinary authority over its own members. While such authority may leave the judiciary free from congressional interference, it jeopardizes the principle of public accountability central to the impeachment function. The public is entitled to expect accountability for serious judicial misconduct as mandated by the Constitution. The vehicle for providing that accountability, impeachment, is already in place.