

14.

Oversight of Federal Judges

Overview

Legislative oversight authority, although broad, is limited to subjects related to the exercise of legitimate congressional power. While Congress has the power to regulate the structure, administration and jurisdiction of the courts, its power over the judicial acts of individual judges¹ is more restricted. For instance, Congress has limited authority to directly remove or discipline a judge for decisions made on the bench. Article III, Section 1 of the Constitution provides that judges have “good behavior” tenure and protection against reduction of their salaries. That has effectively come to mean lifetime tenure for Article III judges, who are subject to removal only through impeachment, which requires a finding that such judge has engaged in a “High Crime or Misdemeanor.” In practice this requirement has excluded political disagreement with judges’ rulings from the bench. Thus, an investigation into decisions or other actions by a particular judge pursuant to an impeachment proceeding would appear to require some connection between an alleged “High Crime or Misdemeanor” and a particular case or cases. Moreover, exercise of the subpoena power outside of the confines of an impeachment proceeding is highly problematic. These protections and limitations have served a basic constitutional goal: establishment of a scheme of judicial independence that ensures impartial judicial decision-making free from fear of political retaliation.

But not all scrutiny of individual judges need be within the context of an impeachment proceeding. Some types of review and consideration of particular court decisions or other judicial acts are, of course, well within the purview of Congress’s legislative authority. For example, Congress has the power to amend statutes that it believes were misinterpreted by court cases, or to propose amendments to the Constitution that it believes would rectify erroneous constitutional decisions. The Senate confirmation process affords an opportunity to influence future decisions by its scrutiny of presidential nominees. Funding for the operations of the judicial branch is in the hands of Congress, as are the rules that determine the jurisdiction of the courts and the manner in which judges manage litigation and admit evidence. Congress has also established a comprehensive statutory scheme governing complaints against federal judges and, where appropriate, the imposition of judicial discipline, which is administered within the judicial branch.

What follows examines in more detail the scope and limits of Congress’s oversight authority over individual federal judges.

A. Congressional Investigatory Authority over the Judiciary: Constitutional Controls and Their Limits

Although oversight may occur regarding any matter within the legislative purview of the Congress, oversight of the other branches of government can become particularly complicated as it implicitly raises sensitive separation of powers concerns. Congressional oversight authority and investigatory powers vis a vis the executive branch and the courts derive from Congress’s various legislative authorities over those branches, whether it be the power of the purse, the power to organize the executive and judicial branches, or the power to make all laws necessary for “carrying into Execution” Congress’s own enumerated powers as well as those of the coordinate branches. Congressional authority to investigate the other branches

1. Unless otherwise noted, as used in this chapter the word “judge” refers to both Article III judges and Supreme Court justices.

of government and compel testimony and the production of documents is not expressly enumerated in the Constitution, but the Supreme Court has made clear that those powers derive from the grant of legislative authority in Article I, Section 1.² For example, in *McGrain v. Daugherty*, the court described the power of inquiry, with the accompanying process to enforce it, as “an essential and appropriate auxiliary to the legislative function.”³ The court also pointed out that the target of the investigation, the Department of Justice, like all other departments and agencies, is a creation of Congress and subject to its plenary legislative and oversight authority. Congress, it held, has clear authority to investigate whether and how these governmental entities are carrying out their missions as long as the power is linked to a legislative function of Congress.⁴

The catalog of areas for which the Constitution has vested in Congress legislative authority over the judicial branch is extensive and provides the basis for determining the scope of Congress’s authority to investigate federal judges.

1. Constitutional Controls of the Judiciary Vested in the Congress

a. Creation and Abolition of Federal Courts

The Constitution created the Supreme Court but left Congress with the task of creating other federal courts.⁵ Today there are 13 circuit courts of appeal and 94 federal district courts with life-tenured judges, and a variety of Article I courts whose judges are term limited.⁶ Congress sets the number of judgeships in each court, including the Supreme Court. Congress can abolish courts it has created, including the judgeships associated with the abolished courts, and has done so.⁷

b. Appointment and Removal of Federal Judges

The Constitution gives Congress express authority over the appointment and removal of federal judges. The Appointments Clause gives the Senate the power to advi[se] and consent” on judicial appointments.⁸ In addition, Article I grants to the House the power to impeach federal judges, and to the Senate the power to try all impeachments.⁹ These express constitutional powers clearly imply congressional investigative authority with respect to proposed nominees and possible impeachments of federal judges. As discussed in more detail below, the Senate’s exclusive and plenary authority over judicial confirmations entitles it to obtain all information necessary to inform its decisions, from both judicial and executive sources.

c. Defining Jurisdiction of Federal Courts

Congress has express constitutional authority over the jurisdiction of the federal courts. Article III, Section 2 of the Constitution vests appellate jurisdiction in the Supreme Court “with such Exceptions, and under such Regulations as the Congress shall make.”¹⁰ The Court has acknowledged that Congress can determine the jurisdiction of the lower federal courts.¹¹ Thus Congress has substantial power to investigate in connection with possible restrictions or expansions of the scope of federal court jurisdiction.

2. 273 U.S. 135, 174 (1927).

3. *Id.* at 174-75.

4. *Id.* at 177-78.

5. U.S. Const. Art. III, § 1.

6. *E.g.*, the Court of Appeals for the Federal Circuit, the Court of Veterans Appeals, and the United States Tax Court.

7. There have been two such abolitions in our history. The first occurred in 1802 as a Jeffersonian response to the last-minute creation by the Adams administration of new courts and judgeships, which were quickly filled with Federalist appointees. The abolition and displacement of the judges was upheld by the Supreme Court in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). The second occurred in 1913 with the abolition of the Commerce Court. The repeal statute, however, provided for the redistribution of the court’s judges to other courts in the judicial system.

8. U.S. Const. Art. II, § 2, cl. 2.

9. *Id.* at Art. I, § 2, cl. 5; *id.* § 3, cl. 6.

10. *See Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1868).

11. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

d. Procedural Rulemaking

Congress enacts, or approves under the Rules Enabling Act,¹² the national rules that govern how judges manage cases and admit evidence. Statutes prescribe numerous aspects of court operations including sentencing criminals, jury selection, providing attorneys for indigent criminal defendants, handling large class actions, setting limits on the amount of pretrial discovery in civil actions, and the processing of complaints of judicial misconduct, among many others. The breadth of Congress's inevitable involvement with judicial procedural rulemaking allows it to investigate matters relating to such legislative proposals and to compel both testimony and documents on these subjects.

e. Making Substantive Law

Congress of course has the power to define the substantive law that the courts apply in the cases that come before them. Disagreements with court interpretations of statutes can be, and have been, remedied by subsequent legislation. Constitutional interpretations of statutes most often need constitutional amendments to override, though in some instances courts will send signals that statutory language changes would resolve the issue. In either event, Congress has substantial investigatory power to examine anything relevant to possible legislative action.

f. Appropriations and Judicial Administration

Finally, Congress's appropriations power affords substantial authority over both the budget of the judicial branch and the administrative structure by which the judicial branch is managed. All the offices of the judicial bureaucracy were established by acts of Congress and thus are proper subjects of legislative oversight and investigation. Interestingly, all the structural enactments of the past century have been at the behest of the judiciary and have served the goal of maintaining judicial independence by establishing a large measure of judicial accountability and a means of communication between the branches. The Judicial Conference of the United States, which manages the preparation and submission of the judiciary's annual budget and any proposed changes to the procedural rules as authorized by the Rules Enabling Act, was created in 1922 at the request of Chief Justice William Howard Taft. The Judicial Conference also supervises the Administrative Office of the Federal Courts, which was created in 1939. Before the establishment of the Administrative Office the Justice Department was the source of the judiciary's administrative support. The Administrative Office submits annual reports to Congress concerning the business of the courts, and the director is required by law to "perform such other duties as assigned to him by the Supreme Court or the Judicial Council." That legislation also created circuit judicial councils for the purpose of managing day-to-day operations of each judicial circuit. In 1967, Congress created the Federal Judicial Center, which conducts research for the judicial branch and manages programs of judicial education. In 1980 Congress gave the Judicial Conference and circuit councils critical operational roles in the newly created judicial discipline system, which was revised in 2002. Congress's plainly strong interest in overseeing operations of the judicial branch may warrant congressional demands for both testimony and documents.

2. The Limits on Congressional Control of the Judiciary

Congress's oversight powers are acknowledged to extend to the judiciary and the operations of the courts, but only up to a point. Since *McGrain*, jurisdictional congressional committees have developed and honed a formidable array of methodologies and tools to obtain information from executive departments and agencies, and even the White House, when they have deemed it necessary to effectuate legitimate legislative functions. Where voluntary cooperation for requested documents and testimony has been withheld, committees have oftentimes had at least some degree of success, even in the face of claims of executive privilege, through a combination of staged, escalating pressures that may include aggressive public hearings, subpoena issuances, immunity grants, funding threats, appointments delays, contempt citations and court enforcement actions.¹³ The question arises, however, whether the enforcement tactics utilized to overcome executive recalcitrance are appropriate, or even constitutionally permissible, in legislative oversight settings involving the operations of the judicial branch and, in particular, the actions of individual judges.

12. Ch. 642, 62 Stat. 961 (codified as amended at 28 U.S.C. §§ 2071-2077).

13. See Chapters 2, 4, and 6.

a. Issuance and Enforcement of Congressional Subpoenas to Federal Judges

There appear to have been only two instances of subpoenas to federal judges outside the context of an impeachment proceeding. Both occurred in 1953 and both judges refused to testify. One was issued by the House Un-American Activities Committee to United States Supreme Court Justice Tom C. Clark. Justice Clark responded with a letter in which he declined to appear based on the separation of powers, stating, “The independence of the three branches of our Government is the cardinal principle on which our constitutional system is founded. The complete independence of the judiciary is necessary for the proper administration of justice.”¹⁴ The second instance involved U.S. District Judge Louis Goodman, who was summoned to appear before a House subcommittee, declined to testify, but read two statements from all his fellow judges at the Northern District of California indicating that, based upon separation of powers grounds, no judge could “testify with respect to any judicial proceedings.”¹⁴ The committees declined to pursue either subpoena. The virtual absence of any precedent of congressional exercise of compulsory process against judges outside the impeachment context strongly bespeaks legislative acknowledgement of a lack of authority.

Apart from the questionable constitutionality of any attempt to compel judges to respond to congressional oversight through the subpoena and contempt process, such a course is essentially impractical. Committees have the authority to issue subpoenas for testimony or documents. Refusal to comply with such a subpoena is punishable by contempt of Congress, which could result in imprisonment for up to one year and/or a fine of up to \$100,000.¹⁵ But a criminal contempt of Congress prosecution can only be triggered by a citation voted by a house that must be presented to a grand jury by a United States attorney.

Outside the impeachment context, the efficacy of such an oversight method with respect to federal judges seems problematic. A successful use of the criminal contempt mechanism by a committee needs to overcome two formidable legal and practical obstacles. First, although the speaker (or in the case of the Senate, the president of the Senate) may certify a statement of facts of such contempt “to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action,”¹⁶ the Department of Justice has taken the position that Congress cannot

14. Reported in *William J. Sullivan v. Andrew J. McDonald*, D.N. CV-06 401 0696, Superior Court, Waterbury, Conn. Judicial District (granting a motion to quash a legislative subpoena to a Connecticut Supreme Court justice not part of any impeachment proceeding as an intrusion on judicial independence protected by the separation of powers). Judge Goodman read into the record two statements signed by the seven judges of the U.S. District Court for the Northern District of California, which indicated their refusal to comply with the subpoena and the reasons therefore:

You have summoned a Judge of the United States District Court for the Northern District of California to appear before your Committee to testify at your current hearings. The Judges, signing below, being all the Judges of the Court, are deeply conscious, as must be your committee, of the Constitutional Separation of functions among the Executive, Legislative, and Judicial branches of the Federal Government. The historic concept that no one of these branches may dominate or unlawfully interfere with the others.

In recognition of the fundamental soundness of this principle, we are unwilling that a Judge of this Court appear before your Committee and testify with respect to any Judicial proceedings.

The Constitution does not contemplate that such matters be reviewed by the Legislative branch, but only by the appropriate appellate tribunals. The integrity of the Federal Courts, upon which liberty and life depend, requires that such Courts be maintained inviolate against the changing moods of public opinion.

We are certain that you, as legislators, have always appreciated and recognized this, as we know of no instance in our history where a committee, such as yours, has summoned a member of the Federal Judiciary.

However, in deference to the publicly avowed earnestness of the Committee, we do not object to Judge Goodman appearing before you to make any statement or to answer any proper inquiries on matters other than Judicial proceedings.

Investigation of the Department of Justice, before the Special Subcommittee to Investigate the Department of Justice, Hearings before the House Comm. on the Judiciary, 83d Cong., 1st Sess., 1753-54 (1953), reprinted in 14 F.R.D 335-36 (1953). An account of the incident appears at http://www.isthatlegal.blogspot.com/2003_03_01_isthatlegal_archive.html.

15. 2 U.S.C. §§ 192, 194. If the refusal to comply is before a subcommittee, it must vote to hold the person in contempt and refer it to the full committee, which, in turn, must vote out a resolution, accompanied by a report, directing the referral of a contempt citation for prosecution. If affirmatively acted upon by a house, the speaker or the president of the Senate certifies it to the United States attorney for presentation to a grand jury. Contempt of Congress proceedings do not seek the contemnor’s testimony or documents; they serve only to vindicate the authority of the house through punishment.

16. 2 U.S.C. § 194.

constitutionally direct that the executive initiate a contempt prosecution.¹⁷ In the instance of a prosecution of a judge for failure to comply with a congressional subpoena, for instance, the Department of Justice may weigh pragmatic and legal factors, e.g., a likely unfriendly forum and the availability of the impeachment or statutory judicial discipline process, as reasons to decline to prosecute.

A second option might be for the Judiciary Committee to seek a house resolution authorizing it to bring a civil action to compel compliance with the subpoena.¹⁸ Such an action, if successful, serves to either force the witness to testify or produce the documents sought, or subjects the subpoenaed person to a contempt of court for failure to comply with the court's order. The downside to this course, as with the first option, is that it takes place in a forum likely to be sympathetic to a claim of congressional intrusion on judicial independence.

A third, more realistic and appropriate option is utilization of the statutory judicial discipline process. Currently, federal judges are subject to internal discipline proceedings within the judicial branch. These judicial discipline procedures are available to anyone, including a member of Congress, who deems it necessary to file a complaint against a federal district court judge, judge of a U.S. circuit court of appeals, bankruptcy judge, or magistrate judge.¹⁹ While Congress does not directly control this oversight option, information derived from this process may ultimately serve as the basis for impeachment proceedings.

Finally, the Judiciary Committee might seek a resolution of the house authorizing the committee to investigate the conduct of a judge to ascertain whether formal impeachment proceedings might be appropriate.²⁰ Passage of such a resolution would authorize the exercise of subpoena power against the targeted judge by the committee.

b. Downward Sentencing Departures and the Testimony of Judge Rosenbaum

For most of the nation's history there were no guidelines for judges at the criminal sentencing stage. Punishments for similar crimes varied greatly in courtrooms across the country. The call for an end to the unfairness of such disparate treatment resulted in the establishment by Congress of the United States Sentencing Commission in 1984. The commission had authority to establish a set of sentencing guidelines that provided judges with ranges of sentences based on variable factors. The guidelines were binding but flexible; leeway was given for downward or upward departures for reasons set forth by the commission. The Supreme Court's 1996 ruling in *Koon v. United States*²¹ expanded that leeway by establishing a deferential "abuse-of-discretion" standard for appellate review of downward sentencing departures. Whether by coincidence or because of *Koon*, downward sentencing departures increased dramatically between 1997 and 2001, which spurred interest from conservatives inside the Congress (particularly in the House Judiciary Committee), the Justice Department, and public interest groups concerned with the trend's impact on effective law enforcement.²²

Congressional interest in and actions on the issue escalated dramatically after the testimony of Chief Judge James Rosenbaum before the House Judiciary Committee in May 2002. Judge Rosenbaum testified on a proposed amendment to the sentencing guidelines that would have permitted downward departures in certain instances for defendants with minimal roles in narcotics conspiracies.²³ Rosenbaum was appointed by President Reagan and had a sentencing record

17. 8 Op. OLC 101 (1984); *House Judiciary Committee v. Miers*, 558 F. Supp. 53 (D.D.C. 2008).

18. Authorization for a civil contempt enforcement action may be made by passage of a simple resolution by a house. See *Miers*, 558 F. Supp. at 53; *Common Oversight and Gov. Reform v. Holder*, 979 F. Supp. 2d 1, 4 (D.D.C. 2013).

19. See *Judicial Improvements Act of 2002*, 28 U.S.C. §§ 351-364. The 2002 act replaced the judicial discipline procedures of the *Judicial Conduct and Disability Act of 1980*, as amended, codified at the former 28 U.S.C. § 372 (c).

20. In our constitutional history there have been 15 impeachment trials in the Senate against judges. Eight have resulted in convictions. In addition to those impeachment investigations that have resulted in Senate trials, there have been a number of instances in which the impeachment process has been initiated by the House of Representatives but has not resulted in articles of impeachment being voted against the subjects of those inquiries. At least 22 of those instances have been investigations initiated against judges. See ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RL98-186, *IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE*, (hereinafter *Bazan*).

21. 518 U.S. 81, 99-100 (1996).

22. See generally, Kate Smith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L. J.* 1420 (2008) (discussing the law, practice and politics of sentencing from the establishment of the Sentencing Commission to the ruling in *United States v. Booker*).

23. The investigation of Judge Rosenbaum is related in Douglas Kelley, *Minnesota Federal Court Judge Caught in Constitutional Crossfire*, 27 *HAMLIN L. REV.* 427 (2004); Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 *IOWA L. REV.* 1, 13-19 (2004).

for drug offenders that exceeded the national median for several years. However, he testified in favor of the amendment for more lenient treatment of minor actors, offering 14 examples from the docket of his district court in Minnesota that he said showed why the proposed change would be more just. The testimony angered conservatives on the committee and prompted the chair of the committee's Subcommittee on Crime to write a letter to Rosenbaum requesting that he provide a massive amount of documentation about the 14 cases. The chief judge responded that much of the information was contained in confidential pre-sentencing reports and he would only provide publically available documents. The chair responded that he wanted all the information he requested and, in addition, an explanation of the reason for a downward departure decision by the judge that he had just discovered. Rosenbaum provided more publically available documents but refused to explain his departure ruling, suggesting that the chairman get a transcript of the hearing. The committee report later issued on the bill criticized in detail Rosenbaum's noncooperation as evidencing hostility to the sentencing guidelines, and indicated that the committee's interest in his testimony would be "ongoing."

In March 2003, the committee threatened to issue a subpoena for records of Judge Rosenbaum's sentencing decisions. A committee spokesperson dismissed concerns that the subpoena threat improperly interfered with judicial independence, stating that being a federal judge did not excuse noncooperation and misleading statements to the committee. In the summer of 2003, an agreement was brokered under which the administrator of the United States courts would be permitted to gather the requested documents and provide them to the committee. By that time, however, other legislative events had overshadowed the agreement.

c. Downward Departures and the Feeney Amendment²⁴

In March 2003, Rep. Tom Feeney proposed an amendment to pending legislation concerning child pornography and other sexual exploitation of children. The amendment would have prohibited all downward judicial departures on grounds other than those specifically provided in the guidelines, and would have eliminated most remaining downward departure grounds relating to the personal history or characteristics of a defendant. The bill that ultimately emerged from the House-Senate conference committee was less radical. In the final bill, the nearly absolute prohibition on judicial downward departures was limited to crimes involving child pornography, sexual abuse, and child trafficking. But the legislation nonetheless contained a series of challenges to the federal sentencing regime.

The Feeney Amendment's apparent interference with the exercise of judges' decision-making discretion was decried, and calls for its repeal were widely voiced. The Supreme Court's 2005 ruling in *United States v. Booker*—holding that Sentencing Commission guidelines are discretionary, not binding—largely mooted the outcry.²⁵ But the core question of the extent to which Congress may use legislative or investigatory powers to interfere with, intrude upon, or limit the independence of an individual judge lingers. During the 2012 presidential primary campaign, candidate Newt Gingrich issued a detailed position paper²⁶ proposing that congressional committees hold "judicial accountability hearings" at which members could "express their displeasure with certain decisions by... requiring federal judges [to] come before them to explain their constitutional reasoning... and to hear a proper Congressional constitutional interpretation."

24. Feeney Amendment commentary at the time was extensive. The legal and political dimensions of the controversy are well presented in Smith, *supra* note 22, at 1458-71; Peterson, *supra* note 23, at n.26.

25. 543 U.S. 220 (2005). The Supreme Court most recently reaffirmed its *Booker* ruling in *Peugh v. United States*, 133 S. Ct. 2072 (2013), holding that a district court erred in sentencing a defendant pursuant to guidelines issued subsequent to less onerous ones that had been in place at the time of the commission of his crime, in violation of the Ex Post Facto Clause. It reiterated that commission guidelines are not binding but are to be consulted and are "the starting point and the initial benchmark" for the exercise of judicial sentencing discretion. "The district court 'may not presume that the Guidelines range is reasonable,'... and it may in appropriate cases impose a non-Guidelines sentence based on disagreement with the [Sentencing] Commission.'" 133 S. Ct. at 2080. *Booker's* effect on sentencing has been significant. A 2008 study by the Sentencing Commission found that since *Booker*, 39 percent of the sentences handed down were outside the applicable guidelines range. The vast majority of sentences of the out-of-range sentences — 95.9 percent — were downward departures. See Mark Osler, *After the Implosion Trailing Edge Guidelines for a New Era*, 7 OHIO ST. J. OF CRIM. L. 795, 799 (2010) (suggesting that the commission's advisory guidelines should only serve to inform judges of what national sentencing trends are for a given type of case, based on the sentences given by federal district judges across the country, thereby sharing valuable peer judgments that would be useful in sentencing decision-making).

26. See, e.g., Andrew Cohen, *Gingrich: Time to Subpoena Federal Judges*, THE ATLANTIC, Oct. 9, 2011, <https://www.theatlantic.com/politics/archive/2011/10/gingrich-time-to-subpoena-federal-judges/246407/>; Andrew Cohen, *Gingrich's Dangerous Plan to Subpoena Federal Judges, Part II*, THE ATLANTIC, Oct. 11, 2011, <https://www.theatlantic.com/politics/archive/2011/10/gingrichs-dangerous-plan-to-subpoena-federal-judges-part-ii/246428/>.

Chief Justice Rehnquist, in the context of the Feeney Amendment, attempted to define that line of demarcation between valid legislative oversight and constitutionally unacceptable interference with an individual judge's independence:

We can all recognize that Congress has a legitimate interest in obtaining information which will assist in the legislative process. But the efforts to obtain information may not threaten judicial independence or the established principle that a judge's judicial acts cannot serve as a basis for his removal from office.

It is well settled that not only the definition of what acts shall be criminal, but the prescription of what sentence or range of sentences shall be imposed on those found guilty of such acts, is a legislative function—in the federal system, it is for Congress. Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines. It has taken steps to reduce that number. Such a decision is for Congress, just as the enactment of the Sentencing Guidelines nearly twenty years ago was.

The new law also provides for the collection of information about sentencing practices employed by federal judges throughout the country. This, too, is a legitimate sphere of congressional inquiry, in aid of its legislative authority. But one portion of the law provides for the collection of such information on an individualized judge-by-judge basis. This, it seems to me, is more troubling. For side-by-side with the broad authority of Congress to legislate and gather information in this area is the principle that federal judges may not be removed from office for their judicial acts.²⁷

The chief justice acknowledged that this principle is not set forth in the Constitution but was established in the impeachment trial of Judge Samuel Chase in 1805 when the Senate failed to convict Chase. The chief justice stated that the acquittal “represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties.” The chief justice reiterated his reliance on this principle in a subsequent annual report to Congress on the state of the judiciary, charging that targeting judicial decisions of individual federal judges “could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties.”²⁸

B. Judicial Nominations

Under the Constitution's Appointments Clause, the president appoints federal Article III judges and justices of the U.S. Supreme Court “by and with the Advice and Consent of the Senate.”²⁹ Some of the broadest authority of the Congress to investigate individual judges arises during the nominations process. Although the use of subpoenas during this process is unusual, Congress can use other oversight tools to assess a nominee's qualifications. These opportunities can arise in a number of different procedural contexts.

27. Chief Justice William H. Rehnquist, Remarks Before the Federal Judges Assn. Bd. of Directors Meeting (May 5, 2003), http://www.supremecourts.gov/publicinfo/speeches/sp_05-05-03.html.

28. See Part II (*Relations Between Congress and the Judiciary*) of the 2003 Year-End Report by Chief Justice William H. Rehnquist, reprinted in 36 THE THIRD BRANCH (2004), <http://www.uscourts.gov/ttb/jan04ttb/index.html>.

29. Under Art. II, § 2, cl. 2, of the U.S. Constitution, the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law...” Article II, § 3 also provides that the president “shall Commission all the Officers of the United States.”

1. Stages of the Appointments Process

The Constitution separates the appointments process into three stages: nomination by the president; consent (or rejection) by the Senate; and final appointment and commissioning³⁰ by the president.³¹ With respect to the Senate’s “advice” on the nomination, presidents have varied as to the extent to which they have sought input from the Senate on nominations. Frequently, a president faced with the task of making a Supreme Court nomination will, as a matter of courtesy, consult with party leaders in the Senate, members of the Senate Judiciary Committee, and senators from a potential nominee’s home state, particularly senators from the president’s political party.³² Depending on the importance or contentiousness of a particular nomination, significant information may be gathered both by the executive branch and by outside groups on potential nominees. At this stage of the proceedings, a senator would likely obtain access to such information informally. The benefit of such information would be primarily for senators seeking to influence a president’s decision as to a prospective nominee. Such efforts could include private consultations with the executive branch or public statements (whether in committee, on the Senate floor, or through the media).

The consent phase is generally more rigidly structured. In recent years, the role of the Senate Judiciary Committee has usually consisted of three stages: a pre-hearing investigative stage;³³ public hearings;³⁴ and a committee decision as to what recommendation to make to the full Senate on the nominee.³⁵ Each of these stages presents an opportunity for Congress to exercise oversight.

Later proceedings seem to present less opportunity for investigations. Following committee consideration, a nomination reported out of Senate Judiciary Committee is placed on the executive calendar to be considered in executive session. In the absence of a vote to the contrary, such executive sessions are open to the public. Under current practice, floor debate on Supreme Court nominations is open to the public, the press, and, since 1986, to live television coverage.³⁶

2. Opportunities for More Extensive Access

The increased contentiousness of the judicial confirmation process over the last three decades may be said to have fundamentally changed the nature of the process described above. The accumulated precedents over these show that the Senate, or a determined minority of that body, has some leverage to obtain access to information regarding judicial

30. See *Marbury v. Madison*, 5 U.S. 137, 155-56 (1803); *Dysart v. United States*, 369 F.3d 1303, 1306, 1311-12 (Fed. Cir. 2004).

31. As noted in an 1837 opinion of the attorney general:

The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President’s nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration.

3 Op. Atty. Gen. 188 (1837).

32. Such care on the part of the president may be a reflection of the fact that “senatorial courtesy” has occasionally played a role in the rejection of a Supreme Court nominee. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 19-20* (1999). See also, DENIS STEVEN RUTKUS, *CONG. RESEARCH SERV. RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE* (2005); ELIZABETH RYBICKI, *CONG. RESEARCH SERV. RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE* (2015).

33. In the pre-hearing investigative stage, the committee conducts a careful examination of the nominee’s background, including a committee questionnaire to which the nominee responds in writing; confidential FBI reports; evaluation by the American Bar Association’s Standing Committee on the Federal Judiciary; input from the nominee’s “courtesy calls” to individual senators on Capitol Hill; news reports; and other pertinent information. See RYBICKI, *supra* note 32.

34. During confirmation hearings, after opening statements, a nominee is likely to face intensive questioning on many issues, including legal qualifications; personal background; past public activities; and timely legal, constitutional, social, or political issues.

35. Typically within a week of the conclusion of confirmation hearings before the Senate Judiciary Committee, the committee will meet in open session to consider what recommendation to report to the full Senate. The committee may report favorably on the nomination, report a negative recommendation, or report no recommendation to the Senate. The Senate may still consider a nomination reported negatively or with no recommendation. Traditionally, at least since the 1880s, it has been the practice of the committee to report all nominations to the Supreme Court to permit the full body to consider, regardless of whether or not a majority of the committee opposes a nomination. This permits the full Senate to decide whether or not to confirm the nominee to the high court.

36. For a more in-depth discussion of the Supreme Court nomination process, see RUTKUS, *supra* note 32.

nominees that is not ordinarily available to a committee engaged in an investigatory oversight proceeding. For instance, when the president submits a nomination to the Senate, the dynamics of the inquiry process may be different from that of an oversight investigation. When faced with a congressional request for information that is deemed privileged, the president may have to weigh the price of sacrificing an executive privilege by providing the information sought against the risk that the nominee might not be confirmed.

a. The Estrada Nomination and DOJ Opposition to Disclosure

The failed nomination of Miguel Estrada to the D.C. Circuit Court of Appeals in 2002 is a case in point. Senate Democrats, asserting an inability to evaluate his fitness and qualification for the office because of the scarcity of his public writings, requested access to all his memoranda dealing with appeal, certiorari or amicus recommendations during the five years he was an attorney in the solicitor general's office. The administration refused to comply.³⁷

During the Estrada confirmation hearing, two senators presented for the record evidence of seven instances in which prior administrations had provided requested documents related to nominees' prior service in the Department of Justice (DOJ) which were claimed to be analogous to those being sought about Estrada. They involved the nominations of Judge Frank Easterbook to the Seventh Circuit, Judge Robert Bork and Chief Justice William Rehnquist to the Supreme Court, Benjamin Civiletti to be attorney general, William Bradford Reynolds to be associate attorney general, Judge Stephen Trott to the Ninth Circuit, and Jeffrey Holmes to be assistant administrator at the Environmental Protection Agency.³⁸

In response, the DOJ Office of Legislative Affairs (DOJ-OLA) contended that disclosure of the memoranda—which it asserted were confidential and privileged—would have the effect of “undermin[ing] the integrity of the decisionmaking process” of the Office of the Solicitor General (SG). This claim was said to be supported by the statements of seven past solicitors general; by the fact that none of the 67 appeals court nominees since 1977 who had worked at the SG's office had ever been asked for similar memoranda; by the fact that none of the seven cited instances of disclosure involved appeal, certiorari or amicus recommendation documents, or other internal SG deliberation memoranda; and because the courts had recognized the deliberative nature of the documents sought as authority for the executive to protect the integrity of such materials which would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which government policies are formulated.³⁹

The memo asserted that “as a matter of law and tradition, these privileges can be overcome only when Congress establishes a ‘demonstrably critical’ need for the requested information,” citing *Senate Select Committee v. Nixon*.⁴⁰ The memo concluded with the further assertion that “the existence of a few isolated examples where the Executive Branch on occasion has accommodated a Committee's targeted requests for very specific information does not in any way alter the fundamental and long-standing principle that memoranda from the Office of the Solicitor General—and deliberative Department of Justice materials more broadly—must remain protected in the confirmation context so as to maintain the integrity of the Executive Branch's decisionmaking process.”⁴¹ President Bush never claimed executive privilege with respect to Estrada's SG memos, unlike President Nixon with the Kleindienst nomination and President Reagan with the Rehnquist nomination. Instead, he allowed Estrada to withdraw in the face of a threat of a filibuster.⁴²

The Kleindienst, Rehnquist, Bork and Trott nomination experiences, dismissed as irrelevant by the DOJ-OLA memo, are nevertheless instructive as examples of how to obtain documents in the face of executive opposition. Kleindienst's

37. *Confirmation Hearings on Federal Appointments: Hearings before the S. Comm. on the Judiciary, Part 5*, 107th Cong., 2d Sess. 1110-11 (August 1, September 18, September 26, and October 7, 2002) (Letter date June 9, 2002 from Assistant Attorney General Daniel Bryant to Chairman Patrick J. Leahy) [hereinafter *Estrada Hearing*].

38. *Estrada Hearing*, *supra* note 37, at 768, 783 (Senator Schumer), 1186-1257 (examples of solicitor general memos produced at hearings), 780-82 (response of Senator Hatch), 783-84 (Statement of Senator Leahy).

39. Letter from Assistant Attorney General Daniel J. Bryant to Chairman Patrick J. Leahy (October 8, 2002) [hereinafter DOJ Memo] (copy available in CRS files).

40. 498 F.2d 725 (D.C. Cir. 1974).

41. DOJ Memo, *supra* note 39, at 4-45.

42. See LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 79-81 (Caroline Academic Press, 2004).

nomination to be attorney general was on the brink of approval when a newspaper article accused him of lying about his connection with a corrupt deal to settle an antitrust case. A special hearing was conducted at which the committee received conflicting accounts as to whether a White House aide had been involved in the settlement talks. The White House counsel, John Dean, claimed executive privilege to prevent the aide's testimony. Senator Sam Ervin threatened to filibuster Kleindienst's nomination if the aide was not produced. The threat led to an agreement for the aide's testimony and Kleindienst was confirmed. A year later Kleindienst resigned during the Watergate affair. He subsequently pled guilty to a misdemeanor charge for lying at his confirmation hearing about President Nixon's intervention in the corrupt settlement of the antitrust case.⁴³

During the confirmation proceeding for the elevation of Justice Rehnquist to be chief justice, the Judiciary Committee sought documents that he had authored on controversial subjects when he headed DOJ's Office of Legal Counsel. President Reagan asserted executive privilege, claiming the need to protect the candor and confidentiality of the legal advice submitted to presidents and their assistants. But with opponents of Rehnquist gearing up to issue a subpoena, both Rehnquist's nomination and that of Antonin Scalia to be an associate justice, which were to be voted on in tandem, were in jeopardy. President Reagan agreed to allow the committee access to a smaller number of documents, and Rehnquist and Scalia were ultimately confirmed.⁴⁴

The DOJ-OLC memo correctly states that the documents sought during the Trott nomination had nothing to do with his work. Two senators used his nomination as a vehicle to gain access to a report prepared by DOJ's Public Integrity Section regarding a recommendation to Attorney General Meese that he seek appointment of an independent counsel to investigate the activities of a former ambassador. Meese did not seek the appointment and refused the senators' requests for the report on the ground of DOJ's "longstanding policy" not to allow congressional access to internal deliberative memoranda. It soon became clear that the Trott nomination would be held up indefinitely unless the department yielded, which it did, and the senators' hold was ended.⁴⁵

The DOJ-OLC memorandum appears to understate the nature and scope of the documents disclosed in Judge Robert Bork's nomination hearing. Louis Fisher describes the Justice Department's understanding of the sensitive nature of documents turned over:

The Justice Department gave Biden the documents. Some were forwarded, such as memos from the Solicitor General's office on the pocket veto issue. Others, under seal by order of a federal district court, had to be unsealed and supplied to the committee. A few were converted to redacted versions (deleting a few sentences of classified material) or in unclassified form. The Department explained that "the vast majority of the documents you have requested reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch." Releasing such materials "seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities." Yet the department waived those considerations "to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork's confirmation process...." When the Senate Judiciary Committee issued its report on Judge Bork's nomination, it included a fifteen-page memo that he wrote as Solicitor General on the constitutionality and policy considerations of the President's pocket veto power.⁴⁶

43. *Id.* at 71-74.

44. *Id.* at 76-77.

45. *Id.* at 79.

46. Fisher also documents several instances in which senators' "holds" on nominations were instrumental in having withheld documents released. One such instance involved an investigation by the House Energy and Commerce Committee of the Justice Department's Environmental Crimes Section. DOJ refused to comply with document subpoenas. The acting assistant attorney general heading the section had been nominated to be the assistant attorney general. The chairman and ranking minority member of the committee wrote letters to the Senate Judiciary Committee advising them of the situation and requesting a delay in her confirmation. Her confirmation was delayed until the House members were satisfied that compliance had been achieved. *Id.* at 82-84.

Finally, it is ironic to note that in the past the department has recognized that it has a responsibility, if not the obligation, to supply information that is relevant to a confirmation proceeding before a Senate committee. This acknowledgement is made in a 1941 opinion issued by Attorney General Robert Jackson.⁴⁷ The opinion is often cited as the seminal rationale and authority for withholding internal Justice Department documents from inquiring congressional committees. The opinion dealt with a congressional request for past and future FBI and department reports, memoranda and correspondence with regard to labor matters in industrial establishments that had naval contracts. After detailing the rationale for noncompliance, Attorney General Jackson qualified his conclusion as follows:

Of course, where the public interest has seemed to justify it, information as to particular situations has been supplied to congressional committees by me and former Attorneys General. For example, I have taken the position that committees called upon to pass on the confirmation of persons recommended for appointment by the Attorney General would be afforded confidential access to any information we have—because no candidate’s name is submitted without his knowledge and the Department does not intend to submit the name of any person whose entire history will not stand light. By way of further illustration, I may mention that pertinent information may be supplied in impeachment proceedings, usually instituted at the suggestion of the Department and for the good of the administration of justice.

Attorney General Jackson’s opinion arguably indicates that the Senate’s exclusive confirmation role is a textual constitutional commitment to that body to receive all information held by the executive with respect to a nominee—regardless of the degree of sensitivity—similar to that which arises during House impeachment investigations. The Supreme Court has recognized that the Appointments Clause is integral to maintaining the integrity of the separation of powers. The mechanism was one of the many to guard against the accumulation of too much power by one branch. Justice Scalia in *Edmonds v. U.S.*⁴⁸ opined that the Senate’s advice and consent role was intended as a safeguard against executive abuses of the appointments power. Since *Marbury v. Madison*, the court has acknowledged the unique and exclusive roles of the president and the Senate in the three stages of the process: the president cannot be forced to submit a nomination nor can the Congress unduly limit the universe of potential nominees for an office;⁴⁹ the Senate has complete, unreviewable discretion whether to give or withhold consent, or not to act at all;⁵⁰ but once it gives consent it cannot recall a confirmation;⁵¹ and the president, after confirmation, still has the discretion not to issue a commission. Again, at each stage, the power of the president and the Senate is exclusive and plenary. This was most recently affirmed in the court’s 2014 ruling in *NLRB v. Noel Canning* rejecting President Obama’s assertion that he could unilaterally determine when the Senate was in recess for recess appointment purposes, holding that “the Senate is in session when it says it is, provided under its own rules it retains the capacity to transact business.”⁵² The analogous constitutional commitments to the House (investigating impeachments) and to the Senate (investigating the qualifications of nominees) argue for a bar to executive information withholding claims in both contexts. The consequence in the House may be an impeachment article;⁵³ the consequence in the Senate may be no confirmation.

47. Position of the Executive Department Regarding Investigative Reports, 40 Op. Atty. Gen. 45 (1941).

48. 520 U.S. 651, 659 (1997).

49. *Myers v. United States*, 272 U.S. 52, 128–29 (1926).

50. *INS v. Chadha*, 462 U.S. 919, 956 n.21 (1983) (“The senate alone was given final unreviewable power power to approve or disapprove Presidential appointments.”).

51. *United States v. Smith*, 286 U.S. 6 (1932)

52. 134 S. Ct. 2550, 2574 (2014).

53. Article III in the Nixon impeachment cited numerous instances of document withholdings as obstructive to the committee’s investigation. Clinton’s numerous claims of executive privilege during Independent Counsel Kenneth Starr’s investigation were recommended to be impeachable offenses.

C. Judicial Discipline

The first⁵⁴ federal statutory judicial discipline procedures were enacted in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.⁵⁵ The act quickly proved efficacious, providing the basis for the first judicial impeachments since 1936. Under the former 28 U.S.C. § 372(c) procedure, in 1986, 1988 and 1989, the Judicial Conference of the United States transmitted to the House of Representatives certifications of a judicial council and of the Judicial Conference to the effect that Judge Harry Claiborne, Judge Alcee Hastings and Judge Walter Nixon, Jr., respectively, may have engaged in conduct that might be considered grounds for impeachment. Judges Claiborne and Nixon had been previously convicted of felony charges, while Judge Hastings had been acquitted. The National Commission on Judicial Discipline and Removal observed that the certifications with respect to the two judges who had prior criminal convictions “were only a formality”:

Congress implicitly acknowledged as much in a 1990 amendment that permits the Judicial Conference to initiate and transmit such a determination on the basis of the criminal record. In the matter of Judge Hastings, however, the exhaustive investigation by a special committee and subsequent report and certification by the judicial council—coming as they did after the acquittal of Hastings on criminal charges—were undoubtedly critical to the House’s willingness to proceed.⁵⁶

In each instance, the House voted articles of impeachment, and the Senate convicted the judge after an impeachment trial and removed the judge from office.⁵⁷

54. Prior to the 1980 act, discipline of federal judges, except for impeachment, was part of the general administrative authority vested in the judicial councils under 28 U.S.C. § 332. Unlike the judicial discipline procedures under the 1980 act and its successor, 28 U.S.C. § 332 did not define an express statutory structure through which complaints regarding federal judges could be addressed. One other provision that may also be of interest, first enacted on April 30, 1790, provided that a federal judge convicted of accepting or receiving a bribe to “obtain or procure the opinion, judgment or decree ... in any suit, controversy, matter or cause depending before him ... shall be fined and imprisoned at the discretion of the courts, and shall forever be disqualified to hold any office of honor, trust or profit under the United States.” It did not speak to removal from office, but only to disqualification from offices of trust, honor and profit under the United States. The current successor to this act is 18 U.S.C. § 201.

55. P.L. 96-458. It was codified at the former 28 U.S.C. § 372(c). In August 1993, the National Commission on Judicial Discipline and Removal, created by the Judicial Improvements Act of 1990, P.L. 101-650, 104 Stat. 5122, reported its findings and recommendations about the issues related to judicial discipline and removal of federal judges, including both the statutory mechanism and the impeachment process, among others. The commission, in its final report, described the 1980 act as follows:

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the 1980 Act) was the result of compromises both within the Congress and between the legislature and the federal judiciary. It was the product of dialogue that revealed to the judiciary Congress’ concern that there be in place a formal and credible supplement to the impeachment process for resolving complaints of misconduct or disability against federal judges, and revealed to Congress the judiciary’s concern that any such system not prove to be a cure worse than the disease. In the end, believing that misconduct in the federal judiciary was not widespread, and sensitive to both institutional and individual judicial independence, Congress provided a charter for self-regulation that followed closely a model devised by the judiciary. The 1980 Act was, however, avowedly an experiment, and key Members of Congress promised that it would be the object of vigorous oversight.

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

Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 278-9 (1993).

56. *Id.* at 279.

57. 1 BERNARD D. REAMS JR. & CAROL J. GRAY, CONGRESSIONAL IMPEACHMENT PROCESS AND THE JUDICIARY: DOCUMENTS AND MATERIALS ON THE REMOVAL OF FEDERAL DISTRICT JUDGE HARRY E. CLAIBORNE, 19, Document I, 1-6 (1987); *Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, S. REP. No. 101-156, 101st Cong., 1st Sess. (Oct. 2, 1989); 135 Cong. Rec. 25330-35 (Oct. 20, 1989). *Impeachment of Judge Walter L. Nixon, Jr., Constitutional Provisions; Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials; Articles of Impeachment Against Judge Walter L. Nixon, Jr., as Amended; Judge Nixon’s Answer to the Amended Articles; and Replication of the House of Representatives*, S. Doc. 101-17, 101st Cong., 1st Sess. 21-27 (Oct. 5, 1989); 135 Cong. Rec. 27102-04 (Nov. 3, 1989).

The current judicial discipline law was enacted as the Judicial Improvements Act of 2002.⁵⁸ The new judicial discipline procedures⁵⁹ are available to anyone, including a member of Congress, who deems it appropriate to file a complaint against a federal district court judge, judge of a U.S. circuit court of appeals, bankruptcy judge, or magistrate judge.⁶⁰ The procedures include a complaint process, review of complaints initially by the chief judge of the circuit within which the judge in question sits, and, if appropriate, referral of the complaint to a special investigating committee, to a panel of the judicial council of the circuit involved, and, if needed, to the Judicial Conference of the United States. Action may be taken on the complaint at any point in the process. Subpoena power is available to the investigator at each stage. Where a complaint alleges conduct that may rise to the level of an impeachable offense, the Judicial Conference can certify that the matter may warrant consideration of impeachment and transmit the determination and the record of the proceedings to the House of Representatives for whatever action it considers necessary.

1. Illustrations of Handling Allegations of Misconduct in the Administration of Judicial Business Under the Discipline Act

While the Judicial Discipline Act provides an alternate mechanism for identifying judges who have engaged in impeachable conduct, thus saving time and resources of the House Judiciary Committee, the act principally serves the purpose of assuring that the day-to-day management and administration of the judicial system is competent, efficient and honest. But there is doubt that the exercise of congressional oversight and investigative authority against an individual judge for allegations of administrative misconduct would be either legitimate or appropriate. The following case studies suggest it would not.

a. Claims of a Judge's Misconduct in the Misuse of a Court's Random Assignment Rule

In 1999 a public interest group and a member of Congress used the judicial discipline mechanism in the former 28 U.S.C. § 372(c) to investigate allegations of judicial misconduct. Complaints were filed against the chief judge of the United States District Court for the District of Columbia, Norma Holloway Johnson, alleging that she had engaged in “prejudicial” conduct in assigning “highly-charged criminal cases” concerning individuals with “close ties to the President, the White House and the Clinton Administration” to district court judges appointed by President Clinton, thereby bypassing the district court’s random assignment rules.⁶¹

The initial complaint,⁶² filed by Judicial Watch, Inc., a public interest group, on August 30, 1999, charged that Judge Johnson had improperly bypassed the normal random case assignment system, established by Local Criminal Rule 57.10 (a), to send a tax evasion case against Webster L. Hubbell and a campaign financing case against Charlie Trie to recent judicial appointees of President Clinton. The chief judge used a provision of the rule which allowed her to deviate from

58. The law was enacted as part of a subtitle of P.L. 107-273, codified at 28 U.S.C. §§ 351-364. It replaced former 28 U.S.C. § 372(c), enacted in 1980 as part of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Title IV of P.L. 101-650. The House Judiciary Committee described the purpose of the new act as follows:

The purpose of H.R. 3892, the “Judicial Improvements Act of 2002,” is to reorganize and clarify the existing statutory mechanism that allows individuals to file complaints against Article III judges. These reforms will offer more guidance to circuit chief judges when evaluating individual complaints, while providing individuals with more insight as to the disposition of their cases. The overall reorganization will make the process of learning about and filing a complaint more user-friendly.

H. JUDICIARY COMM., JUDICIAL IMPROVEMENTS ACT OF 2002, H.R. REP. NO. 107-459, at 8 (2002).

59. 28 U.S.C., 28 U.S.C. §§351-364. For a detailed discussion of the judicial discipline process, under the current provisions, *see* EMILY C. BARBOUR, CONG. RESEARCH SERV. RL41758, JUDICIAL DISCIPLINE PROCESS: AN OVERVIEW.

60. The U.S. Court of Federal Claims, Court of International Trade, and Court of Appeals for the Federal Circuit are directed in 28 U.S.C. § 363 to prescribe their own rules, consistent with chapter 16 of title 28, U.S.C., establishing judicial discipline complaint procedures and mechanisms for investigation and resolution of such complaints. If a federal judge is convicted of a felony under federal or state law and has exhausted his or her appeals, or if the time for seeking direct review has expired and no such review has been sought, the judge may not hear cases until the pertinent judicial council decides otherwise, and any service after that time may not be considered for purposes of computing years of service on the bench under 28 U.S.C. §§ 371(c), 377, or 178, or creditable service under 28 U.S.C., ch. 83, subchapter III, or 5 U.S.C., ch. 84.

61. REPORT OF THE SPECIAL COMM. TO THE JUDICIAL COUNCIL FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE MATTER OF A CHARGE OF JUDICIAL MISCONDUCT OR DISABILITY (Judicial Complaints Nos. 99-11 and 00-1, February 1, 2001, at 1) [hereinafter SPECIAL COMMITTEE REPORT].

62. Judicial Council Complaint No. 99-11 (D.C. Cir. 1999).

the random assignment requirement and send a case to a particular judge if she determined “at the time an indictment is returned that the case will be protracted and that the expeditious and efficient disposition of the court’s business requires assignment of the case on a non-random basis.”⁶³

On November 17, 1999, Acting Chief Judge Stephen Williams dismissed the complaint as “frivolous.”⁶⁴ Judicial Watch petitioned for review of the dismissal on December 17, 1999. On January 10, 2000, Representative Howard Coble, chairman of the House Judiciary Committee’s Subcommittee on Courts and Intellectual Property, filed a letter in support of reconsideration detailing further instances of alleged improper assignments by the chief judge. The letter followed dissatisfaction with Chief Judge Johnson’s responses to committee requests for information and further investigation that turned up four more instances of nonrandom assignments. Rather than continuing the investigation and issuing subpoenas, Chairman Coble turned to the complaint procedure of the Judicial Discipline Act. On February 9, 2000, in response to Chairman Coble’s letter, the Judicial Council ordered the reconsideration of that part of the Judicial Watch allegation dealing with case assignments and a determination whether a special committee should be appointed to investigate the matter. On February 16, 2000, Chairman Coble filed a formal complaint against Chief Judge Johnson⁶⁵ with respect to assignments in several other campaign finance cases. On March 14, 2000, Acting Chief Judge Williams authorized the special committee of the Judicial Council to investigate the complaints, and thereafter the special committee retained Joe D. Whitley as counsel to conduct the investigation.⁶⁶

After an extensive review and investigation of nine questioned assignments—two from the Office of the Independent Counsel involving Webster Hubbell, and seven from the Justice Department’s Campaign Financing Task Force—the counsel reported that he had not found any evidence that Chief Judge Johnson’s purpose included a political intent to advance the interests of President Clinton, the Clinton administration or the White House. After review, the special committee to the Judicial Council adopted his conclusion.⁶⁷ The Judicial Council affirmed the findings and conclusions of the report of the special committee in a memorandum opinion on February 26, 2001, which dismissed the complaints.⁶⁸

While the proceeding did not result in any disciplinary action being taken against the chief judge, it had (1) the appearance of thoroughly and publically ventilating the serious charges brought against the judge, and (2) supplied the impetus for the repeal of Local Criminal Rule 57.10 (c), which, since 1971, had authorized chief judges of the district court to deviate from the random assignment requirement. A chief judge no longer has authority to specially assign cases.⁶⁹ It also demonstrated that a well-founded official complaint by the House Judiciary Committee can trigger the statutory judicial discipline mechanism.

b. Allegations of Procedural Misconduct by Manipulation of the Composition of an Appellate Panel and the Timing of En Banc Review

In a “procedural appendix” to a dissenting opinion in a high-profile affirmative action case,⁷⁰ a Sixth Circuit judge alleged procedural irregularities in the consideration of the case. One allegation was that the chief judge, Boyce F. Martin, Jr., placed himself on a panel, ignoring the circuit’s random selection policy, and then redirected significant interlocutory motions to it. Later that panel heard further appeals including the appeal on the merits. The second allegation involved the

63. Local Criminal Rule 57.10(c). The deviation authorization had been in effect since 1971. It was repealed on February 1, 2000, during the pendency of the investigation.

64. REPORT OF THE COUNSEL TO THE SPECIAL COMMITTEE FOR THE JUDICIAL COUNCIL FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE MATTER OF A CHARGE OF JUDICIAL MISCONDUCT OR DISABILITY (Judicial Complaint Nos. 99-11 and 00-1, December 18, 2000, at 16-17.) [hereinafter SPECIAL COUNSEL REPORT].

65. Judicial Council Complaint No. 00-1 (D.C. Cir, 2000).

66. SPECIAL COUNSEL REPORT, *supra* note 64, at 18-25.

67. “[W]e conclude that the evidence does not support a finding that Chief Judge Johnson engaged in conduct ‘prejudicial to the effective and expeditious administration of the business of the courts.’ We find the Counsel’s Report persuasive.” SPECIAL COMMITTEE REPORT, *supra* note 61 at 2-3.

68. Judicial Council Opinion at 2.

69. SPECIAL COUNSEL REPORT at N. 43; Judicial Council Opinion at 5.

70. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (Boggs, J., dissenting). The ruling was subsequently upheld by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

chief judge's manipulation of the timing of a vote on a petition for *en banc* consideration of his panel's merits ruling. The dissenter claimed that the chief judge delayed consideration of the petition until two senior Republican judges took senior status and thus became ineligible to participate on the *en banc* panel. The case was reviewed *en banc* only after his panel had issued its opinion affirming the lower court's ruling.

When the allegations of the procedural appendix were brought to the attention of the chairman of the House Judiciary Committee, he sent a letter to the chief judge inquiring whether he had done the alleged acts and requesting production of internal Sixth Circuit documents relating to the case. The chief judge responded to the request, provided documents, and met with majority and minority staffers of the committee. He volunteered that he was making efforts to revise the random assignment procedures of the court. The matter then rested for some time. During that period Sixth Circuit Judge Alice Batchelder was considering a misconduct complaint. She ultimately ruled that both allegations "rais[ed] an inference that misconduct had occurred" but that no further action was necessary because "internal reviews and procedural reforms at the court had 'greatly reduced the potential for future incidents.'" Neither side was satisfied with the result and it was appealed to the Sixth Circuit judicial council. The council dismissed the appeals as moot on the grounds that corrective action had been taken and the chief judge's term was expiring, but without any factual findings. The matter did not end there. The House Judiciary Committee attempted to revive the investigation with requests for internal court documents. It received a request from Judicial Watch for an impeachment investigation. No further committee action was taken and the committee formally closed its investigation in 2006.

It can be concluded that, as in the Judge Holloway situation, the judicial discipline system worked. The situation was publically aired, the assignment rules were changed, and there was no negative impact on the litigation.⁷¹

c. Lack of Transparency at the Tax Court

This case study does not directly concern the judicial discipline mechanism but illustrates a situation where congressional action (and inaction) has undermined judicial independence.

The Tax Court is an anomalous government entity. By statute the Tax Court is a "court of record"⁷² that engages in purely judicial functions, and the Supreme Court has said that it is a "Court of Law" exercising judicial power.⁷³ Yet Congress has left it outside the administrative framework to which most federal courts belong and the laws, practices, and oversight scrutiny to which they are subject. Although it is an Article I court, it is not served by the Administrative Office of the United States Courts. Neither is the Tax Court subject to the Judicial Code—including the Judicial Discipline Act and the Rules Enabling Act—or, with respect to its rulemaking, to the Judicial Conference of the United States. It is not deemed an "agency" so it is not subject to the Freedom of Information Act or the agency provisions of the Administrative Procedure Act.⁷⁴ Perhaps most incongruous, it is not part of the annual judiciary budget request submitted by the director of the Administrative Office to OMB. The Tax Court submits its funding requests to the congressional tax writing committees—House Ways and Means and Senate Finance—which write the IRS Code provisions it enforces and are responsible for its oversight and its pay, a situation fraught with concerns of objectivity and judicial independence.⁷⁵

71. An interesting parallel to the Sixth Circuit occurred shortly thereafter in Connecticut when the soon-to- retire chief judge of the state's supreme court was accused of delaying the publication of a sensitive decision in order to protect the selection of his presumed successor, an associate justice who participated in the ruling. The legislature's Judiciary Committee began an inquiry and asked the former chief justice (now a retired senior judge) for process information regarding release of opinions, which was voluntarily acceded to. The committee then issued the judge a subpoena to testify. The judge moved to quash, which was granted by the Superior Court, which noted the similarity of the Sixth Circuit situation, on separation of powers grounds. It reasoned that since there was no impeachment proceeding then pending, there was substantial cooperation of the judge, and that because a judicial misconduct process was available, the issuance of a legislative subpoena was an improper intrusion on the judicial independence. See William Sullivan v. Andrew J. McDonald and Michael P. Lawler, D.N. CV-06 4010696, Sup. Ct., Judicial D. of Waterbury, June 30, 2006.

72. 26 U.S.C. §7441.

73. *Freytag v. Comm'r, IRS*, 501 U.S. 868, 889-91 (1991).

74. Leandra Lederman, *Tax Appeal: A Proposal to Make the Tax Court More Judicial*, 85 WASH. L. REV. 1195, 1202, 1209-10 (2008).

75. *Id.* at 1210-12.

The Tax Court only hears tax disputes between private parties and the federal government and is the forum of choice with aggrieved taxpayers because it allows litigation without paying the amount in dispute first. Tax Court trials are bench trials. The judges are presidential appointees who serve 15-year terms. The Chief Judge has the power to appoint special trial judges (STJs), judicial officers analogous to magistrate judges, though they are employees at will. STJs are permitted to hear any Tax Court case, but they are only authorized to render decisions in cases with limited amounts in dispute (under \$50,000) under informal procedures.⁷⁶ The chief judge is authorized to assign STJs to cases for large dollar amounts to hear but not decide. Prior to 1983, Tax Court Rule 182 set forth procedures applicable to large cases assigned to STJs. It required the STJ to “file his report, including findings of fact and opinion.” The report was to be served on the parties, each of whom had an opportunity to file a brief setting forth exceptions of law or fact to that report.” The reports were made public and included in the record on appeal.⁷⁷ The rule was amended in 1983 to withhold the reports from the public and parties and to exclude them from the appellate record. The new rule required the STJ, after trial and submission of briefs, to “submit” a report with findings of fact and opinion to the chief judge, who was to assign it to a court judge for final decision. The assigned judge was to defer to the credibility findings and assume the fact-findings to be correct. The judge could adopt, modify or reject the report in whole or part. The effect of the rule was to make unknown whether and how the final decision deviated from the STJ report. The change in term “file” in the old rule to “submit” in the new rule allowed the court to treat STJ reports as internal, personal documents that did not have to be part of the official records of the court.⁷⁸

In 1999, the Tax Court issued a decision finding that the subject taxpayers had acted with the intent to deceive the commissioner and held them liable for underpaid taxes and substantial fraud penalties. That decision consisted wholly of a document labeled, “Opinion of the Special Trial Judge,” and declared that the trial court judge agreed with and adopted the attached opinion. The taxpayers learned that the actual STJ opinion ruled in their favor and requested its revelation and that it be made part of the appeal record. The Tax Court and three appeals courts denied their requests but a ruling by the Supreme Court in *Ballard v. Commissioner* found the failure to include the initial findings of fact and opinion in the record on appeal anomalous and unwarranted.⁷⁹ The court held that “[N]o statute authorizes, and the current text of Rule 183 does not warrant, the concealment at issue.”⁸⁰ It noted that the Tax Court’s reading departed from uniform, accepted administrative decision-making practice elsewhere in the federal judiciary. “A departure of the bold character practiced by the Tax Court—the creation and attribution solely to the special trial judge of a superseding report composed in an unrevealed collaboration with a regular tax court judge—demands, at the very least, full and fair statement in the Tax Court’s own Rules.”⁸¹ The court warned, however, that if the rule was changed to reflect the current practice, “that change would, of course, be subject to appellate review for consistency with relevant statutes and due process.”⁸²

The aftermath of the *Ballard* ruling was revealing. There were no public hearings. The Oversight Subcommittee of the House Ways and Means Committee conducted internal investigations that consisted of interviews with Tax Court judges, at the court’s offices, in which discussion of the *Ballard* ruling was off limits.⁸³ The Tax Court agreed that Rule 183 would be revised to allow STJ reports to be public records and parties to receive copies and utilize them for appeals.⁸⁴ The subcommittee and the Chicago Tribune requested copies of the original reports in other cases tried under Rule 183 between 1984 and 2005. Only the Tribune announced findings: that out of over 900 cases in which an STJ had issued a report adopted by the Tax Court, only 117 original reports could be located. Of the 117, five had been deviated from in the final released version.

76. *Id.* at 1201-02.

77. *Id.* at 1233-34.

78. *Id.* at 1235-38.

79. 544 U.S. 40 (2005).

80. *Id.* at 46-47.

81. *Id.*

82. *Id.* at 65.

83. Interviews with Payson R. Peabody, former tax counsel, H. Comm. on Ways and Means, (2001-2005), on October 24, 2012, and David Kass, former staff director and chief investigative counsel, H. Subcomm. on Oversight, Ways and Means Comm. (2005-2006), on July 15, 2012 [hereinafter *Interviews*].

84. Lederman, *supra* note 74, at 1239.

The Tax Court explained the disappearance of some 800 reports on the understanding of the STJs after 1984 that their reports were their personal property and not part of the official records of the court.⁸⁵ There apparently was an internal staff report of its investigation but no public issuances.⁸⁶ There has been no public congressional rebuke of the Tax Court or any of the Tax Court judges or administrative personnel involved in the 20 years of collaborative secrecy. Nor has there been any legislative proposal to bring the Tax Court into conformance with practices and laws that support judicial independence and accountability, including making the judicial discipline scheme applicable to the Tax Court.⁸⁷ The current relationship of the Tax Court to the tax oversight committees is rife with possibilities of influence and conflict of interest that undermine judicial independence and accountability. It may explain the muted congressional reaction to a festering 20-year practice.⁸⁸

D. Impeachment

Congress can also exercise its oversight authority over individual judges in anticipation of or during impeachment proceedings.⁸⁹ Federal judges are among those “civil Officers of the United States” who can be impeached for engaging in conduct amounting to treason, bribery, or other high crimes and misdemeanors.⁹⁰ While use of compulsory process against a sitting judge outside the impeachment process is rare and legally problematic, the issuance of subpoenas *during* the impeachment process, including against judges, has become more common and acceptable.⁹¹ Indeed, the failure to comply with subpoenas during an impeachment inquiry could result in an independent article of impeachment.⁹²

Moreover, Federal Rule of Criminal Procedure 6(e)(3)(c)(i) authorizes a court to make disclosures “preliminary to or in connection with a judicial proceeding.” Consistently, and without an exception that has been publically noted, the courts have held that a House investigation preliminary to impeachment is a judicial proceeding within the scope of the exception to the rule. Indeed, courts have held that investigations conducted by committees of judicial councils pursuant to

85. *Id.* at 1229-30

86. *Interviews, supra* note 83.

87. The Judicial Discipline Act requires three Article I courts to adopt discipline mechanisms in conformance with those made applicable by the Act to Article III courts. *See* note 67 *supra*.

88. The issues of lack of transparency and limited oversight continue to date. *See* Leandra Lederman, *(UN)Appealing Deference To The Tax Court*, 63 DUKE L.J. 1835, 1837-38 (2014) (“The Tax Court...is a federal court whose decisions are appealable to federal courts of appeals, yet it is located outside of the judicial branch. Unlike the Federal Court of Claims, for example, which is also a legislative court, the Tax Court is not treated as part of the judiciary for administrative purposes. Among other things, that means that the Tax Court is not subject to the Administrative office of the U.S. Courts, the U.S. Judicial Conference, or the Rules Enabling Act

89. For a general overview of the impeachment process, see JARED P. COLE AND TODD GARVEY, CONG. RESEARCH SERV., RL44260, IMPEACHMENT AND REMOVAL (2015).

90. The somewhat skeletal constitutional framework for the impeachment process can be found in the following provisions:

- Art. I, § 2, cl. 5: “The House of Representatives ... shall have the sole Power of Impeachment.”
- Art. I, § 3, cl. 6: “The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.”
- Art. I, § 3, cl. 7: “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”
- Art. II, § 2, cl. 1: “The President ... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”
- Art. II, § 4: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

91. Similarly, the statutory scheme established for review and discipline of judicial conduct, discussed *supra*, provides that judicial councils, special committees appointed by judicial councils, the Judicial Conference, or a study committee appointed by the chief justice, all have full subpoena power. *See* 28 U.S.C. §§ 331, 332d and 356(a) and (b).

92. *See, e.g.*, Impeachment Article III against President Nixon accusing him of withholding subpoenaed information from the Judiciary Committee. Also, Independent Counsel Starr’s report to the House Judiciary Committee on the Lewinsky matter suggested that President Clinton’s claims of executive privilege to prevent the testimony of a number of witnesses had “been inconsistent with the President’s duty to faithfully execute the laws.” The Judiciary Committee in Article III of its impeachment charges alleged that the president had “prevented, obstructed, and impeded the administration of justice” and had engaged in a “course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony.” *See* LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 65-66 (2004).

the past and current judicial discipline statutes are within the exception and have granted access to grand jury material.⁹³ In addition, in at least four instances the House has directly requested and received grand jury materials in impeachment proceedings.⁹⁴

The case law with respect to what a congressional committee may do with 6(e) material released by a court, while sparse, is unequivocal: A committee is free to do with it as it will, as long as it complies with the rules of the House with respect to dissemination. The courts have conceded that they are powerless to place restrictions on the use of the material once it is in the hands of a committee.⁹⁵

1. Frequency of Impeachments of Judicial Officers

A total of 15 judges have been the focus of impeachment proceedings. Of those 15, eight were convicted on impeachment and removed from office.⁹⁶ In the five most recent judicial impeachments, investigations under the former 28 U.S.C. § 372(c) and current 28 U.S.C. §§ 351-364 judicial discipline provisions resulted in referrals of the cases by the Judicial Conference of the United States to the House of Representatives for the House to determine whether or not impeachment might be appropriate. Judge Harry E. Claiborne, United States district judge for the District of Nevada, was impeached, tried in the Senate, and convicted in 1986. In the case of Judge Hastings, the impeachment investigation and proceedings spanned parts of 1988 and 1989. The judicial impeachment of Judge Walter L. Nixon, Jr., United States district judge for the Southern District of Mississippi, took place in 1989. The House of Representatives impeached Judge Samuel B. Kent in 2009. After he agreed to resign, the House agreed to a resolution not to further proceed with the articles and the Senate dismissed them. Judge G. Thomas Porteous was impeached by the House in March 2010 and convicted and removed from office in December 2010.

2. Initiation and Prosecution of Impeachment Proceedings

The power to determine whether impeachment is appropriate in a given instance rests solely with the House of Representatives. Thus, investigations preliminary and attendant to impeachments carry some of the broadest authorities to investigate the activities of individual judges or justices. An impeachment process may be triggered in a number of ways, including charges made on the floor by a member or delegate on his or her own initiative;⁹⁷ a member presenting

93. See, e.g., In re Report and Recommendations of June 5, 1992 Grand Jury Transmission of Evidence to House of Representative, 370 F. Supp. 1219, 1228-1230 (D.D.C. 1974), *mandamus denied sub nom* Haldeman v. Sirica, 501 F.2d 714, 715 (D.C. Cir. 1974) (granting access to House Judiciary Committee in President Nixon impeachment); In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1075-76 (S.D. Fla. 1987), *aff'd* 833 F.2d 1438, 1444-45 (11th Cir. 1987) (granting access to House Judiciary Committee in Judge Hastings' impeachment); In re petition to Inspect and Copy Grand Jury Materials, 735 F. 2d 1261 (11th Cir.), *cert. denied*, 469 U.S. 884 (1984) (granting access to grand jury materials to investigating committee of Judicial Council in preliminary investigation of Judge Hastings under 28 U.S.C. 372(c)). See also Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) (supporting conclusion that power to impeach includes power to obtain evidence).

94. In 1811, a grand jury in Baldwin County in the Mississippi Territory forwarded to the House a presentment specifying charges against Washington District Superior Court Judge Harry Toulmin for possible impeachment action. 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 2488 at 985, 986 (1907) [hereinafter HINDS' PRECEDENTS]. In 1944, the House Committee on the Judiciary received grand jury material pertinent to its investigation into allegations of impeachable offenses committed by judges Albert W. Johnson and Albert L. Watson. *Conduct of Albert W. Johnson and Albert L. Watson, United States District Judges, Middle District of Pennsylvania: Hearings before the Subcommittee of the Committee on the Judiciary to Investigate the Official Conduct of United States District Court Judges, Albert W. Johnson and Albert L. Watson*, 79th Cong. (1945). In 1989, the House Judiciary Committee petitioned and received grand jury material pertinent to impeachable offenses committed by Judge Walter L. Nixon. Nixon v. United States, Civ. No. H 88-0052 (G) (S.D. Miss., Hattiesburg Div.), referenced in IMPEACHMENT OF WALTER L. NIXON JR., H. R. REP. NO. 101-36, 15 (1989). Finally, in 1998, the Special Division for Appointing Independent Counsel granted Kenneth Starr's ex parte motion to authorize him to release and transmit grand jury materials to the House of Representatives pursuant to his obligation under 28 U.S.C. 595(c) to report to the House "any substantial and credible information ... that may constitute grounds for impeachment." On September 4, 1998, the House adopted H.R. Res. 525, 144 CONG. REC. H7607, which directed that the House Judiciary Committee review the transmittal and ordered that the independent counsel's narrative report be printed as a House document and that all other material received be released by September 28, 1998, as a House document unless otherwise determined by the committee.

95. See cases cited *supra*, note 93.

96. For a summary compilation of names, dates, and outcomes of these proceedings, see <http://www.fjc.gov/history/home.nsf>. The first eight judicial impeachment trials predate the statutory judicial discipline provisions added by the Judicial Conduct Act of 1980, as amended, and the Judicial Improvements Act of 2002. For a detailed description of the articles of impeachment brought against these judges, see CHARLES DOYLE, CONG. RESEARCH SERV., RL98-896, IMPEACHMENT GROUNDS: PART 4A: ARTICLES OF PAST IMPEACHMENTS; CHARLES DOYLE, CONG. RESEARCH SERV., RL98-897, IMPEACHMENT GROUNDS: PART 4B: ARTICLES OF PAST IMPEACHMENTS.

97. 3 HINDS' PRECEDENTS, *supra* note 94, at §§2342, 2400, 2469.

a memorial listing charges under oath, which is usually referred to a committee for examination;⁹⁸ a resolution dropped in the hopper by a member and referred to a committee;⁹⁹ a message from the president; charges transmitted from the legislature of a state or territory or from a grand jury; facts explored and reported by a House investigating committee; or a suggestion from the Judicial Conference of the United States¹⁰⁰ that the House may wish to consider whether impeachment of a particular federal judge would be appropriate.¹⁰¹

The Senate also has a unique role to play in the impeachment process; it has the authority and responsibility to try an impeachment brought by the House.¹⁰² In addition, should an individual be convicted on any of the articles, the Senate must determine the appropriate judgment: either removal from office alone, or, alternatively, removal and disqualification from holding further offices of “honor, Trust or Profit under the United States.”¹⁰³

3. The Nature of an Impeachable Offense

What constitutes an impeachable offense has been the topic of considerable debate. Neither the Federalist Papers, nor the debates in the Constitutional Convention, nor the state ratifying conventions give us particular guidance on the standards to be applied to judicial impeachments beyond the constitutional language in Article II, Section 4 of the U.S. Constitution.¹⁰⁴

Conviction through the impeachment process for “Treason, Bribery, or other high Crimes and Misdemeanors” is the constitutional standard for removal of a president, vice president, or other civil officers of the United States. Treason is defined both in statute¹⁰⁵ and in the Constitution.¹⁰⁶ Bribery, while not defined in the Constitution, was an offense at common law and has been a statutory offense since the first Congress enacted the act of April 30, 1790.¹⁰⁷ It is now codified at 18 U.S.C. § 201. Thus, treason and bribery may be fairly clear as to their meanings, but the remainder of the language has been the subject of considerable debate.

The phrase “high Crimes and Misdemeanors” is not defined in the Constitution or in statute. It was used in many of the English impeachments, which were proceedings in which criminal sanctions could be imposed upon conviction.¹⁰⁸ No definitive list of types of conduct falling within the “high Crimes and Misdemeanors” language has been forthcoming as a result of this debate, but some measure of clarification has emerged.

98. *Id.* §§2364, 2486, 2491, 2494, 2496, 2499, 2515.

99. Such a resolution may take one of two general forms. It may be a resolution impeaching a specified person falling within the constitutionally prescribed category of “President, Vice President, and all civil Officers of the United States.” Such a resolution would usually be referred directly to the House Committee on the Judiciary. Alternatively, it may be a resolution requesting an inquiry into whether impeachment would be appropriate with regard to a particular individual falling within the constitutional category of officials who may be impeached. Such a resolution, sometimes called an inquiry of impeachment to distinguish it from an impeachment resolution of the type described above, would usually be referred to the House Committee on Rules, which would then generally refer it to the House Committee on the Judiciary.

100. 28 U.S.C. §§ 351-64.

101. See *Jefferson's Manual of Parliamentary Practice* § 603 at 314-15, <https://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112-jeffersonman.pdf>.

102. As to each article, a conviction must rest upon a two-thirds majority vote of the senators present. U.S. Const., Article I, §3, cl. 6.

103. U.S. Const., Article I, §3, cl. 6. The precedents in impeachment suggest that removal can flow automatically from conviction, but that the Senate must vote to prohibit the individual from holding future offices of public trust under the United States, if that judgment is also deemed appropriate. A simple majority vote is required on a judgment. The Constitution precludes the president from extending executive clemency to anyone to prevent their impeachment by the House of Representatives or trial by the Senate. U.S. Const., Article II, § 2, cl. 1.

104. The focus at that time was more on the type of conduct which might justify removal of a president. See, e.g., The Federalist Papers, No. 69, 416 (C. Rossiter, ed., 1961).

105. 18 U.S.C. § 2381.

106. U.S. Constitution, Art. III, Sec. 3.

107. 1 Stat. 112, 117.

108. As Alex Simpson, Jr., amply demonstrated in his discussion of the Constitutional Convention's debate on this language and the discussion of it in the state conventions considering ratification of the Constitution, in “*Federal Impeachments*,” 64 U. PA. L. REV. 651, 676-695 (1916), confusion as to its meaning appears to have existed even at the time of its drafting and ratification.

The debate on impeachable offenses during the Constitutional Convention in 1787 indicates that criminal conduct¹⁰⁹ was at least part of what was included in the “Treason, Bribery, or other high Crimes and Misdemeanors” language.¹¹⁰ However, the precedents in this country suggest that conduct which may not constitute a crime, but which is nonetheless serious misbehavior that brings disrepute upon the public office involved, can be a sufficient ground for impeachment.

The House Judiciary Committee, in recommending articles of impeachment against President Richard Nixon in 1974, appears to have premised those articles on both acts and omissions: First, that Nixon abused the powers of his office, causing “injury to the confidence of the nation and great prejudice to the cause of law and justice” and resulting in subversion of constitutional government; second, that he failed to carry out his constitutional obligation to faithfully execute the laws; and third, that he failed to comply with congressional subpoenas needed to provide relevant evidence for the impeachment investigation.¹¹¹

The minority of the House Committee on the Judiciary in the report recommending that President Nixon be impeached took the view that errors in the administration of his office were not sufficient grounds for impeachment of the president or any other civil officer of the United States.¹¹² The minority views seem to suggest that, under their interpretation of “high Crimes and Misdemeanors,” crimes or actions with criminal intent must be the basis of an impeachment.¹¹³

Impeachment charges were brought against President Andrew Johnson involving allegations of actions in violation of the Tenure of Office Act,¹¹⁴ including removing Secretary of War Edwin McMasters Stanton and replacing him with Secretary of War Lorenzo Thomas and other related actions. Two of the articles brought against the president asserted that he sought to set aside the rightful authority of Congress and to bring it into reproach, disrepute and contempt by “harangues” criticizing the Congress and questioning its legislative authority.¹¹⁵ President Johnson was acquitted on those articles upon which votes were taken.

4. Is the Impeachment Standard Different for Judicial Officers?

It has been suggested that the impeachment provisions and the “good behavior” language of the judicial tenure provision in Article III, Section 1 of the Constitution should be read in conjunction with one another when judicial officers are the subjects.¹¹⁶ Whether this would serve to differentiate impeachable offenses for judicial officers from those that would apply to civil officers in the executive branch is not altogether clear. During the impeachment investigation of Justice Douglas in the 91st Congress, Representative Paul McCloskey, Jr., reading the impeachment and good behavior provisions in tandem, contended that a federal judge could be impeached for either improper judicial conduct or non-judicial conduct amounting to a criminal offense.¹¹⁷ Then-Minority Leader Gerald Ford inserted in the Congressional Record a memorandum taking the position that impeachable misbehavior by a judge involved proven conduct, “either in the administration of justice or in

109. Article I, Section 3, Clause 7 appears to anticipate that some of the conduct within this ambit may also provide grounds for criminal prosecution. It indicates that the impeachment process does not foreclose judicial action. Its phrasing might be regarded as implying that the impeachment proceedings would precede the judicial process, but, as is evident from the impeachments of Judge Claiborne in 1986, and of judges Hastings and Nixon in 1988 and 1989, at least as to federal judges and probably as to most civil officers subject to impeachment under the Constitution, the impeachment process may also follow the conclusion of the criminal proceedings. Whether impeachment and removal of a president must precede any criminal prosecution is as yet an unanswered question but was squarely faced by the Watergate special prosecutor’s office. *See* LANCE COLE AND STANLEY M. BRAND, CONGRESSIONAL INVESTIGATIONS AND OVERSIGHT 410–414, 419 (Carolina Academic Press, 2011) [hereinafter COLE AND BRAND] for a discussion of the special prosecutor’s considerations that led to his decision not to indict President Nixon.

110. *See* the discussion of the debates on this subject in the minority views in connection with the report submitted by the House Judiciary Committee recommending President Nixon’s impeachment, H.R. REP. NO. 93-1305, 362-72 (1974), printed in 120 CONG. REC. 29312-15 (1974). For a discussion of presidential impeachment grounds, *see* 3 DESCHLER’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES ch. 14, § 3.8.

111. *See id.*, ch. 14, § 3.7.

112. *Id.*

113. H.R. REP. NO. 93-1305.

114. Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430.

115. *See* Impeachment of President Andrew Johnson in H. COMM. ON THE JUDICIARY, 93RD CONG., IMPEACHMENT: SELECTED MATERIALS 154-61 (Comm. Print 1973).

116. *See* 3 DESCHLER’S ch. 14, §3.8.

117. *Id.*

his personal behavior,” which casts doubt on his personal integrity and thereby on the integrity of the entire judiciary.¹¹⁸

For example, Judge John Pickering was convicted on all four of the articles of impeachment brought against him, including charges that he mishandled a case before him in violation of federal laws and procedures. The alleged misconduct included (1) delivering a ship which was the subject of a condemnation proceeding for violation of customs laws to the claimant without requiring bond to be posted after the ship had been attached by the marshal; (2) refusing to hear some of the testimony offered by the United States in that case; and (3) refusing to grant the United States an appeal despite the fact that the United States was entitled to an appeal as a matter of right under federal law. However, it should also be noted that the fourth article against him alleged that he appeared on the bench in an intemperate and intoxicated state.

In another example, Judge Halsted Ritter was acquitted of six of the seven articles brought against him. He was, however, convicted on the seventh, which summarized or listed the first six articles. The factual allegations upon which the seventh article was based included assertions that Ritter, while a federal judge, accepted large fees and gratuities and engaged in income tax evasion. However, the basis of the seventh article was that the “reasonable and probable consequences of the actions or conduct” involved therein were “to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge.” This article was challenged unsuccessfully on a point of order, arguing that article VII merely repeated and combined facts, circumstances and charges from the preceding six articles. The president pro tempore ruled that article VII involved a separate charge of “general misbehavior,”¹¹⁹ which it would appear was a charge going beyond the criminality of the behavior alleged in previous articles.

During the Douglas impeachment debate, Representative Frank Thompson, Jr., argued that historically federal judges had only been impeached for misconduct that was both criminal in nature and related to their judicial functions, and that such a construction of the constitutional authority was necessary to maintain an independent judiciary.¹²⁰ However, in the *Final Report by the Special Subcommittee on H. Res. 920 of the Committee on the Judiciary of the House of Representatives*,¹²¹ the subcommittee suggested two “concepts” of judicial impeachability for the committee to consider. The subcommittee observed:

Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involved criminal conduct in violation of law, or (2) that involved serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench, or unwarranted and unreasonable impartiality [sic] manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature, that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.

Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve [sic] criminal acts in violation of law.¹²²

The most recent impeachments, those of Judges Nixon, Hastings and Kent, appear to more clearly demark a dual standard applying to judicial impeachments. The House report on Judge Nixon stated:

118. *Id.* at ch. 14, § 3.11. See also COLE AND BRAND, *supra* note 109, at 403-406.

119. See 3 DESCHLER's ch. 14, §13.6.

120. *Id.* at ch. 14, § 3.12, at 455-57.

121. Special Subcomm. on H. Res. 920, H. Comm. on the Judiciary, 91st Cong., Final Report (Comm. Print 1970), as cited in 3 DESCHLER's ch. 14, §3.13.

122. 3 DESCHLER's ch. 14, §3.13.

The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined “other high Crimes and Misdemeanors” to be serious violations of the public trust, not necessarily indictable offenses under criminal laws. ... [What constitutes an impeachable offense in the context of federal judges has] evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. Where a judge’s conduct calls into question his or her integrity or impartiality, Congress must consider whether impeachment or removal of the judge from office is necessary to the integrity of the judicial branch and to uphold the public trust.¹²³

The House report on Judge Hastings expressed similar views, observing that the “high Crimes and Misdemeanors” standard “refers to misconduct that damages the state and the operations of government institutions, and is not limited to criminal conduct.”¹²⁴ The committee also drew attention to the noncriminal nature of impeachment, which is designed to remove the federal officer from his or her office in order to protect the “constitutional form of government from the depredations of those in high office who abuse or violate the public trust.”¹²⁵ The foregoing understandings were approvingly referenced in the House report on Judge Kent, the most recent impeachment proceeding.¹²⁶

These cases suggest that a judge might be vulnerable to impeachment not only for criminal conduct, but also for improper judicial conduct involving a serious dereliction of duty; placing the judge, the court, or the judiciary in disrepute; or casting doubt upon his integrity and the integrity of the judiciary.

5. Can a Judge Be Impeached For Misconduct Occurring Prior to the Time of Holding her Present Office?

The impeachment and conviction of Judge G. Thomas Porteous in 2010 was the first based, in part, on conduct occurring before he began his tenure as a federal judge. Articles I and II each alleged misconduct beginning while he was a state court judge as well as misconduct while he was a federal judge. Article IV alleged false statements made in connection with his nomination and confirmation as a district court judge, all involving pre-federal conduct. Article III alleged personal misconduct with respect to his own personal bankruptcy proceeding. He was convicted on all four articles, removed from office, and disqualified from holding any future federal office.¹²⁷ Third Circuit Judge Robert W. Archbold was impeached and convicted based on misconduct committed as both a circuit and a district judge.¹²⁸

6. Can a Judge Who Has Resigned Be Impeached For Misconduct During her Judicial Tenure?

On September 9, 2015, the Judicial Conference, pursuant to its authority under the Judicial Conduct and Disabilities Act, certified to the House its determination that consideration of impeachment of former United States District Court Judge Mark E. Fuller may be warranted. The Judicial Conference’s certification was based on findings that Judge Fuller had (a) repeatedly physically abused his wife, (b) lied under oath about his misconduct to the special committee to the Judicial Council of the 11th Circuit, and (c) “made false statements to the Chief Judge of the Eleventh Circuit in late September 2010 in a way that caused massive disruption in the District Court’s operation and loss of public confidence in the Court as an instrument of Justice.”

The referral is significant because it is still an open constitutional question whether a former officer is subject to impeachment. A prominent impeachment scholar has noted “a surprising consensus among commentators that resignation does not necessarily preclude impeachment and disqualification.”¹²⁹ The Judicial Conference apparently recognizes the novelty of its action but believes it is warranted “given the severity of the misconduct... together with a finding of perjury...

123. H.R. REP. NO. 101-36 at 5, 12 (1989).

124. H.R. REP. NO. 100-810 at 6 (1988).

125. *Id.* at 6-7.

126. H.R. REP. NO. 111-159 at 5-6.

127. 156 CONG. REP. S8609-11 (daily ed. December 8, 2010).

128. VI CANNON’S PRECEDENTS, SECS. 498, 499, 512, at 684-86, 705-708. *See also* COLE AND GARVEY, *supra* note 89, at 15-16.

129. MICHAEL GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 79 (1996).

that certification of this matter ‘to the House of Representatives for whatever action the House of Representatives considers necessary’ is appropriate.”The Judicial Conference states that even if the House determines that impeachment is not warranted, it will “serve as a public censure of Judge Fuller’s reprehensible conduct, which no doubt has brought disrepute to the Judiciary and cannot constitute the ‘good behavior’ required of a federal judge.”¹³⁰ The House Judiciary Committee has not yet acted on the certification.

E. Concluding Observations

Congress has a wide range of oversight tools available with respect to the judicial branch. However, the ability of the Congress to use these tools to investigate individual judges may be more limited. While these tools can be exercised in a variety of contexts, including nominations, judicial discipline, and impeachment, their use outside of these contexts has been relatively rare, and questions have been raised as to whether such exercise of congressional oversight could give rise to a separation of powers violation. The line between judicial independence and judicial accountability is fine; but a proper balance between them is essential for constitutional stability.¹³¹

130. See COLE AND GARVEY, *supra* note 89, at 16-17.

131. See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L. J. 909 (2007).