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Congressional Oversight of Judges and Justices

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Elizabeth B. Bazan
Legislative Attorney
American Law Division

Morton Rosenberg
Specialist in American Public Law
American Law Division

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Summary

This report addresses Congress' oversight authority over individual federal judges or Supreme Court Justices. Congressional 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 judges or Justices is more restricted. For instance, Congress has limited authority to 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, which effectively has come to mean lifetime tenure for Article III judges subject to removal only through conviction on impeachment. However, impeachment of a judge or Justice requires a finding that such judge or Justice has engaged in a "High Crime or Misdemeanor." Thus, an investigation into decisions or other actions by a particular judge pursuant to an impeachment would appear to require some connection between an alleged "High Crime or Misdemeanor" and a particular case or cases.

Of course, review and consideration of particular court decisions or other judicial acts are well within the purview of Congress' legislative authority. For instance, Congress has the legislative authority 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. However, investigating the judge or Justices behind such decisions may require something more. This report reviews a number of circumstances in which Congress may be authorized to either pursue or otherwise influence an investigation of individual federal judges or Supreme Court Justices.

First the report addresses the general powers and limitations on Congress' oversight authority. Second, the report examines the Senate approval process for the nominations of individual judges or Justices, and the Senate's ability to obtain information on judges or Justices during that process. The report also considers the limits of existing statutory authority for judicial discipline and how Congress has influenced such procedures. It discusses the issue of how far the congressional investigatory powers can be exercised regarding possible judicial impeachments. Finally, it treats investigations regarding the individual actions of a judge outside of the above contexts, such as how a judge imposes sentences under the United States Sentencing Guidelines. A separate report, CRS Report RL32926, *Congressional Authority over Federal Courts*, by Elizabeth B. Bazan, Johnny Killian, and Kenneth R. Thomas, addresses Congress' legislative authority over the courts.

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I. Congressional Oversight Authority

Throughout its history, Congress has engaged in oversight – the review, monitoring and supervision of the implementation of public policy. These oversight powers are based on Congress' authority to engage in effective inquiries and

investigations to assure itself and the public that the laws are being “faithfully executed.”¹ The first several Congresses inaugurated such important oversight techniques as special investigations, reporting requirements, resolutions of inquiry, and use of the appropriations process to review executive activity. Contemporary developments, moreover, have increased the legislature’s capacity and capabilities to oversee and check the Judiciary and the Executive. For instance, public laws and congressional rules have measurably enhanced Congress’ implied power under the Constitution to conduct oversight.²

Although oversight may occur regarding any matter within the legislative purview of the Congress, such oversight can become particularly complicated as regards the other branches of government. These congressional investigatory powers derive from Congress’ 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’ own enumerated powers as well as those of the Executive. Such legislative and oversight powers can even extend to individual assessments of the performance of judges or Justices, such as might occur during a judicial nomination process or during an impeachment proceeding.

For instance, as is discussed below, any number of oversight methods would be available to obtain information regarding a particular judge or Justice during a nomination process. These might include informal Member contacts with the judge or Justice; congressional staff studies; studies prepared by congressional support agencies or noncongressional entities; and formal committee hearings. To the extent that the cooperation of the Executive or Judicial Branches is required to facilitate these processes, these methods would generally be sufficient. Even if there were a dispute between the branches as to access to information, the threat of withholding consent to the nomination would be likely to lead to some accommodation of congressional requests.

However, the question arises as to whether the Congress has the authority to compel the Judicial or Executive Branch to provide information on individual judges or their judicial acts. One possibility is for the Congress to establish statutory reporting requirements. As is discussed below, Congress has, by statute, provided that the Department of Justice must provide information to Congress on downward departures under the United States Sentencing Guidelines by individual federal judges. As is discussed below, Justice Rehnquist, however, has suggested that this

¹ See CRS Report RL30240, *Congressional Oversight Manual*, by Louis Fisher, Frederick M. Kaiser, Walter Oleszak, and Morton Rosenberg (hereinafter *Oversight Manual*).

² See *generally* *Oversight Manual*. For several major reasons, Congress has shown an increasing interest in oversight since the late 1960’s. These reasons include the expansion in number and complexity of federal programs and agencies; the increase in government expenditures and personnel, including contract employees; the rise of the budget deficit; and the frequency of divided government, with Congress and the White House controlled by different parties. Major partisan disagreements over priorities and processes have also heightened conflict between the legislature and the executive.

provision, known as the Feeney Amendment, is a violation of separation of powers. Further, a district court considering this provision has struck it down.³

A more controversial option would be to attempt to compel judges and Justices to respond to congressional oversight through the subpoena and contempt process. For instance, committees have the authority to issue subpoenas for testimony or documents. Refusal to comply with such a subpoena is punishable as a contempt of Congress, which could result in imprisonment for up to one year and/or a fine of up to \$100,000.⁴ Most often, however, the threat of contempt, or the actual vote of a committee or of the House itself, has resulted in compliance before the referral for prosecution.⁵

However, outside the impeachment context, the efficacy of such an oversight method with respect to federal judges or Justices seems unclear. 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,”⁶ the Department of Justice has taken the position that Congress cannot constitutionally direct that the Executive initiate a contempt prosecution. 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 process, as reasons to decline to prosecute.

A second option might be for the full Judiciary Committee to seek a House resolution authorizing it to bring a civil action to compel compliance with the subpoena. 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 court’s order. The down side 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. It does not appear that the House has ever enforced a subpoena against a sitting federal judge.

³ *United States v. Mendoza*, No. CR 03-730 DT, slip. op. (C.D. CA. Jan. 12, 2004). See *infra*, VI. Other Investigatory Contexts.

⁴ 2 U.S.C. §§ 192, 194. See *Oversight Manual*, 36-37. 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. Contempts of Congress proceedings do not seek the contemnor’s testimony or documents; they serve only to vindicate the authority of the House through punishment.

⁵ It is thought that this occurs because the costs and uncertainties to the contemnor of seeking vindication in a criminal prosecution of asserted constitutional or common law principles or privileges are too great.

⁶ 2 U.S.C. § 194.

A third option is utilization of the statutory judicial discipline process. Currently, federal judges are subject to internal discipline proceedings within the Judiciary. These judicial discipline procedures 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.⁷ While this oversight option is not directly controlled by Congress, information derived from this process may ultimately serve as the basis for impeachment proceedings. Finally, the Committee might seek a resolution of the House authorizing the Judiciary Committee to investigate the conduct of a judge to ascertain whether formal impeachment proceedings might be appropriate.⁸

II. Limits on Congressional Investigatory Authority Over the Judiciary

Congress' oversight authority is based on obtaining information that will assist it in the legislative process with respect to matters within its constitutional purview. These powers are acknowledged to extend to the Judiciary and the operations of the courts, but only up to a point. Chief Justice Rehnquist, in the context of recent congressional actions with respect to downward departures in sentencing by federal judges, attempted to define that line of demarcation as follows:

. . . 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

⁷ 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.

⁸ In our constitutional history there have been 15 impeachment trials in the Senate, 11 against judges. Seven trials have resulted in convictions, all against judges. In addition to those impeachment investigations which 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 CRS Report 98-186A, *Impeachment: An Overview of Constitutional Provisions, Procedures, and Practice*, by Elizabeth B. Bazan (hereinafter Bazan).

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.⁹

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 states 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 his most recent report to Congress on the state of the Judiciary.¹⁰

The Chief Justice does not define what he means by “conduct in the exercise of his judicial duties.” For example, this reference may be intended to suggest that the appropriate means for challenging a judge’s decision on a given case is not the impeachment process, but rather the appeals process, which affords the parties affected an opportunity for review of the judge’s decision and correction of errors in that judgment. In addition, the reversal of a lower court decision does not generally mean that the judge below had engaged in conduct rising to the level of a “high crime or misdemeanor.” On the other hand, the Chief Justice’s statement are unlikely to be interpreted to mean that a judge should not be impeached for criminal acts from the bench, gross misconduct on the bench, or abuse of his or her judicial office, as a review of the past judicial impeachments would significantly undercut such a view.

It should be noted, however, that outside of the impeachment context, the use of compulsory process against a sitting judge has been extremely rare. One such instance occurred in 1953 when a House Judiciary subcommittee subpoenaed federal district court Judge Louis E. Goodman to testify about allegations that judges and prosecutors had improperly interfered with a grand jury investigation of misconduct of officials of the (then) Internal Revenue Bureau.

Judge Goodman appeared before the subcommittee and refused to testify about the grand jury matters in question, either in public or in executive session, citing both

⁹ Remarks of the Chief Justice before the Federal Judges Assn. Bd. of Directors Meeting, May 5, 2003, *reprinted at* [http://www.supremecourts.gov/publicinfo/speeches/sp_05-05-03.html].

¹⁰ See part II, “Relations Between the Congress and the Judiciary,” of the 2003 Year-End Report on the Federal Judiciary, by Chief Justice William H. Rehnquist, *reprinted in* 36 *The Third Branch* (Jan. 2004), available at [<http://www.uscourts.gov/ttb/jan04ttb/ii/index.html>].

grand jury secrecy rules (which would allow such revelations only in judicial proceedings) and the independence of the Judiciary. After the judge read a pair of statements into the record,¹¹ the subcommittee questioned the judge, but he continued to refuse to reveal matters pertinent to the grand jury proceedings. After the close of the hearing the judge's refusal to respond to the Subcommittee's inquiries was not further pursued.

In sum, an evaluation of the limits on congressional investigatory oversight authority requires an examination of the contexts in which Congress does have authority over the federal court. There is little question that where Congress is investigating the federal courts generally, its investigatory authority is broad, as Congress has significant legislative authority over the structuring of the Judicial Branch.¹² However, where Congress is investigating individual judges or Justices, then it would appear that Congress may need to articulate a legislative basis or some other constitutional authority for such investigation. Following is a discussion of some of these congressional authorities and precedents.

¹¹ 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].

¹² For a discussion of congressional authority over the federal courts, see CRS Report RL32926, *Congressional Authority over Federal Courts*, by Elizabeth B. Bazan, Johnny Killian and Kenneth R. Thomas.

III. Judicial Nominations

Under the Appointments Clause of the Constitution, Art. II, Section 2, Clause 2, 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.”¹³ Some of the broadest authority of the Congress to investigate individual judges or Justices would appear to arise during the nominations process. Although the use of subpoenas is unusual in the nomination and confirmation process, other means of oversight can be utilized toward the end of informing Congress as to the qualifications of the nominee. These opportunities can arise in a number of different procedural contexts.

The Constitution appears to separate the appointments process into three stages: nomination by the President alone; consent (or rejection) by the Senate; and final appointment and commissioning¹⁴ of the appointee by the President.¹⁵ As 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.¹⁶ Depending on the importance or contentiousness of a particular nomination, significant information may be gathered by both the Executive Branch and by outside groups on potential nominees. Access to such information by a Senator at this stage of the proceedings would be likely to be obtained informally. The benefit of such information would be primarily for Senators seeking to influence a President’s decision as to a prospective Supreme Court nominee. Efforts by a

¹³ 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”

¹⁴ Under Article II, § 3, of the Constitution, “The President . . . shall Commission all the Officers of the United States.”

¹⁵ 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 Ops. Atty. Gen. 188 (1837). *See also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803); *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004).

¹⁶ 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*, CRS Report RL31989, “Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate,” by Denis Steven Rutkus.

Senator to influence such a decision may include both private consultation with the Executive Branch, or with the expression of views in a public forum, whether in committee, on the floor of the Senate or in statements to 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;¹⁷ public hearings;¹⁸ and a committee decision as to what recommendation to make to the full Senate on the nominee.¹⁹ Each of these stages would appear to represent an opportunity for Congress to exercise extensive 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 is open to the public. Under current practice, floor debate on Supreme Court nominations are open to the public, the press, and, since 1986, to live television coverage.²⁰

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

¹⁷ In the pre-hearing investigative stage, the committee carefully examines 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 Federal Judiciary, input from the nominee's "courtesy calls" to individual Senators on Capitol Hill, news reports, and other pertinent information.

¹⁸ 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.

¹⁹ 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, may report a negative recommendation, or may report no recommendation to the Senate. The Senate may still consider a nomination reported negatively or with no recommendation. Traditionally, at least since the 1880's, 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 the nomination. This permits the full Senate to decide whether or not to confirm the nominee to the High Court.

²⁰ For a more in depth discussion of the Supreme Court Nomination process, see CRS Report RL31989, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," by Denis Steven Rutkus.

have to weigh the price of sacrificing an executive privilege by providing the information sought against the risk that the nominee may not be confirmed. 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 sparsity 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.²¹

During the confirmation hearing, two Senators presented for the record evidence of seven instances in which prior Administrations had provided requested documents for nominees related to prior service in the Department of Justice (DOJ) which were claimed to be analogous to those being sought about Estrada. They involved the nominations 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.²²

In a response from the DOJ Office of Legislative Affairs (DOJ-OLA), dated October 8, 2002, it was contended that disclosure of the memoranda demanded, which were asserted to be confidential and privileged, would have the effect of "undermin[ing] the integrity of the decisionmaking process" of the Solicitor General's Office (SG). This claim was said to be supported by the statements of seven past Solicitors General; by the fact that none of the 67 court of appeals 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 on amicus recommendation documents or other internal SG deliberation memoranda; and because the deliberative nature of the documents sought had been recognized by the courts 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.²³

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

²¹ *Confirmation Hearings on Federal Appointments*, Hearings before the Senate Committee 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)(Estrada Hearing).

²² Estrada Hearing 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).

²³ Letter dated October 8, 2002, from Assistant Attorney General Daniel J. Bryant to Chairman Patrick J. Leahy (DOJ Memo)(copy available in CRS files).

requested information,” citing *Senate Select Committee v. Nixon*.²⁴ 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.”²⁵ President Bush never claimed executive privilege with respect to Estrada’s SG memos, as did President Nixon with the Kleindienst nomination and President Reagan with the Rehnquist nomination, and in the end allowed Estrada to withdraw in the face of a threat of a filibuster.²⁶

The Kleindienst, Rehnquist, Bork and Trott nominations, dismissed as irrelevant by the DOJ-OLA memo, are nevertheless instructive. Kleindienst’s nomination to be Attorney General was on the brink of approval when a newspaper article accused him by 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 and later 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.²⁷

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, the nomination of not only Rehnquist but that of Antonin Scalia to be an Associate Justice, whose nominations 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.²⁸

The DOJ-OLA 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

²⁴ 498 F.2d 725 (D.C. Cir. 1974).

²⁵ DOJ Memo at 4-45.

²⁶ See Louis Fisher, “The Politics of Executive Privilege,” 79-81 (Caroline Academic Press, 2004)(Fisher).

²⁷ *Id.* 71-74.

²⁸ *Id.* at 76-77.

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 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.²⁹

The DOJ-OLA 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.³⁰

The patterns observed in the engagement and resolution of information access disputes between congressional investigative committees and DOJ are analogous, pertinent, and, in every respect but one, indistinguishable from access disputes occurring during the Senate confirmation process for judicial and DOJ nominations. Experience has shown that the investigative disputes are often resolved on the perceived legitimacy of each branch's claim based on past practice. Although the

²⁹ Fisher, *supra* at 79.

³⁰ 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. Fisher at 82-84.

accommodation process between Congress and the Executive Branch is conducted in a highly political atmosphere, the arguments made by each side are usually grounded in legal doctrine and rely heavily on their interpretations and past experiences. At times, the Executive Branch is able to persuade Congress that a particular request is insufficiently weighty, sometimes based on the representations that the particular information being sought has never before been provided to Congress. The resolution in such cases is to allow executive briefing, limited access to redacted documents, or no access.

But where the perceived need for the withheld documents or testimony is great (which often means politically important), Congress' reaction to withholding on such grounds is often to conclude that if the agency has produced such information (or its equivalent) before, it can produce it again, and that resistance must be based on a desire to cover up something that Congress would clearly want to see. In a series of investigations outside the nomination context (particularly during the investigations of the Clinton Administration), congressional committees built on succeeding acquiescences, together with threats of contempt of Congress votes, to force DOJ to disclose documents, at least in some form. The disclosure during the campaign finance investigations of the Freeh and La Bella memos to Senate and House committees after bitter and assertive Executive withholdings, is agreed to have been a significant event in the history of such confrontations that put the Executive in a difficult position for future attempts to withhold internal DOJ deliberative document in open cases.³¹

This shortly came to be realized in the confrontation over subpoenaed DOJ documents said to reflect ongoing corruption over a period of 30 years in the FBI's Boston regional office. That confrontation involved the agency's knowing acquiescence in the giving of perjured testimony by undercover informers which resulted in the conviction and imprisonment of four innocent persons for murder committed by the informants, as well as the further knowledgeable acquiescence in at least 21 further murders over the next 29 years by the informants. President Bush claimed executive privilege to prevent disclosure of the documents, asserting in his written claim the broadest immunity for internal DOJ deliberative documents. The President ordered the release of the documents after the public hearing when it became apparent that the Committee had a bipartisan majority to sustain a contempt vote in the Committee and on the House floor.³²

³¹ Todd D. Peterson, "Congressional Oversight of Open Criminal Investigations", 75 Notre Dame L. Rev. 1373, 1410 (2002) ("The disclosures of the Freeh and La Bella memoranda, even in the limited form it took place, could create a novel and dangerous precedent for DOJ.")

³² "Everything Secret Degenerates: The FBI's Use of Murderers as Informants," House Report No. 108-414, 108th Cong., 2d Sess. 121-134 (2004); Hearings, "Investigations into Allegations of Justice Department Misconduct in New England-Volume I," House Comm. on Government Reform, 107th Cong, 1st and 2d Sess. 520-556, 562-604 (2002)(testimony recounting numerous instances of DOJ acquiescence in congressional information demands).

The investigative experiences are compelling but distinguishable from the confirmation context. The distinguishing factor, however, appears to favor those seeking disclosure of a nominee's writings or communications. In the investigative context the ability of a committee to force compliance rests on its apparent ability to muster majorities at the full committee and House floor levels as well as some public support for such an executive rebuke. In the Senate confirmation process much less is currently needed. If 41 votes can be mustered and maintained to prevent a cut-off of debate on a nomination,³³ the Executive will be put to the choice of abandoning the nominee or compromising in some way on the disclosure of the documents. As the Rehnquist and Kleindienst experiences demonstrate, even a presidential claim of privilege will not suffice if there is a determined majority (or minority) and the President decides he must have the nominee.

Perhaps one other element is needed: the credibility of the claim of need for the documents and whether in the past *analogous* documents have been disclosed. This is not a question of legally binding precedent as in the adversarial litigation context. It is simply a credible past experience in a political context. The key distinguishing factor, then, is the confirmation context itself. The President does not have the leverage he has in the investigative context. There he can force majority votes in committees and on the floor, and even if a contempt citation is voted against an executive official, the likelihood of an indictment being sought by a U.S. Attorney is negligible. The only wild card is the degree, if any, of political damage the President perceives he could sustain by his withholding action. That appears to explain most of the disclosures in the investigative context. Currently, in a Senate confirmation proceeding, a minority may prevail if it can sustain 41 votes. Experience has shown that if the President cannot bring political or public pressure to bear, and wants the nomination, he will have to effect some disclosure compromise or abandon the nominee.

IV. Judicial Discipline

It is not clear if Congress has authority to investigate and punish judges' behavior outside of the impeachment process. Beginning in 1930, it was urged in scholarly writings and in congressional debates that an alternative to removal by impeachment could be discerned in the impeachment section of Article II and in the judiciary article of Article III. Although proposed from time to time Congress never adopted such a proposition. However, Congress did address judicial discipline authority within the Judicial Branch. The first³⁴ federal statutory judicial discipline

³³ Despite recent concerns over the procedures appropriate for judicial nominees, Senate rules do not currently prohibit filibuster of judges of Justices. See Dan Balz, *A Last Minute Deal on Judicial Nominees*, Wash. Post. A1, col. 4 (May 24, 2005).

³⁴ 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
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procedures were enacted in the Judicial Councils Reform and Judicial Conduct and

³⁴ (...continued)

enacted in the act 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. It should be noted that such disqualification is not mandated. For instance, Judge Robert F. Collins, U.S. District Judge for the Eastern District of Louisiana, was convicted on bribery charges under 18 U.S.C. § 201(b)(2), among others, in 1991. He was sentenced to 82 months of imprisonment, but disqualification does not appear to have been part of the sentence imposed. *United States v. Collins*, 972 F.2d 1385, 1395 (5th Cir. 1992). After exhausting his appeals, Judge Collins resigned from office. For an examination of the legislative history of this provision and some of the arguments for and against the use of this act to support a contention that the Constitution would permit the Congress to enact statutory mechanisms to remove federal judges in addition to the impeachment process, see CRS Report 92-905, by E. Bazan, *Disqualification of Federal Judges Convicted of Bribery — An Examination of the Act of April 30, 1790 and Related Issues*, reprinted in *II Research Papers of the National Commission on Judicial Discipline and Removal* 1285-1319.

Disability Act of 1980.³⁵ Congressional oversight over this process might provide a basis for investigation of a particular judge or Justice.

For instance, if a complaint alleges conduct that may rise to the level of impeachable offenses, then the Judicial Conference can refer the matter to the House of Representatives for whatever action the House deems appropriate. An argument can be made that these judicial discipline proceedings can serve as the basis for judicial impeachment³⁶ thus further providing a basis for Congress to oversee the process. 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:

³⁵ 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 & Removal at 3-4 (August 1993).

³⁶ 28 U.S.C. § 355; former 28 U.S.C. § 372(c).

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.³⁷

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.³⁸

The current judicial discipline law was enacted as the Judicial Improvements Act of 2002.³⁹ The new judicial discipline procedures⁴⁰ are available to anyone, including a Member of Congress, who deems it appropriate to file a complaint against a federal district court, judge of a U.S. circuit court of appeals, bankruptcy judge, or magistrate judge.⁴¹

³⁷ *Report of the National Commission on Judicial Discipline & Removal*, *supra* note 34, at 4.

³⁸ 1 Reams, Bernard D., Jr., and Gray, Carol J., *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.Rept. 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).

³⁹ 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. In H. Rept. 107-459, to accompany H.R. 3892, at 8, 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.

⁴⁰ Chapter 16 of title 28, U.S.C., 28 U.S.C. §§351-364. For a discussion of the Judicial Discipline process, under the current provisions, see CRS Report RS22084, *Judicial Discipline Process: An Overview*, by Elizabeth Bazan.

⁴¹ 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
(continued...)

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 of 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.⁴²

The initial complaint,⁴³ 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 the random assignment requirement and send a case to a particular judge if she determined that “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.”⁴⁴

On November 17, 1999, Acting Chief Judge Stephen Williams dismissed the complaint as “frivolous.”⁴⁵ 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. 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

⁴¹ (...continued)

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.

⁴² Report of the Special Committee 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) (Special Committee Report).

⁴³ Judicial Complaint No. 99-11.

⁴⁴ 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.

⁴⁵ 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.) (Special Counsel Report).

Chief Judge Johnson⁴⁶ with respect to assignments in several 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.⁴⁷

After an extensive review and investigation of nine questioned assignments — two from the office of Independent Counsel involving Webster Hubbell, and seven from the Justice Department’s Campaign Financing Task Force, the Counsel reported that they had not found, with respect to any case, 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, a conclusion that was adopted after review by the Special Committee to the Judicial Council.⁴⁸ The findings and conclusions of the Report of the Special Committee were affirmed in a memorandum opinion by the Judicial Council on February 26, 2001, which dismissed the complaints.⁴⁹

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.⁵⁰ It also demonstrated that a well founded official complaint by the House Judiciary Committee can trigger the statutory judicial discipline mechanism.

V. Impeachment

Another circumstance under which Congress could exercise its oversight authority over individual judges or Justices would be in anticipation of or during impeachment proceedings. 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.⁵¹ Impeachment, however, is a

⁴⁶ Judicial Complaint No. 00-1.

⁴⁷ Special Counsel Report, at 18-25.

⁴⁸ “[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 at 2-3.

⁴⁹ Judicial Council Opinion at 2.

⁵⁰ Special Counsel Report at footnote 28; Judicial Council Opinion at 5.

⁵¹ 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.

(continued...)

cumbersome process, which takes time and resources away from other legislative business.⁵² But, as has been indicated above,⁵³ 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.⁵⁴ Indeed, the failure to comply with subpoenas during an impeachment inquiry could result in an independent article of impeachment.⁵⁵

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.”

⁵¹ (...continued)

Art. I, § 3, cl. 6 and 7:

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.

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.

⁵² Its cumbersome nature, however, arguably may be viewed as necessary to minimize the chance that so serious a course of action will be taken lightly. Bazan, *supra* note 8, at 22.

⁵³ See discussion *supra*, II. Limits on Congressional Investigatory Authority Over the Judiciary.

⁵⁴ Similarly, the statutory scheme established for review and discipline of judicial conduct, discussed *supra*, provides that Judicial Councils, special committees appointed by 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).

⁵⁵ 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 the 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).

Consistently, and without an exception that we are aware of, 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 the Judicial Councils Reform and Judicial Conduct and Disability Act, as amended, are within the exception and have granted access to grand jury material.⁵⁶ In addition, in at least four instances the House has directly requested and received grand jury materials in impeachment proceedings.⁵⁷

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

⁵⁶ 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)(*dicta*)(supporting conclusion that power to impeach includes power to obtain evidence).

⁵⁷ For instance, 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 Hind's Precedents of the House of Representatives, § 2488 at 985, 986 (1907). 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., 1st Sess. (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, 101" Cong. 1" Sess. 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.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.

dissemination. The courts have conceded that they are powerless to place restrictions on the use of the material once it is in hands of a committee.⁵⁸

There have been a total of eleven judges who have been the focus of impeachment trials; of those eleven, seven were convicted on impeachment and removed from office.⁵⁹ The judges impeached by the House and tried by the Senate in the first eight impeachment proceedings were: John Pickering, District Judge for the United States District Court for the District of New Hampshire (1803-04); Samuel Chase, Associate Justice of the United States Supreme Court (1804-05); James H. Peck, District Judge for the United States District Court for the District of Missouri (1826-31); West H. Humphreys, District Judge for the United States District Court for the District of Tennessee (1862); Charles Swayne, District Judge for the United States District Court for the Northern District of Florida (1903-05); Robert W. Archbald, Circuit Judge, United States Court of Appeals for the Third Circuit, serving as Associate Judge for the United States Commerce Court (1912-13); Harold Louderback, District Judge, United States District Court for the Northern District of California (1932-33); and Halsted Ritter, District Judge of the United States District Court for the Southern District of Florida (1936).

In the three most recent judicial impeachments, investigations under the former 28 U.S.C. § 372(c) 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 most recent judicial impeachment, that of Judge Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi, took place in 1989.

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; charges preferred by a memorial from the same, usually referred to a committee for examination; a resolution dropped in the hopper by a Member and referred to a committee;⁶⁰ a message from the President; charges transmitted from the legislature

⁵⁸ See cases cited *infra*, note 99.

⁵⁹ 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 CRS Report 98-896, *Impeachment Grounds – Part 4A: Articles of Past Impeachments*, by Charles Doyle; CRS Report 98-897, *Impeachment Grounds – Part 4B: Articles of Past Impeachments*, by Charles Doyle.

⁶⁰ 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
(continued...)

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

⁶⁰ (...continued)

referred directly to the House Committee on the Judiciary. *See, e.g.*, H. Res. 461 (impeaching Judge Harry Claiborne for high crimes and misdemeanors, first introduced June 3, 1986, and referred to the House Judiciary Committee; as later amended, this resolution was received in the House on August 6, 1986, from the Committee; it impeached Judge Claiborne for high crimes and misdemeanors and set forth articles of impeachment against him); H. Res. 625 (introduced Oct. 23, 1973, impeaching President Richard M. Nixon for high crimes and misdemeanors); H. Res. 638 (introduced Oct. 23, 1973, impeaching President Richard M. Nixon for high crimes and misdemeanors); H.Res. 920 (introduced April 15, 1970, impeaching Associate Justice William O. Douglas for high crimes and misdemeanors; referred to House Judiciary Committee).

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. *See, e.g.*, H.Res. 304 (directing the House Committee on the Judiciary to undertake an inquiry into whether grounds exist to impeach President William Jefferson Clinton, to report its findings, and, if the Committee so determines, a resolution of impeachment; referred to House Committee on Rules on November 5, 1997); H.Res. 627 (introduced Oct. 23, 1973, directing the Committee on the Judiciary to investigate whether there are grounds for impeachment of Richard M. Nixon; referred to the House Committee on Rules, and then to the House Judiciary Committee); H.Res. 626 (introduced Oct. 23, 1973, directing the Committee on the Judiciary to inquire into and investigate whether grounds exist for the impeachment of Richard M. Nixon; referred to House Committee on Rules); H.Res. 636 (introduced Oct. 23, 1973, seeking an inquiry into whether grounds exist for impeachment of President Richard M. Nixon; referred to House Committee on Rules); *See the discussion in 3 Deschler's Precedents of the House of Representatives*, H. Doc. 94-661 (hereinafter *3 Deschler's*), ch. 14 § 5.10-5.11, at 482-84 and § 15, at 621-26 (1977). *Cf.*, H.Res. 922 (directing the Speaker of the House to appoint a special committee to investigate and determine whether Associate Justice William Orville Douglas has committed high crimes and misdemeanors; referred to House Committee on Rules on April 16, 1970. On April 24, 1970, House Rules Committee Chairman Colmer stated that he would not program the resolutions (like H.Res. 922) creating a special committee to study the impeachment charges, in light of the statement of the Chairman of the House Judiciary Committee that the Judiciary Committee would hold hearings and take action within 60 days on the impeachment.) *3 Deschler's*, ch. 14, § 14.14, at 605-12.

It may be noted that the impeachment investigation by the House Judiciary Committee of President Nixon in 1974 was pursuant to the authority in H.Res. 803. H.Res. 803 was reported out of House Judiciary Committee on Feb. 1, 1974 ("authoriz[ing] and direct[ing]" the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America,;" called up as privileged, debated, and passed the House on February 6, 1974.) This resolution was privileged as it was reported by the House Judiciary Committee, to which resolutions of impeachment had been referred, and as it was incidental to consideration of impeachment. This is an unusual procedure, because normally resolutions providing for funding from the contingent fund of the House are only privileged if called up by the House Administration Committee, and resolutions authorizing investigations are normally privileged only if called up by the House Rules Committee. *3 Deschler's*, ch. 14, § 15.3, at 623-26.

States,⁶¹ that the House may wish to consider whether impeachment of a particular federal judge would be appropriate.⁶²

The Senate also has a unique role to play in the impeachment process, as it has the authority and responsibility to try an impeachment brought by the House.⁶³ 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.”⁶⁴

For either body to base an investigation on the potential impeachment of a judge or Justice, it would appear that an impeachable offense would need to be at issue. However, 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, Sec. 4 of the U.S. Constitution.⁶⁵

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 statute⁶⁶ and in the Constitution.⁶⁷ Bribery, while not defined in the Constitution, was an offense at common law, has been a statutory offense since the First Congress enacted the Act of April 30, 1790,⁶⁸ and 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

⁶¹ 28 U.S.C. §§ 351-64.

⁶² See *Jefferson’s Manual*, *supra*, § 603 at 302.

⁶³ 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

⁶⁴ 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.

⁶⁵ 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 (Penguin Books USA Inc., C. Rossiter, ed., 1961).

⁶⁶ 18 U.S.C. § 2381.

⁶⁷ U.S. Constitution, Art. III, Sec. 3.

⁶⁸ 1 Stat. 112, 117

proceedings in which criminal sanctions could be imposed upon conviction.⁶⁹ 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.

The debate on impeachable offenses during the Constitutional Convention in 1787 indicates that criminal conduct⁷⁰ was at least part of what was included in the “treason, bribery, or other high crimes and misdemeanors” language.⁷¹ However, the precedents in this country reflect the fact that conduct which may not constitute a crime, but which may still be serious misbehavior bringing disrepute upon the public office involved, may provide a sufficient ground for impeachment.

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 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

⁶⁹ 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.

⁷⁰ Article 1, 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.

⁷¹ 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. Rept. No. 1305, 93rd Cong., 2d Sess. 362-72 (1974), *printed in* 120 *Cong. Rec.* 29312-15 (1974). For a discussion of presidential impeachment grounds, see 3 *Deschler's* § 3.8, at 434-45.

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,”⁷² which it would appear was a charge going beyond the criminality of the behaviour alleged in previous articles.

The House Judiciary Committee, in recommending articles of impeachment against President Richard Nixon in 1974, appears to have premised those articles on the theory that President 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; that he failed to carry out his constitutional obligation to faithfully execute the laws; and that he failed to comply with congressional subpoenas needed to provide relevant evidence for the impeachment investigation.⁷³

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.⁷⁴ 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.⁷⁵

Impeachment charges were brought against President Andrew Johnson involving allegations of actions in violation of the Tenure of Office Act,⁷⁶ including removing Secretary of War Stanton and replacing him with Secretary of War 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.⁷⁷

President Johnson was acquitted on those articles upon which votes were taken. Another Executive Branch officer to go to trial on articles of impeachment was Secretary of War Belknap. The articles alleged that he, in an exercise of his authority as Secretary of War, appointed John Evans to maintain a trading post at Fort Sill, and

⁷² 3 *Deschler's* ch. 14, § 13.6, at 581-82.

⁷³ See 3 *Deschler's* ch. 14, § 3.7, at 429-34.

⁷⁴ See 3 *Deschler's* ch. 14, § 3.7, at 429-34.

⁷⁵ H.R. Rept. No. 1305, 93rd Cong., 2d Sess. 362-72, printed at 120 Cong. Rec. 29312-15 (1974), as reprinted in part in 3 *Deschler's* ch. 14, § 3.8, at 434, 435.

⁷⁶ Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430.

⁷⁷ See “Impeachment of President Andrew Johnson,” in *Impeachment, Selected Materials, prepared by the Committee on the Judiciary of the House of Representatives*, H.R. Doc. No. 7, 93rd Cong., 1st Sess. 154-61 (October 1973).

allowed Evans to continue in that position, as part of an arrangement which provided Belknap personal gain. The arrangement allegedly provided that Evans would pay \$12,000 annually from the profits of the trading post to a third party who would, in turn, pay Belknap \$6,000 annually. Belknap resigned before the Senate trial on his impeachment and was not convicted on any of these articles.

It has been suggested that the impeachment provisions and the “good behaviour” language of the judicial tenure provision in Article III, Section 1, of the Constitution should be read in conjunction with one another.⁷⁸ Whether this would serve to differentiate impeachable offenses for judicial officers from those which 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.⁷⁹ 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 his personal behavior,” which casts doubt on his personal integrity and thereby on the integrity of the entire judiciary.⁸⁰

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 maintaining an independent Judiciary.⁸¹ In the *Final Report by the Special Subcommittee on H.Res. 920 of the Committee on the Judiciary of the House of Representatives*, 91st Cong., 2d Sess. (Comm. Print, Sept. 17, 1970), as cited in 3 *Deschler’s* ch. 14, § 3.13, the Subcommittee suggested two “concepts” related to this question for the Committee to consider. These concepts shared some common ground. As 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

⁷⁸ See 3 *Deschler’s* ch. 14, § 3.10, at 449-52.

⁷⁹ *Id.*

⁸⁰ 3 *Deschler’s* ch. 14, § 3.11, at 452-55.

⁸¹ See 3 *Deschler’s* ch. 14, § 3.12, at 455-57.

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.⁸²

Thus it would appear that this common ground represented those general principles which the Subcommittee deemed fundamental to conduct upon which impeachment of a federal judge could be based.

This review of some of the precedents on the question of what constitutes an impeachable offense suggests that the answer to this question is less than clear. Criminal conduct appears to be a sufficient ground, whether the person involved is a judge or a member of the Executive Branch. Where the person to be impeached is the President or an executive officer, conduct having criminal intent, serious abuses of the power of the office involved, failure to carry out the duties of that office, and, possibly, interference with the Congress in an impeachment investigation of the President or other executive official may be enough to support an article of impeachment. As to federal judges, the impeachment language might be read in light of the constitutional language providing that they serve during good behavior. With this in mind, 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.⁸³

VI. Other Investigatory Contexts

The question arises as to whether the Congress has authority to investigate individual judges or Justice without reference to either a judicial nomination, an impeachment, or judicial discipline.⁸⁴ On January 12, 2004, in *United States v.*

⁸² 3 *Deschler's* ch. 14 § 3.13, at 463-64.

⁸³ To review summaries of the articles of impeachment brought against Senator William Blount, President Andrew Johnson, and former Secretary of War William Belknap, see CRS Report for Congress 98-882A, "Impeachment Grounds: A Collection of Selected Materials," 14-17 (October 29, 1998). This report also includes a sampling of materials on the question of what constitutes an impeachable offense from Blackstone's Commentaries, Wooddeson's Lectures, impeachment provisions from state constitutions, debates from the Constitutional Convention and state ratifying conventions, Alexander Hamilton, Supreme Court Justices James Wilson and Joseph Story, articles of impeachment from the judicial impeachment cases, materials from the time of the Douglas and President Nixon impeachment inquiries, and discussions from treatises and law reviews. For the full text of the articles of impeachment for Senator Blount through Judge Ritter, see *Impeachment, Selected Materials, Committee on the Judiciary, House of Representatives*, H. Comm. Prt. Ser. No. 10, 105th Cong., 2d Sess. 1261-1338 (November 1998). For the full text of the articles of impeachment for Judge Claiborne, Judge Hastings, and Judge Nixon, see *id.*, at 7-17.

⁸⁴ For instance, Chairman Sensenbrenner of the House Judiciary Committee, in a speech at (continued...)

Mendoza,⁸⁵ a federal district court in California considered a constitutional challenge to the Feeney Amendment to the “Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003” (PROTECT) Act, which provides reporting requirements on the judicial decisions of individual federal district court judges. In *Mendoza*, the court found that the requirement that the United States Attorney General report a district court’s grant of a downward departure under the United States Sentencing guidelines to the House Judiciary Committee and the Senate Judiciary Committee was an unconstitutional interference with judicial independence and a violation of separation of powers.⁸⁶

The doctrine of separation of powers is not found in the text of the Constitution, but has been discerned by courts, scholars and others in the allocation of power in the first three Articles, i.e., the “legislative power” is vested in Congress, the “executive power” is vested in the President, and the “judicial power” is vested in the Supreme Court and the inferior federal courts. That interpretation is also consistent with the speeches and writings of the framers. But while the rhetoric of the Supreme Court points to a strict separation of the three powers, its actual holdings are far less decisive.⁸⁷ Nevertheless, beginning with *Buckley v. Valeo*,⁸⁸ the Supreme Court has

⁸⁴ (...continued)

Stanford University, suggested that Congress could create an office of the Inspector General for the Judiciary. Zale Lecture on Public Policy, “The Relationship Between the Legislative and Judicial Branches,” May 9, 2005. The full text of this speech is available at [<http://judiciary.house.gov/media/pdfs/stanfordjudgesspeechpressversion505.pdf>]. Under this proposal, the chairman has suggested that the Inspector General could, through audits and inspections, ensure that federal funds are spent for the purposes appropriated by Congress. The chairman contemplates that the Inspector General could report to Congress, so that Congress could take corrective legislative action when necessary. While investigations undertaken by the Inspector General would appear to be aimed at court administration matters, such investigations could theoretically be aimed at the behavior of individual judges.

⁸⁵ No. CR 03-730 DT, slip. op., 2004 U.S. Dist. Lexis 1449 (C.D. Ca. Jan. 12, 2004).

⁸⁶ Id., slip op. at 12-14. The case also involved a challenge to the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 et seq., and the PROTECT Act. The court noted that the 1984 act had passed constitutional muster in *Mistretta v. United States*, 488 U.S. 361 (1989). With the exception of the reporting requirements of Title IV, Section 401(l)(1)-(3) of the PROTECT Act, the *Mendoza* court upheld all other provisions of the PROTECT Act. *United States v. Mendoza*, No. CR 03-730 DT, slip op. at 9, 11 (D.C.D. CA. Jan. 12, 2004). The court further found these provisions severable from the remainder of the PROTECT Act. Finally, the court indicated that it would stay the implementation of its order pending an appeal upon request of the party seeking an appeal, and that it would certify the matter for immediate appeal should any party so request. Id., slip op. at 14.

⁸⁷ For instance, the Supreme Court has declared categorically that “the legislative power of Congress cannot be delegated.” *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932). The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was made (the Court upheld the power of the Food and Drug Administration to allow reasonable variations, tolerances, and exemptions from misbranding prohibitions). The Court has long recognized that administration of the law requires exercise of discretion, and that “in our increasingly (continued...) ”

reemphasized separation of powers as a vital element in American federal government.⁸⁹

The federal courts have long held that the Congress may not act to denigrate the authority of the Judicial Branch. In the 1782 decision in *Hayburn's Case*,⁹⁰ several Justices objected to a congressional enactment that authorized the federal courts to hear claims for disability pensions for veterans. The courts were to certify their decisions to the Secretary of War, who was authorized either to award each pension or to refuse it if he determined the award was an “imposition or mistaken.” The Justices on circuit contended that the law was unconstitutional because the judicial power was committed to a separate department and because the subjecting of a court’s opinion to revision or control by an officer of the Executive or the Legislative Branch was not authorized by the Constitution. Congress thereupon repealed the objectionable features of the statute.⁹¹ More recently, the doctrine of separation of powers has been applied to prevent Congress from vesting jurisdiction over common-law bankruptcy claims in non-Article III courts.⁹²

The *Mendoza* decision did not deny the authority of the Congress to require the Judiciary to provide reports regarding the administration of the court’s federal criminal law docket. Although criminal sentencing is traditionally left to the discretion of judges, the United States Sentencing Commission was established by

⁸⁷ (...continued)

complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989). *See also* *Whitman v. American Trucking Assn., Inc.*, 531 U.S. 457 (2001).

⁸⁸ 424 U.S. 1, 109-43 (1976)

⁸⁹ It is true that the Court has wavered between two approaches to cases raising separation-of-powers claims, using a strict approach in some cases and a less rigid balancing approach in others. Nevertheless, the Court looks to a test that evaluates whether the moving party, usually Congress, has “impermissibly undermine[d]” the power of another branch or has “impermissibly aggrandize[d]” its own power at the expense of another branch; whether, that is, the moving party has “disrupt[ed] the proper balance between the coordinate branches [by] preventing the [other] Branch from accomplishing its constitutionally assigned functions.” *Morrison v. Olson*, 487 U.S. 654, 695 (1988). *See also*, e.g., *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Mistretta v. United States*, 488 U.S. 361 (1989); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise*, 501 U.S. 252 (1991).

⁹⁰ 2 Dall. (2 U.S.) 409 (1792). This case was not actually decided by the Supreme Court, but by several Justices on circuit.

⁹¹ Those principles remain vital. *See, e.g.*, *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) (“Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”); *Connor v. Johnson*, 402 U.S. 690 (1971).

⁹² *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Congress⁹³ to limit this discretion by regularizing sentencing procedures.⁹⁴ Thus, for the last 15 years, sentencing in federal courts has been governed by a regime promulgated by the Commission, the United States Sentencing Guidelines. During this time, Congress has passed numerous laws providing for review, promulgation, or amendment of federal sentencing guidelines applicable to particular offenses. In addition, the Supreme Court has recently held that, to the extent that the Guidelines increase the penalty for a crime based on factors not submitted to a jury, that the guidelines are only advisory, not mandatory.⁹⁵ Thus, Congress would seem to have a significant basis for oversight over the operation of the guidelines.

⁹³ The 1984 Act, as amended, specified the composition of membership of the Commission, 28 U.S.C. § 991, the terms of office and compensation for its voting members, 28 U.S.C. § 992, and the powers and duties of the Chair of the Commission, 28 U.S.C. § 993. and of the Commission itself. 28 U.S.C. § 994.

⁹⁴ The Sentencing Commission was established in 1984 as an independent commission in the Judicial Branch. Pub. L. 98-473. Its voting members are appointed by the President, by and with the advice and consent of the Senate, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, crime victims, and others interested in the criminal justice process. 28 U.S.C. § 991. Its purposes are to:

establish sentencing policies and practices for the Federal criminal justice system that — (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken in to account in the establishment of general sentencing practices; and (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and (c) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Id.

⁹⁵ Although the Supreme Court has upheld the Guidelines in the face of arguments that they constituted an unconstitutional delegation of authority and an affront to the separation of powers, the Court also held that due process and the right to a criminal jury trial require that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. And for this reason, the Court, in *Blakely v. Washington*, 124 U.S. 2531 (2004), found a state sentence imposed by operation of a legislative sentencing guideline unconstitutional even though the final sentence fell beneath the maximum penalty assigned to the crime of conviction. In *United States Booker*, 125 S. Ct. 11 (2004), the Court agreed that these principles apply to the federal Sentencing Guidelines and as a consequence the Guidelines must be considered advisory rather than mandatory. See CRS Report RL32573, *United States Sentencing Guidelines and the Supreme Court: Booker, Fanfan, Blakely, Apprendi, and Mistretta*, by Charles Doyle; CRS Report RS21932, *United States Sentencing Guidelines After Blakely: Booker and Fanfan – A Sketch*, by Charles Doyle.

The *Mendoza* court also upheld other portions of the PROTECT Act.⁹⁶ The PROTECT ACT⁹⁷ was a response to concerns over the frequency and magnitude of downward departures,⁹⁸ and dealt not just with the guidelines but with the structure of the Sentencing Commission.⁹⁹ With respect to certain types of cases where the

⁹⁶ P.L. 108-21.

⁹⁷ For additional discussion of the sentencing guidelines aspects of the PROTECT Act, see CRS Report RL31917, "The PROTECT (Amber Alert) Act and the Sentencing Guidelines," by C. Doyle (May 13, 2003); CRS Report RS21522, "A Sketch of the PROTECT (Amber Alert) Act and the Sentencing Guidelines," by C. Doyle.

⁹⁸ During testimony before the House Judiciary Committee hearings on H.R. 1104 and H.R. 1161, the Justice Department touched upon these issues in a statement by Associate Deputy Attorney General Daniel P. Collins:

H.R. 1161 contains certain additional provisions not found in the Senate bill. In particular, section 12 of the bill would enact long-overdue reforms to address the growing frequency of "downward departures" from the Sentencing Guidelines. This is especially a problem in child pornography cases. . . .

Much of the damage is traceable to the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996). In *Koon*, the Court interpreted the Sentencing Reform Act to require appellate courts to apply a highly deferential standard of review to departure determinations by sentencing judges. The Court also disapproved the practice whereby appellate courts had held that any factor not explicitly disapproved by the Sentencing Commission (or by statute) could serve as ground for departure, in an appropriate case as determined by the district court in its discretion.

Under *Koon*, judges who dislike the Sentencing Reform Act and the sentencing guidelines have significant discretion to avoid applying a sentence within the range established by the Commission, and it is difficult for the Government effectively to appeal in such cases. Moreover, *Koon*'s expansion of the permissible grounds of departures has led to a growing trend of increasingly vague grounds of downward departures. Thus, in FY 2001, departures on such vague grounds as "general mitigating circumstances" accounted for over 20% of all downward departures.

Section 12 of H.R. 1161 would provide much-needed and long-overdue reform by establishing that decisions to depart from the guidelines are to be reviewed under a *de novo* standard of review. To that extent, *Koon* would be explicitly overruled. While we enthusiastically support this measure, we do not believe it goes far enough. We strongly urge the Subcommittee to include appropriate language that would overrule both of the key holdings in *Koon*. Specifically, the bill should include language that would prohibit departures on any ground that the Sentencing Commission has not affirmatively specified as a permissible ground for a downward departure. In so doing, the bill would effectively overrule *Koon* on this point as well.

H.R. 1104, The Child Abduction Prevention Act and H.R. 1161, *The Child Obscenity and Pornography Prevention Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 15-18 (2003) (Statement of Assoc. Dep. Att'y Gen. Daniel P. Collins).

⁹⁹ Title IV of the PROTECT Act made a number of changes to the Sentencing Commission membership, sentencing statutes and sentencing guidelines, standard of review in appeals from district court decisions departing from the guidelines, and pertinent reporting (continued...)

offenses involved child victims or sexual offenses,¹⁰⁰ both the United States Code¹⁰¹ and the U.S. Sentencing Guideline¹⁰² were amended to restrict downward departures¹⁰³ to only those instances where such departures are explicitly authorized.¹⁰⁴ However, Title IV of the PROTECT Act also revised reporting requirements for the sentencing court and for the Attorney General to require the court to increase the specificity of the order regarding downward departures. The Act requires the sentencing court to provide a transcript of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

However, as noted above, the Act also requires that in certain cases, the Attorney General must report a district court's grant of a downward departure to the

⁹⁹ (...continued)

requirements. Under 28 U.S.C. § 991, the Commission includes seven members. Prior to passage of the PROTECT Act, the statute provided that at least three of the members of the Sentencing Commission were to be federal judges; when the Act was passed, five of the members were federal judges. As amended by the Act, 28 U.S.C. § 991 provides, in the future, that no more than three members of the Commission at a time may be federal judges. P.L. 108-21, § 401(n). This provision does not apply to judges serving on the Commission or nominated to the Commission at the time of enactment. 28 U.S.C. § 991 note.

¹⁰⁰ These types of cases included nonparental kidnapping involving a minor victim, 18 U.S.C. § 1201; sex trafficking of children or sex trafficking using force, fraud or coercion, 18 U.S.C. § 1591; obscenity offenses, 18 U.S.C., ch. 71 § 1460 *et seq.*; sexual abuse, 18 U.S.C. ch. 109A, § 2241 *et seq.*; sexual exploitation and other abuse of children, 18 U.S.C. ch. 110, § 2251 *et seq.*; or transportation for illegal sexual activity and related crimes, 18 U.S.C. ch. 117, § 2421 *et seq.*

¹⁰¹ 18 U.S.C. § 3553(b)(2).

¹⁰² § 5K2.0.

¹⁰³ P.L. 108-21, § 401(a) and (b). Downward departures in such cases must involve circumstances of a kind specifically identified as a permissible ground in the sentencing guidelines or policy statements issued under 28 U.S.C. § 994(a), which have not been taken into consideration by the Sentencing Commission in formulating the guidelines, and which should result in a different sentence.

¹⁰⁴ Alternatively, the court may make a downward departure where the court finds, on the Government's motion, that the defendant has provided substantial assistance to the Government in the investigation or prosecution of another person, and where the kind or degree assistance is a mitigating circumstance not adequately considered by the Commission in promulgating pertinent sentencing guidelines. The PROTECT Act also limits the court in determining whether a circumstance was adequately considered by the Commission, to consideration of the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, along with any pertinent legislative amendments thereto. The Act added a new U.S. Sentencing Guideline § 5K2.22 which provides a policy statement addressing specific offender characteristics which may be grounds for downward departures in such cases. A court, in determining whether a downward departure is appropriate in such cases involving child victims or sexual offenses, is precluded from taking into consideration the defendant's aberrant behavior; drug, alcohol, or gambling dependence or abuse; or the defendant's family ties and responsibilities and community ties. U.S.S.G. §§ 5K2.20, 5K2.13, 5H1.6.

House Judiciary Committee and the Senate Judiciary Committee. The report must specify the case; the facts involved; the identity of the district court judge; the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and the position of the parties with respect to the downward departure, whether or not the Government has filed, or intends to file a motion for reconsideration.¹⁰⁵

It is these last provisions that were ultimately struck down by the *Mendoza* court. In doing so, the court stated that:

This Court agrees with Defendant's analysis and concludes that [the reporting provision] chills and stifles judicial independence to the extent that it is constitutionally prohibited. The chilling effect resulting from such reporting requirements is sufficient to violate the separation of powers limitations of the United States Constitution.¹⁰⁶

The Court also noted that

What criteria is relevant for a separation of powers analysis is the "practical consequences" of the provision, or provisions, in question. *Mistretta v. United States*, 488 U.S. 361, 393, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) (quoting *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 857, 92 L. Ed. 2d 675, 106 S. Ct. 3245 (1986); *Nixon v. Fitzgerald*, 457 U.S. 731, 753, 73 L. Ed. 2d 349, 102 S. Ct. 2690 (1982)). The provision of the statute in question affects the relationship between the political branches to such an extent that it interferes with the Judiciary's independence from those of the Legislative and Executive Branches of the government. The specific provisions of the statute in question do not on its face give, or purport to give, either the Executive or Legislative branch any direct coercive power over the Judiciary for their judicial acts, but the threat, real or apparent, is blatantly present. There is no legitimate purpose served by reporting individual judges's performance to Congress. Congress does not have any direct oversight of the Judiciary.¹⁰⁷

Although it is not clear whether the *Mendoza* decision will be upheld, the opinion articulates the proposition that there are limits to congressional oversight authority.

VII. Conclusion

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 or Justices may be more limited. While these tools can be exercised in a variety of contexts, including nominations, judicial discipline, and impeachment,

¹⁰⁵ Within five days of a decision by the Solicitor General regarding authorization of an appeal of the downward departure, the Attorney General must report to the House and Senate Committees on the Judiciary, describing the Solicitor General's decision and his basis for that decision.

¹⁰⁶ *Mendoza*, slip op. at No. CR 03-730 DT, slip. op. 18 (C.D. CA. Jan. 12, 2004).

¹⁰⁷ *Id.* at 18-19.

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 violation of the doctrine of separation of powers.