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States District Court with respect to the release of such documents.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on agreeing to the resolution.

The resolution (S. Res. 533) was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. BAKER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

Mr. ROBERT C. BYRD. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 1873.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the bill from the Senate (S. 1873) entitled "An Act to establish a procedure for the processing of complaints directed against Federal judges, and for other purposes", do pass with the following amendments:

Strike out all after the enacting clause, and insert:

SHORT TITLE

SECTION 1. This Act may be cited as the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980".

JUDICIAL COUNCILS OF THE CIRCUITS

SEC. 2. (a) Section 332(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of—

"(A) the chief judge of the circuit, who shall preside;

"(B) that number of circuit judges fixed by majority vote of all such judges in regular active service; and

"(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that—

"(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparagraph shall be no less than two; and

"(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

"(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

"(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

"(4) Only circuit and district judges in regular active service shall serve as members of the council.

"(5) No more than one district judge from

any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.".

(b) Section 332(c) of title 28, United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.".

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332: Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 15 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits.".

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC. 3. (a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to the circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After reviewing a complaint, the chief judge, by written order stating his reasons, may—

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) related to the merits of a decision or procedural ruling, or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly—

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council—

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions;

"(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this subsection;

"(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considerers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge

any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.".

(b) Section 332(c) of title 28, United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings. to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.".

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332: Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 15 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits.".

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC. 3. (a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to the circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After reviewing a complaint, the chief judge, by written order stating his reasons, may—

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) related to the merits of a decision or procedural ruling, or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly—

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council—

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions;

"(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this subsection;

"(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considerers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct—

"(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

"(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

"(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

"(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

"(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

"(B) In conducting any investigation under this subsection, the Judicial Conference, or a special committee appointed by the Presiding Officer of the Judicial Conference, shall have full subpoena powers as provided in section 331 of this title.

"(10) A complainant aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A judge or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be reviewable on appeal or otherwise.

"(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that—

"(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint; and

"(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

"(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special

committee appointed under paragraph (4) of this subsection, upon a judicial council, or upon the Judicial Conference until all related proceedings under this subsection have been finally terminated.

"(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

"(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and privileged against disclosure by any person in any proceeding, except that the judicial council of the circuit, the Judicial Conference of the United States, or the Congress may release any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution.

"(15) Except as expresaly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

"(16) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection."

(b) The section heading for section 372 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

(c) The item relating to section 372 in the section analysis for chapter 17 of title 28, United States Code, is amended to read as follows:

"372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

AUTHORITY OF THE JUDICIAL CONFERENCE

SEC. 4. The fourth undesignated paragraph of section 331 of title 28, United States Code, is amended to read as follows:

"The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. In its discretion, the Conference may make necessary and appropriate orders in the exercise of its authority under section 372 of this title, and in the performance of its authority under such section may, as a Conference or through a special committee appointed by the Presiding Officer, hold hearings, take sworn testimony, and issue subpoenas and subpoenas duces tecum. Subpoenas shall be issued by the clerk of the Supreme Court of the United States or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the Court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas issued on behalf of the United States or an officer or agency thereof. All judicial officers and employees of the United States shall promptly carry into effect all such orders of the Judicial Conference. The Conference may also prescribe and modify rules for the exercise of authority conferred by section 372 of this title in accordance with subsection (c) of such section.".

ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

SEC. 5. Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h)(1) The Director shall, out of funds appropriated for the operation and maintenance of the courts, provide facilities and pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference under section 372 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title. Administrative and professional assistance from the Administrative Office of the United States Courts may be requested by each judicial council and the Judicial Conference for purposes of discharging their duties under section 372 of this title.

"(2) The Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 7. This Act shall become effective on October 1, 1981.

Amend the title so as to read: "An Act to revise the composition of the judicial councils of the Federal judicial circuits, to establish a procedure for the processing of complaints against Federal judges, and for other purposes.".

UP AMENDMENT NO. 1700

Mr. DECONCINI. Mr. President, I move that the Senate concur in the amendments of the House with an amendment which I send to the desk.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Arizona (Mr. DECONCINI) proposes an unprinted amendment numbered 1700.

Mr. DECONCINI. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

In lieu of the matter proposed to be inserted, insert the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980".

JUDICIAL COUNCILS OF THE CIRCUITS

SEC. 2. (a) Section 332(a) of title 28, United States Code, is amended to read as follows:

"(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of—

"(A) the chief judge of the circuit, who shall preside;

"(B) that number of circuit judges fixed by majority vote of all such judges in regular active service; and

"(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that—

"(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparagraph shall be no less than two; and

"(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

"(2) Members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service.

"(3) The number of circuit and district judges fixed in accordance with paragraphs (1)(B) and (1)(C) of this subsection shall be set by order of the court of appeals for the circuit no less than six months prior to a scheduled meeting of the council so constituted.

"(4) Only circuit and district judges in regular active service shall serve as members of the council.

"(5) No more than one district judge from any one district shall serve simultaneously on the council, unless at least one district judge from each district within the circuit is already serving as a member of the council.

"(6) In the event of the death, resignation, retirement, or disability of a member of the council, a replacement member shall be designated to serve the remainder of the unexpired term by the chief judge of the circuit.

"(7) Each member of the council shall attend each council meeting unless excused by the chief judge of the circuit.".

(b) Section 332(c) of title 28, United States Code, is amended by striking out "quarterly" and inserting in lieu thereof "semiannually".

(c) Section 332(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

"(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

"(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.".

(d)(1) The section heading for section 332 of title 28, United States Code, is amended to read as follows:

"§ 332. Judicial councils of circuits".

(2) The item relating to section 332 in the section analysis for chapter 16 of title 28, United States Code, is amended to read as follows:

"332. Judicial councils of circuits.".

PROCEDURES WITHIN JUDICIAL COUNCILS

SEC. 3. (a) Section 372 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to dis-

charge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

"(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term 'chief judge'). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

"(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may—

"(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

"(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complaint and to the judge or magistrate whose conduct is the subject of the complaint.

"(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly—

"(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

"(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

"(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

"(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

"(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council—

"(A) may conduct any additional investigation which it considers to be necessary;

"(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

"(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

"(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

"(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

"(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

"(v) censuring or reprimanding such judge or magistrate by means of private communication;

"(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

"(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

"(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

"(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

"(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct—

"(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

"(ii) which, in the interest of justice, is not amendable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings to the Judicial Conference of the United States.

"(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

"(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

"(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332 (d) of this title.

"(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

"(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

"(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that—

"(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

"(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

"(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

"(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

"(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

"(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless—

"(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

"(B) authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

"(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

"(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Pro-

cedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

"(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection."

(b) The section heading for section 372 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

(c) The item relating to section 372 in the section analysis for Chapter 17 of title 28, United States Code, is amended to read as follows:

"§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline.".

AUTHORITY OF THE CONFERENCE

SEC. 4. The fourth undesignated paragraph of section 331 of title 28, United States Code, is amended to read as follows:

"The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendation to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice of all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoena duces tecum issued on behalf of the United States or an officer or any agency thereof. The conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.".

ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

SEC. 5. Section 604 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h)(1) The Director shall, out of funds appropriated for the operation and maintenance of the courts, provide facilities and pay necessary expenses incurred by the judicial councils of the circuits and the Judicial Conference under section 372 of this title, including mileage allowance and witness fees, at the same rate as provided in section 1821 of this title. Administrative and professional assistance from the Administrative Office of the United States Courts may be requested by each judicial council and the Judicial Conference for purposes of discharging their duties under section 372 of this title.

"(2) The Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 7. This Act shall become effective on October 1, 1981.

Amend the title so as to read: "An Act to revise the composition of the judicial councils of the Federal judicial circuits, to establish a procedure for the processing of complaints against Federal judges, and for other purposes.".

Mr. DECONCINI. Mr. President, this amendment is in the nature of a substitute.

It is with great pleasure that I initiate discussion of this amendment to S. 1873, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. On October 30, 1979, the U.S. Senate passed S. 1873, the Judicial Conduct and Disability Act of 1979. Approximately 2 weeks ago on September 15, 1980, the House of Representatives passed a similar bill, H.R. 7974, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

At the outset, I should like to emphasize, however, that I have always preferred passage of a much stronger judicial discipline bill, such as the Judicial Tenure Act as passed during the 95th Congress and subsequently reintroduced by Senator NUNN and myself in the early days of the 96th Congress. As I am sure many Members will remember, this proposal was a great deal more controversial than the language we have before us today. That proposal was more in line with my own views.

I favor the removal sanction of the Judicial Tenure Act, which I believe to be both constitutional and appropriate. I also believe that there should be an independent court composed of sitting article III judges to review determinations which are initially reviewed by the circuit judicial councils. Unfortunately, the former would not have survived in the Senate this Congress and the latter was not found to be acceptable by the House of Representatives.

Today's compromise substitute amendment is at least close to what was originally envisioned by the Senate this Congress, in that a permanent, independent standing committee of the judicial conference is authorized to be established. Such a body, while not an independent review court, will provide for uniformity of decisions and the building of precedents. The Judicial Conference, the circuits and the special courts should have ample opportunity to demonstrate adherence to the provisions under this legislation. As part of a vigorous oversight responsibility, I plan to monitor implementation of the Judicial Conduct and Disability Act. I particularly expect to examine the way in which specific sanctions are imposed, as well as the method of appellate review of judicial council decisions, in order to see if statutory or other perfecting changes are necessary in the future.

The purpose of the proposed legislation is to establish a procedure for investigating and resolving allegations that a member of the Federal judiciary has been unable to discharge efficiently all the duties of his or her office by reason of mental or physical disability or has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.

The goals of the proposed legislation are to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's system of justice, and, at the same time, to maintain the independence and autonomy of the judicial branch of Government.

During the last 15 years, much attention has been focused on whether Congress should enact a statutory process as a complement to the existing impeachment process that would enable the judicial branch to consider and act on complaints of unfitness lodged against Federal judges. Discussion of this matter has occurred during a period when the judges of this country are being called upon to decide an increasing number of sensitive issues involving the basic functions of our society and fundamental relationships between people. It is a time, in other words, when judges most need to be free to make the decisions they believe to be correct. But it is also a time when the public most needs to retain its faith in the judiciary and the legal system.

This judicial involvement in controversial issues has coincided in recent years with a growing disenchantment concerning the trustworthiness of all public officials. Thus it is not surprising that during this period sentiment in certain quarters of Congress emphasized the need for assuring judicial ethics and accountability.

Legislation on this subject is not new to the Senate. Similar bills have been introduced periodically since the 1940's. More recently, efforts were commenced in the 90th and 91st Congresses by Senator Tydings, while Senator NUNN subsequently renewed these efforts in the 93d, 94th, and 95th Congresses. Last Congress, the Senate for the first time ever passed a bill on this subject which was entitled the Judicial Tenure Act. Unfortunately this bill died a quiet death in the House of Representatives when no further action was taken by that body. An identical judicial tenure proposal, S. 295, was introduced this Congress by Senator NUNN and myself. Two other proposals, S. 522 and a part of S. 678, have also been introduced on this subject earlier this Congress.

Since 1966, the Subcommittee on Improvements in Judicial Machinery has heard from approximately 60 witnesses gleaning valuable information and insightful comments in the development of

this legislation. Legislation on this subject has attracted a significant amount of attention and thought-provoking analysis. These efforts have resulted in a greatly improved and more arguably constitutional procedure which the committee views as more operationally feasible than the existing method of impeachment.

Also, in the last year and a half, all 11 judicial councils have implemented rules for the processing of complaints against Federal judges in response to a resolution issued by the Judicial Conference on March 9, 1979. However, an examination of the various sets of rules adopted by the respective judicial councils indicates that they lack uniformity and, in many instances, are silent on important issues.

S. 1873 would, I believe, go a long way toward remedying the existing deficiencies in the various sets of rules now in use by the 11 judicial councils by strengthening and clarifying their power to handle complaints against members of the Federal judiciary.

Although, on the whole, the general caliber of the Federal judiciary has been extremely high, the problem of the unfit judge is a serious challenge to our judicial system. The Federal courts must remain free from doubt in order to be effective. Recent incidents and publicity regarding several Federal judges have created an unhealthy atmosphere that is threatening the integrity of the judicial branch.

Testimony received by the Judiciary Committee indicates that problems do exist and have existed in the past. These difficulties that have not been adequately resolved have created the need for this type of legislation.

Currently, a judge who is unable to discharge efficiently the duties of his or her office by reason of mental or physical disability or whose conduct is prejudicial to the effective and expeditious administration of justice may remain on the bench for a lengthy period of time before his or her peers eventually convince the judge to retire.

If this peer influence is not effective, the only resolution may rest with the eventual passing away of the judge. This is the current situation because there is no statutory authority which provides that complaints may be filed and matters resolved with adequate due process safeguards.

The public should be provided with a means to allege judicial disability or misconduct that is contrary to the maintenance of an effective and efficient governmental system.

There has been some concern expressed regarding the filing of frivolous complaints by dissatisfied litigants for the sole purpose of harassing judges. This proposed legislation will stop complaints in the first stages of the proceedings not only if they are frivolous, but also if they are inconsistent with the standard prescribed in the statute, or are related to the merits of a decision or procedural ruling. Furthermore, it is not expected that the filing of a complaint will always result in formal procedures. In those rare cases where there is a need for a disciplinary proceeding, confidentiality is assured in most instances.

In a very real sense, however, the problem addressed in this legislation is more one of perception than actuality—the need to assure the public that formal procedures are in place to deal with the rare instance justifying a disciplinary inquiry.

Today's public demands that all branches of Government be made accountable for their actions, including the Federal judiciary.

In the introduction to the "Standards Relating to Judicial Discipline and Disability Retirement," adopted by the American Bar Association's house of delegates in 1978, it is stated that:

> The major purpose of judicial discipline is not to punish judges, but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves

In light of this fact, it would be unwise to ignore this general national concern for accountability since the success of the system depends on the support of the public.

It has been stated that the only existing method for dealing with an unfit judge is removal by impeachment pursuant to the U.S. Constitution.

I think we all recognize that impeachment is a cumbersome and unwieldly process, as evidenced by the fact that in nearly 200 years only 54 judges have been impeached. Furthermore, only four judges have been removed from office. It seems unreasonable to assert that only four Federal judges in our history have misbehaved. An even more significant indicator is that the last impeachment was in 1936, more than 40 years ago.

When the Founding Fathers created the impeachment provision they were envisioning a nation comprised of a handful of States and a Congress with a limited workload. This is no longer the situation. For many years Congress has been too absorbed in ever increasing and relatively more important legislative matters and as a result the impeachment process has fallen into disuse. Because it is not used, impeachment has ceased to be a real deterrent to misconduct on the bench.

To further complicate the problem, the recently enacted Federal Omnibus Judgeship Act will, when fully implemented, increase the number of court of appeal and district court judges to approximately 850. The projections of the Federal Judicial Center estimate that there will be a need for 1,000 district judges and 350 circuit judges by 1990. If Congress has not been able to effectively utilize the impeachment process to date, these additional factors prove that future dependence on impeachment to discipline Federal judges is no longer viable.

The judiciary, as well as the public, should also be provided with a less drastic means of discipline than impeachment. In addition, we also owe Federal judges an alternative to the stigma attached to impeachment proceedings, in those cases where aberrant behavior is the innocent product of a poor mental or physical condition.

In the long run, we think this will actually strengthen the judicial branch.

The Judicial Councils Reform and Conduct and Disability Act of 1980 helps to fill the gap between impeachment and doing nothing at all by establishing a procedure for disciplining members which is designed to be totally within the judicial branch—that is, judges will be judging judges.

Although legislation of this type is greatly needed, S. 1873 is not without its opponents. Some believe that this bill is unconstitutional on several grounds. Most of the doubts have arisen from the view that impeachment is the only method of investigating and remedying judicial misconduct that is expressly authorized under the Constitution. It is argued that since the Constitution refers only to impeachment, it has, by implication, excluded all other modes of judicial discipline. In analyzing the constitutional arguments both for and against the bill, however, an overwhelming majority of the members of the Judiciary Committee have concluded that the language of the Constitution does not prohibit enactment of this act.

Opponents who take the exclusivist view believe that the inclusion of one thing is the exclusion of another, that is, that the impeachment provisions found in the Constitution exclude all other forms of judicial discipline. The Supreme Court, however, applies a commonsense approach to constitutional construction. This method results in strict construction in accordance with the exclusivist view in some cases and the finding of an implicit grant of authority in other instances.

Taking the commonsense approach, it is very unlikely that the intent of the Constitution was to leave Federal judges unaccountable for their behavior. Furthermore, the First Congress, whose Members included many of the Constitution's framers, enacted a law which provided for the fining and imprisonment, at the court's discretion, of any judge convicted of accepting bribes. This statute is clearly inconsistent with the views of the exclusivists.

Appellate courts do have the power to overrule the illegal decisions of lower courts and judges. However, this type of review is an inappropriate remedy in the event of aberrant judicial behavior, as well as problems caused by a mental or physical disability.

It should be noted that there are two statutes which currently authorize the judiciary to apply some very general disciplinary measures. Section 332(d) and 372(b) of title 28 of the United States Code are similar to the two-part standard found in S. 1873. Neither of these statutes has been alleged as being a threat to the independence of the judiciary.

Further, Congress has been granted the power to enact appropriate legislation by the necessary and proper clause of the Constitution. This clause gives Congress the power to enact legislation

to enable it to effectively carry out the spirit and letter of the Constitution.

Opponents of the nonimpeachment methods for judicial discipline argue that some forms of discipline are tantamount to removal and, thus, unconstitutional if not conducted by impeachment.

Although the question has never been finally settled, the committee has respected the position that removal of Federal judges by any means other than impeachment is arguably unconstitutional. Therefore, the proposed legislation is designed to avoid this important issue by not providing for removal of Federal judges short of impeachment. Nor is any effort made to alter or modify the constitutional impeachment process with this legislation.

If consideration of impeachment appears to be warranted the Judicial Conference merely makes a report to the House of Representatives to that effect. Clearly, this bill is not unconstitutional since it leaves removal to be instituted by the House of Representatives, followed by a trial in the Senate.

The committee emphasizes that the purpose and goal of these new provisions is to establish a mechanism which deals with matters which for the most part fall short of being subject to impeachment. Where impeachment may be appropriate, traditional constitutional procedures continue to govern.

It has also been argued that the utilization of any other method short of impeachment to discipline judges, even within the judicial branch itself, would ignore the concerns of the framers of the Constitution that members of the judiciary should be unconstrained from public pressures or threats from the other branches of Government.

This legislation protects the fragile independence of the judiciary since the creation of a measure to investigate and discipline judges does not interfere with the doctrine of separation of powers, nor the theory of judicial independence, if the judicial branch has sole control over the proceedings.

In addition, under the provisions of the act, judges are shielded from the influence of public disapproval with the substance of the law itself and judicial interpretations of it. It is made clear that with this legislation judges need not feel threatened by frivolous complaints or those growing out of dissatisfaction with one of their decisions or procedural rulings. These insufficient complaints will be screened out and dismissed. Federal judges are tenured for life, and should not be harassed in the legitimate exercise of their duty to interpret and apply the law.

The purpose of this legislation is to remedy matters relating to a judge's condition or conduct which interfere with his performance and responsibilities. And although the complainant, rightfully, may ask for review of a dismissal, the judicial council may exercise its discretion in granting that review. It is to be expected that it is only in those rare cases where the chief judge has not recognized the merit of a complaint, that the council will reexamine a dismissed complaint about the conduct of a judge.

In conclusion, the committee wishes to emphasize the overriding principles governing the act; first, the recognition that the informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception. Only in the rare case will it be deemed necessary to invoke the formal statutory procedures and sanctions provided for in the act. Second, under this legislation, circuit council resolution of complaints remains paramount. The committee views local consideration and disposition of the great bulk of complaints as the preferable course to take.

Nevertheless, the authorization for the establishment of a standing committee of the Judicial Conference of the United States, which we expect will in fact come into existence, will assure the public and the judge of a forum to review those cases where review is deemed advisable.

The proposed legislation will establish a procedure for investigating and resolving allegations against members of the Federal judiciary. Any person can file a complaint with the chief judge of the circuit alleging that a judge is unable to discharge efficiently his or her duties by reason of mental or physical disability or that the judge is engaging in conduct prejudicial to the effective and expeditious administration of justice.

In brief, the legislation uses the existing circuit councils as the primary mechanism for the resolution of complaints against Federal judicial officers. A complaint can be filed with the circuit's clerk of the court; it then is referred to the chief judge of the circuit who is granted broad discretion to solve the perceived problem or to dismiss the complaint if it is frivolous. The chief judge's decision is rendered in writing. If the chief judge is unable to solve the complaint or dismiss it, he must create a special committee to investigate the facts and allegations in the complaint.

The special committee conducts an investigation as extensive as it considers necessary and then files a comprehensive written report with the full judicial council of the circuit. The judicial council then may conduct an additional investigation, and then must take such action "as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit" including actions specifically delineated in the legislation.

In addition, the circuit council may refer any complaint to the Judicial Conference of the United States. The council is required to do so if a judge has engaged in conduct which might constitute grounds for impeachment or activity which, in the interest of justice, is not amenable to resolution by the judicial council.

Any complainant who is not satisfied with a decision of a chief judge may petition the judicial council for review thereof. In addition, nothing in the legislation precludes a complainant from bringing any matter to the attention of the House of Representatives for an impeachment inquiry or to the U.S. Department of Justice for a criminal investigation.

This legislation also calls for the Director of the Administrative Office of the U.S. Courts to annually report to Congress on the number of complaints filed, the nature thereof, and the disposition of them.

And lastly, the proposed legislation provides for consistency in circuit rules and it improves the functioning of the judicial councils by providing for district judge representation.

The Senate substitute amendment under consideration today makes four major substantive changes in the House of Representatives amendments regarding the judicial discipline provisions to S. 1873. All of these modifications strengthen the House provisions by codifying certain procedural rights regarding complainants and implicated judicial officers and by requiring the procedures and institutions involved to be more open to public scrutiny.

First, by amending paragraph (10) of the House provisions, a procedure is set forth which provides for equality of appeal rights between complainants and judges or magistrates briefly stated, a complainant, judge or magistrate who is not satisfied with a final order of a chief judge under paragraph (3) of the same subsection may petition the appropriate judicial council for review of the chief judge's decision. It is unlikely that judges or magistrates will exercise their right to petition for review because the powers of the chief judge under paragraph (3) are limited to dismissing the complaint or concluding the proceeding if corrective action has been taken.

Nonetheless, to preserve equal treatment between the parties in the process, the right to petition for review of the chief judge's actions to the circuit council is provided to all the individuals involved in the proceedings.

In a similar vein, the right to petition the Judicial Conference of the United States for review of a decision of a judicial council is provided to complainants and judges or magistrates. Paragraph (10), as modified by the Senate amendment, further provides the Judicial Conference, or the standing committee established under amended section 331 of title 28, United States Code, with discretionary authority to grant or deny a petition for review. It is envisioned that over the long term these petitions will develop into something like petitions for writs of certiorari to the Supreme Court of the United States.

As guidance to the Judicial Conference on how to implement procedures regarding the petitions, it is the view of the House and Senate Judiciary Committees that petitions should be reviewed by all the members of the decisionmaking body, whether it be the Judicial Conference itself or the standing committee established under section 331 of title 28, United States Code.

In addition, either a majority or a number equaling one less than that needed for a majority should be required for the granting of a petition, and consequently, for review on the substance of the petition. To preserve flexibility, however, the committees felt it unnecessary to set forth every procedure that might be required to process a complaint. It is expected that the Judicial Conference will exercise its authority to draft rules in this regard, and that these rules will be available for public scrutiny.

Second, and similarly, a change is made to paragraph (11) of the House-passed legislation. By adding a new subparagraph (C), the Senate amendment provides complainants with the possibility of appearing at proceedings conducted by an investigating panel, if the panel concludes that the complainant could offer substantial information. The investigating panel referred to here is likely to be one appointed by a circuit council pursuant to paragraph (4) of the proposed legislation. However, it may also be one utilized by the Judicial Conference, or the standing committee authorized to be established under section 4 of the legislation. The investigating panel additionally may, if the circumstances so require, allow the complainant to be accompanied by legal counsel.

Third, the Senate amendment substantially improves the House bill's action relating to the confidentiality of papers, documents, and records of proceedings related to investigations. At the outset, the House language "privileged against disclosure" is stricken and alternative language "shall not be disclosed" is inserted. Although assurances were given that the House bill did not create an evidentiary privilege, it was thought advisable to strike the ambiguous language.

In addition, the Senate amendment adds a new paragraph which provides that the confidentiality right can be waived in writing by a judge or magistrate who is the subject of a complaint. This waiver must be accompanied by an authorization of the presiding judge of the investigating panel (be it the chief judge of the circuit, the Chief Justice of the United States or the chairman of the standing committee established under section 331 of the title 28, United States Code).

Finally, the Senate amendment adds an entirely new paragraph to the House-passed bill. New paragraph (15) requires that each written order to implement a sanctioning action under paragraph (6)(B) shall be made available to the public through the appropriate clerk's office of the circuit court of appeals. Unless contrary to the interests of justice, each such order shall be accompanied by written reasons explaining the action. This new paragraph applies to sanctioning orders of the judicial councils, the Judicial Conference of the United States, and the standing committee which can be established under section 331 of title 28, United States Code. The exception allowing a sanction to be imposed without giving reasons therefor is meant to be a narrow one and should not subsume the broader goal of insuring public access to the process created by this legislation.

The fourth substantive change made to the House-passed bill is found in section 4 of the substitute amendment. The House bill's reference to the possible creation of a special committee of the Judicial Conference is stricken. In lieu thereof, the Senate amendment authorizes the conference to exercise the authority provided in newly created 28 U.S.C. 372(c) as a conference or through a standing committee. If the conference chooses to establish a standing committee, the members shall be appointed by the Chief Justice of the United States, and all petitions for review shall be reviewed by that committee. Presumably, the committee would have a chairman and would be composed of an odd number of members.

In addition, it is the intent of both the House and Senate Judiciary Committees that the Chief Justice carefully consider not appointing any chief judges to such a standing committee. This is in light of the fact that the chief judges sit at the lowest tier of this procedure and also serve as the presiding officers of each circuit council, which are the next level of review. Both the Conference and the standing committee are empowered to hold hearings, take sworn testimony, issue subpenas and subpenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. All judicial officers and employees of the United States are required to promptly carry into effect all orders of the Judicial Conference or the standing committee. The Conference may additionally prescribe and modify rules for the exercise of authority contained in the proposed legislation.

The Senate amendment places the entire legislative package on a firmer foundation. If the Judicial Conference finds it desirable or necessary to delegate its responsibility under the proposed legislation, it only has one choice. It must create a standing committee which will consider all petitions for review. The membership of this committee will be open to public scrutiny. Undoubtedly, only judges with untarnished ethical reputations will be appointed by the Chief Justice, thus insuring fair, consistent and high quality decision-making.

In addition to those four substantive changes included in the Senate amendment, both the House and Senate Judiciary Committees believe that there should be a continuing dialog between the legislative and judicial branches, and vigorous oversight by Congress. Section 5 of the proposal requires that the Director of the Administrative Office of the United States Courts shall include in his annual report filed with the Congress a summary of the number of complaints filed with each judicial council under section 372(c) of title 28, United States Code, indicating their general nature and the disposition of those upon which action has been taken.

In order to better perform its oversight responsibilities, the committee will give serious consideration to making requests for other reports on the implementation of the act, as well as possible oversight hearings and subsequent perfecting amendments to the statute.

Before concluding I thank Senator KENNEDY, as committee chairman, and Senator THURMOND, as the ranking minority member, for their support and assistance. I also thank Senator NUNN for his sustained interest in this legislation and without whom we would not be here today. Senator BAYH also deserves mention for his support.

In addition, I thank Michael Altier, counsel for my Subcommittee on Improvements in Judicial Machinery, for the many hours he put in drafting, researching, and negotiating for the passage of this proposal. My staff director, Romano Romani, also deserves credit for his work on this bill. Finally, I thank Ann Woodley for her recent technical assistance.

In conclusion, I urge adoption of this amendment to this much-needed and long overdue piece of legislation.

● Mr. NUNN. Mr. President, I rise in support of the substitute compromise amendment now offered by Senator DECONCINI to S. 1873, the Judicial Conduct and Disability Act. I regret, as he does, that the stronger, progressive provisions of judicial discipline legislation incorporated in S. 1423, the Judicial Tenure Act of 1978 which passed this body on September 7, 1978 and which were incorporated in our bill S. 295 are not now included in this legislation.

I regret that it does not provide for a practical and effective alternative to impeachment to enforce the constitutional standard of "good behavior" on the Federal judiciary. I will continue to try to establish a removal process to assure judicial accountability.

However, I do believe that this compromise substitute enables Congress to take a strong step in the right direction by providing our Federal judges with a mechanism within the Judiciary branch whereby they can judge their colleagues on the bench. This legislation represents a decade's struggle for this much needed judicial improvement, and I am gratified that the Senate has taken this major step for establishing a degree of accountability on the Federal bench.

Mr. President, let me thank my colleague from Arizona for the diligent work and tremendous job he has done in bringing this legislation to the floor. This bill is a product of his leadership and the direct result of his diligent work on this issue over the last several years. I support and applaud his planned vigorous oversight of the review mechanism established in this legislation.●

Mr. MATHIAS. Mr. President, I oppose the amendment in the nature of a substitute to the House-passed version of S. 1873, the Judicial Councils Reform and Judicial Disability Act of 1980, and I shall vote against it.

I am not unmindful of the diligent and good faith efforts by Senator DECONCINI, Representative KASTENMEIER, and others to achieve a compromise on this important issue. Certainly, the proposed amendment is a marked improvement

over the Senate passed version of S. 1873, as well as S. 1423, the Judicial Tenure Act, which passed the Senate in 1978 but was not acted upon by the House of Representatives before the close of the 95th Congress.

Unlike S. 1423, the proposal now before us does not allow for unsanctioned, alternative methods of removal of a judge whose conduct does not conform with the good behavior requirement of article III, section 1 of the Constitution. Also, in contrast to the Senate passed version of S. 1873, the amendment has substituted the proposed "Court on Judicial Conduct and Disability" which was designed to hear appeals from decisions of the judicial councils.

These are important changes, but they are not enough. They do not remove my fundamental objections to judicial discipline legislation that impinges on the principle of judicial independence.

Above all, I am convinced that any legislatively devised scheme to discipline Federal judges by means other than impeachment contravenes the Constitution and its guarantee of fearless and impartial judges. For me, impeachment is not only the sole constitutional means for removing miscreant judges, it is the only constitutionally permissible means of disciplining Federal judges. If Congress must supplement the impeachment process, it should not resort to the legislative route with its obvious constitutional obstacles. Rather it should follow the Constitution explicitly and employ the impeachment process so meticulously devised by our Founding Fathers. To me that is not merely the preferable way to proceed. It is the only way.

Second, I do not believe that the proponents of the amendment have met their heavy burden of demonstrating the need for the proposal. I made this very point last year when the Senate debated S. 1873. At that time, I noted the virtual absence of documented examples of serious judicial misconduct necessary to justify the radical alteration of our judicial system contemplated by S. 1873. I have reviewed the extensive hearing record compiled by the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, and, I have found nothing in this record to alter my opinion that a judicial discipline bill is unnecessary.

The importance of this issue cannot be overestimated. It does not touch upon some passing matter of public interest or some ripple in the current of daily events. This is basic stuff. It is part and parcel of the fabric of the Republic.

The place of Federal judges in our lives and in our constitutional system was objectively described by that observant French visitor, Alexis de Tocqueville in 1841. After noting that "the American Judge is brought into the political arena independent of his own will," Tocqueville went on to comment on the importance of the Federal judiciary as one of the three equal, separate, coordinate branches of Government:

> The peace, the prosperity and the very existence of the Union, are invested in the hands of the . . . judges. Without their active co-operation the constitution would be a dead letter: the executive appeals to them for assistance against the encroachments of the legislative powers; the legislature demands their protection from the designs of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against the interests of private citizens . . .

Mr. President, I ask unanimous consent to have printed in the RECORD an article that I wrote some time ago entitled "Judicial Independence: A Principle Worth Preserving," which was published in the summer of 1980 in the Maryland Bar Journal.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

JUDICIAL INDEPENDENCE: A PRINCIPLE WORTH PRESERVING

(By Senator CHARLES McC. MATHIAS, JR.)

Last year, in an article in this Journal,[1] I examined the Federal judicial selection process, especially with regard to the dual responsibility placed upon the United States Senate by the Constitution:[2] (1) to advise the President in his judicial selection process, and (2) to consent to or withhold consent from Presidential nominees. I noted then the increased importance of this constitutionally-mandated selection and confirmation process as a result of legislation enacted in the 95th Congress calling for the addition of 152 new members to the Federal bench.[3] Since that time, the Senate Judiciary Committee not unexpectedly has been busy reviewing this unprecedented number of nominees for these new judicial positions. Great care has been taken to insure that the Committee's review procedures are adequate to the demands posed by this expansion of the Federal judiciary.[4]

But, the nomination and confirmation process has not been the only issue regarding the operation and integrity of the Federal judiciary that Congress has concentrated on recently. Over the past few years, the idea that we need a statutory scheme for disciplining Federal judges to supplement the constitutionally-prescribed impeachment process has gained momentum. In fact, in 1978, the Senate approved S. 1423, the Judicial Tenure Act. This proposal, which was not acted on by the House of Representatives before the close of the 95th Congress, would have allowed for the non-Congressional removal of judges whose conduct did not conform with the good behavior requirement of Article III, section 1.[5] Its passage by the Senate was a significant—not to say, ominous development.

The House's failure at act on S. 1423, in the 95th Congress, left proponents of judicial discipline legislation at square one. They had to start the legislative process all over again when the 96th Congress convened. And, they did. Subsequently, on October 30, 1979, by a vote of 56–33, the Senate passed S. 1873.[6] The bill is pending before the House Judiciary Committee and now, more than any time in the past, the possibility exists that Congress will enact legislation to deal with allegations of judicial misconduct.

For the past several years, I monitored the progress of legislative proposals to supplement the impeachment process. I have poured over the hearing records compiled by the Senate Judiciary Committee. I have studied the views expressed by the Founding Fathers and noted constitutional scholars. Based on this review, I concluded that the Judicial Conduct and Disability Act of 1979 is of dubious constitutionality, unnecessary and unwise as a matter of public policy. As a result, I voted against S. 1873 both in the Senate Judiciary Committee and on the floor of the United States Senate.

HOW THE JUDICIAL CONDUCT AND DISABILITY ACT WOULD OPERATE

If enacted, S. 1873, would create procedures within all eleven judicial councils[7] to deal with complaints filed by any person alleging that a judge is mentally or physically unable to discharge efficiently his or her judicial duties or that the judge is engaging in conduct inconsistent with the effective and expeditious administration of the court. The bill provides that complaints which relate to the merits of any decision of a judge or any matter reviewable on appeal are beyond the jurisdiction of the councils. If the Council finds that the allegations conform to the standards prescribed for a complaint, it may order remedial action, such as temporarily precluding a judge from being assigned additional cases.[8] Under no circumstances may the Council order the judge's removal from office.

The bill would also establish a Court on Judicial Conduct and Disability to hear appeals from decisions by the councils. The Court would be composed of five Article III judges designated by the Chief Justice of the United States. The Court may either dismiss the complaint, affirm or modify the action of the Council or reverse or remand the matter to the Council. If the Court decides that the interests of justice warrant such action, it may hold its own de novo hearing. Following such a hearing, the Court could take certain prescribed actions, but could not order the removal of the judge from office.[9] Decisions rendered by the Court would not be subject to judicial review.

IS THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1979 CONSTITUTIONAL?

Acknowledging the serious constitutional questions surrounding any legislatively-devised scheme to remove federal judges by means other than impeachment, the Senate wisely excluded from the Judicial Conduct and Disability Act of 1979, the authority to remove federal jurists from office. I supported this exclusion. It is not an insignificant decision. But, it is not enough. It should not and must not end the inquiry into the bill's constitutionality.

In my view, the bill still fails to pass constitutional muster. For me, impeachment is not only the sole constitutional means of removing miscreant judges, it is the sole constitutionally permissible means of discipling federal judges. Alexander Hamilton, in Federalist 79, underlined this point:

> "They (federal judges) are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and if convicted, may be dismissed from holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character; and is the only one which we find in our own Constitution with respect to judges."

The Founding Fathers were deeply concerned over the conflict between judicial independence and judicial accountability. They were well aware, as Justice Black noted in his dissent in *Chandler* v. *Judicial Council*, 398 U.S. 74, 143 (1970), "that the judges of the past—good patriotic judges—had occasionally lost their freedom and their heads because of the actions and decrease of other judges. They were determined that no such thing should happen here."

Our Founding Fathers were well aware of the abuses associated with a dependent judiciary. Their own colonial experience, as well as related events in Great Britain, were fresh in their minds when they convened in Philadelphia in 1787. Of particular concern to them were the questions of judicial tenure

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and the tying of judicial salaries to tax revenues of the Crown generated in the colonies.[10]

The authors of the Constitution knew that during much of British history, judges served at the King's pleasure and that the jurist's office ended with the death of the monarch. They were aware that frequently the King exercised this prerogative and ordered the removal of a jurist who displeased him. The best known example of this type of judicial dependence was when King James I in 1616 removed Sir Edward Coke who had angered the monarch with his stand in favor of judicial independence. To end such abuses, the British Parliament in 1701 passed the Act of Settlement which provided that "judges" commissions be made *quamdiu se bene gesserint* (during good behavior) and their salaries ascertained and established but upon address of both Houses of Parliament, it may be lawful to remove them."

While the Act of Settlement was a step toward judicial independence, it did not provide for a truly independent judiciary. Although the judges were safe from the whim of the monarch, they were now subject to the power of address and thus removable by the Parliament for any reason.

Significantly, although the British themselves opted for judicial tenure during good behavior, they did not extend this measure of judicial independence to the colonial judiciary. On the contrary, for the most part, the Royal Governors were instructed to avoid issuing "good behavior" commissions, thus making colonial jurists dependent on the governors' pleasure. Equally distressing to the colonists was a provision in the Townshend Revenue Act of 1767 which provided for the payment of judicial salaries out of taxes imposed on the colonists by the Crown.[11]

These restraints of judicial independence enraged the colonists. They helped fuel the call for rebellion. One of the chief grievances against the British, catalogued in the Declaration of Independence, was the King's making the colonial judges "dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."

The impact of this British and colonial precedent was reflected in the early state constitutions. Much time, effort and thought was invested by the authors of the state constitutions in crafting procedures governing judicial independence and judicial accountability. Most state documents provide for judicial tenure during good behavior; a few limited the length of office to a set term of years. Virtually all provided for removal by impeachment. Several incorporated the British system of address into their Constitutions. And, a number allowed for impeachment on grounds of maladministration. Although the texts of the documents varied, the concern was constant.[12]

It was against this background that the Founding Fathers met in Philadelphia in the summer of 1787 to revise the Articles of Confederation and ultimately to draft a Constitution. As the record indicates, they had learned their history lessons well.

The Founding Fathers debated the issue of judicial independence versus judicial accountability at length. They provided us with an unusually detailed legislative record of their efforts. Their actions reflected a keen understanding of English and colonial precedent. They were determined to go beyond historical precedent and to confer upon federal judges a degree of independence unparalleled in the annals of history.

Specifically, the authors of the Constitution knew that the grant of judicial independence contained in the Act of Settlement was limited. Judges could still be removed through address by the Parliament. They consciously chose not to adopt such a procedure here.[13] And, the Founding Fathers rejected "maladministration" as a basis for impeachment, although that ground was found in some State Constitutions.[14] As James Madison stated: "so vague a term will be equivalent to a term during the pleasure of the Senate."

[The Founding Fathers concluded that the form of Republican government they envisioned required a truly independent judiciary and that neither address nor maladministration conformed with their conception.]

What they could and did accept was a system of judicial tenure during good behavior coupled with a carefully crafted and specific procedure for dealing with judicial misconduct. They specified in the Constitution that federal judges would be held accountable for their actions through a single process. That process was impeachment. The noted Constitutional scholar and former Senator, Sam Ervin, has written "(t)hey (the Founding Fathers) very carefully provided for a federal judiciary that operates completely independent of everything but the Constitution."[15] I too am convinced that the Founding Fathers considered impeachment the sole constitutionally acceptable means of disciplining federal judges, not merely of removing them. This view is confirmed by their familiarity with history, their actions at the Constitutional Convention, and the record of their deliberations. Their refusal to incorporate into our organic law address and maladministration was especially significant. Their failure to adopt an internal system of judicial discipline similar to that contained in Article 1, Section 5, clauses 1 and 2, regarding Congressional self-discipline is also important.

Finally, the members of the Constitutional Convention rejected legislative control of the judiciary. They specifically refused to create "a national judiciary . . . to consist of one or more Supreme tribunals, and of inferior tribunals to be chosen by the National Legislature to hold office during good behavior."[16] As Martha Ziskind wrote in her article, entitled "Judicial Tenure in the American Constitution: English and American Precedents", "They (the Founding Fathers) hoped to make the Judges free from popular pressure and from legislative control. Their purpose was to create a truly independent Judiciary limited only by the cumbersome process of impeachment."[17]

This view of the exclusivity of the impeachment clause has the ringing endorsements of the late Justices Douglas and Black. In his dissent in *Chandler* v. *Judicial Council, supra*, Justice Douglas writing for himself and Justice Black, provided us with a very explicit statement of this view of the Constitution:

"*An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge.* He commonly works with other federal judges who are likewise sovereign. But, neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury. (Emphasis supplied).[18]

It has been argued that one of the primary reasons for this legislation is that the impeachment process is cumbersome, unwieldly, and time-consuming. Certainly, it is difficult to impeach a federal judge. That was the intent of the Founding Fathers; that was the way they sculpted the Constitution and that is the way it is. It is inconceivable to me that our Founding Fathers, who took such care to develop the impeachment process and to otherwise safeguard judicial independence, would have endorsed the types of sanctions and disciplinary procedures contained within the Judicial Conduct and Disability Act. Concern over the difficulty of employing the impeachment process should not blind our judgment; it should not, in the name of efficiency and expediency, lead us to adopt unconstitutional proposals.

But, if Congress should conclude that some mechanism is necessary to supplement the impeachment process, it is not without a remedy. It need not resort to the legislative route with its obvious constitutional obstacles. Rather, it can follow the Constitution explicitly and employ the amendment process so meticulously devised by our Founding Fathers. That to me is not only the preferable way to proceed, it is the only way.

All too often in the past Congress has enacted legislation of questionable validity, assuming that the determination of a bill's constitutionality is within the sole province of the Judiciary. In effect, we have said "we don't know about the constitutionality of this bill, so let us pass it and let the courts decide on it."

We must not succumb to this temptation. We have a responsibility—independent of that of the Judiciary—to consider carefully questions of a bill's constitutionality. We cannot ignore this duty. We can be wrong; we can be in error just as the Court is on occasion; but we have sworn an oath to discharge our duties as members of Congress in accordance with the Constitution. I do not believe that we can perform those duties responsibly without coming to a conclusion about whether our contemplated actions are constitutional. As Chief Justice Burger has reminded us:

"In the performance of assigned constitutional duties, each branch of government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[19]

I concur wholeheartedly. Every member of Congress has a solemn duty to assess the constitutionality of the Judicial Conduct and Disability Act of 1979. I have done so. And I have concluded that the bill is unconstitutional.

IS THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1979 NECESSARY?

The most striking aspect of the hearing record on S. 1873 is the virtual absence of documented examples of serious judicial misconduct necessary to justify the radical alteration of our judicial system contemplated by the Judicial Conduct and Disability Act of 1979. The most that can be said of the hearing record is that it shows that throughout our history at any given time perhaps a handful of judges has engaged in seriously objectionable behavior. In this bill, a spector is raised which does not exist. A remedy is provided where none is needed. Significantly, the Senate Judiciary Committee Report on S. 1873 appears to concede this crucial point:

"This Committee recognized that the great majority of our existing federal judges perform their duties in a dedicated and capable manner. In a very real sense the problem addressed in the Act is more one of perception than actuality—the need to assure the public that procedures are in place to deal with the rare instance justifying an inquiry related to the condition or conduct of a member of the Judiciary. Stated another way, the growing public demand for the accountability of public officials should extend to the judicial branch. (Emphasis supplied.)"[20] Certainly there is a kind of tide moving in the direction of making every element of our society—both public and private—accountable today. In the Congress, we see this trend in the enactment of Sunshine legislation and

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increased financial disclosure requirements. But, simply because such a trend exists does not make it necessarily right to carry it over into the federal judiciary.

Federal judges have been given a special status. They have been constitutionally granted judicial independence. Throughout our history, this grant of independence has been debated back and forth. But, interestingly, the final conclusion has always been that the independence of the judiciary was more important than the ability to discipline judges and call into question the integrity of their decisions or the purity of their motives.

If Congress is to break with tradition and enact legislation such as the Judicial Conduct and Disability Act of 1979, it must clearly demonstrate the overwhelming need for such legislation. It must not pass such far-reaching legislation when it admits that the problem it addresses is "more one of perception than actuality." The burden of proving the need for this bill is on its proponents. By their own admission, the bill's proponents have not made their case. To legislate on such a thin basis would be a grave error.

In addition, it would be premature for Congress to adopt the Judicial Conduct and Disability Act at the very time the Judicial Conference and every Judicial Council have taken concrete action to clarify and strengthen the authority of the Councils to deal with instances of judicial misconduct.

On March 9, 1979, the Judicial Conference adopted a resolution calling for the promulgation by the eleven Judicial Councils of procedural rules to process complaints alleging judicial conduct inconsistent with the effective administration of the business of the courts within the circuit.[7] In response to the Conference's March 9 resolution, virtually all eleven Councils have adopted rules to implement the Conference's recommendations. For example, on June 6, 1979, the Fourth Circuit Court of Appeals adopted a rule creating a process to deal with complaints filed against federal judges. This new system took effect on August 1, 1979.

I think it is fair to say that the actions taken by both the Conference and the various Councils are in large measure attributable to Congressional concern regarding judicial discipline, especially the Senate's passage in 1978 of S. 1423, the Judicial Tenure Act. The proponents of the Judicial Tenure Act sent a message that was heard across the land and received a reasonable and rational response from the Judges themselves. In view of this response, Congress should avoid precipitous action now. It should monitor the progress of these newly implemented Council procedures, rather than embarking on the uncharted course promised by the Judicial Conduct and Disability Act of 1979. It is entirely possible that these new procedures will satisfy the call for a Congressionally devised mechanism to supplement the impeachment process. Let us tread slowly. Let us recognize that we are treading on historic ground, constitutional ground, ground on which the Founding Fathers preceded us. Let us give the Judiciary a sufficient opportunity to deal with the issue of judicial misbehavior on its own.[8]

Is it wise for Congress to enact the Judicial Conduct and Disability Act of 1979?

Finally, I believe that it would be unwise public policy to enact the Judicial Conduct and Disability Act of 1979. It would pose a direct and serious threat to the time-honored and constitutionally enshrined principle of judicial independence. This principle is worth preserving. It is not a new principle. It is an ancient one. Its origin can be traced back long before the Constitution of the United States was written. Herodotus, the Greek Historian, in describing ancient Persia, wrote:

"The Royal judges are men chosen from among Persians, who continue in office until they die or they are convicted of some injustice. They determine causes between the Persians and are the interpreters of the ancient Constitutions and all questions referred to them."

Our Founding Fathers were worldly men. They were scholars. They knew Herodotus and they were aware that by grafting judicial independence into the Constitution, they were embodying the wisdom of the ages into our organic law. In this area, they were not creating a new experiment in government.

Another very disturbing feature of the Judicial Conduct and Disability Act of 1979 from the standpoint of judicial independence is its failure to deal with clearly frivolous and non-meritorious complaints with expediency and finality. Unlike the proposal of the Judicial Conference, the bill does not provide the Chief Judge of the Circuit with the authority to dismiss frivolous complaints, thus putting a quick end to non-meritorious allegations. Rather, under the Committee's bill, a complainant is not only assured that the full Council will review his allegations, however frivolous, but also that if he appeals the Council's actions, he can compel the Court on Judicial Conduct and Disability to decide whether to hear the appeal—a decision which requires the Court to review the complaint and the record compiled by the Council.

This system insures that the disgruntled litigant, whose primary purpose is to harass federal judges, will have an unnecessarily extended opportunity to work his mischief. This process can only have a chilling effect on federal judges. Will they be deterred from taking courageous stands on unpopular issues by the fear that a dissatisfied litigant will seek vengeance through the complaint process established under this bill? Is it worth the risk, especially when we are addressing what the Senate Judiciary Committee calls a perception rather than an actuality? I think not.

The members of Congress would do well to keep in mind the warning of Professor Gerald Gunther of the Stanford Law School:

"Federal judges are inevitably in the business of rendering controversial decisions. Important issues and interests are at stake in the cases before them; and the losing side frequently and understandably feels aggrieved. With the proliferation of federal statutes and regulations, the federal judges' involvement in controversy is bound to grow. Setting up an unnecessary new channel which may lend itself to the harassment of those judges is a profoundly disturbing departure from one of the most cherished values of the American constitutional scheme, that of judicial independence. I recognize that the bill is not intended to offer a channel for losing litigants and interests to challenge the merits of a judicial decision. Yet, over the years, and particularly in recent months, I have been increasingly troubled by remarks I have heard that there are people who look forward to the enactment of the judicial discipline legislation as a way of getting at judges whom they consider to be too much to the right or too much to the left or unpalatable in their viewpoint in some other respect. It would not require great imagination for an aggrieved litigant to formulate complaints formally consistent with the limited scope of the proposed Act, yet in substance motivated by disagreements on the merits—complaints which, even though they are dismissed as frivolous, may be appealed; procedures which even though they did not result in sanctions against the judge as they presumably would not, would surely serve as harassment and would open the way for one more crack in the fragile framework of judicial independence."[9]

Conclusion

I am not insensitive to the concern that has prompted the sponsors to push for enactment of the Judicial Conduct and Disability Act of 1979. Both its proponents and its opponents share a common goal: that the federal judiciary be free of corrupt, misbehaving judges. Where I differ is over the scope of the problem and the constitutionally-permissible means of addressing it—if it warrants Congressional action at all.

Footnotes

[1] Mathias "Advice and Consent: The Role of the Senate in the Judicial Nomination and Confirmation Process", 12 Md. Bar Journal 26 (1979).

[2] "(H)e (the President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . ."

[3] The Omnibus Judgeship Act, Pub. L. No. 95-486 created 117 district judgeships and 35 on the appellate level. It is anticipated that by the end of the 96th Congress, the Senate Judiciary Committee will have also processed the nominations of approximately 45 individuals who were chosen to fill vacancies created through death or resignation.

[4] As I indicated last year in this Journal, *supra* note 1 at 27, I prepared 14 detailed questions which were submitted to every judicial nominee during the second session of the 95th Congress. These questions were designed to elicit responses concerning possible conflicts of interest—both substantive and financial—which might suggest the appearance of impropriety. Since that time the Senate Judiciary Committee has adopted an extensive questionnnaire which incorporates many of the questions that I had originally propounded. Every nominee must complete this questionnaire before his nomination will be considered by the Committee.

[5] "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . ."

[6] During the course of the Senate's consideration of S. 1873, an amendment to the bill was offered which would have provided for the removal of federal judges by means other than impeachment. The proposal was defeated by a vote of 60-30. 125 Cong. Rec. S. 15415 (daily ed Oct. 30, 1979).

[7] The judicial councils were established by the Administrative Office Act of 1939, 53 Stat. 1223, 28 U.S.C. 1223, 28 U.S.C. § 332. § 332(d) of this law authorizes each council to "make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit. The district court shall promptly carry into effect all orders of the judicial council." S. 1873 is intended to supplement the provisions now contained in § 332(d). For a detailed history of the judicial councils, *see*, Fish, "The Politics of Federal Judicial Administration" (1973).

[8] In addition, the Council could (1) certify that the judge is disabled and trigger the appointment of a new judge pursuant to 28 U.S.C. 372(b); (2) request that the judge voluntarily retire; (3) censure or reprimand the judge either publicly or privately; or (4) order such other action as the Council deems appropriate.

[9] Specifically, the Court could (1) dismiss the action; (2) certify that the judge is disabled and trigger the appointment of a new judge pursuant to 28 U.S.C. 372(b); (3) order that, on a temporary basis for a time certain, no further cases be assigned to the