Judicial Tenure

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Many lessons should be learned from the recent experiences of the Watergate era. We were reminded especially that power can intoxicate its holders and can be abused by the highest governmental officials in this nation. Watergate highlighted the unfortunate fact that public confidence in government has been eroded over the past few years for many reasons and it will continue to decline unless affirmative steps are taken, in each branch of government, to stimulate renewed trust in public officials and institutions.

The daily news reports are replete with accounts of the new disclosure requirements being imposed on prospective Presidential appointees and of the drafting of more extensive ethical standards for members of Congress. It is imperative that all governmental officials act to restore and maintain the public trust. Nevertheless, in no branch of government is this public confidence and respect more vital than in the federal judiciary.

It would be shortsighted to focus current reform efforts on ensuring that members of the executive and legislative branches of government conform to legal, moral and ethical standards of the highest order and, at the same time, to ignore the conduct of members of the judiciary, the branch of government which possesses the authority to interpret, delay, and discontinue the actions of the other two. As now-Attorney General Griffin Bell stated during the 1976 hearings on the proposed Judicial Tenure Act, "We are living in a time when our public institutions are under examination and the courts are not exempt. A citizen should be afforded a clear method for complaining against the courts."

Our appointed federal judges enjoy a high degree of independence; they are not required to answer periodically to the electorate, as are the President and members of Congress. Although the need for a substantial degree of judicial independence is clear, history has demonstrated that no one person, or group of people, can be assumed perfect and therefore left completely unchecked. Despite the overall competence and integrity of members of the federal judiciary, an occasional judge does misbehave or become physically or mentally disabled and yet continues to exercise the authority of his office.

* United States Senator from Georgia.

IS IMPEACHMENT EFFECTIVE?

Historically, the sole procedure which has been employed to remove a federal judge who has misbehaved or has become disabled has been impeachment, the power found in articles I and II of the United States Constitution. Any discussion regarding removal and discipline of federal judges, therefore, must begin with the United States Constitution. The following provisions are particularly relevant to this discussion:

The House of Representatives . . . shall have the sole Power of Impeachment.2

The Senate shall have the sole Power to try all Impeachments.3

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.4

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.5

At the time the United States Constitution was written the United States was a nation comprised of thirteen states with a federal judiciary and a Congress of commensurate size and responsibility. During the course of the recently completed Second Session of the 94th Congress, in excess of 870 measures were passed by House of Representatives and Senate and 700 roll call votes were cast in the Senate.6 It is unreasonable, to say the least, to assume that the House of Representatives could drop its work for weeks to impeach and that the Senate could or should lay aside all legislative business for an average period of seventeen days7 in order to impeach and try an obscure, yet misbehaving judge. Present law authorizes 525 federal judges8 with an additional 168 retired or senior judges,9 a number considerably larger than originally authorized. Under these circumstances either the interests of the country or the interests of the accused judge must unavoidably suffer. As Professor J.W. Moore wrote during World War II:

5. U.S. CONST. art. III, § 1.
7. J. BORKIN, THE CORRUPT JUDGE 195 (1962) [hereinafter cited as BORKIN].
It is absurd to think that large national interests during the war, for example, must await upon the trial of Judge X. . . . As a matter of fact, the Senate continues with the nation's business at the expense of Judge X. Senators troop in to answer the roll call when lack of a quorum is suggested and then troop out to the attendance of larger affairs.10

In a contemporary context, it would be virtually impossible to conduct the business of this country and, at the same time, to devote adequate attention to an impeachment trial.

Analogizing impeachment to a heavy piece of artillery is eminently appropriate.11 The procedure is cumbersome and ponderous and is only practical in the most serious and flagrant cases of abuse. As a result, indiscretions which should be addressed are regularly ignored. Common sense requires that a balance be struck between the necessity for institution of impeachment proceedings and the resultant dilution of legislative accomplishment. There must be a logical relationship between the importance and power of the respondent and the taking up of the time of the whole Senate in order to try him. In 1936 Senator William McAdoo accurately predicted the future of the impeachment procedure as follows:

The pressure of other responsibilities on the time of the Senate, together with the inevitable increase in the number of Federal judges, is clearly bringing us close to the time when this body will find it a matter of sheer physical impossibility to conduct a sufficient number of impeachment trials to render the prospect of impeachment an effective deterrent to judicial misconduct. On the other hand, the practical certainty that in a large majority of cases misconduct will never be visited with impeachment is a standing invitation for judges to abuse their authority with impunity and without fear of removal.12

History has born out Senator McAdoo's prediction and, with it, Thomas Jefferson's characterization of impeachment as an "impractical thing" and "a mere scarecrow."13 Over the course of our two hundred years as a nation, only fifty-four judges and one Justice have been officially investigated. Of these, only eight judges and one Justice have been successfully impeached by the House of Representatives, resulting in the conviction and removal of a mere four judges in two centuries.14 The last impeachment and conviction occurred in 1936. While the overall quality of the federal

12. 80 CONG. REC. 5934 (1936).
bench is generally recognized, it seems unreasonable to assert that only four federal judges in our history have misbehaved or have been disabled. On the contrary, the record is filled with cases of judges against whom substantial allegations were levied and who continued to serve on the federal bench.  

The facts clearly demonstrate that impeachment has not been utilized to ensure compliance with the constitutional standard of "good behavior" imposed on the federal judiciary by article III. Moreover, except in the most flagrant and publicized cases, it is questionable whether impeachment is an appropriate means through which to decide the merits of such serious allegations. Examination of the fifth amendment and its due process safeguards raises some questions regarding the propriety, if not the constitutional sufficiency, of a trial where, as Congressman Summers described an impeachment proceeding, "at one time only three Senators [jurors] were present and for ten days we presented evidence to what was practically an empty chamber."  

A point of view which is too often ignored in analyzing the impeachment procedure is that of the accused judge. There is no question that society's rights must be protected; but, is impeachment, with its attendant public humiliation and loss of pension, a proper answer for the problem of a senile or disabled judge who has served well but fails to recognize that the time to step down has arrived?

Furthermore, an inherently political body such as the Congress inevitably raises the spectre of partisan politics. While each member of Congress is under a constitutional obligation to remain dispassionate and objective, the recent experience of heated debates during the House of Representatives Judiciary Committee's consideration of the Nixon impeachment raises serious questions regarding this principle's practicalities. Thomas Jefferson once referred to impeachment as "an engine more of passion than of justice." This evaluation must be accorded serious thought in weighing the relative merits of the process in each individual circumstance, as well as when considering the need for an alternative.

Careful analysis leads one to the inevitable conclusion that, in both practical and legal terms, impeachment has not ensured and cannot effectively ensure judicial compliance with the constitutional "good behavior" standard. Woodrow Wilson stated this premise most succinctly as follows:

16. U.S. Const. amend. V.
18. BERGER, supra note 17, at 79 n.130.
Judging by our past experiences, impeachment may be said to be little more than an empty menace."\(^\text{19}\)

**A Possible Alternative: Statutory Disciplinary Authority**

The fact that repeated efforts have been made by scholars, jurists and legislators to develop a reasonable alternative to impeachment can be viewed as substantial evidence that a need for improved judicial accountability has existed throughout our history. Congressional dissatisfaction with the efficacy of impeachment has been evidenced by repeated legislative efforts to deal with the problem of judicial discipline. A few statutory provisions have been enacted which have been credited with possessing varying amounts of disciplinary authority.\(^\text{20}\) A brief examination of these statutes is relevant to the overall issue.

In 1922, the Congress enacted legislation which created the Judicial Conference of the United States.\(^\text{21}\) Prior to the enactment of this statute, any management or administrative actions which were taken within the federal judiciary were informal and often disorganized. Passage of the Judicial Conference legislation initiated the movement toward judicial self-management and federal court efficiency. In practical terms, the conference was assigned few responsibilities, the majority of which were of a housekeeping nature.

During the early 1930's, the issues of federal court independence and performance received an increasing amount of public attention, partly due to President Roosevelt's court-packing plan and the impeachment of Judge Ritter. Consequently, Congress enacted the Administrative Office Act\(^\text{22}\) in 1939. The basic accomplishments of this legislation were twofold. There was created, in each federal circuit, a judicial council to improve the speedy administration of justice. Also, the Administrative Office of the United States Courts was established to compile statistics, manage the budget, and handle the bookkeeping function.

The judicial councils are composed of all active circuit judges within a particular circuit and have varied responsibilities which are described in scattered sections of title 28 of the United States Code. However, the most relevant language is contained in section 332(d), which provides: "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

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19. BERGER, supra note 17, at 167 n.200.
Clearly the judicial councils were authorized to deal with administrative details. However, the focus of continuing debate has been whether this language authorizes the disciplining or removal, in fact or in effect, of a judge subject to the jurisdiction of the council. In any event, it is clear that several categories of the federal judiciary would not be within the jurisdiction of a judicial council even if such authority, in fact, exists.

The legislative history of section 332(d) is somewhat ambiguous and has been cited as authority by parties on both sides of the discipline issue. The most prominently mentioned Supreme Court decision which addresses this issue to any extent is Chandler v. Judicial Council. On December 13, 1965, the Judicial Council of the Tenth Circuit issued an order pursuant to sections 332 and 137 to the effect that Judge Chandler, due to an inability or unwillingness to discharge his official duties, should not act in any case then or thereafter pending. The order declared that no further cases were to be assigned to him and that proper dispersal of his cases would be made by the judges of that circuit or the council itself.

The facts and circumstances of the Chandler case presented the opportunity to the Supreme Court to delineate the extent of disciplinary authority, if any, which had been statutorily authorized. While commentators have delighted at scraps of dicta and gratuitous language contained in the dissenting opinions of Justices Douglas and Black, the majority did not actually provide any substantive guidance regarding the legitimacy of disciplinary actions, tantamount to removal, pursuant to that statutory authority. A relatively unnoticed portion of the majority opinion did, however, opine that:

> [S]tanding alone, § 332 is not a model of clarity in terms of the scope of judicial councils' powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute and definition of review of Council orders are called for.

That innocuous portion of the majority opinion accurately and pointedly characterizes the state of the law regarding judicial discipline. The courts themselves are crying out for legislative clarification of their authority to keep their own house in order. As then private attorney, former federal circuit judge, and now Attorney General of the United States, Griffin Bell stated during his testimony on the Judicial Tenure Act:

The Judicial Council authority may or may not be adequate to resolve some of the problems which arise in the administration of

25. Id. at 77-78.
26. Id. at 85 n.6.
the Federal court system. For example, in section 332(b) it is provided that each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. . . . Does this language contemplate the resolution of disability and disciplinary problems?28

In addition to section 332, Congress has enacted sections 371 and 372 of the Administrative Office Act29 to deal with the problem of aging and permanently disabled judges. Section 371(a) provides that a Justice or judge can continue to receive his current salary when he resigns, if he is seventy years of age and has served on the bench at least ten years. Section 371(b) is more frequently utilized because it permits a Justice or judge, who meets the age and service requirements, to retire, assume senior status and thereby perform duties assigned to him under section 294.30 This procedure permits the individual to continue to receive any salary increases which are authorized. The President appoints a successor in the event of a retirement.

A Justice or judge who does not meet the age requirements of section 371, but who wishes to retire, may do so under section 372(a). In order to invoke this section, he must certify that he has become "permanently disabled from performing his duties."31 In the event that he has not served the requisite ten years, he is only entitled to one half his salary.

Section 372(b) authorizes the involuntary retirement of a judge if the permanent disability is certified to by a majority of the appropriate judicial council. The authority provided by section 372(b) is not clear because the judge must be unable to discharge all of the duties of his office to justify its implementation. Another major deficiency is that the section is not applicable to Justices of the United States Supreme Court.

It is clear that Congress has periodically enacted legislation to address the void existing in the judicial disciplinary system. It is equally clear that these statutory enactments are ambiguous and that the authority conferred is not by any means definitively described. Several circuits have attempted to use these sections to "keep their houses in order" but as now Attorney General Griffin Bell indicated, the extent to which they can go demands clarification.

PROPOSED ALTERNATIVES

The unavoidable conclusion is that Congressional inaction on the subject of judicial tenure and discipline has resulted in one of the three branches of our federal government being virtually unaccountable to any-

28. 1976 Hearings, supra note 1, at 139.
one, even itself. Although several constitutional amendments concerning judicial discipline and tenure were proposed during the early 1800's, this subject has been most clearly and carefully scrutinized in the years subsequent to the last impeachment in 1936.

**Previous Federal Bills**

In the late 1930's, two bills were introduced in Congress on the matter of providing an alternative disciplinary and removal procedure. Senate Bill 4527,\(^{32}\) introduced by Senator McAdoo, proposed the establishment of a special court composed of federal judges which would have jurisdiction over all federal judiciary misbehavior cases, except those involving Justices of the United States Supreme Court. This proposal provided that the prosecutorial role was to be filled by the Department of Justice and that the decision could be appealed to the Supreme Court. House of Representatives Bill 2271\(^{33}\) was introduced by the Chairman of the House of Representatives Judiciary Committee, Hatton Summers, and provided that the House of Representatives, by way of resolution addressed to the Chief Justice of the United States, could initiate a hearing into the behavior of an accused district judge. Prosecution was to be conducted by representatives from the House, and appeal to the Supreme Court was provided. Both bills restricted the remedy to removal.

Serious legislative efforts in this regard were somewhat dormant from this period until former Senator Joseph D. Tydings, of Maryland, introduced the Judicial Reform Act\(^{34}\) in 1969. Senate Bill 1506 represented a thoughtful and novel approach to the subject because its procedures were totally confined within the federal judiciary. A Commission on Judicial Disabilities and Tenure, comprised of five federal judges, was to act as a fact-finding body with regard to any allegations of misbehavior. The commission had the authority to dismiss a spurious complaint, or, in the event the evidence so warranted, to recommend removal of the accused judge to the Judicial Conference of the United States where a trial-like procedure would be conducted. A removal order from the Judicial Conference could be appealed to the Supreme Court. Senator Tydings' approach did not bring Justices of the United States Supreme Court within its purview.

**The Proposed Judicial Tenure Act**

Because of the need for a disciplinary mechanism other than impeach-

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34. Senator Tydings, United States Senator from Maryland and chairman of the Subcommittee on Improvements in Judicial Machinery, introduced Senate Bills 1506 through 1516 to the 91st Congress, first session, on March 12, 1969. 115 Cong. Rec. 6220-30 (1969).
ment, this writer introduced the Judicial Tenure Act in the 93rd and 94th Congresses. The proposed Judicial Tenure Act, is patterned after Senator Tydings’ proposed Judicial Reform Act.

Following detailed review of the controlling constitutional provisions, the Justices of the United States Supreme Court were brought within the scope of the legislation because, in the author’s view, the Constitution makes no distinction between the tenure of Supreme Court Justices and lower federal judges. Article III, section one, specifically states that “[t]he judges both of the supreme and inferior Courts, shall hold their Offices during good Behavior.” As far as could be determined, no persuasive legal argument could be made that Supreme Court Justices should be held to a lower standard of judicial conduct.

Several other less controversial changes were incorporated in the Proposed Act to insure its constitutionality. These changes were particularly concerned with the doctrine of separation of power and providing further procedural safeguards to the accused judge or Justice.

In the spring of 1976, hearings on the Proposed Act were conducted before the Senate Judiciary Committee’s Subcommittee on Improvements in Judicial Machinery. As a result of the testimony which was received during the course of these proceedings, several changes in the Proposed Act were made in order to incorporate some of the perfecting suggestions offered by the witnesses.

The purpose of the Proposed Act is to provide a mechanism within the judicial branch itself to enforce the “good behavior” standard which is imposed on the federal judiciary by article I, section I, of the Constitution. Proposed to be established within the federal judiciary is a procedure to investigate allegations that federal judges have failed to exercise “good behavior” or charges that a judge is suffering from permanent physical or mental disability that seriously interferes with the performance of his duties.

The proposed procedure begins with the Council on Judicial Tenure which consists of twelve members, eleven of whom represent each of the judicial circuits and a twelfth member selected by all the judges of the United States Court of Claims, Court of Customs and Patent Appeals, and Customs Court. The office of the executive director of the Council on Judicial Tenure is designated as a central filing point for all written complaints.

Any person may file a written complaint alleging that a particular judge or Justice has conducted himself in a fashion which constitutes grounds for

35. Hereinafter referred to in the text as the “Proposed Act.”
discipline. An initial screening process by the Council on Judicial Tenure is contemplated so that spurious and groundless complaints may be recognized at the outset. The Council on Judicial Tenure is authorized to dismiss any complaints which they determine to be outside of the scope of the Proposed Act or frivolous in nature. It is anticipated that this procedure will eliminate most complaints brought by disgruntled litigants or those based merely on personality differences.

If not dismissed, the complaint is referred to the judicial council of the appropriate circuit, or to the chief justice or chief judge of those courts not within the circuit structure. A written report of the judicial council’s review is to be submitted to the Council on Judicial Tenure within ninety days. This preliminary review procedure by the judges who are most familiar with the activities of the accused judge should facilitate an accurate factual determination procedure and identify spurious complaints which survived initial screening. It is important to note that the judicial council’s role is limited to fact-finding and that the power to dismiss complaints is retained by the Council on Judicial Tenure.

Upon receipt of this preliminary report, the Council on Judicial Tenure may dismiss the complaint or it may order further investigation. If the latter option is initiated, notice of such action must be sent to the accused judge, who then has the right to submit a statement. The Council on Judicial Tenure must determine if a sufficient basis in law and fact exists to warrant a formal hearing before the Court on Judicial Discipline. In the event that a hearing is requested, a written report setting forth the complaint and a factual summary must be filed with the Disciplinary Court by the Council on Judicial Tenure. During the pendency of the proceedings, the Disciplinary Court has authority to suspend judicial action by the accused judge.

The Disciplinary Court is composed of all members of the Judicial Conference of the United States, except the Chief Justice of the United States Supreme Court, and is an authorized court of the United States. The accused judge has all the rights required by due process, including the rights of notice and representation by counsel. The Disciplinary Court may order the censure or removal from office of any judge or Justice whose conduct is determined to be inconsistent with the “good behavior” standard. The Disciplinary Court may also order the involuntary retirement of a judge or Justice if it finds him unable to discharge one or more of the critical duties of his office. The authority to dismiss a complaint is also available at this level. An order censuring, removing or involuntarily retiring a judge or Justice must be stayed pending appeal to the Supreme Court.

37. Hereinafter referred to in the text as the “Disciplinary Court.”
Such an appeal may be taken within ten days after notice of the order by the Disciplinary Court by the filing of a petition with the Supreme Court. If one of the Justices of the Supreme Court is the accused, the bill automatically disqualifies the other Justices and creates a special Temporary Court of Disciplinary Review to hear the Justice's appeal. If the order of the Disciplinary Court is affirmed, or if no appeal is made within the specified time, the order becomes final.

Each portion of this proposal has been subjected to scrutiny, in theory at least, since the 1930's. This writer believes that the Proposed Act represents a comprehensive and reasoned approach which, if enacted, would address many of the insufficiencies in the area of judicial discipline which have been described in this article.

THE CONSTITUTIONALITY OF A "GOOD BEHAVIOR" APPROACH

Impeachment

Constitutional questions have been raised by those who oppose creation of a procedure which would allow meaningful implementation of the "good behavior" standard. The opponents rely upon the assertion that impeachment is the solitary means of removal permissible under the United States Constitution. Thus, it is productive to examine exactly what the United States Constitution says and does not say on this issue.

The United States Constitution states in article I that the Houses of Congress shall have the sole powers of impeachment and trial of all civil officers. It does not say, however, that Congress shall have the sole power of removal of these officers. As a matter of fact, it was determined early in our nation's history, that lesser executive branch officials could be removed by order of the President. In 1897 the Supreme Court held that the President had the authority to remove a United States' Attorney despite the fact that the impeachment clause provides for the removal of civil officers. How can it reasonably be argued that impeachment is exclusive with regard to some "civil officers," such as judges, and not exclusive with regard to others? Moreover, if the framers had intended impeachment to be the sole

39. Id. at 136.
40. It is interesting to note that the extreme remedy of impeachment is provided for in article I, the legislative article, and in article II, the executive article. However, no mention of this procedure is made in article III, the judicial article. In view of the fact that the debate by the framers on the subject of impeachment focused almost totally on the President, and that the term "civil officers" was included almost as an afterthought, one could easily assume that the framers intended to further address the tenure of federal judges in the appropriate place, article III.
method of removal, it would have been a simple matter to employ specific language to that effect.

It appears that impeachment of federal judges was authorized, not as an exclusive means of disciplining the judiciary, but rather as one of the limited checks by one branch of government on another. Impeachment was not intended to preclude the judiciary from disciplining itself; rather, it was intended either as a carefully circumscribed exception to the separation of powers doctrine, to be used in extreme cases of abuse, or as a safeguard against judicial branch inaction.

If we accept the principle that impeachment of federal judges is a limited authority granted to the legislative branch as part of the system of checks and balances, it seems logical that the framers must have contemplated a disciplinary mechanism that would be available for less than extreme cases of abuse and in the normal course of maintaining the integrity and efficiency of the judicial branch. Since this mechanism was contemplated, it was logically placed in article III of the United States Constitution.

The English Model

As the framers knew, three methods were available under the English system to accomplish the removal of a federal judge. Under the executive method, the King had the power, prior to the Act of Settlement in 1700, to remove judges at will. Under the legislative method, Parliament could remove a judge by bill of attainder, impeachment, or joint address to the King. According to the judicial method, judges holding office during good behavior, by patent from the King, were removable by writ of scire facias.

The framers deliberately incorporated judicial independence into the United States Constitution by specifically addressing each of the known means of removing a judge from office. First, they prohibited the executive, the President, from removing federal judges, although he was given the power to appoint, with the advice and consent of the Senate. Second, they limited the legislative removal power to the impeachment process. Third, they provided that the standard of tenure for all federal judges would be "good behavior."

42. Our federal system of government is predicated upon the doctrine of separation of powers. The interrelating system of checks and balances was devised by a group of men concerned about abuses resulting from the dominance of one branch of government, the English monarchy. They provided elaborate safeguards to ensure against history repeating itself by formalizing the separation of powers doctrine.
43. The Act of Settlement, 1700, 12 & 13 WILL. 3, c. 2, § 3.
44. See 1976 Hearings, supra note 1, at 91 (statement of Prof. Raoul Berger).
45. Id. at 89.
46. Id.
47. Id.
Professor Raoul Berger, the noted constitutional scholar, has compiled a detailed analysis of the history and precedent on which the "good behavior" clause is based.\textsuperscript{48} In his testimony before the Subcommittee on Improvements in Judicial Machinery, Professor Berger documented the technical legal distinction between impeachment and "good behavior" tenure.\textsuperscript{49} His analysis generates the unavoidable conclusion that the grounds for impeachment and the "good behavior" requirement are two distinct standards of conduct and that "good behavior" is a much more stringent standard than a prohibition against bribery, treason or other high crimes and misdemeanors. In other words, not all forms of bad behavior constitute impeachable offenses. Professor Berger pointed out that impeachment at common law was a criminal proceeding brought by the House of Commons in the House of Lords on charges of "treason, bribery, high crimes and misdemeanors."\textsuperscript{50} Berger further documented the fact that the terms "high crimes and misdemeanors" had a limited technical meaning which referred to serious offenses and did not encompass all forms of misbehavior. As the House Judiciary Committee wrote in their report on the grounds for impeachment during the Nixon impeachment deliberations, "'High Crimes and Misdemeanors' has traditionally been considered a 'term of art' . . . The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the Framers meant when they adopted them.'"\textsuperscript{51} Although the framers departed from the English model in separating the impeachment proceeding from a criminal proceeding, they intentionally retained the limited technical grounds of "high crimes and misdemeanors." Furthermore, there is no indication that the framers intended the impeachment provisions to be a complete recitation of the causes justifying removal from office.\textsuperscript{52}

In contrast to impeachment, removal for breach of "good behavior" was a judicial, not a legislative proceeding. Good behavior tenure was originated in the Act of Settlement in 1700 in an effort to isolate the judiciary from the arbitrary whims of the monarch. The words "good behavior" in all commissions and grants, public and private, imparted an office or estate for the life of the grantee terminable only by his death or breach of good behavior.\textsuperscript{53} This termination was declared by the judiciary in a civil proceeding for forfeiture of the office which was initiated by a writ of

\textsuperscript{48} BERGER, supra note 17, at 122-80.
\textsuperscript{49} 1976 Hearings, supra note 1, at 89-91 (statement of Prof. Raoul Berger).
\textsuperscript{50} Id. at 89.
\textsuperscript{51} STAFF OF HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REPORT ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 12 (Comm. Print 1974).
\textsuperscript{53} See BERGER, supra note 17, at 126.
scire facias. Its sole objective was to remove the existing officer with no penalties or disqualifications involved.\textsuperscript{54}

When the framers employed the words "good behavior," with no indication that it was being used in a novel fashion, they must have assumed the inclusion of similar procedures for its implementation. Such an assumption is supported by James Madison's explanation to the Virginia Ratification Convention that "where a technical word was used all the incidents belonging to it necessarily attended it . . . ."\textsuperscript{55} Chief Justice Marshall concurred with Madison's explanation and later stated the test by which one must judge whether a removal procedure is constitutionally permissible: "It is not enough to say, that this particular case was not in the mind of the convention . . . . It is necessary to go farther and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it . . . ."\textsuperscript{56}

A gap between the two standards, "good behavior" and the grounds for impeachment, must therefore exist. To assume otherwise would be to claim that the grounds for impeachment and "good behavior" tenure are the same and would render the "good behavior" clause meaningless. The longstanding constitutional principle that no clause in the United States Constitution is intended to be without effect\textsuperscript{57} will not permit this result. Therefore, an alternative method to impeachment to accomplish the removal of federal judges must have been contemplated by the framers. This alternative method was to provide for the removal for misbehavior or disability less serious than an impeachable offense but in derogation of the "good behavior" standard.

In light of the evidence, it certainly cannot logically be maintained that the framers would have rejected a process of judicial removal other than impeachment. It seems apparent that the term "good behavior" was employed with the eminently logical intention of providing a disciplinary means within the judiciary branch itself, and in addition to the impeachment power authorized to the legislative branch. Simple logic indicates that if an office is conferred during "good behavior," it is relinquished upon bad behavior and some means of enforcing that end must be available.

\textit{Judicial Independence}

Some commentators and courts assert that the enactment of legislation of the nature of the Proposed Act would dramatically dilute the indepen-

\textsuperscript{54} Id. at 128 n.32.
\textsuperscript{55} Id. at 131.
\textsuperscript{57} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).
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ence of our federal judiciary. Arguments of this kind are superficial and misleading. Judicial independence, a principle which is a precondition to an effective system of justice, has historically referred, not to the independence of judges from one another, but rather to the independence of the judiciary from other branches of government. The intention of the framers was to avoid the British experience where the judiciary was totally dominated by the King. Professor Berger noted that "all the remarks in the several Conventions that bear on judicial independence, so far as I could find, referred to freedom from legislative and executive encroachments. No one suggested that judges must be immune from traditional judicial control . . ." The assertion that a disciplinary mechanism, totally restricted within the judiciary, infringes on judicial independence simply does not make sense. This view was supported by a leading framer of the United States Constitution, Justice Wilson, who wrote: "The independence of each power consists in this, that its proceedings . . . should be free from the remotest influence, direct or indirect, of either of the other two powers. But further than this, the independency of each power ought not to extend."

Except for the constitutional provision of impeachment, the judiciary would be as autonomous and independent of outside infringement following enactment of the Proposed Act. A proceeding in which all of the participants are members of the judiciary would be inherently less political than a trial in the Senate. Furthermore, judges not only are much better trained to make the types of findings required than are Senators, but the judiciary is more likely to be concerned about the misdeeds of one of its own than is another branch of government. As Judge Haynsworth of the Fourth Circuit stated in his testimony on the Judicial Reform Act, "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 administration of justice, itself, so long as the judge in question has all of those rights to hearings and procedural due process. . . ."

CONCLUSION

Impeachment is not the only constitutionally permissible means of removing a federal judge. During our nation's formative years, when there was less of a legislative burden on Congress and there were substantially

59. BERGER, supra note 17, at 154.
60. Id.
fewer federal judges, impeachment was an adequate check on judicial abuse. As the country and government grew in complexity and size, impeachment's value as such a check drastically diminished. While the need for an alternative was recognized, the traditional view of impeachment as the method of removal was sufficient to stifle the efforts to provide alternatives. The increasing awareness of the impotence of impeachment has stimulated interest in the subject. The tradition of the exclusivity of impeachment is no longer taken for granted and the constitutional issues are being scrutinized rather than avoided.

The time has come to recognize the practicalities of the issue and to examine it in a broad perspective of reason and common sense. It is clear that impeachment, in practical terms, is not an effective disciplinary mechanism; that the existing statutory authority is ambiguous and insufficient in this regard; and that substantial authority exists indicating that the procedure proposed by the Judicial Tenure Act is constitutional.

No less jurists than Justices Rehnquist, Burger and Blackmun have expressed the opinion that the principle represented by the Judicial Tenure Act is constitutional.62 Attorney General Bell has stated, with regard to the Judicial Tenure Act, that he is "not troubled over the constitutionality of the proposed legislation."63 The Judicial Tenure Act has been endorsed, in total or in principle, by the Judicial Conference of the United States, the American Bar Association, the American Judicature Society and the American Association of Attorneys General. Professor Berger has made clear that Congress possesses the authority to enact legislation in this regard:

[S]ince the judicial power to declare a forfeiture on breach of a condition subsequent existed at the adoption of the Constitution, and since a dispute whether the condition was breached constitutes a 'case or controversy,' it falls within the 'judicial power.' Consequently, legislation that would set up a special court within the judiciary branch to adjudicate disputes whether a judge breached the 'good behavior' condition would merely entail a grant of fresh subject matter jurisdiction . . . . Such a grant would instead constitute action to supplement the 'judicial power' under the 'necessary and proper' clause or under the power of Congress to regulate the jurisdiction of the inferior courts.64

These issues are clearly identified and should now be addressed by Congress. It is the responsibility of the Congress to pass legislation and the responsibility of the courts to adjudge its constitutionality. This author is hopeful that Congress will fulfill its responsibility on this issue.

62. 1976 Hearings, supra note 1, at 101-02.
63. 1976 Hearings, supra note 1, at 141.
64. BERGER, supra note 17, at 134-35.