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THE INDEPENDENCE OF THE FEDERAL JUDICIARY†

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It is indeed an honor to speak at the Boston College Law School. As you are probably aware, there has been some criticism directed at judges who deliver speeches and write articles on matters which may subsequently come before them in the course of litigation. The subject of my remarks is one that will likely not be part of any litigation that may come before me, and it is a subject of the highest interest to members of the bench and bar alike. I address myself today to the current congressional attempt to infringe upon the independence of what Professor Alexander Bickel calls "the least dangerous branch."

As you are no doubt aware, in our unique system of government we have three independent, yet interdependent branches. Each limits and counterbalances the others so that the ship of state continues on a relatively even keel. The power of the executive and legislative branches is checked by the operation of the judicial branch; the jurisdiction of the courts is within the aegis of Congress; and the power to appoint Judges is vested in the Executive.¹

A hallmark of our federal system is the independence of the judiciary. This independence is occasionally threatened by those who, while meaning well, would undermine the very attribute that makes the judicial system of this nation without peer. The paramount importance of the judiciary's independence was ably expressed by the late Circuit Judge John J. Parker:

There is one qualification which is the *sine qua non* of

† This paper was delivered on November 18, 1971, at the Boston College Law School Forum. It is reproduced without substantial change, except for the addition of footnotes. The reader is asked to bear in mind that it was written primarily to be heard, not read.

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¹ The power to appoint judges is, of course, subject to the advice and consent of the Senate. U.S. Const. art. II, § 2.

judicial success or even judicial respectability. That quality is independence The judge must not only be independent—absolutely free of all influence and control so that he can put into his judgments the honest, unfettered and unbiased judgment of his mind, but he must be so freed of business, political and financial connections and obligations that the public will recognize that he is independent. It is of supreme importance, not only that justice be done, but that litigants before the court and the public generally understand that it is being done and that the judge is beholden to no one but God and his conscience. As was well said by John Marshall in the debate on the Constitution in the Virginia Convention: "The Judicial Department comes home in its effects to every man's fireside; It passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he (the judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary."²

The founding fathers were convinced that the independence of the judiciary was of paramount importance in their new government. Their belief was embodied in the Third Article of the Constitution, which provides that judges "shall hold their office during good behavior." The framers of the Constitution sought to establish the judiciary's independence by limiting the method for removal of federal judges to a cumbersome³ impeachment process.

Alexander Hamilton expressed their views most clearly in his contributions to the *Federalist Papers*. In No. 79 he wrote:

The precautions for their [judges'] responsibility are comprised in the article respecting impeachments. They are

² Parker, *The Judicial Office in the United States*, 20 *Tenn. L. Rev.* 703, 705-06 (1949).

³ The impeachment process is a cumbersome but carefully structured procedure which requires some analysis. Procedurally, the Constitution provides that a civil officer may be impeached by the House of Representatives and tried by the Senate, and, if convicted, may be removed from office and disqualified from holding any other. Congress alone possesses the power to remove all civil officers by impeachment, although many civil officials, with the exception of Article III judges, may be removed in other ways. See text at p. 440 *infra*. The authority for this result is implicit in various other sections of the Constitution. *Id.* The President has the power to remove all subordinate executive officers since the power of appointment carries with it, absent contrary authority, the power of removal. See text at p. 439 *infra*. Similarly, Congress may set the tenure of inferior officers and so may enforce those limits by necessary means. *Id.*

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liable to be impeached for mal-conduct 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 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 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 virtual disqualification.⁴

In Federalist No. 78, Hamilton concluded his argument for an independent judiciary by elucidating the benefits of the good behavior standard:

The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

[In view of] the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; [and] . . . nothing can contribute so much to its firmness and independence as permanency in office.

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the

⁴ The Federalist No. 79 at 532-33 (J. Cooke ed. 1961) (A. Hamilton).

permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

...
But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

...
Upon the whole there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of their judicial offices in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.⁵

I. ATTEMPTS TO ENCROACH ON JUDICIAL INDEPENDENCE

In the last forty years Congress has considered several alternative methods for the removal of federal judges. In 1936, two bills were introduced which sought to provide an additional avenue for the removal of federal judges. Both bills gave the power of removal to a special court and allowed an appeal to the Supreme Court. One bill,⁶ introduced by Senator McAdoo, proposed the establishment of a court to be composed of the senior judges of the ten circuit courts of appeals and the Chief Judge of the Court of Appeals for the District of Columbia. Its jurisdiction would have extended to the trial of all federal judges, except justices of the Supreme Court, upon the issue of misbehavior. Prosecution of the matter was to be entrusted to the United States Attorney General; and upon conviction and transmission of notice thereof to the President, the judge was to be automatically removed from office. The bill also provided for an appeal to the Supreme Court.

A second bill,⁷ introduced by Congressman Summers, provided a method whereby the House of Representatives could transmit a resolution directly to the Chief Justice of the United States. This bill

⁵ The Federalist No. 78 at 21-23, 525-27, 530. (J. Cooke ed. 1961) (A. Hamilton).

⁶ S. 4527, 74th Cong., 2d Sess. (1936). For congressional discussion of the measure see 80 Cong. Rec. 5933-39 (1936).

⁷ H.R. 2271, 75th Cong., 1st Sess. (1937). See congressional discussion of the measure in 81 Cong. Rec. 6157-96 (1937).

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provided that if, in the opinion of the House, there were reasonable grounds for believing that any judge of the United States, other than a judge of any of the circuit courts of appeals or the Supreme Court, was guilty of misconduct, the Chief Justice should convene the circuit court of appeals for the circuit in which the judge's judicial district was situated to try the issue of the accused judge's good behavior. The Chief Justice would have been required to designate three circuit judges, none of whom had to be from the circuit of the accused judge, to serve on such a court. Prosecution was to be entrusted to managers designated by the House, and appeal was allowed to the Supreme Court of the United States by either the prosecution or the accused. Judgment was to be limited to removal from office.

Both of these bills were the subject of much criticism. Serious doubt existed as to whether a proceeding for removal constituted a "case or controversy" falling within the judicial power⁸ of the courts under Article III.⁹ A further objection was predicated on the argument that the impeachment provisions of the Constitution impliedly exclude all other methods for removal.¹⁰ In rejecting the two proposals, Congress wisely adhered to the belief of the framers of the Constitution that the impeachment procedure should be the sole means for removing judges.

A similar and equally unfortunate attempt to tamper with the independence of the judiciary occurred when President Franklin Roosevelt sought to "pack" the Supreme Court with Justices who would sustain the legislation of the New Deal.¹¹ In 1937, President Roosevelt delivered a message to Congress in which he proposed a legislative plan that would have increased the number of justices from nine to a possible maximum of fifteen. Thus he brought into the open a disagreement between the Court on one hand, bent on maintaining the doctrine of judicial independence, and, on the other, those individuals and groups who wished the Court to refrain from reviewing matters of legislative policy. The unsuccessful action by President Roosevelt exemplified the angry collision between dynamic and popular presidents and the federal courts, and is illustrative of the numerous presidential and congressional efforts to encroach on the federal judiciary's independence.¹²

⁸ "The judicial power shall extend to all cases . . . [and] controversies. . . ." U.S. Const. art. III, § 2.

⁹ See Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 *Harv. L. Rev.* 330, 333-34 (1937).

¹⁰ See text at pp. 449-50 *infra*.

¹¹ See generally W. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* ch. 10 (Torchbook ed. 1963).

¹² See, e.g., the discussion of Lincoln's disregard for the Court in *Ex parte Merryman*, in R. Cushman, *Leading Constitutional Decisions* 79 (13th ed. 1966).

In a recent session of Congress, former Senator Tydings, together with other liberal senators,¹³ introduced S. 1506, a bill entitled *The Judicial Reform Act*.¹⁴ Although both Senator Tydings and his bill were unsuccessful in gaining popular approval, the principal aim of the bill—the establishment of a Commission on Judicial Disabilities and Tenure—still enjoys strong support. Addressing a convention of the American Bar Association, Deputy Attorney General Kleindienst expressed the Nixon Administration's approval of the bill. He stated, in part:

I [regret] . . . that I did not either see or get the opportunity to speak in favor of Senator Tydings' proposal with respect to judicial removal. On behalf of the Administration and on behalf of the Attorney General, we favor this very much indeed, and judicial reform. Although we have not yet presented our position to the Congress, we will in the near future. We commend his effort and his activity and his diligence in this area, and, like you, as a result of the vote you took here this morning, we are hopeful that the Congress will enact this into legislation this year.¹⁵

In spite of its initial defeat, the terms of the proposed Act deserve considerable attention. It is to Title I of the Act that my comments and criticism will be directed, for it is this section that represents the most recent assault on the independence of the federal judiciary. Title I calls for the creation of a "Commission on Judicial Disabilities and Tenure" within the judicial branch.¹⁶ This Commission would be composed of five members, each a federal judge in active service, and would include two district judges and two circuit judges to be assigned by the Chief Justice. In addition, no judge who is a member of the Judicial Conference¹⁷ of the United States could be assigned to the Commission.

¹³ The cosponsors were Senators Eagleton, Goodell, Hatfield, Magnuson, Mondale, Muskie, Scott, Stevens and Yarborough.

¹⁴ S. 1506, 91st Cong., 1st Sess. (1969).

¹⁵ Reprinted in *Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 93 (1970).

¹⁶ The proposed version of S. 1506 is contained in *Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 10-47 (1969) [hereinafter cited as *Hearings*].

¹⁷ 28 U.S.C. § 331 (1970) provides:

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial

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The Act would provide that, upon a complaint, either formal or informal, of *any* person, the Commission could undertake an investigation of the official conduct of an Article III judge to determine whether that judge's conduct has been consistent with the standard of good behavior. Willful misconduct and persistent failure to perform his official duties would constitute conduct inconsistent with the requirement of good behavior. After an investigation, the Commission could order a hearing concerning the conduct of the judge and, within ninety days after the adjournment of the hearing, the Commission would have to make findings of fact and a determination regarding the judge's conduct. If, upon the concurrence of four of its members, the Commission decided that the conduct of the judge was inconsistent with the good behavior requirements of Article III, it would report its findings to the Judicial Conference with the recommendation that the judge be removed from office. If the Commission found that the judge's conduct was in keeping with good behavior, the matter would be dismissed; the judge under investigation could then decide whether to make public any or all information relating to the investigation.

The Judicial Conference or one of its committees would review the record, findings and determination of the Commission. It could hear oral arguments, receive additional evidence, or require the filing of briefs. The Conference could accept, modify or reject the findings of the Commission. Should the Conference accept the recommendation of the Commission, the Conference would then stay certification of its

Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

determination to the President pending review in the Supreme Court by writ of certiorari. If the judge did not seek review, or if he did and the findings were affirmed, the Conference would certify to the President that the judge be removed from office. The judge then would be removed and a new one appointed by the President with the advice and consent of the Senate.

In addition, the Commission would be empowered to hear any claim by a retired judge that he was not being assigned court duties which he was willing and able to undertake. Such a claim would have to be substantiated to the satisfaction of a majority of the Commission, which would then transmit an appropriate order to the authority responsible for the assignment of judicial duties to retired judges.

The proposed Act attempts to circumvent the impeachment provisions of the Constitution. Its supporters correctly contend that the impeachment process is cumbersome; indeed, they argue that it is too cumbersome. In their haste to condemn it, however, they demonstrate its essential purpose. Impeachment was *designed* to be cumbersome in order to make removal by whim an impossibility.¹⁸ It embodies the belief that before a judge can be removed from office he must have offended the Constitution to such a degree that the great weight of the Congress is moved to convict him. The supporters of S. 1506, who testified before the Tydings Subcommittee, claim that an easier method of removal for federal judges is necessary. However, the clear result of the bill would not be to make removal of federal judges easier than is provided by the Constitution; rather, the result would be to make it easy to remove federal judges. This change would violate the spirit and letter of the Article II impeachment grounds, which were purposely intended to make difficult the removal of federal judges and other civil officers. The impeachment provisions have been fundamental in permitting judges to retain their independence from political interference, which in turn, has allowed them to accord justice without favoritism. This beneficial and necessary aspect of the federal judiciary would be substantially undermined if the bill were to become law.

The impeachment process has been and continues to be a viable means of removing federal judges and policing their conduct. While thirteen men, eight of them judges and one of them a President, have been impeached and four have been convicted by the Senate, a total of fifty-five judges were subjected to congressional inquiry up to 1962.¹⁹ As the testimony of Joseph Borkin, a proponent of S. 1506, makes clear, the benefits of the impeachment process are realized indirectly:

¹⁸ See discussion in note 3 *supra*.

¹⁹ See Hearings, *supra* note 16, at 100-15.

[I]mpeachment is a costly, complicated, and cumbersome process, initiated rarely, and then only with the greatest of reluctance. Its only real effectiveness has been indirect. By threatening a misbehaving judge with exposure and disgrace, it has forced those judges guilty of the most flagrant abuses to resign rather than face the ordeal of impeachment.²⁰

However, as an expert on judicial behavior, Mr. Borkin argued that the history of the impeachment of judges indicates the procedure's failure. This failure, he contended, is evidenced by the fact that while fifty-five judges were investigated, only eight were impeached. It should be noted that, in addition, eight were censured and seventeen resigned at some stage of the investigation, while the balance were absolved. Mr. Borkin thus concluded that the impeachment process is so cumbersome that the bar, the prosecuting officials and Congress "appear [to be] willing to permit resignation from the bench to serve as a curtain behind which judges of questionable character could hide the details of their misdeeds."²¹

It seems to me that supporters of S. 1506, such as Mr. Borkin, do not really want to see the federal judiciary improved; they want to see heads roll. It should not matter how a "judge of questionable character" leaves the bench so long as he does. The institution of the federal judiciary is better served by the resignation of a particular judge than by the successful witch-hunting of a few individuals bent on removing all those jurists who, in the opinion of a few, are not observing the requirements of good behavior.

In his testimony before the Subcommittee, Mr. Borkin explained in great detail the sagas of three federal judges²² indicted for judicial corruption. They were sordid tales and most unfortunate. However, they missed the point. It is not surprising that a few judges have violated the canons of judicial ethics; judges after all are human, appointed by a less-than-perfect man, a President, and confirmed by less-than-perfect men and women, the United States Senate. Men may err. What is significant is the number of fine men and women who grace the federal bench and who are above reproach—men and women who are dedicated to their high position as federal judges—conservative judges, liberal judges, black judges, white judges—all, or at least the vast majority, of whom discharge their responsibilities to the utmost of their abilities. If a judge is to be placed in a position where he can be reviewed by five other judges on the complaint of "any person," many well-qualified individuals would refuse appointment.

²⁰ Id. at 101.

²¹ Id. at 104.

²² Id. at 105-14.

The independence of the federal judiciary is more important to those persons than perhaps any other aspect of the position.

Many decisions of a judge may bestir bitter feelings in the litigants. If the proposed bill were passed, every judge would be made constantly aware of the possibility that an unsatisfied litigant might seek to discredit him and to have him removed by means of an investigation. This is especially true in the district courts, where the trial judge is regularly in personal contact with controversial issues, emotional settings, and, frequently, volatile personalities. Under these circumstances, a district judge *must* be able to act and decide cases and controversies free from the threat of reprisal through use of the investigative function of the Commission. For those who would deny that the power of the Commission could be used as a means of reprisal need only look to those unfortunate circumstances in Oklahoma involving Judge Chandler, a matter to which I shall later return.

It is easy to discern how the existence of such a Commission might have affected the work of a judge such as the former Chief Judge of this district, Charles E. Wyzanski. Judge Wyzanski is a man of integrity with definite, but enlightened, opinions. Yet one can imagine that in his more than thirty years on the bench he has angered some individuals who would have been happy to see him investigated, humiliated and removed. On the other hand, I think you would agree that there are many in this country who would wish that fate to befall Judge Julius Hoffman of the Northern District of Illinois. While there are those who have disagreed with Judge Wyzanski and with Judge Hoffman, it is the strength of our system that they are not to be investigated or removed for any reason other than a finding that they are guilty of the charge of "high crimes and misdemeanors" as determined by a trial in the Senate.

As a federal district judge I have the strongest feeling that Title I of the proposed bill would obstruct and effectively destroy the independence of the federal judiciary. There is, however, much disagreement on this point. Many fine judges, all circuit judges I might add, as well as esteemed members of the bar testified before the Senate Subcommittee on Improvements in Judicial Machinery to the effect that (1) the bill would strengthen the federal judiciary and (2) impeachment is not the exclusive remedy for removal.

Judge Craven of the Fourth Circuit testified before the Subcommittee that, in his view, impeachment might not be the exclusive remedy for the removal of judges since impeachment is an Article II procedure and judges are created by Article III. He did not find the standard of "willful misconduct in office"—the bill's new "definition" of misbehavior—overly vague, although he considered it less than satisfactory:

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A phrase like "willful misconduct" is like other phrases such as "judicial temperament" and "obscenity." It is almost impossible to define such phrases, but we generally recognize the quality when we see it. . . .

But even if broad general terms are retained, I do not think that the federal judges need be fearful of a legislative grant of power to a committee composed of themselves enabling removal from office for willful misconduct in office or willful or persistent failure to perform official duties. It does not seem to me that the grant of such power *within* the judicial branch itself seriously infringes upon a proper tenure of office. I have never thought that independence of the judicial branch embraced hog-on-ice license for the individual judge. I do not believe that a federal judge will be inhibited or made timid in the discharge of his duties by recognition that he may not, with impunity, willfully engage in misconduct in office or persistently fail to do his job. Absolute tenure, in my opinion, is not necessary to assure judicial independence in deciding cases."²⁸

With due deference to Judge Craven, to my knowledge, no reasonable man has ever argued that judges have absolute tenure. The impeachment process has kept many judges, both directly and indirectly, from completing their careers on the federal bench. It should also be remembered that judges are subject to the sanctions of the criminal law and that they, like any other citizen of the Republic, may be indicted, tried and found guilty of any criminal violation.

I cannot count the number of times nor recount the variety of claims upon which attorneys have brought suit against powerful public agencies in my courtroom. If the Commission were in existence and any disgruntled litigant could bring a judge before it, how, then, could a judge decide a case which requires the determination of a controversial social issue. Unquestionably, he would be reluctant to find against a contentious litigant if he knew that the loser could bring him before the Commission. Under the present system, the dissatisfied litigant returns to his office and prepares an appeal. If the Commission were in existence he might also call an investigative agency to request an inquiry into the judge's character and his activities on and off the bench. With the possibility of abuse so great, it is unlikely that the presence of the Commission would lead to the fair hearing of cases; rather, it would likely give dissatisfied litigants license to discredit federal judges.

With great regularity, cases come before me and every other federal judge involving vast sums of money and, often, the future of

²⁸ Id. at 116-17.

major business enterprises. Frequently, the cases involve a stockholder's derivative action or a class action in which the plaintiffs may be quite poor in comparison to the wealth and power of the defendant. The pressures on a judge in such a case can be enormous, especially where the livelihood of a city may depend on the outcome of the case. To add to the equation the possibility that the powerful corporation, should it lose, could attempt to have him removed from the bench or at least harassed by bringing him before the Commission, might well be more than any individual judge could withstand.

While it is uncertain whether S. 1506 should or could be applied to justices of the Supreme Court, we can well imagine the number of complaints that would have been made to such a commission against Mr. Chief Justice Warren and members of his Court. Imagine, also, the number of times that Mr. Justice Douglas, or the late Mr. Justice Black, might have been brought before such a commission. It is unlikely that with the ominous presence of a commission hanging over its head, the Warren Court could have handed down its landmark decisions in matters of race relations, criminal procedure and voting rights. These decisions have changed the face of the nation. It is not impermissible to speculate whether monumentally important cases such as *Marbury v. Madison*,²⁴ *McCulloch v. Maryland*²⁵ and *Dred Scott v. Sandford*²⁶ would have been decided differently, had the Commission on Disability and Tenure been in existence from the beginning of the Republic. It is quite possible that the power of the "third branch" might have been so weakened that, in truth, it would now be the least dangerous branch.²⁷

I happen to be one who believes that there are no such things as political trials in the United States. However, I am convinced that this commission would create political federal courts, with judges fearful of deciding potentially volatile issues because of the threat of reprisal. While I do not intend to discredit or impugn the bar or the bench in any of these statements, the possibilities are alarming. I know that I personally would have great difficulty sitting in review of another judge's alleged willful misconduct in office; there may be others, however, who might relish such an opportunity. This is not to suggest that they are inferior men and women, but rather, that they are merely men and women who have likes and dislikes, hates and loves, each with his own judicial, political and personal philosophy of life and the law.

In his testimony, Judge Craven expressed his belief that S. 1506 would allow the federal judiciary to keep its own house in order.

²⁴ 5 U.S. (1 Cranch) 137 (1803).

²⁵ 17 U.S. (4 Wheat.) 316 (1819).

²⁶ 60 U.S. (19 How.) 393 (1856).

²⁷ The Federalist, No. 78 at 523 (J. Cooke ed. 1961) (A. Hamilton).

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He felt that as long as Congress described willful misconduct in office, then he, as a judge, would be on notice. He also felt that the congressional standard of "willful misconduct" could act as a stronger deterrent than the potential threat of impeachment:

Now, I think this would have a very healthy effect not just on the crooked judge but on the judge who may be arrogant on the bench, who may be discourteous to counsel and even to the jury sometimes, who is utterly indifferent . . . to time, except his own time; who will come to court at 11 instead of 9:30 if it suits him . . . who continues cases . . . for a lawyer with whom he formerly practiced but it seems quite difficult to get a continuance if you didn't practice with him. You don't really know it is favoritism, but if you suspect it, injury has been done to the judiciary; even the suspicion of it reflects upon the whole judiciary.

Then there is the judge who may be thought to be one who deliberately will delay adjudication of a particular class of cases; he doesn't like that kind of case, and it may take 9 months to get a decision out of him. It is impossible to know whether he is really guilty or not. But this sort of thing, I think, would tend to diminish if the judges felt that they were subject, at least, to inquiry, not necessarily to removal. . . .²⁸

Judge Craven suggests that the inquiry might lead to the serious punishment of censure, but he assumes that this is unlikely to occur very often, since the Commission would make few investigations. He premises his conclusions on the personal belief that the Commission and members of the bench and bar would act with honor and would initiate such proceedings against a judge only under grave circumstances. I would like to believe this but, unfortunately, in order to accept such a conclusion, I would have to ignore my own experience on the bench as well as some events of recent history.

Mr. Justice Douglas, for example, whose absolutist views on First Amendment rights have often vexed conservatives, several terms ago published his controversial book, *Points of Rebellion*.²⁹ The outcry was significant enough to cause the House Judiciary Committee to begin yet another investigation into the public and private affairs of Justice Douglas. Although it is uncertain whether the Commission would have jurisdiction over justices of the Supreme Court, one can envision a situation in which a federal judge such as Justice Douglas would have

²⁸ Hearings, *supra* note 16, at 121.

²⁹ W. Douglas, *Points of Rebellion* (1969).

to present his case before the Commission, after having been accused of being unfit by "any person" distressed by the judge's First Amendment views.

Another witness before the Subcommittee, Judge Maris, Senior Circuit Judge of the Third Circuit, also favored the Commission, arguing that impeachment is an inadequate mechanism to deal with those infrequent occasions when a judge is guilty of improper conduct or becomes physically or mentally disabled and refuses to retire. His only concern with the Commission was that of insuring that its proceedings be conducted with due process. With regard to the issue of the independence of the federal judiciary, Judge Maris stated:

I believe it is perhaps salutary from time to time to have somebody looking over your shoulder. I don't see how any judge need fear any such provision if he is conducting himself properly. As a matter of fact, it seems to me our history teaches that judges receive great consideration in their conduct and in their work. They are regarded highly, as a group, and perhaps too often derelictions which may well be small are overlooked by the public. I just don't fear that this would be any real threat to the independence of the judiciary.³⁰

With all due respect to Judge Maris, it appears that he offers "the wishing makes it so" theory in support of S. 1506. He believes that since men are basically honorable and that judges are, with few exceptions, basically competent and honorable individuals, judges have nothing to worry about. His argument assumes a premise which ignores the activities of those who lose important or controversial lawsuits.

Judge Haynsworth of the Fourth Circuit also endorsed the Commission. He stated, in part:

I believe that the very existence of . . . the commission, which would initially handle complaints, would result in substantial protection to the fit judge who is the victim of misconceptions or frivolous complaints that may rankle widely in the absence of some readily available adjudicatory forum to assess them. I believe it would result in earlier retirements of those judges whose conduct is substantially questionable, and it would provide a much more orderly means for the involuntary removal of the rare unfit judge than the impeachment procedures now provide. I am heartily in favor of authorizing judges to remove from office the unfit judge whose willful misconduct reflects upon the entire system and the admin-

³⁰ Hearings, *supra* note 16, at 130.

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istration of justice, itself, so long as the judge in question has all of those rights to hearings and procedural due process which Title I of S. 1506 provides.⁸¹

Judge Haynsworth further testified that he was opposed, as were the district judges of the Fourth Circuit, to having district judges represented on such a commission. While the prospect of being reviewed by a judge or judges who may never have sat in a district court is somewhat disturbing, the prospect of being personally reviewed by a circuit judge from one's own circuit is, however, far more disconcerting. Were this latter prospect to become a reality, how regularly would a district judge disagree with the law in his circuit if he knew that his good behavior could be reviewed eventually by the same judge with whom he had disagreed?

In my review of the testimony of the witnesses before the subcommittee, I think I have fairly summarized the views of those who favor the Commission. They believe that a statutory alternative to impeachment may be devised which would enable the federal judicial system to clean its own house, and that the system, in fact, needs cleaning. The men who testified before the subcommittee are honorable and well-meaning, but they are wrong. The most unfortunate testimony was that contained in the statement of Bernard Segal, then President of the American Bar Association, who indulged in a broad indictment of the federal judicial system in his support of the proposed bill. His statement to the Subcommittee read, in part:

In one respect, we have had continuing improvement in the federal courts during the past fifteen years. In my opinion, the quality of the judges on the federal bench, their general level of competence and diligence, has never been higher. But more than ever before, this fixes a glaring spotlight on the judge who because he is incompetent or physically or mentally disabled simply does not or cannot do his job . . . It is regrettable, but true . . . that one bad judge can undo the efforts of a hundred excellent judges. This circumstance, present always, is aggravated in these days when causes beyond the control of even the most able of judges have created such widespread cynicism by our citizens as to the efficiency of our judicial system to meet the demands which the modern world presses upon it.⁸²

Mr. Segal and those who share his views rely heavily on existing

⁸¹ *Id.* at 136.

⁸² Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2d Sess. 121-22 (1970).

state procedures similar in principle to those proposed in S. 1506 to alleviate the shortcomings of the federal judiciary. In many instances these procedures are inapposite. In some states, for example, judges are subject to review through the elective process. In others, where the state constitutions contain no impeachment provisions, the states clearly must provide other means for removal. But putting aside these differences for a moment, it is possible that such a system could work. The question is, however, whether Congress should adopt such a program, regardless of the possible constitutional limitations, when the danger of abuse is so great. It is my belief that it should not.

In 1959 Professor Henry Hart of the Harvard Law School devoted forty pages to criticism of the opinions of certain members of the Supreme Court of the United States.³³ One of his criticisms of the opinions of the Court was, in general, that they were "threatening to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court. . . ."³⁴ Thurman Arnold, a former judge of the Circuit Court of Appeals, and himself a first-rate lawyer, responded eloquently to Professor Hart³⁵ in language that is relevant to the subject here under discussion:

I do not know what "first-rate lawyers" Professor Hart has in mind. But to the public, first-rate lawyers can only mean men with large corporate practices and leaders in the American Bar Association who are now attacking the Court. Therefore, regardless of what Professor Hart is saying to himself, he is saying to the public that the Court must so conduct itself as to regain the admiration of its critics in the American Bar Association and the corporate bar. Has Professor Hart forgotten that Mr. Justice Brandeis was bitterly opposed by those who were considered the first-rate lawyers of that time? Has he forgotten that in the early days of the New Deal the majority of the Court did so conduct themselves as to gain the admiration of the first-rate lawyers of that time and that they did this so steadfastly as almost to wreck the Court? Has he forgotten that the decisions bitterly attacked by "first-rate lawyers" have often proven to be the Court's greatest decisions?

Had I been judging the competence of the members of the Court as Mr. Hart does, I would have chosen Justice

³³ Hart, Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, (1959).

³⁴ Id. at 101.

³⁵ Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298 (1960).

Black's eloquent dissent in *Barenblatt* and Justice Brennan's dissent in *Uphaus*, Justice Harlan's majority opinion in *Cole v. Young*, Chief Justice Warren's majority opinion in *Watkins*, and Justice Frankfurter's courageous dissenting opinion in *Rosenberg*. I would have concluded that the Justices who joined in these opinions were worthy of sharing with Holmes and Brandeis the honor of making the Court represent at least in part a great symbol of the ideal of civil liberties. . . .

At the time the *Barenblatt* and *Uphaus* opinions were written, there was a resolution pending in Congress to limit the appellate jurisdiction of the Supreme Court, which failed to pass the Senate by only one vote. The Court was under heavy attack from a prominent faction of the American Bar Association, all of whom could be classed as the "first-rate lawyers" who Mr. Hart tells us are losing confidence in the Court. I do not suggest that the majority was motivated by the pending resolution in arriving at their decision. I do suggest that had the dissent prevailed the resolution might have passed. It may well be fortunate that these great dissents did not prevail, so that they may later make a path to be traveled in the future. In any event, from these samples I would have presented a much more hopeful picture than Professor Hart does and, I suspect, a much more realistic one.³⁰

I join with the late and distinguished Judge Arnold. Quite correctly, it seems to me, his reply dramatizes the potential impact that a powerful faction might have on the federal judiciary if such a resolution or S. 1506 were passed. The outcome would be precipitous. "The benefits of the integrity and moderation of the judiciary" of which Hamilton spoke in the *Federalist Papers*³⁷ might well be supplanted by the temerity and excessiveness which political power and wealth often breed. S. 1506 can only bring great harm to the courageous and independent members of the judiciary who have withstood a wide variety of pressures. In my opinion the passage of the Judicial Reform Act would be the sort of mistake from which the judiciary and the Republic could never recover.

Although I am most disturbed by the potential for abuse which lies dormant in this bill, proponents of the Judicial Reform Act must also convince its critics and, very likely, the Supreme Court, that the bill is constitutional. It is to the constitutional issue and to an exam-

³⁰ *Id.* at 1315-16 (footnotes omitted).

³⁷ *The Federalist* No. 78 at 528 (J. Cooke ed. 1961) (A. Hamilton).

ination of the exclusivity of the impeachment clause that I should now like to turn.

II. THE EXCLUSIVITY OF THE IMPEACHMENT POWER

"The power of Congress to remove all civil officers by impeachment has always been regarded as an integral part of the system of checks and balances. . . ."³⁸ As noted previously, impeachment is the only method expressly provided in the Constitution for the removal of unfit civil officers, including federal judges. Therefore, it is my belief, and that of many others,³⁹ that the Constitution provides impeachment as the exclusive procedure for the removal of federal judges. This position is predicated on the language of the Constitution, the Federalist Papers and the principle of the independence of the federal judiciary.

A. *Removal: The Cases and the Constitution*

Three sections of the Constitution are relevant to a discussion of removal: (1) Article I, section 2 provides that the House of Representatives "shall have the sole power of impeachment"; (2) Article I, section 3 invests in the Senate "the *sole* power to try all impeachments" (emphasis added). Section 3 also requires that "no person shall be convicted without the concurrence of two-thirds of the members present." Article I further provides that "judgment in cases of impeachment shall not extend further than to removal of office"; and (3) Article II, section 4 enumerates the grounds for removal: "for conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Those who contend that a statutory alternative to impeachment would be constitutional note that the language of Articles I and II does not expressly provide that impeachment is exclusive. It is difficult for me to come to any other conclusion, however, after a careful reading of the language of the Constitution and the Federalist Papers. Despite the obvious intent of these documents, the nonexclusivists con-

³⁸ Note, The Exclusiveness of the Impeachment Power Under the Constitution, 51 Harv. L. Rev. 330 (1937).

³⁹ Included among those distinguished jurists who share or have shared this belief are Mr. Justice Story, Lord Bryce, Alexander Hamilton and Professor Hart. See Kramer & Barron, The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior," 35 Geo. Wash. L. Rev. 455, 459 (1967) [hereinafter cited as Kramer & Barron].

Several recent articles deal with the exclusivity of impeachment proceedings. Of these, two deal exclusively with this issue and rely heavily on English precedents and the beliefs of the delegates to the Constitutional Convention, as contrasted with my focus on American Court decisions, *infra*. These articles are Ervin, Separation of Powers: Judicial Independence, 35 Law & Contemp. Prob. 108 (1970) and Shipley, Legislative Control of Judicial Behavior, 35 Law & Contemp. Prob. 178 (1970).

tend that the exclusivity argument is inconclusive since there are a number of cases which hold that impeachment is not the sole mode for removal of civil officers.

The first case usually cited for this proposition is *Parsons v. United States*.⁴⁰ Parsons was the United States Attorney for the Northern and Middle Districts of Alabama. Although Parsons' term of office was to end on February 4, 1894, President Cleveland attempted to remove him from office on May 26, 1893. Upon his removal, Parsons sued to recover the salary owed to him from May 26 to December 31, 1893. The question before the Court was whether the President had the power to remove a United States Attorney when removal occurred prior to the end of a four-year appointment. Parsons claimed that the President had no power to remove him directly and that the President and the Senate had no authority to remove him indirectly by appointing his successor.

Mr. Justice Peckham, writing for the majority of the Court, analyzed the constitutional history regarding the President's power of removal. He found that, after long debates in the two Houses of the First Congress, both had voted to allow the President the power to remove the Secretary of the Department of Foreign Affairs.⁴¹ He noted that in *In re Hennen*⁴² Mr. Justice Thompson had stated:

No one denied the power of the President and the Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution.⁴³

Justice Peckham also reviewed a case which involved the removal of a federal judge, *United States v. Guthrie*.⁴⁴ In *Guthrie*, the President had attempted to remove Chief Justice Goodrich of the territory of Minnesota, an Article I judge.⁴⁵ Judge Goodrich petitioned for a writ of mandamus in the Circuit Court of Appeals for the District of Columbia, to be issued against the Secretary of the Treasury to compel payment of the former's judicial salary. On appeal, the Supreme Court held that it lacked the power to command the withdrawal of money

⁴⁰ 167 U.S. 324 (1897).

⁴¹ Id. at 328-30.

⁴² 38 U.S. (13 Pet.) 230 (1839).

⁴³ 167 U.S. at 331, quoting 38 U.S. (13 Pet.) at 259.

⁴⁴ 58 U.S. (17 How.) 284 (1854).

⁴⁵ For a discussion of other than Article III judges, see H. Hart and H. Wechsler, *The Federal Courts and the Federal System* 340-51 (1953).

from the Treasury for the payment of any individual claim and that, therefore, the mandamus should not issue. Thus the question of the President's authority to remove Judge Goodrich was not reached.⁴⁶

However, the Attorney General's advisory opinion to the President on the issue of removal prior to the litigation in *Guthrie* had implicitly recognized limits on removal other than by impeachment. Certain officials, the opinion indicated,

are not exempted from the executive power which, by the constitution, is vested in the President of the United States over all civil officers appointed by him; and whose tenures of office are not made by the constitution itself more stable than during the pleasure of the President of the United States.⁴⁷

The Attorney General concluded that the President had the authority to remove the territorial Chief Justice from office for any cause. During oral argument in *Guthrie*, however, the Attorney General modified this conception of the President's power of removal. He argued quite persuasively that territorial judges were not Article III judges but rather, Article I judges:

Constitutional courts are such as are intended by the provisions of the third article of the Constitution. The judges of this class, by the express terms of the constitution, hold their offices during good behavior. It comprehends the judges of the Supreme Court and of the various judicial circuits and districts into which the United States are subdivided.⁴⁸

Mr. Justice Peckham concluded in *Parsons* that the President had the power of removal, despite some question concerning construction of the tenure of office statute.⁴⁹ Therefore the President, in his discretion, was allowed to remove an officer, "although the term of office may have been limited by the words of the statute creating the office."⁵⁰

Parsons may be construed as holding that the President may remove an officer appointed with the advice and consent of the Senate. But it seems to me that the facts of that case are simply not susceptible of such broad application. *Parsons* served with limited tenure and was appointed under the authority of Article II, rather than Article III. In addition, the United States Attorney General involved in

⁴⁶ 58 U.S. (17 How.) at 303.

⁴⁷ 5 Op. Att'y Gen. 288, 290 (1851).

⁴⁸ 58 U.S. (17 How.) at 289.

⁴⁹ The statute in question may be found in 167 U.S. at 343.

⁵⁰ *Id.*

Parsons is distinguishable from the current members of the federal judiciary. The latter, as Article III judges, serve during a period of good behavior, a standard prescribed by the Constitution, not a statute. *Parsons*, therefore, cannot be viewed as being dispositive of the case of an Article III judge.

In another removal case, *Shurtleff v. United States*,⁵¹ the petitioner was a customs agent who had been removed from office solely by presidential action. As in *Parsons*, the petitioner sought to recover pay for the remaining period of his appointment. The duty of writing the Court's opinion again fell to Mr. Justice Peckham and, not surprisingly, he reaffirmed the position of the Court in *Parsons*. He stated, in part:

It cannot now be doubted that in the absence of constitutional or statutory provision the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate. . . . To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication. Congress has regarded the office of sufficient importance to make it proper to fill it by an appointment to be made by the President and confirmed by the Senate. It has thereby classed it as appropriately coming under the direct supervision of the President and to be administered by officers appointed by him, (and confirmed by the Senate,) with reference to his constitutional responsibility to see that the laws are faithfully executed.⁵²

In discerning the intent of the statute, Justice Peckham reasoned that the right of removal exists unless precluded by the presence of explicitly contrary language in the statute. The right, he suggested, exists in the right to appoint rather than in the grant itself, and "it requires plain language to take it away."⁵³ The Justice went on to question whether Congress had intended to limit the right to certain enumerated causes:

If so, see what a difference in the tenure of office is effected as to this office, from that existing generally in this country. The tenure of judicial officers of the United States is pro-

⁵¹ 189 U.S. 311 (1903).

⁵² *Id.* at 314-15. The Act which had created Shurtleff's position permitted his removal for inefficiency, neglect of duty or malfeasance in office.

⁵³ *Id.* at 316.

vided for by the Constitution, *but with that exception* no civil officer has ever held office by a life tenure since the foundation of the Government.⁵⁴

That lone exception is the core of my position. Article III judges are creatures of the Constitution, not the Congress. They are provided with life tenure during good behavior and only the constitutionally authorized court of impeachment may remove them from office. In *Shurtleff*, Justice Peckham rather inconclusively blurred the distinction between creations of the Constitution and those of the Congress. He concluded that the impeachment requirement was never intended to prevent the removal of a customs agent for causes other than those listed in Article II, section 4 or by the President, if he so desired it. His observations on the removal of a customs agent certainly seem correct. But it is a giant leap from that premise to the conclusion that Article III judges may be removed by a commission established by the Congress operating under its Article I powers.

Another case which considered the limitations of nonimpeachment removal, *Myers v. United States*,⁵⁵ involved the removal of a postmaster four months before the expiration of his four-year term.⁵⁶ In that case, the Act establishing the position of postmaster was held to be unconstitutional because it made the President's power of removal depend upon the consent of the Senate. The Court found that the appointment of a postmaster was an exercise of the President's executive power, as provided in Article II, section 1; and although the power of appointment was limited by senatorial advice and consent, the Executive's power, the Court held, was not limited or tempered by the legislative branch in the matter of removals.

In *Myers*, Mr. Chief Justice Taft, writing for the majority, as well as Justices Brandeis, McReynolds and Holmes all in dissent, carefully reviewed the power of the President to remove executive officers. All the opinions contained dicta concerning the removal of federal judges. Despite disagreement among them on the issue in the principal case, the Justices agreed that even though Congress establishes the number of federal judges, the extent of their jurisdiction and their salary, judges are not to be treated like postmasters or United States attorneys on the issue of removal. The Chief Justice stated:

It has been sought to make an argument, refuting our conclusion as to the President's power of removal of executive officers, by reference to the statutes passed and practice pre-

⁵⁴ *Id.* (emphasis added).

⁵⁵ 272 U.S. 52 (1926).

⁵⁶ The administratrix of the postmaster's estate argued that the postmaster could not be removed without the consent of Congress.

vailing from 1789 until recent years in respect of the removal of judges, whose tenure is not fixed by Article III of the Constitution, and who are not strictly United States Judges under that article. The argument is that, *as there is no express constitutional restriction as to the removal of such judges*, they come within the same class as executive officers, and that statutes and practice in respect thereof may properly be used to refute the authority of the legislative decision of 1789 and acquiescence therein.

The fact seems to be that judicial removals were not considered in the discussion in the First Congress, and that the First Congress . . . and succeeding Congresses until 1804, assimilated the judges appointed for the territories to those appointed under Article III, and provided life tenure for them, while other officers of those territories were appointed for a term of years unless sooner removed.⁵⁷

Although *Myers* did not consider the removal of an Article III judge, Chief Justice Taft's dictum indicated that federal judges could be removed only by impeachment. Only some executive officers, he posited, could be removed by other means. To some degree, this view has been observed in legislation vesting the President with removal power. Revised Statutes 1768⁵⁸ gave the President, in his discretion, authority to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States. Chief Justice Taft further noted that Congress could never take onto itself the power to remove or the right to participate in the exercise of the powers to remove inferior executive officers.⁵⁹ It seems to me logical to ask, if Congress could not so act here, how could it constitutionally enact legislation which would permit the removal of an Article III judge by any means other than impeachment? Any legislation sanctioning other means of removal would seem to infringe the constitutional principle of the separation of governmental powers.

The question of removal was again raised in a later case, *Humphrey's Executor v. United States*.⁶⁰ That case concerned the issue whether a commissioner appointed to the Federal Trade Commission for a fixed term under the Federal Trade Commission Act could be removed by the President for a reason other than inefficiency, neglect of duty, or malfeasance in office. The Court held that Commissioner Humphrey could be removed by the President but only

⁵⁷ 272 U.S. at 154-55.

⁵⁸ The statute is cited in full in *McAllister v. United States*, 141 U.S. 174, 177 (1891).

⁵⁹ See discussion at p. 444 *infra*.

⁶⁰ 295 U.S. 602 (1935).

for one of the enumerated reasons. In limiting the grounds for removal to those expressly stated in the statute, the Court distinguished the *Myers* case which had permitted the removal of the postmaster for reasons unspecified in the relevant Act.⁶¹ The Court found the office of postmaster to be essentially unlike the position of a Federal Trade Commissioner:

A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or the judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is.⁶²

The petitioner in *Humphrey's Executor* was, in contrast, a member of a federal agency; the Court recognized this distinction as being crucial:

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies. . . . Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.⁶³

Thus Mr. Justice Sutherland, speaking for the Court, read the *Myers* opinion as excluding from its grasp all officials "who occup[y] no place in the executive department and who exercis[e] no part of the executive power vested by the Constitution in the President."⁶⁴

The distinction articulated by Justice Sutherland is not unlike the distinction made by Mr. Chief Justice Marshall in *Marbury v. Madison*.⁶⁵ The Chief Justice determined that a justice of the peace for the District of Columbia could not be removed at the will of the President. Such an officer was to be distinguished from one, such as the director of the Department of Foreign Affairs, appointed to aid the President in the performance of his constitutional duties.⁶⁶ Although Chief Justice Marshall might have disapproved of some of the

⁶¹ The Court distinguished the case on the grounds that the narrow issue treated in *Myers* "was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." *Id.* at 626. The Court also distinguished the *Shurtleff* case as one dealing with "exceptional" circumstances. *Id.* at 623.

⁶² *Id.* at 627.

⁶³ *Id.* at 628.

⁶⁴ *Id.*

⁶⁵ 5 U.S. (1 Cranch) 137 (1803).

⁶⁶ *Id.* at 162, 165-66.

decisions previously discussed, the Supreme Court has held that the President *does* have the power to remove executive officers at his whim and that his power to remove officials from positions established by Congress is limited to the conditions enumerated in the enabling legislation.

In the case of a federal judge, however, neither of these distinctions applies since the source of the judgeship is neither executive nor legislative. The authority to establish federal judgeships derives from Article III, and the Constitution has already established both the conditions under which a federal judge can be removed and the method by which removal is to be accomplished. In view of the constitutional provisions, the decisions in all the cases from *Marbury* through *Myers* and *Humphrey's Executor* ought not to be relied upon to reach the conclusion that the impeachment process is nonexclusive.

As I have suggested, it is a long leap from the principle laid down in *Myers* to the conclusion that Congress can provide a procedure by which one judge may try another's right to hold office. Despite the measure of distance between the premise and conclusion, such distinguished scholars as Solicitor General Griswold still subscribe to the nonexclusivity position. In his brief to the Supreme Court in *Chandler v. Judicial Council*,⁶⁷ a case I will examine in detail momentarily, the Solicitor General stated:

The power of impeachment—which applies to *all* federal officers, not only to federal judges—is not defined in Article III but rather embodies the sole method by which the *legislature* may *directly* remove governmental officials—to the exclusion, for example, of the English practice of passing bills of attainder. Thus, just as the impeachment clause does not prevent the President from removing executive officers in his own discretion, even though they are also subject to removal by Congress through impeachment . . . so also there is nothing in the Constitution to suggest that Congress cannot, consistently with the separation of powers, provide procedures by which the courts could try the right of a judge to continue to hold office.⁶⁸

The Solicitor General posits that implicit in the good behavior clause is the assumption that judges must, therefore, be subject to supervision and control by "appropriate agencies." He states quite correctly that, in a hierarchical judicial system, judges of "inferior courts" are subject to the supervision and control of superior courts.

⁶⁷ 398 U.S. 74 (1970).

⁶⁸ Brief for Solicitor Gen. at 33, *Chandler v. Judicial Council*, 398 U.S. 74 (1970).

The writ of mandamus may, for example, be used to exert "supervisory control." However, I still cannot accept the conclusion that impeachment is nonexclusive by starting from the premise that superior courts may regulate inferior courts by the use of mandamus, or by reviewing their decisions on appeal. The existence of the Judicial Conference of the United States and the resolutions it promulgates may also be included within this "supervisory power." But this again is not the issue of the exclusivity of the impeachment remedy nor may the two be analogized.

On the issue of impeachment itself, the Solicitor General stated in his *Chandler* brief:

There has been general agreement from the earliest times that Congress could constitutionally provide alternative procedures to impeachment, particularly judicial trials or hearings, for determining whether federal judges have abided by the requirement of good behavior.⁶⁹

With all respect to the Solicitor General, this statement is inaccurate. Whether Congress has this power is a highly debatable issue. Unfortunately, the Supreme Court's attention in the *Chandler* case, as well as that of the Solicitor General, focused on whether the procedures at the removal tribunal were consistent with due process guarantees, rather than on the exclusivity of the impeachment remedy.

B. *The Language of the Constitution*

To return to the thread of the argument of the nonexclusivists, they contend that the terms of sections 2 and 3 of Article I establish that the House and Senate shall both be involved in the impeachment of all civil officers and that the two bodies hold exclusive power to remove federal judges. These sections provide that the House of Representatives "shall have the sole power of impeachment" and that the "Senate shall have the sole power to try all impeachments." Since impeachment is the only procedure available for the removal of federal judges, in my opinion, this language limits the procedure involved in the exclusively congressional process to impeachment and is not a grant of power to the legislature.⁷⁰

There is some question, however, as to whether the removal process and the impeachment process are coextensive.⁷¹ Article II

⁶⁹ Id. at 35 (footnote omitted).

⁷⁰ Much of the following discussion relies on the arguments raised in a memorandum prepared by the staff of the Subcommittee on Improvements in Judicial Machinery. The memorandum is entitled *Constitutionality of a Statutory Alternative to Impeachment*. See Hearings at 221.

⁷¹ Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibil-*

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section 4 provides that "all civil Officers of the United States shall . . . be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The Constitution calls for removal *on* impeachment and conviction rather than *by* impeachment and conviction. Thus, although removal is a result of impeachment and conviction, the nonexclusivists argue that it is not limited solely to this process. As our review of the cases arising under this section indicated, the Supreme Court has refused to lump together all civil officers, including judges, for the purpose of approving removal by means other than impeachment. Removal of "executive" officers and "legislative" officers under certain conditions may be effected without impeachment proceedings; but there is no authority which indicates that removal by means other than impeachment applies to Article III judges.

The nonexclusivists also contend that the language of the Constitution creates difficulty in that there exists a gap between the conduct for which impeachment will lie and that which violates good behavior.⁷² Nonexclusivists theorize that some additional removal process must have been contemplated to fill this gap. The argument is based on the traditional notions of impeachment in England, which permitted removal for even slight offenses. Those notions were considered too broad in scope by the framers of our Constitution. Thus removal was limited to legislative impeachment for serious crimes. The nonexclusivists maintain that "high crimes and misdemeanors" refer to offenses similar in magnitude to "treason" and "bribery," and that the standard of good behavior may be breached by conduct of a lesser magnitude.⁷³ It should be noted that good behavior had a rather well-defined meaning at common law:

[Good] behaviour means behaviour in matters concerning the office except in the case of a conviction upon an indictment for any infamous offense of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour though not committed in connection with the office.

Misbehaviour as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance, or neglect of or refusal to perform the duties of the office.⁷⁴

ities under the Constitution, 28 Mich. L. Rev. 870, 895-97 (1930) [hereinafter cited as Shartel].

⁷² Id. at 899.

⁷³ Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. at 223-24 (1969) [hereinafter cited as Hearings].

⁷⁴ 7 E. Halsbury, Laws of England 22-3 (1909).

Nonexclusivists still complain that "high crimes and misdemeanors" is not comprehensive in scope because it excludes laziness which, as the English knew, was violative of good behavior.⁷⁵ The question whether laziness is something less than good behavior is purely academic. A more important question is whether the term "misdemeanor" covers unethical but not illegal conduct.⁷⁶ I believe it does. The fact that the Constitution fails to specify every possible misdemeanor does not mean that impeachment may not lie for conduct which may fall short of a crime of great magnitude, such as treason or bribery.

The nonexclusivists' argument continues that since the founding fathers were concerned primarily with the independence of the judiciary,⁷⁷ they intended a narrow definition of the grounds for impeachment in order to curb legislative interference with the operation of the judiciary.⁷⁸ Following this theory, one could find a distinction between the good behavior and the impeachment clause standards. I cannot accept this theory. It is true that the framers sought to avoid legislative intrusion into the affairs of the judiciary. Thus they intended that breaches of good behavior would refer to high crimes and misdemeanors, so that judges could be removed only by the Senate sitting as a court of impeachment. While this question is far from settled, any doubts should be resolved in favor of the constitutional provision, especially in view of the founders' belief that the legislative branch should refrain from interfering in judicial matters.

The theory that the constitutional language does not preclude the legislative creation of judicial removal machinery, the nonexclusivists claim, is supported by the doctrine of the separation of powers.⁷⁹ Each of the three branches is independent. Within this independence, it is argued, each branch has the inherent power to remove its own members, unless prevented by an express constitutional provision to the contrary. Their argument concludes that the Constitution denied the Judiciary this inherent power by vesting the impeachment power in the Congress. Apparently, the framers' intention in creating the impeachment provisions was to protect the judiciary from the political caviling that removal power often engenders.

Article I, section 5 does permit each House of Congress, by a concurrence of two-thirds, to expel its members for misbehavior. Since there is no such clause in Article III, it must be assumed that the founding fathers did not intend that the judiciary should police its own ranks. Nor is it likely that they intended to vest in Congress the

⁷⁵ Hearings, *supra* note 73, at 222-23.

⁷⁶ See Simpson, *Federal Impeachments*, 64 U. Pa. L. Rev. 803, 805 (1916).

⁷⁷ See generally *The Federalist*, Nos. 78 & 79 (J. Cooke ed. 1961) (A. Hamilton).

⁷⁸ Dwight, *Trial By Impeachment*, 15 Am. L. Reg. 257, 263 (1867).

⁷⁹ Hearings, *supra* note 73, at 224.

power to create machinery by which the judiciary could carry out this purpose. The nonexclusivists, however, assert that the rebuttal to this argument lies in the concept of Federalism:

The Framers established a Federal form of government and carefully delineated the powers of the national and state governments. Article I, section 4 of the Constitution establishes state authority over Elections for Senators and Representatives. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof: but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Had the Framers failed to provide for congressional punishment and expulsion of its own members, the States may have exercised such powers incident to their "election" powers. Since judges are, however, appointed by the President with the advice and consent of the Senate, there is no similar threat of State removal. The absence of a judicial removal provision in Article III then, is not conclusive of an intent that the judiciary should have no power to punish misbehaving judges.⁸⁰

I must confess that I do not grasp this argument. To suggest that the Constitution explicitly grants to Congress, and not the judiciary, the right to discipline and to expel the latter's members in order to avoid the rigors of state election rights is a tortured reading of the Document. This is especially true when one considers the illogical conclusion the nonexclusivists draw from this reading; namely, that Congress, as a result of the threat of state removal of its members, may create additional powers of removal of judicial officers besides impeachment. Unquestionably, this argument is outside the realm of reason.

C. *The Federalist Papers*

When the Summers Bill⁸¹ was introduced in the House of Representatives, a minority report was filed.⁸² The report indicated that the bill was unconstitutional and recommended its rejection. The House members who joined in the minority report⁸³ contended that the issue of good behavior should be tried only by a court of impeachment. They determined that the remedy of impeachment is as broad as the obligation of good behavior, because the words "high crimes and misdemeanors" were not used in their criminal sense but in their social sense.

⁸⁰ Id.

⁸¹ H.R. 2271, 75th Cong., 1st Sess. (1937).

⁸² Reprinted in Hearings, *supra* note 73, at 234.

⁸³ Representatives Guyer, Hancock, Michener, Gwynne, Graham and Springer.

For support of their position, the minority report drew from Hamilton's observation in the Federalist Papers:

Mr. Hamilton pointed out that a judge might be impeached for "any conduct rendering him unfit to be a judge," even though not involving any violation of a criminal statute. He pointed out for example that a judge might be impeached because of insanity if that rendered him unfit to perform the duties of his office. In fact, a judge was once impeached on that ground.⁸⁴

The minority congressmen objected to the bill because the conduct and statements of the framers of the Constitution indicate that they thoroughly examined other methods for the removal of judges and discarded them all except for the procedure of impeachment. The dissenting congressmen frankly feared, and I think correctly so, that if Congress had the authority to legislate in this area, it could abuse the authority, causing great damage to the third branch of the Government. The fear of legislative abuse of the judiciary, which the minority report recognizes, has deep roots in our system of government. In number seventy-eight of the Federalist Papers, Hamilton expressed this same fear. He concluded that "all possible care is [a pre]requisite to enable [the judiciary] to defend itself against [congressional] attacks."⁸⁵

The opinion of the signatories of the minority report has lost none of its validity in the intervening years, and it endures as wise counsel. The cases as well as the plain meaning of the Constitution indicate that impeachment is the sole means of removal of federal judges. The arguments of the nonexclusivists, designed to contradict this conclusion, purportedly rest on the apparent motives of the framers; their reliance seems erroneously founded. As the Federalist Papers of Hamilton suggest, the framers likely intended that the impeachment provisions should be exclusive. The wisdom of the framers' belief is perhaps best demonstrated by the unfortunate saga of Judge Chandler. It is to his case that I will now address my remarks.

III. THE CASE OF JUDGE CHANDLER

Although a number of cases have discussed the removal issue⁸⁶ and much commentary has been written about the subject,⁸⁷ only one case has actually considered the issue of removal of an Article III

⁸⁴ Hearings, *supra* note 73, at 234.

⁸⁵ The Federalist, No. 78 at 523 (J. Cooke ed. 1961) (A. Hamilton).

⁸⁶ See discussion at pp. 438-46 *supra*.

⁸⁷ See generally Shartel, *supra* note 71; Note, The Exclusiveness of the Impeachment Power Under the Constitution, 51 Harv. L. Rev. 330 (1937); Kramer & Barron, *supra* note 39; Simpson, *supra* note 76.

judge by means other than impeachment. That case, *Chandler v. Judicial Council*,⁸⁸ considered the authority of the congressionally created Judicial Council to limit the powers of a federal judge.

On December 13, 1965, the Judicial Council of the Tenth Circuit, acting under the authority of 28 U.S.C. Section 332,⁸⁹ issued an order⁹⁰ finding (a) that Chief Judge Chandler of the Western District of Oklahoma was unable or unwilling to discharge his duties as a district judge and directing that he should not act in any case then or thereafter pending; (b) that until the Council's further order, no cases filed in the district were to be assigned to him; and (c) that if all the active judges could not agree upon the division of business and case assignments necessitated by the order, the Council, acting under the authority of 28 U.S.C. Section 137⁹¹ would make such division and assignments as it deemed proper. In response, Judge Chandler filed a motion with the United States Supreme Court for leave to file a petition for a writ of mandamus or, alternatively, a writ of prohibition addressed to the Tenth Circuit Judicial Council.

During the four years prior to the order of December 13, 1965, Judge Chandler was involved as a defendant in a considerable amount of litigation. A civil suit,⁹² which was later dismissed, was brought charging him with malicious prosecution, libel and slander. He was also named as a party defendant in a criminal indictment which charged

⁸⁸ 398 U.S. 74 (1970).

⁸⁹ Section 332 provides:

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

28 U.S.C. § 332 (1970).

⁹⁰ 398 U.S. at 77-8.

⁹¹ Section 137 provides:

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

28 U.S.C. § 137 (1970).

⁹² *O'Bryan v. Chandler*, 352 F.2d 987 (10th Cir. 1965), cert. denied, 384 U.S. 926 (1966).

him with conspiracy to cheat and defraud the state of Oklahoma.⁹³ In addition, he was "the subject of two applications to disqualify him in litigation in which . . . [he] had refused to disqualify himself."⁹⁴ For these reasons and because there was a long history of controversy between the Council and Judge Chandler, the Council had issued the order of December 13. Then followed some confusing months. Judge Chandler agreed not to take any new cases, but he continued to assert his judicial authority over cases pending before him. In February of 1966, the Council ordered Judge Chandler to continue to sit on the cases pending before him prior to December 28, 1965, the effective date of the December 13 order. Judge Chandler challenged all the orders of the Council relating to the assignment of cases in his district "as fixing conditions on the exercise of his constitutional powers as a judge."⁹⁵ He specifically urged that the impeachment power had been usurped by the Council. The Supreme Court, in an opinion by Chief Justice Burger, held that the administrative action of the Council was not reviewable and that even if it were, Judge Chandler had not made out a case for extraordinary relief.

The question raised before the Court was whether Congress can vest in the Judicial Council power to enforce reasonable standards concerning when and where federal court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and other routine matters. In essence, the Court was asked to determine whether Congress could enact legislation which significantly encroached upon the independence of a federal judge. Writing for the majority, the Chief Justice answered the questions affirmatively, but the majority avoided the crucial question—whether a creation of Congress, the Judicial Council, could place restrictions on a federal judge such that he was effectively removed from office. Instead, the majority found that the Court did not have the jurisdiction to entertain Judge Chandler's petition for extraordinary relief, and denied his motion for leave to file. The dissenters, however, discussed at length⁹⁶ both the issue of whether a judge could be removed from office by means other than impeachment and "the scope and constitutionality of the powers of the judicial councils under 28 U.S.C., §§ 137 and 332."

Of the minority opinions, Mr. Justice Harlan disagreed on the matter of jurisdiction, as did Justices Black and Douglas. All three

⁹³ 398 U.S. at 77 n.4. The indictment was later quashed.

⁹⁴ Id. at 77. See *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55 (10th Cir. 1962), cert. denied, 372 U.S. 915 (1963); *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966). In both cases writs of mandamus were issued against Judge Chandler.

⁹⁵ 398 U.S. at 82.

⁹⁶ Id. at 89-143.

avored reaching the crucial issue of the independence of the judiciary, and it is their opinions which deserve our attention. Mr. Justice Harlan, in his concurring opinion, felt that the order of February 4, 1966, did not constitute a removal from judicial office, or "anything other than an effort to move along judicial traffic in the District Court."⁹⁷ In treating the order in this way, Justice Harlan was able to avoid the delicate issue raised so vigorously by the other dissenters.

The dissents of Justices Douglas and Black were, in contrast, addressed to the necessity of preserving the independence of the federal judiciary. Mr. Justice Douglas stated:

What the Judicial Council did when it ordered petitioner to "take no action whatsoever in any case or proceeding now or hereafter pending" in his court was to do what only the Court of Impeachment can do. If the business of the federal courts needs administrative oversight, the flow of cases can be regulated. . . . But 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.

The mood of some federal judges is opposed to this view and they are active in attempting to make all federal judges walk in some uniform step. *What has happened to petitioner is not a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren.* The result is that the non-conformist has suffered greatly at the hands of his fellow judges.

The problem is not resolved by saying that only judicial administrative matters are involved. The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

⁹⁷ Id. at 119.

These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. That is the crucial issue at the heart of the present controversy.⁹⁸

...
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 idiosyncrasies can be of no possible constitutional concern to other federal judges.⁹⁹

Mr. Justice Black's short dissent closes with these words:

I am regrettably compelled in this case to say that the Court today, in my judgment, breaks faith with this grand constitutional principle. Judge Chandler, duly appointed, duly confirmed, and never impeached by the Congress, has been barred from doing his work by other judges. The real facts of this case cannot be obscured, nor the effect of the Judicial Council's decisions defended, by any technical, legalistic effort to show that one or the other of the Council's orders issued over the years is "valid." This case must be viewed for what it is—a long history of harassment of Judge Chandler by other judges who somehow feel he is "unfit" to hold office. Their efforts have been going on for at least five years and still Judge Chandler finds no relief. What is involved here is simply a blatant effort on the part of the Council through concerted action to make Judge Chandler a "second-class judge," depriving him of the full power of his office and the right to share equally with all other federal judges in the privileges and responsibilities of the Federal Judiciary. I am unable to find in our Constitution or in any statute any authority whatever for judges to arrogate to themselves and to exercise such powers. Judge Chandler, like every other federal judge including the Justices of this Court, is subject to removal from office only by the constitutionally prescribed mode of impeachment.

The wise authors of our Constitution provided for judicial independence because they were familiar with history; *they*

⁹⁸ Id. at 136-137 (emphasis added).

⁹⁹ Id. at 140-41.

*knew that judges of the past—good, patriotic judges—had occasionally lost not only their offices but also sometimes their freedom and their heads because of the actions and decrees of other judges. They were determined that no such things should happen here. But it appears that the language they used and the protections they thought they had created are not sufficient to protect our judges from the contrived intricacies used by the judges of the Tenth Circuit and this Court to uphold what has happened to Judge Chandler in this case. I fear that unless actions taken by the Judicial Council in this case are in some way repudiated, the hope for an independent judiciary will prove to have been no more than an evanescent dream.*¹⁰⁰

Needless to say, I am in full agreement with the positions of the dissenters in this case. I find it distressing to think that the Chief Justice of the United States can countenance the removal of federal judges by any means other than impeachment. It also seems incredible to me that distinguished members of the Senate could continue to lend any support to a measure like S. 1506 in light of the *Chandler* situation. As the background of that case demonstrates, the potential for abuse by these congressionally created review boards is considerable.

IV. CONCLUSION

The time has come once and for all to end the harassment of federal judges. Every few years another attempt is made to impinge upon the independence of our unique judicial system. This time, however, there is some new evidence of the probable ill effects of such an impingement. Somewhat rhetorically I must ask how many more Judge Chandlers there must be before Congress recognizes that these legislative creations unconstitutionally encroach on the independence of the federal judiciary. Some members of Congress who support this kind of legislation seem intent upon creating some new tribunal for the removal of federal judges. But in assuming this position they ignore a tribunal which already exists—the Senate sitting as a court of impeachment. As I have noted, the arguments against sole reliance upon this Court are weak and unpersuasive.

The time has also come for all the interested parties, both judicial and congressional, to remember the limitations inherent in their offices. The Judicial Conference was created to aid in the efficient administration of the courts and not to sit as a reviewing body over the issue of the alleged misbehavior of federal judges. Similarly, the Supreme Court

¹⁰⁰ Id. at 142-43.

should be the ultimate arbiter of lawsuits, not the final authority in determining whether an inferior judge or one of its own members is unfit to sit.

I am a Chief Judge of the United States District Court. I attempt to administer within my own district, and I attempt to see that the judges in my district operate as efficiently as they can. It is not my role, however, to demand that any one judge not have a case on his docket for more than a specific length of time, or that he act more cordially towards litigants. We are judges, not policemen. If we fail in our duties, have us impeached. The Congress should neither foster nor condone conflicts within the judiciary; conflicts will inevitably arise through creation of any judicial commissions such as that proposed in S. 1506. As Senator Sam Ervin has noted on numerous occasions: "To me, the duty of a federal judge is to decide cases and controversies—not to meddle in the business of his colleagues." I agree.