WHO MAY DISCIPLINE OR REMOVE FEDERAL JUDGES? A CONSTITUTIONAL ANALYSIS

PETER M. SHANE†

The United States Constitution provides that federal judges shall “hold their Offices during good Behaviour,” and shall receive a Compensation “which shall not be diminished during their Continuance in Office.”¹ These few words and, by common understanding, the Impeachment Clauses,² represent the sole constitutional text explicitly addressing issues of judicial tenure, compensation, discipline, and removal. This elliptical prose has provoked fervent debate for two

† Professor of Law, University of Iowa. This Article was prepared under contract to the National Commission on Judicial Discipline and Removal. Although the analysis does not necessarily reflect the views of the Commission, its members, or its staff, I am grateful to the Commission members and staff for their probing questions and helpful suggestions, all of which enriched my thinking. I would also like to thank the participants of the roundtable conference convened by the Commission on December 18, 1992 that reviewed an earlier draft of this Article: Professors Akhil Reed Amar, Walter Dellinger, Peter Charles Hoffer, and Philip Kurland. Their comments were of great assistance. I benefitted also from the research assistance of Martin L. Wissott, Iowa '94.

¹ U.S. CONST. art. III, § 1. By convention, these clauses are known as the Judicial Tenure and Salary Protection Clauses, respectively.

² Article II, § 4, of the Constitution states that “The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” *Id.* art. II, § 4. The Constitution vests “the sole Power of Impeachment” in the House of Representatives. *Id.* art. I, § 2, cl. 5. This process, which produces articles of impeachment resembling an indictment, triggers the “sole Power” of the Senate to “try all Impeachments.” *Id.* art. I, § 3, cl. 6.

The Constitution’s express procedural requirements for Senate impeachment trials are sparse: Senators “sitting for that Purpose” must be “on Oath or Affirmation”; the Chief Justice of the United States shall preside over the impeachment trial of a President; and conviction requires “the Concurrence of two thirds of the Members present.” *Id.* Impeachment trials are expressly exempted from the Constitution’s jury requirements. *See id.* art. III, § 2, cl. 3.

Should an impeachment trial result in a conviction, “[j]udgment . . . shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.” *Id.* art. I, § 3, cl. 7. As interpreted by the Senate, this provision requires removal from office as an automatic consequence of conviction, but disqualification from office requires a separate vote. *See SENATE COMM. ON RULES & ADMIN., PROCEDURE AND GUIDELINES FOR IMPEACHMENT TRIALS IN THE UNITED STATES SENATE*, S. DOC. NO. 33, 99th Cong., 2d Sess. 95, 99, 101 (1986) [hereinafter *PROCEDURE AND GUIDELINES*]. The President’s pardon power does not extend to impeachment. *See* U.S. CONST. art. II, § 2, cl. 1.

centuries, and this Article addresses the two issues perhaps most fundamental to the continuing controversy: First, is impeachment the sole permissible mechanism for judicial removal? Second, who, if anyone, is authorized to discipline federal judges through sanctions other than removal?

These questions are necessarily anxious ones. Because courts rarely address the legal issues related to impeachment,³ and because centuries of debate have evoked no consensus on certain key points,⁴ the two issues seem to defy authoritative resolution through the usual processes of constitutional law making. Indeed, the Supreme Court's recent decision to treat as nonjusticiable any claims regarding the procedural sufficiency of Senate judicial impeachment trials only buttresses this conclusion.⁵

No feature of our public institutional life, however, is likely more essential to preserving a government of laws than an honorable and independent judiciary. Except perhaps for concerns surrounding the judicial nomination and confirmation processes, no issues pertain more directly to the quality of judicial integrity and independence than those of judicial tenure, compensation, discipline, and removal. To confront

³ For example, the Supreme Court has held that challenges to the constitutional sufficiency of Senate impeachment trial procedures present a nonjusticiable political question. See *Nixon v. United States*, 113 S. Ct. 732, 735-40 (1993). In addition, lower courts have held that impeachment proceedings need not precede criminal proceedings against a public officer subject to impeachment. See *United States v. Claiborne*, 727 F.2d 842, 847-48 (9th Cir.) (holding that an active federal judge may be criminally prosecuted), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706, 710-11 (11th Cir. 1982) (same), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.) (same), *cert. denied*, 417 U.S. 976 (1974). And, finally, one court has held that an impeachment based substantially on allegations that resulted in an acquittal in a prior criminal prosecution does not amount to double jeopardy. See *Hastings v. United States*, 802 F. Supp. 490, 500 (D.D.C. 1992), *vacated and remanded*, 1993 WL 81273, at *1 (D.C. Cir. Mar. 2, 1993), *dismissed*, 1993 WL 439810, at *2 (D.D.C. Oct. 21, 1993).

⁴ Scholarly debate persists, for example, on the questions whether impeachable offenses are properly limited to statutory crimes, compare IRVING BRANT, *IMPEACHMENT: TRIALS AND ERRORS* 8 (1972) (affirmative) with RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 79 (1973) (negative); whether impeachment convictions are judicially reviewable, compare BRANT, *supra*, at 182-97 and BERGER, *supra*, at 121 (affirmative) with CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 53-63 (1974) (negative); and—most relevant to this Article—whether impeachment is the sole constitutionally permissible means for removing Article III judges, compare Martha A. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 152-53 (affirmative) with BERGER, *supra*, at 122-80 (negative).

⁵ See *Nixon*, 113 S. Ct. at 732.

these questions is thus to face problems resistant to definitive resolution, but essential to "get right."

As one surveys the sizeable literature in this area, it is hard to avoid making two observations. First, reaching definitive judgments on at least some key issues from the plain meaning of the Constitution's text, or from a narrow version of constitutional originalism, is virtually impossible. The text is open to multiple interpretations, and the data relevant to unearthing the drafters' intent are sometimes not focused on the points most pertinent to current deliberations. Second, the methodological premises of some proffered analyses are insufficiently examined. Although the views of the founders are relatively clear as to the questions they actually debated, how one should regard the issues the founders did *not* discuss is not obvious. For example, when calculating the implications of the entire Constitution on impeachment-related issues that the founders did not consider, no compelling reason exists to focus exclusively on their specific views regarding impeachment. If the objective is a constitutional interpretation that makes sense of the whole document, then considering those values and policies signaled by other parts of the Constitution that distribute governmental power, in addition to the Impeachment Clauses, makes more sense.

This Article argues that "strict originalism," that is, attempts to discern the Constitution's resolution of particular issues according to the founders' expectations regarding those very issues, makes sense with respect to what I term *political* mechanisms for judicial discipline and removal. By political mechanisms, I mean those removal methods that can be fully initiated and fully implemented by the elected (or "political") branches of the federal government without the involvement of the judiciary.⁶ As discussed later, history provides clear evidence that impeachment was to be the sole political mechanism for disciplining federal judges.

Pursuing a narrow originalist assessment of *judiciary-dependent* mechanisms for judicial discipline, that is, methods that the elected branches cannot fully execute because the judiciary itself must play an important role in their implementation, makes far less sense. This

⁶ I am thus using "political" in the same sense in which the Supreme Court employs the word to designate "political questions." See, e.g., *Powell v. McCormack*, 395 U.S. 486, 518 (1969) (defining the term as questions "not justiciable primarily because of the separation of powers within the Federal Government"). I do not mean to imply that political mechanisms are ungoverned by law, only that the relevant legal decisions are made entirely by the elected branches of government.

conclusion is especially compelling with regard to disciplining federal judges not sitting on the Supreme Court. For example, judiciary-dependent methods of judicial discipline include both criminal prosecution, which requires a judicial trial, and judicial self-regulation, as under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.⁷ Notably, the founders did not deliberate seriously upon the use of such judiciary-dependent mechanisms, and the Constitution was not drafted in reaction to any popular assessment of their virtues or vices.

As to judiciary-dependent mechanisms of judicial discipline, it is sounder to attempt what Professor Geoffrey Miller has elsewhere called "neoclassical" constitutional interpretation.⁸ Such interpretation is not rooted in highly specific original understandings of particular questions, but rather in more general values revealed in the founders' debates about the Constitution as a whole, including its general scheme for the distribution of government power. The conclusions drawn in this Article by employing such an analysis are: (1) that federal judges may be disciplined through judicially enforceable civil and criminal sanctions imposed through executive or independent counsel prosecution, and (2) that the federal judiciary, subject to congressional regulation, may exercise powers of self-regulation for judges not sitting on the Supreme Court.

As scholars have noted, the existence of authority to devise mechanisms other than impeachment for judicial discipline does not itself prove that instituting those other mechanisms is desirable.⁹ The existence of such authority does help, however, to legitimate those judicial discipline mechanisms currently employed, and to promote the debate concerning whether those or other procedures are necessary, or indeed, sufficient.

⁷ Pub. L. No. 96-458, 94 Stat. 2035, 2036-40 (1980) (codified at 28 U.S.C. § 372(c) (1988 & Supp. IV 1992)).

⁸ Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52-58.

⁹ See Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 103 (1989). For example, even if judicial self-regulation is a permissible source of discipline, cumbersome procedures could drain judicial resources and outweigh any intended benefit, or substantive standards could encroach on the desired independence of the judiciary. For the conclusions of the National Commission on Judicial Discipline and Removal regarding the prudence of the various proposals it considered, see NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL (1993).

I. WHAT THE FOUNDERS RESOLVED: IMPEACHMENT
AS THE EXCLUSIVE POLITICAL MECHANISM
FOR JUDICIAL DISCIPLINE

A. *Confronting Constitutional Ambiguity*

The Constitution yields no "plain meaning" with respect to our understanding of the conditions concerning judicial tenure, discipline, and removal. In fact, the Constitution makes no express reference to the removal of judges. Yet, the Philadelphia Convention assumed, and our government has acted from its earliest days as if, the "civil officers" subject to impeachment under Article II include judges.¹⁰ So interpreted, the Impeachment Clauses render judges removable for "Treason, Bribery, or other high Crimes and Misdemeanors."¹¹ This Article II text raises the obvious question whether misconduct of a lesser variety might violate the "good Behaviour" standard of Article III and thus subject a judge to removal, or at least discipline, through some other process. The question arises because the Article III formula could sensibly be read either as setting a substantive standard of conduct on which judicial tenure is contingent,¹² or as employing an eighteenth-century term of art signaling that federal judges shall hold life tenure unless impeached.¹³

Additional uncertainty arises because the Constitution confers on federal courts "[t]he judicial Power of the United States,"¹⁴ yet authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹⁵ Thus, if a judge is a "civil officer" within the meaning of the Impeachment Clauses, then a judge would seem likewise to be an "officer" of the "Government of the United States," whose powers Congress may regulate. These clauses, there-

¹⁰ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., 1966) [hereinafter THE RECORDS] ("It had been said that the Judiciary would be impeachable."); cf. THE FEDERALIST No. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST No. 79] ([Judges] are liable to be impeached . . . by the House of Representatives . . ."). In 1803, John Pickering was the first federal judge impeached. Twelve judicial impeachments have followed since. See Gerhard, *supra* note 9, at 10 n.29.

¹¹ U.S. CONST. art. II, § 4.

¹² See BERGER, *supra* note 4, at 122-81.

¹³ See Gerhard, *supra* note 9, at 65-67.

¹⁴ U.S. CONST. art. III, § 1.

¹⁵ *Id.* art. I, § 8, cl. 18.

fore, plausibly could either confer judicial disciplinary power directly to the judiciary or empower Congress to determine that the exercise of judicial self-regulation is "necessary and proper" for executing judicial authority.

Because the text is ambiguous, commentators have turned to historical data in search of the drafters' understanding of their own handiwork. In spite of the intense modern debate on interpretive method in constitutional adjudication, relatively formalist arguments hold a special attraction with respect to issues concerning the allocation of government power.¹⁶ By "formalist arguments," I mean those arguments derived from purportedly straightforward understandings of a limited range of authoritative materials, such as the constitutional text, the ratification debates, and the records of the First Congress. Such arguments are appealing because functionalist debates over government structure are often notably open-ended, and because allowing conspicuous creativity in interpreting the words that prescribe the government's checking and balancing mechanisms would seem at odds with the Constitution's central premise concerning government's structure—namely, that checks and balances are firmly established to preserve our government as one of limited powers.

In resorting to history, however, one should not wish into being information that does not exist. As one commentator has aptly written: "[T]he founders thought, argued, reached decisions, and wrote about the issues that mattered to them, not about our contemporary problems."¹⁷ Among the implications of this insight is the importance of not imagining originalist answers to contemporary problems that the founders simply did not address.¹⁸ With respect to judicial

¹⁶ See generally Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985) (arguing that narrow originalist interpretation of "fairly determinate clauses delineating government structure" may buttress legitimacy of judiciary's more open-minded interpretation of fundamental rights clauses); Peter M. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573 (1987) (urging that conventional textualist interpretation of Articles I and II of the Constitution, where possible, is likely to further the Constitution's specific normative purposes and to fulfill more generally "our aspirations for control and accountability as a part of justice").

¹⁷ H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987).

¹⁸ In a skillful defense of originalism as a workable approach to constitutional interpretation, Professor Richard Kay has expressed the view that the Constitution leaves no question unanswered because the permissibility of any truly new and unanticipated practice can be resolved through a set of presumptions. In particular, because the national government is a government of limited powers, he posits that "[a]ny truly new thing done by the federal government is unauthorized and therefore

discipline, history can be helpful only to the extent that the conventional late-eighteenth century meaning of the relevant constitutional phrases resolves our current puzzles, or to the extent that those voting to propose and ratify the Constitution contemplated the specific questions we currently address to the Impeachment Clauses—and moreover—had achieved consensus as to the proper answers. From this perspective, the major implication of the relevant clauses for judicial susceptibility to political removals seems overwhelmingly clear: Impeachment is the only mechanism with which the elected branches are empowered to remove federal judges without relying on the courts themselves.¹⁹

B. *Historical Rejection of Removal Mechanisms Other Than Impeachment*

Prior to the Convention of 1787, Americans were familiar with three models of judicial accountability to political authority. These were systems by which judges could be removed (1) by the Executive at will,²⁰ (2) by the Executive upon “address” from the legislature,²¹

void.” Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 256 (1988). By contrast, the states do not owe their existence to the Constitution, which promises to leave to the states all powers not prohibited or reserved to the national government. See U.S. CONST. amend. X. Thus, “[a]ny truly *new* thing done by a state must be outside of those prohibitions, and must, therefore, be constitutional.” Kay, *supra*, at 256.

It may be that, because there is some broadly relevant (but not narrowly focused) historical material against which to assess the permissibility of all the disciplinary options discussed in this Article, none would qualify as a “truly *new* thing” within Professor Kay’s interpretive framework. *Id.* However, to the extent some options for judicial discipline may “fall outside the categories established by the constitution-makers,” *id.* at 255, Professor Kay’s interpretive axioms will not help in their resolution. That is, whether or not his interpretive premises can be used persuasively to adjudicate all unanticipated forms of government action directly affecting private parties, they do not directly help in interpreting separation of powers controversies within the national government. No doubt exists that the national government may discipline and remove its judges; that power is authorized. Professor Kay’s premises though do not help to address which branch is permitted to exercise the authorities of the national government, and in which form.

¹⁹ In rejecting as nonjusticiable an impeached judge’s procedural challenges to his Senate trial and conviction, the Supreme Court recently stated: “In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature.” *Nixon v. United States*, 113 S. Ct. 732, 738 (1993). It would be more accurate, or at least less controversial, to describe impeachment as the only check on the misconduct of individual judges. Other congressional powers regarding the structure, jurisdiction, and spending of the federal courts might be considered legitimate institutional checks on the judicial branch.

²⁰ Such, of course, was the English system prior to the Glorious Revolution, and

or (3) by legislative bodies through impeachment.²² The susceptibility of judges to at-will discharge by the Stuart Monarchs had been a major grievance among the English throughout the seventeenth century, except during the Commonwealth period.²³ The ability of the Crown to remove colonial judges at its pleasure was likewise a grievance of the colonists,²⁴ and was expressly deplored in the Declaration of Independence.²⁵ Because the abuses of royal prerogative concerning judges represented the primary backdrop against which the founders crafted a new system of judicial tenure, it is not surprising that the constitutional standard for judicial tenure during "good Behaviour" is identical to the standard embodied in the 1700 Act of Settlement.²⁶ The "good Behaviour" standard was adopted by that Act precisely to redress the precariousness of judicial tenure evident during the Stuart period.

The second political mechanism for judicial removal—legislative address to the Executive—was expressly contemplated and rejected during the Constitutional Convention. On August 27, Delaware's John Dickinson proposed that judges be removable by "the Executive on the application [of] the Senate and House of Representatives."²⁷ After brief debate, the motion failed by a vote of one in favor, three absent, and seven opposed. Gouverneur Morris, John Rutledge, and Edmund Randolph explicitly opposed the motion as inconsistent with the intended independence of the judiciary.²⁸

the situation of colonial judges in British North America. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 160 (1969); Frank J. Battisti, *An Independent Judiciary or an Evanescent Dream?*, 25 CASE W. RES. L. REV. 711, 712 n.2 (1975).

²¹ See Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1113 (1976) (describing attempt by the Pennsylvania Assembly in the 1700s to insist that colonial judges be displaced for misbehavior at the request of the Assembly); *id.* at 1153-55 (describing address under, *inter alia*, the Bill of Rights of the Massachusetts Constitution of 1780, the Delaware and Maryland Constitutions of 1776, and the South Carolina Constitution of 1778).

²² On the experience of the states prior to the drafting of the Constitution, see PETER C. HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 68-95 (1984).

²³ See Battisti, *supra* note 20, at 712 n.2 (discussing the removal of judges by the King for decisions that were "unfavorable to the Crown"); Smith, *supra* note 21, at 1105-10 (discussing the frequent removal of judges for political reasons).

²⁴ See WOOD, *supra* note 20, at 159-61.

²⁵ "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).

²⁶ See BERGER, *supra* note 4, at 150.

²⁷ THE RECORDS, *supra* note 10, at 428.

²⁸ See *id.* at 428-29.

This history is plainly significant because contemporary observers consistently interpreted the text as authorizing impeachment to be the sole political instrument for effecting judicial removals. In *The Federalist*, No. 79, Alexander Hamilton wrote:

The precautions for [judges'] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for misconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.²⁹

Hamilton thus characterizes the Constitution's failure to specify any method of judicial removal other than impeachment as a deliberate reflection of the drafters' intentions regarding judicial independence. He offers a cost-benefit analysis to justify the consequence that the text will leave the government virtually without remedy in cases of judicial "inability." In the worst cases, he implies discreetly, the inability of grossly disabled judges will suffice to keep them off the bench. In less extreme cases, distinguishing the able from the unable "would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good."³⁰

The New York Antifederalist essayist Brutus agreed that the "only causes [for which federal judges could] be displaced [would be] conviction of treason, bribery, and high crimes and misdemeanors."³¹

²⁹ THE FEDERALIST No. 79, *supra* note 10, at 474.

³⁰ *Id.*

³¹ *Essays of Brutus*, in THE ANTI-FEDERALIST 103, 163 (Herbert J. Storing ed., 1985). Brutus's essays appeared in the *New York Journal* over the same period during which

He identified impeachment as the sole constitutional avenue for the removal of federal judges.³² Naturally, Hamilton and Brutus agreed on these points, because they both sought to persuade their readers of the political independence of the judiciary. They differed only as to whether this independence was virtue (à la Hamilton) or vice (à la Brutus).

C. *Separation of Powers Theory and the Political Removal of Judges*

Not surprisingly, given the consistency of the historical data, regarding impeachment as the exclusive political means for judicial removal is consistent with both the pertinent constitutional text and other well-recognized aspects of the federal separation of powers. The logic of this interpretation is evident upon reflecting that impeachment and conviction entail, by design, a highly deliberative and cumbersome decision-making process. It seems implausible that the founders explicitly insisted on so painstaking a mechanism for disciplining judicial "Treason, Bribery, or other high Crimes and Misdemeanors," yet left it implicitly open to Congress or to the President to remove federal judges on identical or lesser grounds through unspecified, yet less cumbersome, devices.

This exclusivity view is also consistent with analogous Supreme Court interpretations of the separation of powers. The Court has found impeachment to be the sole mechanism through which Congress may participate in decisions to remove executive officers.³³ The Court concluded that any other direct congressional role in removing

that paper published many of Publius's papers constituting *The Federalist*. Notably, the actual authorship of Brutus's essays is a matter of historical dispute. See *id.* at 103. The description of judicial tenure cited here appears at the beginning of an essay arguing that the Constitution would give the federal judiciary extraordinarily broad and dangerous powers. See *id.* at 163. Brutus ultimately contended: "Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial." *Id.* at 186.

³² *Id.* at 185. Brutus's statement appears in support of his explanation why the national judiciary will enjoy extraordinary independence, and his argument that judges "placed in this situation will generally soon feel themselves independent of heaven itself." *Id.* at 183.

³³ See *Bowsher v. Synar*, 478 U.S. 714, 722-23 (1986) (finding that officers of the United States can be removed "only upon impeachment by the House of Representatives and conviction by the Senate"); *Myers v. United States*, 272 U.S. 52, 114-15, 170 (1926) (quoting with approval President Coolidge's statement that "[t]he dismissal of an officer of the Government . . . other than by impeachment, is exclusively an executive function").

executive officers would generate too active a legislative role in the supervision of administrators.³⁴ That would be the case even though the decisional powers vested in many of the executive officers who might be subjected to congressional removal involve matters of policy on which legislative influence is ordinarily regarded as legitimate.³⁵ Given that the legitimate purview of congressional politics is presumably narrower in adjudication than in executive administration, it is inconceivable that the Court would permit Congress to play a greater role in the dismissal of judges than it plays in the supervision of executive officers.

In the same vein, a judiciary vulnerable to removal at the Executive's will would have been antithetical even to the nascent ideal of judicial independence that the Revolutionary generation pursued:

Since the colonists had become convinced that dependence of the judges on executive caprice was "dangerous to liberty and property of the subject," their Revolutionary constitutions sought to isolate the judiciary from any future gubernatorial tampering³⁶

In fact, in over two hundred years, it does not appear that any commentator has seriously suggested either that unilateral executive removals of Article III judges are constitutionally permissible, or that permitting such removals would amount to a constitutional improvement.³⁷

³⁴ See *Bowsher*, 478 U.S. at 722-23 (concluding that such a role is not contemplated by the Constitution and is "inconsistent with separation of powers").

³⁵ Cf. *Sierra Club v. Costle*, 657 F.2d 298, 405-10 (D.C. Cir. 1981) (declining to invalidate EPA rulemaking on grounds of unrecorded ex parte contacts with White House aides and members of Congress).

³⁶ WOOD, *supra* note 20, at 160.

³⁷ My impression that no one has interpreted the 1787 constitutional text as permitting unilateral executive removals of Article III judges is supported chiefly by an extensive bibliography on judicial removals compiled for the National Commission on Judicial Discipline and Removal by the Federal Judicial Center. The sources cited there make no such suggestion. See FEDERAL JUDICIAL HISTORY OFFICE, FEDERAL JUDICIAL CTR., *THE HISTORY OF JUDICIAL DISCIPLINE AND REMOVAL IN AMERICA: A PRELIMINARY WORKING BIBLIOGRAPHY* (1992). Summarizing her detailed review of the various proposals introduced in Congress since 1789 for constitutional amendments or legislative reforms relating to judicial tenure, Elizabeth B. Bazan, a legislative attorney with the American Law Division of the Congressional Research Service, did not mention any proposal for unilateral presidential removals. The proposal coming closest would have permitted presidential removal upon address by both houses of Congress. See *Hearing Before the National Commission on Judicial Discipline and Removal*, 102nd Cong., 2d Sess. 236 (1992) (testimony of Elizabeth B. Bazan). Nor did anyone proffer such a suggestion for the consideration of the Commission itself. Telephone Interview with Bill Weller, Deputy Executive Director, National Commission on Judicial Discipline and Removal (July 23, 1993).

The President does enjoy statutory authority to remove adjudicators for cause from several of the so-called Article I courts. See 10 U.S.C. § 942(c) (Supp. IV 1992)

The permissibility of political removals through impeachment is, indeed, so compelling a constitutional conclusion that only one significant ambiguity truly exists with respect to the authority of the political branches, acting alone, to discipline federal judges: Does the exclusivity of impeachment as a political mechanism for removal prohibit other political disciplinary mechanisms short of removal? More specifically, does this exclusivity prevent the suspension of judges by joint resolution, upon executive initiative, or upon address by both houses of Congress to the President?

D. *Political Discipline and Judicial Independence*

Frequently it is suggested that all politically controlled disciplinary mechanisms short of impeachment are precluded by implication because any such mechanisms would undermine the value of judicial independence that the Judicial Tenure and Salary Protection Clauses are intended to protect. This independence, it is widely argued, has two components. The first, a separation of powers component, involves the judiciary's status as a co-equal branch, free from the domination of Congress or the Executive.³⁸ The second, a due process-related component, concerns the rights of litigants to impartial decision-making under the rule of law, free from extraneous interference.

The idea that Congress or the Executive could forego the impeachment process and adopt a less cumbersome disciplinary system—leading, for example, to the temporary suspension of individual

(Court of Military Appeals); 26 U.S.C. § 7443(f) (1988) (Tax Court); 38 U.S.C. § 7253(f) (Supp. IV 1992) (Court of Veterans Appeals). The constitutionality of even these provisions might conceivably be called into question by *Freytag v. Commissioner*, 111 S. Ct. 2631 (1991), which upheld appointments of special trial judges by the Chief Judge of the United States Tax Court on the ground that the Tax Court is a "Court of Law" in which Congress may vest the appointment of inferior officers. *Id.* at 2641, 2645. Justice Scalia's concurrence for four justices, however, arguing that "legislative courts" are most accurately deemed executive departments for constitutional purposes, *id.* at 2657-60, would clearly support the President's authority to remove adjudicators for misconduct.

³⁸ Raoul Berger argues this is the exclusive conception of judicial independence embodied in the Constitution, stating: "[A]ll the remarks in the several Conventions that bear on judicial independence, so far as I could find, referred to freedom from legislative and executive encroachments." BERGER, *supra* note 4, at 154. Even if this is so, however, the intended beneficiaries of this freedom from encroachment include not only the judges who remain free to govern themselves, but the parties who appear before them and are assured relatively neutral and impartial adjudication. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 322 (1989).

judges—would be fundamentally inconsistent with whatever degree of judicial freedom from extraneous influence that the Constitution envisions.³⁹ At the very least, it would be troubling in adjudication involving the federal government that the judges would be dependent on one of the litigants for their continued reputation and well-being.

Separation of powers theory, however, provides the more decisive argument for the flat impermissibility of political mechanisms for judicial discipline other than impeachment. The founders intended the federal separation of powers specifically to preclude any possibility of adjudication by Congress except in cases of impeachment:

One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures. The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the “tyranny of shifting majorities.” Jefferson observed that members of the General Assembly in his native Virginia had not been prevented from assuming judicial power, and “[t]hey have accordingly *in many instances decided rights* which should have been left to *judiciary controversy*.” The same concern also was evident in the reports of the Council of the Censors, a body that was charged with determining whether the Pennsylvania Legislature had complied with the State Constitution. The Council found that during this period “[t]he constitutional trial by jury had been violated; and powers assumed, which had not been delegated by the Constitution. . . . [C]ases belonging to the judiciary department, frequently [had been] drawn within legislative cognizance and determination.”

It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches. Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause, Art. I, § 9, cl. 3. . . . This Clause, and the separation-of-powers doctrine generally, reflect the Framers’ concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.⁴⁰

If adjudication by Congress is ordinarily impermissible as a general matter, adjudicating the conduct of judges (except through the

³⁹ On the exaggerated nature of the claim for maximum judicial independence at the lower court level, see *infra* notes 108-17 and accompanying text.

⁴⁰ *INS v. Chadha*, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring) (citations omitted); see WOOD, *supra* note 20, at 407-08.

specifically authorized mechanism of impeachment) would seem a fortiori unacceptable. It would inflict on judges a specific mode of usurpation actually discussed and recognized at the founding as a categorical transgression of the separation of powers. Further, because Congress's target would be a judge, there could be impermissible legislative interference with the judiciary's exercise of even those powers Congress had not directly usurped.

In a similar vein, the exercise of direct influence over the judiciary by the Executive, except through the expressly conferred power of appointment, would categorically violate the founders' expectations. Although it was chiefly the Confederation period that alerted the founders to the dangers of legislative influence over the judiciary,⁴¹ the dangers of executive domination were recognized and addressed even in the early Revolutionary constitutions.⁴² Until the mid-eighteenth century, what are now considered executive and judicial functions had usually been categorized together as "executive power." This was so even though the separation of the King from the personal exercise of judicial authority had become established British constitutional doctrine.⁴³ The separation of executive and judicial powers in the Revolutionary constitutions, and finally, in the United States Constitution, thus reflected the later thought of Montesquieu, who not only distinguished the three modes of power, but expressed in the most emphatic terms the importance of separating executive and judicial authorities: "Were [the judiciary power] joined to the executive power, the judge might behave with violence and oppression."⁴⁴ The obvious potential for subjugation of the judiciary that would result from placing disciplinary power over judges in the hands of the Executive alone would manifest an abuse about which the founders were self-consciously and explicitly concerned. Any proposal for such a disciplinary measure should therefore be regarded as a *per se* violation of the separation of powers.

⁴¹ See WOOD, *supra* note 20, at 161, 436, 452.

⁴² See *supra* notes 23-29 and accompanying text.

⁴³ See W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 101-02 (1965).

⁴⁴ 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 152 (Thomas Nugent trans., 1949).

II. WHAT THE FOUNDERS LEFT OPEN: JUDICIARY-DEPENDENT MECHANISMS FOR JUDICIAL DISCIPLINE

A number of commentators assert that the arguments demonstrating the exclusivity of impeachment as a political device for judicial discipline exclude any possibility of judicial discipline through judiciary-dependent devices such as prosecution or judicial self-regulation. Three factors supposedly mandate that conclusion: (1) the Constitution's failure to authorize expressly any disciplinary procedure other than removal, (2) the ideal of judicial independence embodied in Article III, and (3) the contemporary statements such as the above-quoted passages from *The Federalist* and the *Letters of Brutus* regarding the exclusivity of impeachment as a removal device.⁴⁵ If followed categorically, this analysis would leave the government no procedural avenue other than impeachment for disciplining sitting judges guilty of misconduct, and no disciplinary sanctions other than removal and disqualification for punishing such judges.⁴⁶

In response, however, other scholars have contended that originalist evidence actually supports the availability of criminal prosecution and judicial self-regulation as alternatives to impeachment.⁴⁷ These conclusions are often buttressed by the argument that forms of discipline that depend on the judiciary for their effectuation do not threaten the separation of powers.⁴⁸

⁴⁵ See, e.g., COMMITTEE ON FED. LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF N.Y., *THE REMOVAL OF FEDERAL JUDGES OTHER THAN BY IMPEACHMENT* 9-21 (1977) (attacking the proposed Judicial Tenure Act on constitutional grounds); MERRILL E. OTIS, *A PROPOSED TRIBUNAL: IS IT CONSTITUTIONAL?* 25-45 (1939) (arguing that the letter and intent of the Impeachment Clauses exclude methods by which authorities other than Congress may remove civil officers); Gerhardt, *supra* note 9, at 73-77 (attacking constitutionality of permitting the federal judiciary to investigate and discipline its own members under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1982).

⁴⁶ The Constitution unambiguously permits criminal process to be brought against public officials after impeachment and removal. See U.S. CONST. art. I, § 3, cl. 7. For a discussion of whether the government might initiate legal proceedings against corrupt judges prior to impeachment, see *infra* part II.A.

⁴⁷ See, e.g., BERGER, *supra* note 4, at 141-53, 173-80 (arguing that the First Congress provided for permanent disqualification for judges upon conviction for bribery); Gerhardt, *supra* note 9, at 77-82 (supporting pre-impeachment prosecutions of impeachable officials); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 891-98 (1930) (arguing for judicial self-discipline and removal power).

⁴⁸ See, e.g., BERGER, *supra* note 4, at 134-35, 174 (arguing that Congress's authorization for judicial self-regulation would not extend the power of the legislature over individual judges); Shartel, *supra* note 47, at 893-94 (arguing that the ideal of the separation of powers is consistent with judicial self-discipline).

Originalist evidence cannot resolve this debate in the same conclusive way it demonstrates the exclusivity of impeachment as a political mechanism of judicial discipline. The scant contemporary commentary on the prosecution of impeachable officials, for example, is ambiguous as to whether the founders intended to bar criminal prosecution prior to impeachment.⁴⁹ Judicial independence, moreover, though an important "original" ideal, must compete with the equally compelling "original" ideal of judicial integrity. In arguing in favor of judicial self-regulatory power, one can indicate that the writ of scire facias was available at common law as a judicial medium for removing judges or other court officers for misbehavior.⁵⁰ No one has unearthed any 1789 discussion of that writ, however, that would confirm the existence of a contemporaneous understanding of its inclusion within the "judicial power" conferred by Article III.⁵¹ Thus, although the Constitution may settle some relevant points on these issues, determining the permissibility of judiciary-dependent modes of judicial discipline must rely upon reasonable inferences.

⁴⁹ In at least two passages in *The Federalist*, Hamilton states that, following impeachment, an offender will be liable for criminal prosecution and punishment. His point is unclear, however, in that it may suggest that prosecution prior to impeachment would be improper, or instead, it may be meant merely to emphasize that impeachment and removal do not exhaust the available tools of accountability available for disciplining government officers who are guilty of misconduct. See THE FEDERALIST No. 65, at 398-99 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the Supreme Court would be an improper forum for impeachment because of judicial involvement in any subsequent criminal prosecution of the impeached official); *id.* No. 77, at 463-64 (cataloguing the "requisites to safety, in the republican sense," imposed to ensure presidential accountability to the people).

With respect to the beliefs of the early Congresses, it may be relevant that in 1795 the House chose not to impeach Judge George Turner based on the Attorney General's assurance that he could be prosecuted in the courts for his alleged misconduct. See Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1217 n.43 (1991).

⁵⁰ See BERGER, *supra* note 4, at 127-35 (providing examples from English history of using scire facias to remove judges); Shartel, *supra* note 47, at 882-83 (arguing that the availability of judicial proceedings for the forfeiture of office under the English Constitution circumvents the bar imposed by the doctrine of separation of powers to the extent that such proceedings apply to judges).

⁵¹ Such conversation is unlikely ever to be unearthed if, as Martha Andes Ziskind argues, scire facias was, by 1787, not a "precedent," but a "fossil." Ziskind, *supra* note 4, at 138.

A. *Pre-Impeachment Criminal Prosecution*

The Constitution does not indicate whether pre-impeachment criminal prosecutions are permissible. The textual argument against such prosecutions springs from the following provision:

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: *but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.*⁵²

The specific reference to the criminal liability of a "party convicted" could be read to imply that the "cases of impeachment" to which the prior clause refers must *precede* prosecution. On its face, of course, the provision would not be limited to judges, but would treat prosecutions of sitting judges and of sitting executive officials identically.

This interpretation of Article I, however, has odd operational implications. The acquittal of an impeached judge would preclude criminal prosecution even if the relevant facts would support a criminal conviction.⁵³ Even more strangely, judges would be immunized from prosecution altogether for any offense—no matter how serious—not deemed by the House to constitute "Treason, Bribery, or other high Crimes and Misdemeanors."⁵⁴

These results might be plausible if we were confident that the founders regarded the criminal law and impeachment as serving identical purposes. If that were so, then a congressional determination in a particular case not to impeach and convict an official would necessarily vindicate the same values or aims that the founders associated with the criminal law. The founders, however, did not regard impeachment and the criminal law as serving the same ends. They would not likely have wished to immunize from judicial process those officials whose prosecution would serve purposes of the criminal law, even if those officials were not liable to impeachment.

This conclusion is clearest if we begin with a comparison of the United States Constitution with the antecedent British law. Under British practice, criminal sanctions as well as removal were often a consequence of impeachment.⁵⁵ Article I, Section 3, Clause 7 notably

⁵² U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

⁵³ See Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 668 (1988) ("If a federal judge must be 'convicted' and thus removed before he or she can be prosecuted, a judge who has been impeached but who is not, for whatever reason, convicted cannot be prosecuted.").

⁵⁴ U.S. CONST. art. II, § 4.

⁵⁵ See BERGER, *supra* note 4, at 67 ("Although English impeachments did not

prohibits that practice by authorizing only removal and disqualification as consequences of impeachment.⁵⁶ The clear function of the first half of Clause 7 is to signal a departure from the British model. The second half of the clause indicates that the exclusion of criminal sanctions from the impeachment process *separates* impeachment from criminal law, without altogether rendering impeachable—or indeed, impeached—officials immune from criminal prosecution. This interpretation, under which Clause 7 indicates merely the limits of our Constitution's departure from English precedent, is more plausible than interpreting the Constitution to mean that sitting officials may not, under any circumstances, be criminally tried.

Hamilton implicitly confirmed the difference between the aims of criminal law and impeachment by writing:

[Impeachable offenses] proceed . . . from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.⁵⁷

The category of offenses that represent an "abuse or violation of some public trust" was thought to differ from those behaviors that represent criminal offenses;⁵⁸ that is, Congress might regard certain common crimes as lacking sufficient implications for an official's public performance to warrant impeachment. Moreover, as indicated by numerous historical precedents, impeachable abuses of the public trust need not amount to criminal offenses themselves.⁵⁹ The purpose of impeachment, therefore, must be understood as the vindication of the public trust. This purpose is distinct from, even when it coincides with,

require an indictable crime they were nonetheless criminal proceedings because conviction was punishable by death, imprisonment, or heavy fine.").

⁵⁶ See U.S. CONST., art. I, § 3, cl. 7.

⁵⁷ THE FEDERALIST No. 65, *supra* note 49, at 396; see also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 803, at 586 (1905) ("[I]mpeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors.").

⁵⁸ The Philadelphia debates are summarized in HOFFER & HULL, *supra* note 22, at 101-02. See also STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 22-25 (Comm. Print 1974) (concluding that grounds for impeachment should not be limited to crimes).

⁵⁹ The pre-Nixon precedents are reviewed in U.S. DEP'T OF JUSTICE OFFICE OF LEGAL COUNSEL, THE LAW OF IMPEACHMENT, APP. I: THE CONCEPT OF IMPEACHABLE OFFENSE 32-57 (1974).

those public purposes ordinarily associated with the criminal law: the punishment of offenders and the deterrence of crime.⁶⁰

Given the intentional distinction between the criminal and impeachment processes, the founders probably did not intend impeachment and conviction to be prerequisites to criminal prosecution. Indeed, limiting the grounds for impeachment to "Treason, Bribery, or other high Crimes and Misdemeanors" seems to indicate the drafters' expectation that the ordinary processes of criminal law would adequately address the commission of common crimes unrelated to the "public weal."⁶¹

Two oft-heard originalist arguments bearing on the permissibility of pre-impeachment criminal prosecutions of sitting judges are particularly weak. Some opponents of pre-impeachment criminal prosecutions argue that, if impeachment is the sole constitutional mechanism for "removal" of sitting judges, then sanctions tantamount to removal such as incarceration cannot be imposed.⁶² This argument, however, is a non sequitur. It assumes that the drafters understood "removal" in a functionalist sense. As Professor Stephen Burbank has observed, however, the specific conventional meaning in 1789 of the term "removal" was limited to the formal termination of one's tenure in office, and contemporary references strongly suggest that the founders did not functionally equate criminal liability with removal.⁶³ The Supreme Court, therefore, would probably not

⁶⁰ The House of Representatives relied on the distinction between the criminal and impeachment processes in concluding that the criminal acquittal of Judge Hastings on charges closely related to those made in his articles of impeachment did not impose any "double jeopardy" restriction on the House. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *THE FEDERAL ROLE IN LOCAL JAILS: FROM LAW ASSISTANCE TO LAW SUITS*, S. DOC. No. 4, 101st Cong., 1st Sess. 130, 134 (1989). The House position was upheld in *Hastings v. United States*, 802 F. Supp. 490, 500 (D.D.C. 1992), *vacated and remanded*, 1993 WL 81273, at *1 (D.C. Cir. Mar. 2, 1993), *dismissed*, 1993 WL 439810, at *2 (D.D.C. Oct. 21, 1993).

⁶¹ See HOFFER, *supra* note 22, at 101-02.

⁶² See Robert S. Catz, *Removal of Federal Judges By Imprisonment*, 18 RUTGERS L.J. 103, 116-18 (1986); see also Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1131-32 (1985) (arguing that congressional authorization of "de facto removal of Article III judges by their colleagues" by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 was unconstitutional).

⁶³ See Burbank, *supra* note 53, at 671-72 & n.130. In support of his argument, Professor Burbank cites the following: THE FEDERALIST No. 65, at 20 (Alexander Hamilton) (Edward G. Bourne ed., 1901); *id.* (No. 77) at 97; *id.* (No. 79) at 108-09; WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 207 (1825) ("[Courts of law] can neither remove nor disqualify the person convicted, and therefore the obnoxious officer might be continued in power and the injury

interpret the word functionally.⁶⁴

A similarly narrow originalist argument, but offered to sustain the permissibility of pre-impeachment prosecutions, rests on Chapter 9, Section 21 of the Act of April 30, 1790,⁶⁵ which provides that any judge convicted of bribery shall be disqualified from holding federal office of "honour, trust or profit."⁶⁶ Professor Michael Gerhardt, for example, has argued that the Act manifests the First Congress's understanding that a consequence ordinarily linked with impeachment—namely, disqualification from office—could be legitimately imposed through the criminal process, thus proving that impeachment is not "the sole means of removing federal judges."⁶⁷

This argument, though plausible, is inconclusive—the Act was never enforced.⁶⁸ Moreover, the statute is sufficiently ambiguous that, had it been enforced, it could easily have lent itself to a narrowing construction. Such a construction would have avoided constitutional doubts regarding the general removability of sitting judges by means other than impeachment. For example, had the Act been enforced, it might have been upheld on the very limited ground that, because bribery is constitutionally specified as an impeachable offense, Congress might categorically decide that bribery always justifies removal. This conclusion would have no bearing, however, on the permissibility of statutory removal for any other crime besides treason,

sustained by the nation be renewed or increased . . ."); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64-69 (Max Farrand rev. ed., 1966); *id.* at 208 ("A commission granted during good behavior can only be revoked by this mode of proceeding."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 782, at 251 (1833) ("In England, the judgment upon impeachments is not confined to mere removal from office; but extends to the whole punishment attached by law to the offence."); *id.* § 784 ("In the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as a part of its regular judgment. If it results at all, it results as a consequence, and not as a part of the sentence."); 1 THE WORKS OF JAMES WILSON 325-26 (Robert G. McCloskey ed., 1967).

⁶⁴ The Supreme Court has demonstrated a willingness to read constitutional powers provisions "literally," not functionally, when it is confident of their conventional meaning. See *INS v. Chadha*, 462 U.S. 919, 956-59 (1982). In the same vein, one court of appeals has held that a judge may be subjected to civil fines even though the government's imposition of a fine could be construed as the functional equivalent of an impermissible reduction of salary. See *Duplantier v. United States*, 606 F.2d 654, 669 (5th Cir. 1979) (holding that penalties on judges for failing to file financial disclosure statements do not violate Compensation Clause).

⁶⁵ 1 Stat. 112, 117 (1845).

⁶⁶ *Id.*

⁶⁷ Gerhardt, *supra* note 9, at 29.

⁶⁸ Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 118 n.43 (1970).

the one other ground for impeachment specifically mentioned in the Constitution.⁶⁹

A more generalized originalist argument against pre-impeachment prosecutions rests on the assertion that potential prosecution would

⁶⁹ Another narrowing construction might begin with the observation that "disqualification" and "removal" are different penalties; one logically need not entail the other. The Senate votes to disqualify by means of a vote that is separate from the vote to convict and remove. See PROCEDURE AND GUIDELINES, *supra* note 2, at 95.

Given this distinction, the Act might have been treated merely as authorizing the disqualification from office of a judge convicted of bribery in a *post-impeachment* criminal proceeding, even if the prior impeachment of that judge resulted only in removal, and not disqualification. Courts might ground such a narrowing construction on an imputed rationale that proof at trial of bribery beyond a reasonable doubt should always incur disqualification, even if impeachment and conviction subject to a lesser standard of proof had not. The Senate has never collectively decided to mandate a uniform standard of proof in impeachment proceedings. See Stanley N. Futterman, *The Rules of Impeachment*, 24 U. KAN. L. REV. 105, 136 (1975). The conventionally understood implication of this fact is that each individual senator remains free to judge the evidence under whatever standard, including a mere preponderance of the evidence, that the senator deems appropriate. See *id.* This understanding was confirmed by the Senate's express rejection, in 1986, of Judge Claiborne's motion to adopt a "beyond a reasonable doubt" standard of proof for his impeachment trial. See ON THE IMPEACHMENT OF ALCEE L. HASTINGS, S. RES. NO. 156, 101st Cong., 1st Sess. 5 (1989). For an argument that the Senate should adopt a uniform standard requiring "clear and convincing" evidence, see Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 719-20 (1988) (asserting that "clear and convincing evidence" is a "high" standard of proof used in important noncriminal cases). Thus limited, the Act would not be probative as to the permissible timing of criminal prosecution.

Lest my hypothetical narrowing constructions appear implausibly creative, compare *Burton v. United States*, 202 U.S. 344 (1906). *Burton* held that the disqualification penalty imposed by an anti-bribery statute covering any "Senator, Representative, or Delegate" and any "head of a Department, or other officer or clerk in the employ of the Government" did not remove a convicted senator from office:

[T]he declaration in section 1782, that any one convicted under its provisions shall be incapable of holding any office of honor, trust or profit "under the Government of the United States" refers only to officers created by or existing under the direct authority of the National Government as organized under the Constitution, and not to offices the appointments to which are made by the States, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a branch of the Legislative Department, owes its existence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by state legislatures, and cannot properly be said to hold their places "under the Government of the United States."

Id. at 359, 369-70. Even prior to the 17th Amendment, this was fairly tortured reasoning. For a more extensive treatment of the issues raised by the Act of April 30, 1790 and by *Burton*, see ELIZABETH B. BAZAN, CONGRESSIONAL RESEARCH SERV., DISQUALIFICATION OF FEDERAL JUDGES CONVICTED OF BRIBERY—AN EXAMINATION OF THE ACT OF APRIL 30, 1790 AND RELATED ISSUES (1992).

subject sitting judges to a level of intimidation that violates judicial independence. The rigors and expense of a criminal investigation are allegedly so great as to offer the Executive real leverage over judges, even if those judges are exonerated.⁷⁰

This argument is far from frivolous because there is no doubt that the vulnerability of sitting judges to criminal prosecution does potentially compromise the ideal of judicial independence—notably, that aspect of independence that depends on freedom from subjugation to either of the political branches. The Executive's capacity to pressure judges through criminal investigations is obvious; history demonstrates the potential abuse of prosecutorial power to retaliate against individuals whom the Executive finds hostile to its policies.⁷¹ Given ordinary human psychology, it presumably requires significant institutional self-discipline to resist the temptation to investigate judges who frustrate the Executive through their solicitude for criminal defendants' rights.

Arguing from the independence ideal is not conclusive, however, because judicial independence is not the only constitutional value relevant to judicial performance. If it is fair in argument to move from precise textual details regarding judicial tenure to the founders' more general allegiance to judicial independence, then it is equally legitimate to move beyond those details to stress a competing ideal—namely the founders' desire for judicial integrity. Each federal court that was recently asked to consider the amenability of sitting judges to pre-impeachment criminal prosecution has found such prosecution permissible. In each case, the court deemed the inappropriateness of placing sitting judges "above the law" to be the paramount relevant value.⁷² It would seem impossible to prove empirically that these

⁷⁰ See *supra* note 62.

⁷¹ See generally NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990* (1992) (focusing on the activities of Attorney Generals Palmer, Daugherty, and Mitchell); JOHN T. ELLIFF, *CRIME, DISSENT AND THE ATTORNEY GENERAL: THE JUSTICE DEPARTMENT IN THE 1960's* (1971) (examining the Justice Department's actions with respect to 1960s movements such as Black militancy and antiwar dissent); EDWIN P. HOYT, *THE PALMER RAIDS, 1919-1920: AN ATTEMPT TO SUPPRESS DISSENT* (1969) (chronicling the anticommunist "Palmer Raids" of the early twentieth century).

⁷² See *United States v. Claiborne*, 727 F.2d 842, 847-48 (9th Cir.) (holding that Article III protections should not be expanded to insulate federal judges from their criminal wrongdoing), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706, 710-11 (11th Cir. 1982) (stating that a judge is subject to the processes of the criminal law), *cert. denied*, 459 U.S. 1203 (1983); see also *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.) (stating that the tenure provision in Article III is not a license to commit crime), *cert. denied*, 417 U.S. 476 (1974); cf. *United States v.*

courts are wrong—that judicial vulnerability to criminal prosecution prior to impeachment necessarily does more to compromise judicial independence than immunity would do to undermine legal accountability.⁷³

Also noteworthy is that Congress has the power to mitigate the separation of powers risk posed by the criminal prosecution of judges. Congress may design a procedure under which prosecutorial decision-making regarding sitting judges is vested largely in judicially appointed special prosecutors beyond the policy control of the President. The Supreme Court has already upheld the judicial appointment of

Collins, 972 F.2d 1385, 1395-96 (5th Cir. 1992) (rejecting a separation of powers argument for a higher standard of reasonable suspicion as a prerequisite to targeting judges for federal criminal investigations), *cert. denied*, 113 S. Ct. 1812 (1993).

At a December 18, 1992 "Constitutional Roundtable," sponsored by the National Commission on Judicial Discipline and Removal to discuss an earlier draft of this Article, Professor Amar offered an alternative route to the argument made above. Professor Amar interprets the Constitution as implying "that generally all federal officials are subject to the general criminal laws passed by Congress." Akhil R. Amar, *On Judicial Impeachment and Its Alternatives—Remarks Prepared For the National Commission on Judicial Discipline and Removal 3* (Dec. 18, 1992) (unpublished manuscript, on file with author). He argues that because all federal officials could thus be made subject to a federal statute imposing capital punishment for certain federal crimes, such as murder in the District of Columbia, removal from office should be regarded as simply one of the wide range of lesser penalties embraced by Congress's near-plenary power to prescribe sanctions for federal offenses. *See id.* at 1, 5. By vesting the pardoning power in the President, Amar argues, the Constitution implies his sole exemption from this liability: "How could the [sitting] President be prosecuted criminally if he retains the power to pardon himself?" *Id.* at 3-4 & n.4.

I am not entirely comfortable with this analysis for three reasons. First, it is not as clear to me, as it is to Professor Amar, that the President could legally pardon himself. The possible implication of the remainder of Professor Amar's reasoning, that the President could be removed and disqualified by criminal prosecution alone, appears to me to be a strong argument against that reasoning. Second, as Professor Dellinger pointed out during the Commission hearing, even if the President is exempt, the Vice-President would not be. This is also a highly surprising conclusion. Third, even if one concludes, as I do, that the value of applying the rule of law to judges outweighs the value of judicial independence in this context, I believe the best method for reaching this conclusion, and for interpreting the Constitution generally on questions of judicial discipline, is one that at least attends to the competing values explicitly, even if the result is a form of "balancing" that is admittedly contestable.

⁷³ For the same reasons, there seems to be no doubt about the vulnerability of sitting federal judges to civil penalties for misconduct. *See Duplantier v. United States*, 606 F.2d 654, 667-68 (5th Cir. 1979) (upholding provisions pertaining to judges in Ethics in Government Act of 1978, including civil penalties for failing to file required financial disclosure statements).

For an even more detailed review of relevant cases that reached the conclusion that sitting judges are constitutionally susceptible to criminal prosecution, see Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Judges* 41-89 (Mar. 19, 1993) (unpublished manuscript, on file with author).

independent counsel against a separation of powers attack in *Morrison v. Olson*.⁷⁴ Specifically, the Court rejected contentions that depriving the President of plenary policy control over the decision-making of certain criminal prosecutors disabled him from discharging his constitutional functions.⁷⁵ Permitting the judiciary to select prosecutors in cases involving judges and removing those prosecutors from routine policy oversight by the Executive could significantly reduce any risk of subjugating the judiciary to executive domination.

B. Judicial Self-Regulation

Besides criminal prosecution, the most obvious alternatives to political mechanisms of judicial discipline involve judicial self-regulation. Congress adopted this approach in enacting the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.⁷⁶ Under that act, any person alleging that a federal judge other than a Supreme Court justice "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a complaint with the clerk of the court of appeals for the relevant circuit.⁷⁷ The clerk then forwards any such complaint ordinarily to the chief judge of the circuit, as well as to the target of the complaint.⁷⁸ The chief judge has discretion, on various grounds, to dismiss the complaint or to convene a committee of judges to investigate its allegations.⁷⁹ That committee is required, in turn, to

⁷⁴ 487 U.S. 654 (1988).

⁷⁵ See *id.* at 695-96. *Morrison* has generated enormous commentary, indicating disagreement not only about the Court's results, but about what the Court actually decided as well. Professor Gerhardt, for example, has explained the holding in *Morrison* as reflecting a balancing test to determine whether the Ethics in Government Act usurped executive power. See Gerhardt, *supra* note 9, at 56. I, however, have suggested that the holding is best understood as a categorical determination that the "executive power" conferred by Article III does not necessarily include policy control over criminal prosecution. See Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 598-608 (1989); see also William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484-94 (1989) (suggesting *Morrison* held that criminal prosecutions are not a solely executive function); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990) (same).

⁷⁶ Pub. L. No. 96-458, § 3, 94 Stat. 2035, 2036-40 (1980 (current version at 28 U.S.C. § 372 (1988 & Supp. IV 1992))).

⁷⁷ § 372(c)(1) (1988).

⁷⁸ See *id.* § 372(c)(2). Complaints against the chief judge go to the circuit judge in regular service next senior to the chief judge in date of commission. See *id.*

⁷⁹ See *id.* § 372(c)(3)(A), (4)(A).

file a report with the judicial council of the circuit.⁸⁰ Upon consideration, the council may investigate further; exercise any of a number of disciplinary powers, including the direction that, "on a temporary basis for a time certain," no cases be assigned to a judge; or censure a judge, privately or publicly.⁸¹ The Council's alternatives include referring a complaint to the Judicial Conference of the United States.⁸² If a council concludes that a judge serving during good behavior may have engaged in conduct potentially entailing impeachment, it must certify its determination to the Judicial Conference.⁸³ No judicial council, however, may remove a judge appointed to hold office during good behavior.⁸⁴

The Judicial Conference, upon receiving a complaint from a judicial council, may exercise any of the same powers vested in the council to dispose of a complaint.⁸⁵ If it determines that impeachment may be warranted, the Conference must transmit its determination and a record of the proceedings to the House of Representatives.⁸⁶ The Conference is further empowered to make such a finding, without formal complaint or certification, if a judge or magistrate has been convicted of a felony and no procedural prospect remains for overturning the conviction.⁸⁷

Such legislation raises several major questions. First, may Congress authorize Article III judges to discipline other Article III judges? Second, may such discipline extend to the Supreme Court? And third, would removal be a permissible consequence of any such discipline?

As noted above, a number of scholars have sought to deploy specifically focused "textualist" and "originalist" arguments to resolve these issues. Arguments in opposition to judicial self-regulation state that the Constitution nowhere expressly authorizes it,⁸⁸ and, in favor, that the Constitution nowhere expressly forbids it.⁸⁹ In favor of judicial self-regulation it is argued that the standard for judicial tenure ("during good Behaviour") is distinct from and facially broader than the description of conduct that may entail impeachment;⁹⁰ opponents

⁸⁰ See *id.* § 372(c)(5).

⁸¹ *Id.* § 372(c)(6).

⁸² See *id.* § 372(c)(7)(A).

⁸³ See *id.* § 372(c)(7)(B).

⁸⁴ See *id.* § 372(c)(6)(B)(vii)(I).

⁸⁵ See *id.* § 372(c)(8).

⁸⁶ See *id.*

⁸⁷ See *id.* § 372(c)(8)(B).

⁸⁸ See OTIS, *supra* note 45, at 24-26.

⁸⁹ See BERGER, *supra* note 4, at 136-37.

⁹⁰ See *id.* at 137-41, 177-80.

insist that the Article III standard is but a term of art signifying life tenure, terminable only through impeachment.⁹¹ A similar contest is posed by statements of various contemporaries of the founders indicating that impeachment is the sole means of effectuating judicial removal.⁹² The response is that the founders were referring only to political mechanisms of discipline when they discussed the exclusivity of impeachment.⁹³ In any event, the exclusivity of impeachment for removal purposes would not logically foreclose other disciplinary sanctions short of removal, which might be effectuated through other means.

If the durability of these competing and neatly opposed arguments testifies to the futility of adjudicating persuasively between them, the situation is not much advanced by considering historical practice known to the founders regarding judicial self-discipline. Burke Shartel and Raoul Berger have both argued that the Constitution did not bar judicial removal of judges through the common law writ of *scire facias*. As explained by Shartel:

[T]he English Constitution knew certain *judicial* proceedings for the forfeiture of office. Judges and other officers, holding "during good behavior" by patent from the King, were removable on *scire facias* in the King's Bench. . . . The causes of forfeiture were . . . misconduct and neglect of duty; and the judgment of ouster, essential to complete the forfeiture, was not different in substance and effect from a judgment of removal.⁹⁴

As argued by Shartel and Berger,⁹⁵ the failure of the Constitution to bar such judicial proceedings and their facial consistency with separation of powers theory support a conclusion that the founders did not intend to bar recourse to judicial self-disciplinary proceedings.

In her 1969 study, however, Martha Andes Ziskind found the *scire facias* history unpersuasive.⁹⁶ First, the specific removals cited by Shartel involved English court officials, but not judges.⁹⁷ Second, there is no evidence that *scire facias* was within the framers' contempla-

⁹¹ See Robert Kramer & Jerome A. Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour,"* 35 GEO. WASH. L. REV. 455, 459-60 (1967).

⁹² See *supra* text accompanying notes 29-32.

⁹³ See BERGER, *supra* note 4, at 152-53.

⁹⁴ Shartel, *supra* note 47, at 882-83 (footnotes omitted).

⁹⁵ See BERGER, *supra* note 4, at 127-35; Shartel, *supra* note 47, at 883.

⁹⁶ See Ziskind, *supra* note 4, at 137-38.

⁹⁷ See *id.* at 138.

tion: no state constitution had expressly authorized the writ.⁹⁸ Third, no mention of the writ appears in notes of the Philadelphia Convention.⁹⁹ And finally, Blackstone, the source of English law best known to Americans, did not even mention *scire facias* as a mechanism for judicial removal.¹⁰⁰

In response, Berger offers plausible explanations why state constitutions would not mention *scire facias* and why the framers would not have discussed it.¹⁰¹ But these explanations do not themselves constitute affirmative evidence of original intent. Indeed, Berger does not contend that his reasoning amounts to evidence that the founders consciously resolved to authorize judicial self-regulation concerning misconduct. His test for the "intention of the Framers" is whether the framers would likely have rejected *scire facias* had they thought about it.¹⁰² And, on this question, Berger relies less on the founders' supposed acquaintance with *scire facias* than on arguments for reading "good Behaviour" as a broader standard for discipline than "Treason, Bribery, or high Crimes or Misdemeanors."¹⁰³ This strategy only confirms the larger impression formed by reading Shartel, Ziskind, and Berger together, namely, that *scire facias* offers the thinnest of reeds on which to build any interpretation of the founders' intent. On this point, it makes sense to look beyond narrowly focused snippets of impeachment-related history and debate in order to form a sensible reading of the Constitution as a whole.

The argument most strenuously deployed against judicial self-regulation concerns the conflict judicial self-regulation portends with the value of judicial independence embodied in Article III.¹⁰⁴ Even

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ BERGER, *supra* note 4, at 141-47 (stating that *scire facias* was unnecessary because judicial appointments were terminable at the King's will).

¹⁰² Although he describes his search as one for "the intention of the Framers," *id.* at 141, Berger later states that the proper test of constitutional interpretation "is that of Chief Justice Marshall, who required a showing that had 'this particular case' been suggested—for present purposes, removal by *scire facias* to effectuate 'good behavior'—the Framers would have rejected it." *Id.* at 146.

¹⁰³ See *id.* at 125-26, 147-53.

¹⁰⁴ See *Chandler v. Judicial Council*, 398 U.S. 74, 136-41 (1970) (Douglas, J., dissenting) (suggesting that judicial self-regulation was employed by judges in an effort to achieve their brand of uniformity); *id.* at 141-43 (Black, J., dissenting) (arguing that judicial self-regulation had been used by judges to harass); *Hastings v. Judicial Conference*, 770 F.2d 1093, 1107 (D.C. Cir. 1985) (Edwards, J., concurring) (suggesting that judicial self-regulation might be used to pressure or intimidate a "non-conformist" judge), *cert. denied*, 477 U.S. 904 (1986); Battisti, *supra* note 20, at

if self-regulation fails to pose the interbranch conflicts that doom political mechanisms for discipline other than impeachment, the prospect of judges overseeing one another outside of the ordinary processes of appellate review arguably poses the identical risk of compromising an individual judge's impartiality and open-mindedness.¹⁰⁵

The argument for maximum judicial independence is fairly compelling at the Supreme Court level. It is the one federal court that the Constitution explicitly mandates, and its core responsibilities—assuring the states' compliance with the federal law and checking the exercise of power by the elected federal branches—require the utmost steadfastness and institutional self-confidence. Giving lower court judges disciplinary power over the justices would be facially inconsistent with the Supreme Court's role,¹⁰⁶ while permitting Supreme Court justices to discipline one another could so easily destabilize the Court as to pose an intolerable risk to the Court's legitimacy.¹⁰⁷

The argument is far less compelling, however, at the lower court level. The problem is not that judicial independence becomes insignificant at the lower court level, but that the founders clearly did not protect that value to the same extent for trial and intermediate appellate judges as they did for Supreme Court justices. Instead of directly providing for lower courts, the Constitution authorizes

723-24 (arguing that judicial self-regulation interferes with the independent decision-making of individual judges); Gerhardt, *supra* note 9, at 76-77 (suggesting that empowering judges to initiate complaints allows them to intimidate and harass other judges); Baker, *supra* note 62, at 1142-43 (illustrating the potential for judicial self-regulation to be used by litigants to harass a "judicial maverick").

¹⁰⁵ See *Chandler*, 398 U.S. at 137 (Douglas, J., dissenting); *Hastings*, 770 F.2d at 1107 (Edwards, J., concurring).

¹⁰⁶ The Supreme Court has employed a standard of constitutional "incongruity" to measure whether the vesting of a particular function in a specific organ of government might be impermissible, even if not explicitly barred by the Constitution. See *Morrison v. Olson*, 487 U.S. 654, 675-77 (1988) (vesting the power in courts to appoint special prosecutors not "incongruous"); *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880) (requiring courts to appoint supervisors of election is within the power of Congress). Although the incongruity standard is vague, it would seem to condemn the notion that judges whose work is routinely reviewed by the Supreme Court might be authorized to discipline the justices reviewing them. The drafters of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 regarded such a system as not merely incongruous, but dangerous. See H.R. REP. NO. 1313, 96th Cong., 2d Sess. 10 n.28 (1980).

¹⁰⁷ Although the Court's divisions are less explicitly partisan than might have been noted in an earlier day, the much-noted vitriol evident in several justices' recent opinions sound a warning note of the risks that could attend permitting the justices to discipline one another.

Congress to establish "inferior Tribunals."¹⁰⁸ It is well established that the discretion thus conferred authorizes Congress to determine which, if any, lower federal courts are necessary, and what their jurisdiction should be.¹⁰⁹ More to the point, the Constitution authorizes Congress to leave federal law substantially to state courts at the lower court level.¹¹⁰ The adoption of this plan represented an explicit rejection of the uncompromising program for federal judicial independence advanced by the Federalists, including the mandatory creation of inferior Article III courts.¹¹¹ This casts doubt on the reliability of the leading Federalists' subsequent claims concerning the degree of independence that was actually guaranteed by the plan they disfavored, but which nonetheless was adopted.

The constitutional plan for lower courts makes manifest that the Constitution did not assure lower court litigants that their claims would be initially resolved by judges whose independence was protected against the influence of potential discipline by means other than impeachment. In 1789, relegating federal claims to state courts meant that, in some states, federal litigants were subject to judges elected or appointed for terms,¹¹² to judges removable by address from the legislature,¹¹³ and to judges removable through state judicial proceedings.¹¹⁴ The Supreme Court has never suggested that the Constitution guarantees federal litigants lower court judges so independent that the states are bound to provide the equivalent of Article III protections to state judges authorized to determine federal claims. For potential federal claimants in 1789—as for the host of litigants in modern administrative agencies—the only constitutionally

¹⁰⁸ U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

¹⁰⁹ See Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-33 (1982); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46-47 (1975). But see Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501-04 (1974).

¹¹⁰ See U.S. CONST. art. III, § 2, cl. 1-2.

¹¹¹ See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 854 (1984).

¹¹² Judges had definite terms of appointment in New Jersey (supreme court: seven years; lower courts: five years), Pennsylvania (seven years) and Georgia (three years), and were elected annually under the 1786 Vermont Constitution. See Ziskind, *supra* note 4, at 138-47.

¹¹³ Removal upon address by the legislature was prescribed by early Constitutions of Delaware, Maryland, South Carolina, New Hampshire, and Massachusetts. See *id.*

¹¹⁴ Judges could be removed through criminal conviction in Maryland and North Carolina. See *id.* at 141-42.

assured recourse to maximally independent judges existed at the Supreme Court level.

This judicial structure belies any narrow argument suggesting that there was a specific original intent to vest maximum individual independence in all lower court judges, even at the cost of all competing institutional values. A sounder position is that Congress may vest judicial self-regulatory powers in the federal courts, at least to the extent that the independence of lower federal judges is not compromised to a greater extent than was the independence of state judges in 1789. Congress is entitled to authorize judicial self-regulation within the bounds of the general balancing test elaborated by the Supreme Court for those separation of powers controversies the Court cannot resolve on more categorical historical or textual grounds.¹¹⁵ Under this doctrine, formulated in an analogous context in *Nixon v. Administrator of General Services*,¹¹⁶ Congress may authorize a system of judicial self-regulation if it does not threaten to undermine the courts' ability to discharge their constitutional functions, or if any risk posed to judicial power is outweighed by the appropriateness of congressional action to safeguard some interest within Congress's constitutional power to protect. Indeed, Congress's regulatory power in this area simply parallels its acknowledged regulatory powers regarding judicial structure, jurisdiction, administration, and procedure.¹¹⁷

¹¹⁵ See *United States v. Nixon*, 418 U.S. 683, 705-07 (1974) (upholding Congress's power to arrange for the executive branch's management of presidential documents through the Presidential Recordings and Materials Preservation Act).

¹¹⁶ 433 U.S. 425, 443 (1977).

¹¹⁷ See JOHNNY H. KILLIAN, CONGRESSIONAL RESEARCH SERV., CONSTITUTIONAL ISSUES RAISED BY THE PROPOSED JUDICIAL CONDUCT AND DISABILITY ACT OF 1979 (1979), reprinted in *Judicial Tenure and Discipline-1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 697, 705-08 (1980). On the history of congressional regulation of federal court administration, see PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 228-68 (1973); Michael J. Remington, *Circuit Council Reform: A Boat Hook for Judges and Court Administrators*, 1981 B.Y.U. L. REV. 695, 707-12.

This Article has not considered the scope of self-regulatory power that might be deemed vested directly in the federal courts by Article III's grant of "judicial power." Although Article III could be read as conferring some degree of self-regulatory power, just as it could be read to confer some degree of inherent jurisdiction, the federal courts now chiefly proceed as if their structure and authority were dependent on legislative authorization or, at least, subject to legislative regulation. Congress's enactment and judicial implementation of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 strongly suggests that Congress and the courts will proceed under a legislative authorization model in designing any future systems

The argument for the permissibility of judicial self-regulation still faces the difficult question whether such a system could permit removal as a sanction. The move from narrow originalism to a type of functionalism in assessing judicial self-regulation was justified above, in part, on the ground that the founders' discussions on the exclusivity of impeachment did not occur in the context of any conscious consideration of judicial self-regulation. The founders did, however, give conscious consideration to the seriousness of removal as a disciplinary mechanism for Article III judges. The Supreme Court might well regard the constitutionally explicit singling out of removal and disqualification as consequences of impeachment as setting categorical limits to those sanctions that might be imposed through other means.¹¹⁸ Because doubts on this point are more serious than doubts whether judicial self-discipline per se is permissible, Congress's wisdom in excluding judicial removals of Article III judges from the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is clear.¹¹⁹

It remains advisable, however, to avoid a narrow originalist determination of the general permissibility of judiciary-dependent disciplinary mechanisms short of removal, especially if one considers the profoundly different circumstances facing the federal judiciary in 1789 and 1993. Had the founders thought about judicial self-regulation in 1789, they might have thought the following: With so few federal judges scattered over so wide a territory, a system of mutual self-policing would be not only unwise, but impracticable. In contrast, it would have been easy for Congress to inform itself as to the performance of the entire federal judiciary, and to police serious instances of misconduct effectively.

Today, the federal judiciary comprises not nineteen judges, but 820.¹²⁰ As the range of critical business competing for Congress's

of judicial self-regulation as well.

¹¹⁸ If, as Professor Gerhardt contends, the Act of 1790, authorizing automatic *disqualification* from office for any federal judge convicted of bribery, implicitly establishes the permissibility of *removing* judges through criminal prosecution, then the argument that removal is a *sui generis* sanction that may be imposed solely through impeachment would be weaker. See Gerhardt, *supra* note 9, at 81. This author's doubts that the Act of 1790 can persuasively bear that much interpretive weight are noted above. See *supra* text accompanying notes 68-69. Moreover, if Professor Amar is correct in suggesting that removal through criminal processes is permissible because of considerations unique to criminal law, then the Act of 1790—even under the Gerhardt interpretation—would not necessarily be probative as to the permissibility of removal through civil processes. See *supra* note 72.

¹¹⁹ See H.R. REP. NO. 1313, 96th Cong., 2d Sess. 16-19 (1980).

¹²⁰ Compare Judiciary Act of 1789, 1 Stat. 73, 73 (1789) (authorizing six seats on

attention has grown greatly, the significance of the federal judiciary in the life of the American polity has expanded beyond anything the most prescient founder could have foreseen. Given the increased public demands for official accountability, the greater judicial capacity—and reduced legislative capacity—to perform a policing function, and the increased complexity of quality control in a vastly larger judiciary, subjected to a much broader range of ethical constraints, proposals for judicial self-regulation surely enjoy an immediacy today that they would not have possessed in 1789. To bar Congress from considering the appeal of such mechanisms in 1993, due to speculation that the founders might have rejected *scire facias* judicial removals in 1789, would be perverse. The Constitution, Chief Justice Marshall said, should be regarded as a document “intended to endure for ages to come.”¹²¹ Congressional discretion to improve the regulation of the federal judiciary is consistent with that principle.

So long as Supreme Court justices remain outside the purview of the congressionally authorized system of judicial self-discipline, no successful separation of powers challenge to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is likely. That Act does not entail the supervision of the courts by either elected branch of government. Both the substantive judgments authorized by the Act, and the procedures for its enforcement, are to be implemented by the judiciary.¹²² Although the Act creates a risk that particular chief judges and judicial councils might impermissibly use their disciplinary powers to chill the decisional independence of individual judges, the traditions and training of the federal judiciary, as well as the institutional caution invariably exhibited in all systems of self-regulation, suggest that the risk is not great. Congress’s judgment is certainly rational that so speculative a hazard is outweighed by the contribution such a system can make to public confidence in the judiciary.¹²³

the Supreme Court and 13 district judgeships) with 28 U.S.C. §§ 1 (1988) (nine seats on Supreme Court), 44(a) (Supp. IV 1992) (authorizing 179 court of appeals judgeships) and 133(a) (Supp. IV 1992) (632 district court judgeships).

¹²¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

¹²² See 28 U.S.C. § 332(d) (1988 & Supp. IV 1992).

¹²³ Again reflecting his distaste for constitutional arguments that explicitly rely on a balancing of competing institutional costs and benefits, Professor Amar has suggested an alternative, and seemingly more categorical, analysis by which to reach the same conclusions proffered above. The conclusions are: (1) judicial self-regulation at lower court levels is constitutionally permissible; (2) judicial self-regulation at the Supreme Court level is impermissible; and (3) no system of judicial self-regulation may employ removal as a sanction. In short, his argument is that the

CONCLUSION

The arguments asserting that impeachment is the sole constitutionally authorized mechanism for judicial discipline are not frivolous. The constitutional text could be so interpreted. Other writings from the founders exist which, read for all they are worth, could point to that conclusion. This originalist evidence, considered in combination with other aspects of the separation of powers, indicates that impeachment is the only permissible political mechanism of judicial discipline. Neither Congress nor the President, unilaterally or in tandem, has any other recourse to remove or discipline federal judges.

These arguments, however, are not persuasive regarding judiciary-dependent mechanisms of judicial discipline. The evidence that all federal judges are amenable to criminal prosecution at any time suggests at least one disciplinary alternative to impeachment. Moreover, the most sensible reading of the Constitution would not preclude a system of judicial self-regulation which employs sanctions short of removal for judges below the Supreme Court level. There is no evidence that the Impeachment Clauses were crafted to eliminate any known abuse of judicial self-regulatory powers. Nor does judicial

regulation of judicial conduct at lower court levels is part and parcel of the ordinary powers of appellate control of lower court behavior—powers normally exercised, for example, through writs of mandamus or prohibition. Disciplinary review of Supreme Court justices and disciplinary removals at any level are impermissible because they cannot be reconciled with the ordinary structure and operation of appellate review. See Amar, *supra* note 72, at 6-9.

Despite the elegance of this approach, I prefer my own analysis for several reasons. First, I am unpersuaded by Professor Amar's characterization of judicial discipline pursuant to such schemes as the 1980 Act as essentially administrative, and thus properly conceptualized as akin to mandamus review. The point of such discipline is not merely to assure the proper resolution of particular legal disputes, but to chasten judges and to deter misconduct—tasks not normally associated with appellate review. Furthermore, if disciplinary measures under the 1980 Act are merely "administrative," it is unclear why removal could not be viewed equally as administrative. The founders' decision to divorce impeachment and removal from the criminal law system reflects a conceptualization of removal as a remedy to protect the proper functioning of government, rather than as a form of dishonor or punishment. See *supra* notes 52-64 and accompanying text. In the broadest sense, removals are thus administrative.

Finally, I think Professor Amar's constitutional interpretation, while eschewing balancing tests at a superficial level, actually disguises the balancing judgment that underlies his analysis. His arguments that discipline is "like" mandamus, but that removal is not "like" normal administration, depend on tacit judgments whether the assimilation of particular practices to the operation of the judiciary would be consistent with the way the judiciary should operate or, rather, subversive of constitutional values. These judgments entail precisely the sorts of intangible considerations that my balancing approach makes explicit.

self-regulation pose dangers of overstepping by the other branches. The risks posed to the decisional independence of individual judges are not so blatant as to invalidate self-regulation; Congress could reasonably accord more weight to the potential boost in public confidence in the judiciary. Additionally, should any congressionally enacted rule or procedure disrupt the judicial function to a degree that cannot be justified by an overbalancing public interest within Congress's power to protect, or should such a rule or procedure transgress any constitutional rights that judges enjoy in common with all persons,¹²⁴ then the judiciary may invalidate that rule or procedure. For this reason, permitting Congress to authorize judicial disciplinary procedures would not pose a significant threat to judicial independence or the separation of powers.

¹²⁴ Because the range of hypothetical rules that Congress might impose is infinite, I have not tried to enumerate all the ways in which particular disciplinary rules might be subjected to constitutional challenge. Likely challenges, however, would probably fall into two categories. First, certain rules might be challenged as unjustifiable infringements of universally enjoyed civil rights and liberties. For example, however pressing the importance of judicial impartiality, Congress presumably could not sustain on that basis a disciplinary rule that barred judges from voting in partisan candidate elections. Second, certain rules might be challenged—on their face or as applied—because of their undue interference with judicial independence and impartiality. For example, it would seem constitutionally dubious to discipline trial judges for high rates of reversal on appeal.