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Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits

JUDGE J. CLIFFORD WALLACE *

INTRODUCTION

On March 7, 1975, Senator Nunn of Georgia introduced Senate Bill No. 1110 to the 94th Congress. S. 1110 proposes

a procedure in addition to impeachment for the retirement of disabled Justices and judges of the United States, and the removal of Justices and judges of the United States whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution . . . 1

The Nunn bill is the latest in a series of proposals for legislative creation of a mechanism for removal and discipline of problem judges by the judiciary itself. 2 These proposals and two fairly recent cases involving the extent of the judiciary's power to govern itself 3 have generated substantial interest—and written material—within the legal community and, to a lesser extent, the public generally. 4 While much of the literature will be cited, it is my purpose neither to suggest a solution to the concerns that have been expressed by both proponents and opponents of the Nunn bill nor to judge other attempts to regulate judicial conduct and the administration of the courts. Rather, I hope to refute the argument that, assuming the need for some type of added control of the judiciary has been demonstrated and that Congress will act in response thereto, the Nunn bill must be accepted as the sole available control method. 5

The Judicial Councils of the circuits (frequently referred to as circuit councils), though they have come under fire in the Chandler and Imperial cases, provide another mechanism—one that has been tried for

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1S. 1110, 94th Cong., 1st Sess. § 1 (1975) [hereinafter referred to as the Nunn bill or S. 1110].
2For a discussion of earlier proposals, see notes 33–45 infra & text accompanying.
3Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970); In re Imperial "400" National, Inc., 481 F.2d 41 (3d Cir. 1973), cert. denied, 414 U.S. 880 (1973). These two cases will be referred to as the Chandler and Imperial cases.
5The author has heard proponents of the Nunn bill argue on three separate occasions before Judicial Conferences of Circuits that judges must accept S. 1110 or the alternative will be a procedure for dealing with problems of judicial administration and misconduct from outside the judiciary.
6See notes 61–76 infra & text accompanying.
more than thirty years with considerable success and one that may strike a better balance between the need for an independent judiciary and the need for a court system that provides due process for all litigants.

Conceding my potential biases, I believe that the federal judiciary is composed by and large of dedicated, competent, and reasonable men and women who hold very powerful and difficult positions, perform remarkably well, and generate little controversy or publicity. This is as it should be. However, it is difficult to deny that from time to time there have also been numbered among the federal judges those who have not fit this description—the judge whose mental, emotional, or physical condition is such that his judicial capacities are seriously impaired. Though rare, one sometimes hears of questionable conduct in or out of the courtroom, as well as cases, though very infrequent, of questionable actions by out-and-out corrupt judges. Publicity, probably rightly, is focused upon such instances. A claim that a litigant appearing before such a judge is denied due process might very well prove non-frivolous and a strong argument can be made that the public ought to be protected from such judges. On the other hand, the framers of the Constitution provided for an independent judiciary and that independence extends to the individual judges, not just to the body of judges as a whole. Thus, any mechanism which purports to regulate a judge's conduct in court runs into the compelling argument that the occasional problem judge is the price we pay for an independent judiciary.

This article will focus upon these two requirements, due process for litigants and judicial independence, as they are balanced first by the Nunn bill and then by Judicial Councils. It will first look briefly at the premises, the legislative history, and the provisions of the Nunn bill. It will then turn to an analysis of the purpose and powers of the Judicial Councils, necessarily focusing upon the Chandler and Imperial cases. The conclusion will suggest some alternatives from which Congress could select, if it becomes convinced that some additional type of judge control is necessary.


An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting).
THE NUNN BILL

The Premises

The Nunn bill is premised upon the constitutionality of the removal of judges by a method other than impeachment. That question has been debated at considerable length and it is not my intention to detail the arguments; a brief review will suffice.

The following provisions of the Constitution are relevant to removal of federal judges:

Art. I, sec. 2. "The House of Representatives . . . shall have the sole Power of Impeachment."

Art. I, sec. 3. "The Senate shall have the sole Power to try all Impeachments."

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

Art. III, sec. 1. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . . ."

By adopting the English term of art "good behavior," a springboard for arguments in favor of removal by methods other than impeachment has been provided. Since acceptance of the Act of Settlement in 1701, English judges have held office "during good behavior." They were, however, removable by means other than impeachment—including *scire facias* and address by both houses of Parliament—and removal could occur for actions that probably would not qualify as high crimes or misdemeanors.

The argument follows that by adopting the English term of art "during good behavior," the framers also intended to adopt

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11 See R. Berger, supra note 10, at 125-35.

the English methods and thus impeachment would not be the sole means of removing judges. Even disregarding its English derivation, the use of this language in the Constitution suggests that good behavior is something different from "Treason, Bribery, or other high Crimes and Misdemeanors." Indeed, it may be argued that a plain sense reading of the language suggests that there is at least some conduct (and arguably the bulk of the kind of conduct proponents of judicial removal wish to eliminate) which would not be "good behavior" but which would also fall short of the "high Crimes and Misdemeanors" standard of the Constitution. Because it is the high crimes language that is tied into the impeachment remedy and the good conduct language is in a separate article with no specified remedy, there is an unclarity and apparent gap in the Constitution. From this position, proponents of judicial removal without impeachment argue that the framers intended not to preclude methods other than impeachment when breach of good conduct is charged. Professor Shartel states this theoretical interpretation: article I limits Congress' removal powers to impeachment. Article II limits removal of certain officers (presumably including judges) only by impeachment. He not only interprets article III as preventing the executive branch from removing judges but also concludes that article III provides power to the judiciary for trying the fitness of its own. Thus, removal by a means other than impeachment must be a power of the judiciary itself. This, it is argued, is wholly consonant with the independence of the judiciary. He contends that while Congress is limited to removal by impeachment, it is empowered under the "necessary and proper clause" to enact legislation establishing a mechanism for removal of judges by the judiciary.

The premises, then, are two: judges may be removed for non-good behavior falling short of "high Crimes and Misdemeanors"; and, judges may be removed by methods other than impeachment. The first has a certain amount of historical validity. Hamilton, while arguing that

13 Professor Stolz offers some interesting speculations on the reason for the apparent ambiguity on the exclusivity of impeachment: 

[T]he explanation may lie in a subtle shift in attitude towards judges and courts; our willingness to perceive judges as subject to human failings has created a problem out of something that an earlier time may well have regarded as essentially unthinkable. Current writing on judicial discipline is full of ghoulish anecdotes about judges who were lazy, or drank too much, or who had lost some of their powers through illness or age. A hundred or even fifty years ago such talk would probably have been regarded as in bad taste if not contemptuous—as tending to encourage disrespect for the courts. It may also be that we are more ready today than before to distinguish between the stupid judge and the judge whose incompetence is rooted in illness or age.

Stolz, supra note 10, at 663 n.22.

14 Shartel, supra note 10, at 891-909; Stolz, supra note 10, at 661-62.
impeachment was the sole means of removal, nonetheless stated that "insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification" for a judge." The first federal judge impeached and convicted, Judge Pickering, was certainly inebriate, probably insane or senile, but was not charged with treason, bribery, or high crimes and misdemeanors. Justice Chase, an outspoken Federalist guilty only of blatant political activity while serving on the Court, was impeached but not convicted by Jefferson's Republicans. In this century, four federal judges have been impeached and while indictable crimes have been charged in at least two cases, neither of the two judges actually removed from office was convicted on a count charging criminal conduct.

There is considerably less historical support for removal by a method other than impeachment. Hamilton, Story, Kent, and Marshall all argued that impeachment was the sole means of removal of judges. As much as he was annoyed by the Federalist-packed judiciary, Jefferson conceded that a constitutional amendment providing an alternative method of removal was the only way to avoid using the impeachment process to rid himself of them. Immediately after the Civil War, a procedure for forced retirement of federal judges was presented to Congress; it failed, apparently because some equated it with removal without impeachment. The failure of the Sumners and Tydings bills may well be due more to their provisions for non-impeachment removal than to their adoption of a lack of good behavior standard for removal. Only the repeal of the Judiciary Act of 1801 stands as

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18 The two judges convicted by the Senate were Judge Archbald (1913) and Judge Halstead Ritter (1936). For a detailed analysis of the four judicial impeachments in this century, see ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 Minn. L. Rev. 185 (1938).
20 3 J. Story, Commentaries on the Constitution §§ 1599-1635 (1833).
21 1 J. Kent, Commentaries on American Law XIV (1826 ed.).
23 Kurland, *supra* note 10, at 694. Professor Kurland points out that Jefferson was a great supporter of judicial independence until he became president. Despite distaste for the impeachment process, he declined to adopt any removal mechanism without constitutional amendment. President Andrew Johnson took the same stand in 1868. *Id.* at 695.
24 *Id.* at 678-83.
25 See notes 34-40 *infra* & text accompanying.
26 See notes 41-45 *infra* & text accompanying.
27 In response to the hearings being conducted in Senator Tydings' subcommittee, Senator Ervin's subcommittee on the Separation of Powers held hearings in which the
real support for non-impeachment removal. After long debate, the new Republican-controlled Congress repealed this controversial piece of Federalist legislation, "un-creating" several federal judgeships. The argument that repeal would violate the constitutional assurance that judges would hold office during good behavior failed to carry the day. However, a century later the same argument saved the jobs of the judges on the Commerce Court; though the court itself was abolished, its judges were moved into other federal courts.

The premises upon which the Nunn bill rests, again, are that a judge can be removed for conduct which is less than a high crime and misdemeanor and that the removal does not require impeachment. These premises raise substantial constitutional questions. The issue has been before the Supreme Court twice but never squarely enough that the Court was forced to reach it. Professor Stolz suggests that the constitutional issue will not be resolved finally until Congress enacts a bill such as the Nunn bill and the Supreme Court is forced to face the difficult question. Professor Kurland, himself a strong supporter of the exclusivity of impeachment as a removal mechanism, concedes that there are no firm answers and that the passage of such a bill by Congress would add substantial weight to the argument for its constitutionality. Thus, while the premises may be open to question, they are certainly not to be lightly dismissed.

The Legislative History

The Nunn bill itself was first introduced as S. 4153 in 1974. It was resubmitted without substantial change to the first session of the 94th Congress. As of December 15, 1975, no hearings had been scheduled. However, Congress has, from time to time, wrestled with similar legislation since the late 1930's when efforts were spearheaded by Congressman Hatton Sumners.


28 Kurland, supra note 10, at 671-78.
29 Id. at 683-87.
30 The issue was first presented in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); the Court might have reached the very issue Congress avoided in repealing the Judiciary Act of 1801, see note 28 supra, but did not do so. Chandler represents the second time the issue was raised; see notes 89-106 infra & text accompanying.
31 Stolz, supra note 10, at 663-64.
32 Kurland, supra note 10, at 697-98.
Sumners, chairman of the judiciary committee, introduced proposals for creation of a removal mechanism within the judiciary in five different Congresses.\textsuperscript{34} In its earliest form, the Sumners proposal provided for the removal of any district judge\textsuperscript{35} upon a finding by a court, composed of three circuit judges from the accused judge's circuit, that he was guilty of non-good behavior. Such three-judge courts were to be convened by the Chief Justice upon receipt of a House resolution that "in the opinion of the House there is reasonable ground for believing that the behavior of a judge . . . has been other than good behavior . . . ."\textsuperscript{36} The Attorney General was empowered to institute these civil actions on behalf of the United States. Either party could appeal the decision of the three-judge court to the Supreme Court; however, if the panel entered judgment for the government, the judge was immediately removed from office and remained so unless the judgment were reversed by the Supreme Court. Hearings on Sumners' judicial removal bills were held in the 75th, 76th and 77th Congresses but, despite a fairly general discontent with the federal judiciary at that particular time,\textsuperscript{37} the bills never left Congress, although twice they were passed by the House.\textsuperscript{38} A similar piece of legislation in the Senate, sponsored by William G. McAdoo beginning with the 74th Congress,\textsuperscript{39} never received Senate approval.\textsuperscript{40}

The more recent precursor of the Nunn bill is the legislation drafted and sponsored by Senator Tydings, then chairman of the Subcommittee on Improvements in Judicial Machinery. Prompted by several incidents in the early 1960's involving alleged judicial misconduct,\textsuperscript{41} Senator Tydings began a study of proposals for judicial reform in 1966.\textsuperscript{42} Two years later, S. 3055, the Judicial Reform Act, was introduced in the 90th Congress. In 1969, it was reintroduced as S. 1506. Title I, the portion of the bill dealing with judicial removal, provided for the establishment of a Commission on Judicial Disabilities and

\textsuperscript{35} The bill was later amended to apply to circuit judges as well. Kurland, \textit{supra} note 10, at 688.
\textsuperscript{36} H.R. 2271, 75th Cong., 1st Sess. § 1 (1937).
\textsuperscript{37} See notes 65-67 \textit{infra} & text accompanying.
\textsuperscript{38} Kurland, \textit{supra} note 10, at 693.
\textsuperscript{39} S. 4527, 74th Cong., 2d Sess. (1936); S. 476, 75th Cong., 1st Sess. (1937).
\textsuperscript{40} Kurland, \textit{supra} note 10, at 693.
\textsuperscript{42} \textit{Hearings on Judicial Fitness Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary}, 89th Cong., 2d Sess. (1966).
Tenure empowered to investigate, charge, try, and recommend removal of any federal judge (other than Supreme Court Justices) for "willful misconduct in office or willful and persistent failure to perform his official duties." If the Commission, composed of five federal judges appointed by the Chief Justice, recommended removal to the Judicial Conference of the United States, the judge would be suspended pending review by that body. Conference certification of the recommendation to the President would remove the judge. The conference certification would be reviewable by the Supreme Court on writ of certiorari. Thus, the Tydings proposal differed from the Sumners mechanism in that the entire process remained within the judiciary—neither congressional resolution nor executive prosecution was suggested—and in the use of an established body (the Judicial Conference of the United States) as a sort of intermediate appellate court.

Despite these differences and the fact that judicial misconduct was very much in the public eye, Senator Tydings' proposal did not receive congressional approval. Lengthy hearings assembled an impressive collection of testimony on both the need for any judicial removal mechanism and the constitutionality of the suggested procedure. Endorsements (sometimes less than emphatic) were also received. But in the end the combination of Senator Ervin's skilled exclusivist argument, the apparent vagueness in the bill's standards of conduct, and a questionable need for the mechanism produced the demise of Title I of the Judicial Reform Act.

The Provisions of the Nunn Bill

The Nunn proposal draws quite heavily upon the Tydings bill. Like its predecessor, S. 1110 suggests a removal mechanism confined entirely to the judiciary itself and an intermediate appeal through the Judicial Council of the circuit. There are, however, several substantive refinements.

The bill provides for the creation of a Council on Judicial Tenure. This council is to be composed of one judge from each of the circuits, the Court of Claims, the Court of Customs and Patent Appeals, and the

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45 Holloman, supra note 41, at 144-50.
Customs Court. Selection to serve on the council is to be by election: a delegate from each of the circuits by a vote of the district and circuit judges at a Judicial Conference of the circuit, and a delegate from each of the special courts by a vote of the judges of the court. Members are elected to three-year terms.

The Council on Judicial Tenure is required to receive all complaints about misconduct by any judge or justice and to make a preliminary inquiry to determine whether the complaint has any merit. If the complaint is "frivolous, unwarranted, or insufficient in law or fact," it is to be dismissed. If, however, the council determines that grounds for removal, censure, or involuntary retirement exist, a panel of five members of the council—four of whom must be circuit or district judges and none from the accused judge's court or circuit—is appointed to hear the case. The panel is empowered to hold hearings, take testimony, subpoena witnesses and records, administer oaths and affirmances, and invoke the aid of any district court of the United States to effect compliance with its subpoenas and orders. To promote full disclosure, a broad immunity is granted all witnesses. A judge or justice whose case is referred to a panel is to be given thirty days' notice of any hearings. He is entitled to appear and make a statement. Within ninety days of the hearing, the panel must make findings of fact and a determination of the justice's or judge's fitness. These findings and the record of the proceedings are to be transmitted to the Judicial Conference of the United States, as is any recommendation. A recommendation for removal, censure, or involuntary retirement requires the concurrence of four members of the panel.

The Judicial Conference of the United States, under the direction of one of its members elected at the annual meeting to preside on any such matter and without the participation of the Chief Justice of the United States, is empowered to sit as a court to hear any cause relating to removal, censure, or involuntary retirement. The proceedings before the conference are de novo. The council on Judicial Tenure is required to appear and present evidence in support of its recommendations. The accused justice or judge is to be given adequate notice and may appear, be represented by counsel, offer evidence, and cross-examine any witness against him. Again, broad immunity is granted all witnesses. During the pendency of the proceeding, the judge involved shall

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46 These are the various disciplinary measures available under the proposal. See notes 48–51 infra & text accompanying.

47 With the approval of the majority of its members, a panel of nine members of the conference (again, none of whom is from the accused judge's court and one of whom is the presiding officer) may be designated to hear the case.
cease all of his judicial duties; the Judicial Conference of the United States is empowered to order reassignment of his cases after consultation with the Chief Judge of his court. The Judicial Conference of the United States may order censure, removal, involuntary retirement, or may dismiss or remand any case brought before it. An order for removal of a judge or for removal, censure, or involuntary retirement of a Supreme Court justice is stayed pending review by the Supreme Court. Only the judge or justice is allowed to petition for review and must do so within ten days of written notification of the conference's order.

Throughout proceedings before the council and the conference, a strict confidentiality is to be maintained. If the Judicial Conference of the United States dismisses a complaint, the judge or justice may request that the conference make public portions of the proceedings not privileged, confidential, or prejudicial to other parties. Upon petition for review to the Supreme Court, the proceedings lose their confidentiality.

The ground for censure or removal from office through this rather elaborate procedure is "conduct . . . inconsistent with the good behavior required by article III section 1 of the Constitution," thus avoiding the vague standards of the Tydings bill. S. 1110 would also amend 28 U.S.C. § 372(b) to allow the Judicial Conference of the United States to certify a judge who declines to retire as mentally or physically incapable of carrying out his judicial function, thus forcing an involuntary retirement. Such certification can occur only after hearings before


50 See note 41 supra.

51 Section 372 provides in pertinent part:

(a) Any justice or judge . . . who becomes permanently disabled from performing his duties may retire from active service . . . .

(b) Whenever any judge . . . who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit . . . is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment . . . .

It is not at all clear what effect this substitution procedure has upon the judge who is certified as disabled. Section 372(b) does not suggest that there is any power to remove cases pending before him or to cease assigning cases to him. Apparently the process has never been used; were it employed, a case such as Judge Chandler's would not be at all unlikely. The proposed amended section 372(b) specifies that the disabled judge would be designated as "involuntarily retired from regular active service." S. 1110, 94th Cong., 1st Sess. 15 (1975).
the Council on Judicial Tenure and the Judicial Conference of the United States. The proposed amendment would expand the involuntary retirement powers by deeming "[h]abitual intemperance that seriously interferes with the performance of any one of the critical duties of a justice or judge" a permanent disability constituting grounds for certification of disability to the President.  

A judge retired involuntarily would be assignable by the Chief Judge of his court to perform such duties as he is willing and able to undertake; if he is not assigned any duties, and feels able to perform some, he may bring his case before the Council on Judicial Tenure and the Judicial Conference of the United States, which is empowered to order the Chief Judge to assign work to the retired judge.

Possible Advantages and Disadvantages of the Bill

The Nunn bill is an improvement over the several prior proposals for a judicial removal mechanism which have been submitted to Congress. It eliminates the involvement of the legislative and executive branches which might tend to politicize the removal process and jeopardize the independence of the judiciary as a whole. Adoption of the good behavior standard avoids compounding the problems of evaluating judicial conduct by adding a vague standard—"willful misconduct or willful and persistent failure to perform . . . official duties"—to the already elusive "good behavior" standard. By specifically providing both a method and a standard for review by an article III court, the provisions for review of recommendations of the Council on Judicial Tenure—apparently an administrative body without traditional judicial powers—avoid the review dilemma posed for the Judicial Councils of the circuits by Chandler and Imperial. Due process is assured judges who are investigated by the council, an assurance lacking in the Sumners bills. By minimizing publicity, the confidentiality requirements, if strictly maintained, would assist in deterring those who might use the process to remove an unsympathetic yet competent judge and, hopefully, in avoiding tarnishing the reputation of a judge whose behavior does not merit disciplinary action and in helping to preserve public confidence in the judiciary.

S. 1110, however, is far from flawless. By subjecting the entire federal judiciary to discipline, it responds to the frequent complaint by district judges that they are the only judges ever deemed unworthy

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53 Id. at 11–12.
enough to warrant Big Brother's watchful eye; however, including justices within the purview of the bill creates constitutional as well as logical problems. Because Supreme Court justices are mandated by the Constitution while other federal judgeships are left to the discretion of Congress, a constitutional challenge might be raised to the procedure. Other serious challenges in reference to justices pertain to both the internal inconsistency of the bill and the special nature of the Supreme Court.

The bill provides that no judge who sits on the same court or circuit as a judge whose conduct is under investigation shall participate in proceedings of either the Council on Judicial Tenure or the Judicial Conference of the United States. The same principle, if extended to the final review by the Supreme Court, either would deny a justice final appeal or would assume that Supreme Court justices alone among the federal judiciary can raise themselves above feelings of camaraderie and render an unbiased decision in a case involving a brother or sister. If one makes the latter assumption, it is not a long step back to the hypothesis that Supreme Court justices are somehow incapable of misconduct—an argument that belies both the reason for including them within the bill and common sense.

Other lesser problems appear in the bill. There is no indication whether senior judges are to participate in election of members of the Council on Judicial Tenure. Terms of council members are not staggered, thus lessening the potential for continuity within the council. The role of the council in its preliminary screening and investigating functions needs further definition. If the confidentiality provisions are to be effective, some sanctions should be considered for those who violate that confidentiality. Further, the bill's drafters would do well to learn from Chandler and specify that the council is an administrative body composed of judges who are not exercising their judicial powers, if that is in fact the intent of the drafters.

Even setting aside the very real question as to the constitutionality of the mechanism proposed by the Nunn bill, some other policy matters ought to be considered before adopting S. 1110. The first question is


56 Another author has suggested as a possible explanation for the exclusion of justices from the coverage of Senator Tydings' removal mechanism that "removal of a Justice of the Supreme Court is of such political significance that it should be accomplished only through impeachment by Congress . . . ." Id.
the extent of the problem S. 1110 is designed to solve. One author has stated that a convincing case for the establishment of a judicial removal scheme has not been made.\(^7\) Though the fact of problem judges cannot be denied, neither should it be exaggerated. If there is a serious problem, enactment of the Nunn bill or similar legislation might be justified. But unless there is a real need, creating this elaborate and potentially powerful tool is tantamount to buying a piledriver to kill an ant.\(^8\)

A closely related consideration is the potential for creation of a problem by creation of a solution. Even assuming that the confidentiality requirements of S. 1110 eliminate most of the potential for abuse, the danger is still real that the mere existence of the Council on Judicial Tenure, with its supporting personnel and potent sanctions, will tempt some to test the mechanism in instances where a judge's idiosyncrasies might otherwise have been tolerated in the name of judicial independence. Because the controls are vested in the judiciary itself and considerable deference to brother and sister judges is probable, this danger may be less than it might otherwise be. However, too frequently it appears that an agency's motivation may be its will for survival and potential for proliferation. That the agency's continued existence rests in part upon executive and legislative control of pursestrings is somewhat threatening to judicial independence; there is no assurance that the council's appropriation will not be increased or reduced based upon political considerations. This must be kept in mind in considering the establishment of any mechanism that deals with so sensitive an area as judicial independence and responsibility.

One must also consider competing policies in centralizing the disciplinary powers in one body instead of leaving those powers with local authorities. Local judges are generally better informed of the particular problem. In addition, they are in a better position to use informal methods in dealing with a problem judge because of their more intimate knowledge of the circumstances of his case and, frequently, be-

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\(^7\) Kurland, supra note 10, at 697. Indeed, Professor Kurland contends that such a case cannot be made. Professor Goulden, while emphasizing the problems in the federal judiciary, still manages to suggest at most a dozen judges whose presence on the bench presents possible due process problems. See J. Goulden, supra note 7.

\(^8\) The same argument, however, has been made with regard to the use of impeachment for removal of judges. Lord Bryce said, "Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." 1 J. Bryce, The American Commonwealth 211 (1901). And Professor Berger has stated: "Once employed to topple giants . . . impeachment has sunk in this country to the ouster of dreary little judges for squalid misconduct." R. Berger, supra note 10, at 3.
cause of a reasonably close working relationship with him. On the other hand, when informal methods fail, formal proceedings may be difficult because of that very same close relationship to the judge and his problem. In this regard, a national body may be in a better position to proceed formally but, on the other hand, may tend to ignore the possibility of dealing with the judge informally. This difficulty will be considered further when the Judicial Councils of the circuits are specifically discussed.

Several other questions bear consideration. The cost of implementing the procedure is important, though it should not be determinative. A more important question is whether, with a presently over-taxed court system, judicial time should be allocated to disciplinary proceedings of the Council on Judicial Tenure and Judicial Conference of the United States. Finally, consideration must be given to the potential danger that a more accessible removal mechanism may result in the homogenizing of the federal judiciary in the name of uniform justice for all. All certainly seek the latter goal but the cost of attaining it need not and should not be the elimination of every flamboyant, controversial, or politically unpopular judge from the judiciary.

Thus, some serious policy questions can be raised concerning the necessity for, and the wisdom of, the Nunn bill. In addition, the constitutional issue is a major stumbling block. On its merits, the Nunn bill, nevertheless, probably stands a better chance of receiving congressional approval than either of its predecessors. Passage is, however, far from certain. With all of its problems, certainly the proponents

59 The mood of some federal judges is opposed [to the view that judges are powerless to censor or discipline their brothers and sisters] and they are active in attempting to make all federal judges walk in some uniform step. . . . The result is that the nonconformist has suffered greatly at the hands of his fellow judges . . . . The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like . . . .

These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. That is the crucial issue at the heart of the present controversy.


60 The bill has received some support in recent literature. Andrews, Judicial Removal of Federal Judges, 11 Ga. St. B.J. 157 (1975); Boyd, Federal Judges: To Whom Must They Answer, 61 A.B.A.J. 324 (1975). Judge Battisti is considerably less enthusiastic about the bill's merits. Battisti, supra note 54, at 730-32. The Judicial Conference of the United States has given the bill its "qualified" approval; the qualifications, however, are so substantial as to eliminate most of the teeth from the bill. The Conference suggests that applicability to justices be eliminated, that removal be eliminated as a sanction, and that mandatory or involuntary retirement and censure be retained as less severe sanctions. See
of the Nunn bill must be required to adequately demonstrate an over-
riding need for its adoption. Assuming problems exist which require
attention, is there an alternative to the Nunn bill which would not result
in the potential judicial upheaval and yet would still reasonably meet
the basic problems which have motivated its proposal? This question
brings me to a brief examination of the Judicial Councils of the circuits.

**The Judicial Council of the Circuit**

*Creation and Purpose*

The Administrative Office Act of 1939[^61] was the second half of a
major judicial administration reform movement that had begun with
the creation of the Judicial Conference of Senior Circuit Judges[^62] (now
called the Judicial Conference of the United States) in 1922. Prior to
1922, the lower federal courts had been without any formal adminis-
trative structure.[^63] The Judicial Conference of the United States
was created as a more or less informal body to encourage communication
within the federal judiciary and to allow the assignment of judges to
jurisdictions where a particularly heavy caseload had created a back-
log. Passage of the bill was obtained with great difficulty, with the
bill's opponents arguing that this centralized agency would encroach
upon the independence of the judiciary.[^64] The Judicial Conference of
the United States performed its rather limited duties well, but by the
late 1930's a movement was underway for expanding the reform. There
were several motivational factors. One was the impeachment and con-
viction of Judge Halstead Ritter, which had thoroughly disrupted the
1936 Congress.[^65] The "court-packing plan," which had finally died in
1936, had also brought the judiciary very much into the public eye.[^66]
The Sumners and McAdoo proposals were under congressional consid-
eration from 1935 until 1944.[^67] The Administrative Office Act[^68]
was the result of all these pressures.

only "senior," or chief judges, but also representatives of the district courts, see Act of
Aug. 28, 1951, 71 Stat. 476, the Court of Claims, see Act of July 9, 1956, ch. 517, 70 Stat.
[^63]: Lumbard, *The Place of the Federal Judicial Councils in the Administration of the
[^65]: *Id.* at 154.
[^66]: *Id.* at 112-24; Comment, *The Authority of the Circuit Judicial Councils: Separation
[^67]: See notes 34-36 supra.
[^68]: See note 61 supra.
The Act was an overall plan of judicial administration. The power of the Judicial Conference of the United States was increased by adding certain supervisory responsibility over the newly-created Administrative Office. The Administrative Office took over from the Justice Department the functions of administration within the courts, including paying salaries and allocating funds. The Administrative Office was also to assemble data concerning the business of the courts. Also included within the Act was the formalization of the requirements for Judicial Conferences of the circuits, a practice apparently begun prior to 1939 in several circuits. These conferences annually brought together all of the circuit and district judges of the circuit, along with members of the bar, to discuss the business of the courts and to advise means to improve the administration of justice. Finally, the Act created the Judicial Councils of the circuits (sometimes referred to as circuit councils).

The Judicial Council of the circuit is composed of the active circuit judges of the circuit. It is presided over by the Chief Judge of the circuit and is required to meet at least twice annually. Its duties as specified in the Act are the consideration of the quarterly reports of the Administrative Office and the following general proviso:

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

This grant of power and responsibility provides the basis for all of the council's actions, except those few specific grants appearing elsewhere in the Judicial Code. The second sentence of that part of section 332(d) quoted above also provides the sole basis of enforcement.

69 Tension had developed between the judiciary and the Department of Justice over this point during the court-packing fight. See generally P. Fish, supra note 64, at 91–124.


72 Powers granted to the Judicial Councils by statute include:

1. the power to order a district judge to reside in a particular part of the district, 28 U.S.C. § 134(c);
2. the power to make necessary orders regarding distribution of cases when the district judges cannot agree on a distribution, 28 U.S.C. § 137;
3. the power to consent to pretermision of any regularly scheduled district court session for lack of business, 28 U.S.C. § 140(a);
4. the power to approve court accommodations provided by the General Services Administration, 28 U.S.C. § 142;
There seems to be little doubt that Congress intended a broad grant of power under section 332(d). The disagreement centers upon the nature of those powers. Some view the councils as purely administrative bodies without any judicial powers whose role is to deal with the problems of administering the courts. Others see the council as a body with certain judicial powers, including the power to determine the fitness of a judge to hear cases. The legislative history is subject to both interpretations. But it should be noted that the creation of the councils was part of an Act, the overall purpose of which was to speed up the administration of justice. While the possibility of disciplining problem judges through the councils' tools was considered, that was not the Act's primary purpose. Indeed, two bills aimed specifically at tampering with the make-up of the judiciary had been expressly rejected by Congress within the three years prior to its passage. This certainly adds credence to the less expansive view of the scope of section 332(d) and it is a view that has received some judicial approval.

(5) the power to consent to special assignment of judges to courts other than their own, 28 U.S.C. § 295;
(6) the power to designate storage facilities for court records, 28 U.S.C. § 457;
(7) the power to approve plans for representation of indigent criminals, 18 U.S.C. § 3006A(a);
(8) certain powers with regard to approval of the appointment and removal of bankruptcy judges, 11 U.S.C. §§ 62(b), 65(a), (b), 68(a), (b), (c), 71(b), (c);
(9) certain powers with regard to approval of jury plans adopted by district courts, 28 U.S.C. § 1863(a); and
(10) the power to certify the disability of a judge who refuses to retire, 28 U.S.C. § 372(b).

See note 51 supra.
73 See notes 122-25 infra.
74 The legislative history of section 332(d) is replete with statements of the broad intent of the framers. Good discussions of that history are found in P. Fish, supra note 64, at 152-65, 391-92; Comment, Judicial Councils, supra note 66, at 818-26; Battisti, supra note 54, at 718-21. More recent commentators have also viewed the Judicial Councils' powers as very broad:
75 Perhaps the most influential witness before the committee was Chief Justice Groner of the District of Columbia Circuit. His testimony makes it clear that delay in the courts and the lack of any mechanism for dealing with that delay were the main problems at which the Judicial Councils' powers were to be aimed. See Hearings on S. 188 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. 9, 11 (1939). Arthur Vanderbilt, who was president of the American Bar Association at the time and a strong backer of the act, commented later: "They [the Judicial Councils] are principally concerned with matters of calendar control." A. Vanderbilt, Cases and Materials on Modern Procedure and Judicial Administration 1250 (1932).
76 These efforts at tampering were the court-packing plan, rejected in 1937, and the Sumners and McAdoo proposals, discussed at notes 33-45 supra & text accompanying.
Pre-Chandler History

Between 1939 and 1965, the Judicial Councils of the circuits maintained a remarkably low profile. As the civil backlog again became a particularly hot issue in the late 1950's, the councils were criticized because, despite their broad powers, it was contended that they had done practically nothing in twenty years.\(^7\) This assertion is far from correct. Professor Fish has documented some of the actions taken by the councils and their presiding officers, the Chief Judges, from their inception until 1969. His description suggests that the councils were at least moderately active in generating general rules and in handling informally specific problem cases and judges. Informal action—i.e., judge to judge discussion—certainly constituted the bulk of the accomplishments. Judges have expressed a certain amount of dislike for this type of work, consisting as it must of friendly persuasion and veiled threats, but seemed to concur that it was quite effective.\(^8\)

An exercise of power by the councils had reached the official reports only once during that period. In \textit{In re Rodebaugh},\(^9\) a resolution required that a court reporter in the Eastern District of Pennsylvania report details of his unauthorized private reporting practice to the Justice Department and the Administrative Office for investigation. Determining that this action fell within the grant of power in section 332(d) for "effective and expeditious administration of justice," the Judicial Council of the Third Circuit justified its actions with the following statement:

The Council is the administrative agency empowered by Congress to investigate and determine the facts and fashion the appropriate administrative remedy. Having acted as thus authorized, its orders have the force of law.\(^8\)

Thus, as early as 1950, this council adopted the view that it was an administrative body. Its opinion and order, however, were not entirely consistent with that view. Section 332(d) requires only that the district judges comply with council orders. The order here was directed to the court reporter himself, who had no duty to comply with what was said to be an administrative agency order. Apparently, however, he complied voluntarily, thus leaving for another court the question of enforceability of council orders.\(^8\)

\(^7\) See Brennan, \textit{supra} note 74, at 44; Lumbard, \textit{supra} note 63, at 169.

\(^8\) See generally P. Fish, \textit{supra} note 64, at 397-426.

\(^9\) 10 F.R.D. 207 (Judicial Council of the 3d Cir. 1950).

\(^8\) Id. at 216.

\(^8\) The council suggested three alternative means of enforcement, none of which is satisfactory. See Comment, \textit{Judicial Councils}, \textit{supra} note 66, at 837-39.
Only one other action of the councils received much publicity. In 1965, Judge Mell G. Underwood of the Southern District of Ohio was the subject of a Judicial Council of the Sixth Circuit resolution that declared him incompetent and asked him to retire. Judge Underwood was told of the resolution privately and asked to comply; he declined to do so, denying the power of the council to take such action. Thereafter, news of the resolution leaked to the media and Judge Underwood was "humiliated" into retirement.82

Chandler v. Judicial Council of the Tenth Circuit83

Judge Stephen Chandler, Chief Judge of the Western District of Oklahoma, had, by 1965, established his reputation as one of the more colorful and controversial judges in the federal judiciary.84 He was at that time involved in two lawsuits, one criminal and one civil. The Tenth Circuit had twice ordered him to remove himself from hearing cases involving major oil companies.85 On December 13, 1965, the Judicial Council of the Tenth Circuit, invoking its powers under section 332(d) and 28 U.S.C. § 137,86 found that Judge Chandler was "unable or unwilling to discharge efficiently" his judicial duties and that a change in assignment of cases in his district was thus necessitated. The council ordered that Judge Chandler take no further action on any case pending before him and that no new cases be assigned to him until further order. This meeting occurred without notice to Judge Chandler. The order became effective on December 28, 1965. On January 6, 1966, Judge Chandler petitioned the Supreme Court for a stay of the order and leave to file a writ of prohibition and/or mandamus directed at the council. The Supreme Court denied both requests, stating that the council's order was wholly interlocutory and would be followed by "prompt further proceedings" at which Judge Chandler would be permitted to appear with counsel.87 Taking this rather broad hint, the council scheduled a hearing for February 10, 1966. In the meantime, however, Judge Chandler had informed the council that he objected

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82 This incident is related by Battisti, supra note 54, at 743–44; and P. Fisher, supra note 64, at 412, 416. When told of the council resolution, Judge Underwood allegedly said, "They have no authority to remove me . . . . I told them to go to hell."
84 J. Goulden, supra note 7, at 206–49, describes in some detail, and not altogether unsympathetically, Judge Chandler's career. Judge Chandler assumed senior status in 1969 and retired in 1975; see 44 U.S.L.W. 2239 (Nov. 25, 1975).
86 See note 72 supra.
only to that portion of the order barring him from further action in pending cases and that he did not disagree with assignment of all new cases to other judges. When the judges in Judge Chandler’s district informed the council that no one intended to attend the February 10 hearing, it was cancelled and a new order was entered modifying the December 13 order. Under the February 4 order, Judge Chandler was permitted to keep those cases assigned to him prior to December 28, 1965. Immediately thereafter, Solicitor General Marshall suggested by memorandum that the issue was mooted by Judge Chandler’s acquiescence in the order. Judge Chandler argued that his acquiescence was only strategy to avoid further encroachments upon his rights as a judge. Efforts were made in July 1967, to reassign cases to Judge Chandler; these too were rejected as further illegal exercises of nonexistent powers. The February 4 order was accordingly left in effect.

The Supreme Court handed down its decision in Chandler on June 1, 1970, four and one-half years after the council acted against Judge Chandler. Four opinions were filed, three of which at least suggest entirely different views of the councils’ powers. Justice Marshall took no part in the decision.88

The Chief Justice, writing for the majority, identified several of the “knotty” problems posed by the case: original jurisdiction of the Supreme Court to review this allegedly administrative action; whether the council’s action was administrative or judicial; and the various methods of enforcing the limited powers granted the council; but declined to reach those issues. Pointing out that “Judge Chandler has never once since giving his written acquiescence in the division of business sought any relief from either the Council or some other tribunal,”89 the majority held that Judge Chandler had therefore failed to make a case for the extraordinary relief sought.

The majority’s footnotes, though dicta, do suggest some answers to the difficult questions posed by the case. Here the legislative history of section 332 was viewed as manifesting the intent to create “an administrative body functioning in a very limited area in a narrow sense as a ‘board of directors’ for the circuit”90 without vesting any traditional judicial powers in the council.91 The majority saw no constitutional barrier to vesting section 332(d)’s powers in an administrative body. This is essentially the same view taken by the Judicial Council

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88 Presumably Justice Marshall did not participate because of his earlier involvement in the case in his position as Solicitor General.
89 398 U.S. at 87.
90 Id. at 86 n.7.
91 Id.
of the Third Circuit in *Rodebaugh*. The possibility that Judge Chandler might have sought review under 28 U.S.C. § 1361 was raised, though no forum was suggested.\(^92\) Pointing out the lack of provision for enforcement of the council’s orders and of proof of intent that that implementation be by regulations, the majority concluded:

Standing alone, § 332 is not a model of clarity in terms of the scope of the judicial councils’ powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute and definition of review of Council orders are called for.\(^93\)

Justice Harlan concurred\(^94\) in the denial of the writ but on entirely different grounds. He performed the “feat” the majority declined to perform in holding that the Supreme Court had jurisdiction to entertain Judge Chandler’s petition.\(^95\) He found jurisdiction by reading the legislative history of section 332 as mandating a body with both judicial and administrative functions. Justice Harlan argued that the council’s exercise of power in “the issuance of orders to district judges to regulate the exercise of their official duties”\(^96\) was an exercise of judicial powers. The council is, at least in this circumstance, an inferior federal court and may be within the appellate jurisdiction of the Supreme Court. Justice Harlan then argued, citing *Marbury v. Madison*,\(^97\) that jurisdiction is proper under the All Writs Act.\(^98\) “[T]he actions challenged by Judge Chandler sufficiently affect matters within this Court’s appellate jurisdiction to bring his application for an extraordinary writ within our authority under § 1651(a) . . . .”\(^99\) However, having found jurisdiction, Justice Harlan concluded that the action by the council was within its statutorily-prescribed powers and that Congress’ grant of those powers was not unconstitutional. It is clear, how-

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\(^92\) *Id.* at 87 n.8.
\(^93\) *Id.* at 85 n.6.
\(^94\) *Id.* at 89.
\(^95\) As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat. It is an exercise we decline to perform since we conclude that in the present posture of the case other avenues of relief on the merits may yet be open to Judge Chandler.

*Id.* at 86. One author has described the majority’s opinion as “of waning sensibility” because of its failure to reach this issue and that of enforcement. Comment, *Little Ado About Much: Jurisdiction of the Supreme Court to Issue Mandamus*, 51 B.U.L. Rev. 106, 110 (1971).

\(^96\) 398 U.S. at 102.
\(^97\) 5 U.S. (1 Cranch) 137 (1803).
\(^99\) 398 U.S. at 117.
ever, that he was referring only to the February 4 order, not the December 13 order.100

Thus even Justice Harlan's expansive view of the councils' powers does not specifically include the power to remove a judge's entire caseload. Justice Harlan's interpretation of the legislative history is plausible. His development of statutory jurisdiction under section 1651 is both creative and thoroughly reasoned. The fact that it attracted no support from his colleagues may suggest that the dicta in the majority opinion would have been the holding had they found jurisdiction.101 However, with the footnote comments only persuasive rather than binding authority and with subsequent changes in the membership of the Court, it seems safer to wait for a new case for the final determination as to whether the dicta will become law.

In separate dissenting opinions, Justices Black and Douglas renewed the arguments they made at the time Judge Chandler's original request for stay was denied. They agreed with Justice Harlan that the Court had jurisdiction and even conceded that "[e]xpediting the flow of cases to the dockets of district judges is wholly in line with the judicial function"102 that Congress intended the councils to perform. However, the December 13 order, "qualified but . . . not . . . erased"103 by the February 4 order, effectively removed Judge Chandler from office, a power which, they contended, was reserved to Congress through impeachment.

[T]here is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.104

Chandler prompted considerable comment in legal periodicals, all of which agreed that the power of the Judicial Councils was a thoroughly unresolved issue. Discussions following the 1966 denial of Judge Chandler's request for stay focus on the judicial removal problem;105 later writing concentrates more on the problem of review and enforce-

100 Id. at 118–19.
101 The lack of support is particularly noteworthy considering the interpretations of section 332 powers previously made by Chief Justice Burger and Justice Brennan; see note 74 supra.
102 398 U.S. at 134.
103 Id. at 135.
104 Id. at 137.
105 See, e.g., Kramer & Barron, supra note 10; Kurland, supra note 10; Stolz, supra note 10; Comment, The Chandler Incident and Problems of Judicial Removal, 19 STAN. L. REV. 448 (1967); Comment, Judicial Responsibility, supra note 71; Comment, Removal of Federal Judges, supra note 8; Comment, Removal of Federal Judges—Alternatives to Impeachment, 20 VAND. L. REV. 723 (1967).
ment of council orders. Congress failed to respond to the majority's request for clarification and definition and the courts were left to their own devices in dealing with council orders.

The Second Circuit was the next court to deal with the problem. The Judicial Council for that circuit had issued some general rules of practice requiring, among other things, dismissal of indictments in cases where the government is not ready for trial within six months of the arrest. Hilbert's indictment was dismissed when the government was unprepared for trial on February 5, 1972. On May 30, 1972, Hilbert was reindicted for the same offense. Judge Dooling denied Hilbert's motion to dismiss the indictment, holding that a new six-month period began on May 30. Hilbert petitioned the Second Circuit for a writ of mandamus. The court, sitting en banc because of the importance of the case, held that the clear intent of its speedy trial rules was to mandate dismissal with prejudice. Further, promulgation of such rules was a proper exercise of the council's powers under section 332. The court found that Congress intended to confer broad powers upon the councils but appeared to restrict those powers to administrative functions. It also concluded, as did Justice Harlan, that mandamus was a proper remedy. Judge Friendly dissented, arguing that the council's rules went beyond a mere exercise of administrative power in removing the trial judges' discretion in determining whether dismissal ought to be with prejudice.

As was the case in Rodebaugh, no problems developed because there was compliance with the court's order. No question was raised regarding the propriety of the circuit judges sitting in review of orders they themselves had promulgated. That very question was dealt with in the Imperial case.

In re Imperial "400" National, Inc.

As in Chandler, the situation which gave rise to the order of the Judicial Council of the Third Circuit in Imperial had fomented over an extended period of time. Attorney Nolan had been appointed counsel for the trustee in bankruptcy of the Imperial "400" motel chain. During

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106 See, e.g., Battisti, supra note 54; Comment, Jurisdiction, supra note 95; Comment, Federal Courts—Procedure—Review of the Actions of the Judicial Council of the Circuit, 42 Fordham L. Rev. 477 (1973); Comment, Judicial Councils, supra note 66.
108 Id. at 359–62.
109 Id. at 362.
110 Id.
the bankruptcy proceedings, rather heated and pointed arguments had arisen between Nolan and counsel for one of the motel’s major creditors over the fees Nolan and his firm were collecting. In the meantime, a construction company represented by Nolan’s firm had proposed a reorganization plan. The plan was greeted with approval by all concerned parties but some concern was expressed at Nolan’s potential conflict of interest. After examining the problem closely, the district judge decided that Nolan could remain as counsel to the trustee but must avoid all involvement in the reorganization proposal. News of this decision came to the attention of the Judicial Council of the Third Circuit which issued a general resolution to all district courts within the circuit. This “general order” led the district judge, albeit reluctantly, to remove Nolan as counsel for the trustee. Nolan, unlike Rodebaugh and Dooling, challenged the order by appealing and by petitioning the district court for a writ of mandamus. A senior district judge from the Fourth Circuit was designated to hear the mandamus action, which he dismissed, holding that Nolan had an adequate remedy by way of appeal to the circuit and that the district court lacked jurisdiction to entertain the petition for mandamus. The appeals were consolidated. All members of the Third Circuit recused themselves, however, and the Judicial Conference of the United States designated Senior Circuit Judges Aldrich of the First Circuit and Lumbard and Smith of the Second Circuit to hear the cases.

Judge Aldrich, writing for the majority, argued first that the circuit had jurisdiction to hear the appeals, even though in doing so it was indirectly reviewing its own councils' orders. He argued that the council is solely an administrative body and review of the district court's order drawing upon the council's resolution is analogous to review of an order drawing its substance from a statute. In any event, the Supreme Court had declined leave to file the petition for mandamus, indicating that review was not to come from that Court. Moving to the merits, Judge Aldrich found that the councils were administrative bodies denied traditional judicial functions, citing the legislative history and Chandler.

Some question exists, however, as to whether the council overstepped its powers to issue general administrative orders in these cases.

113 RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that recusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest.

481 F.2d at 42.
Two items particularly trouble the majority. The first is the apparent personal and individual nature of the order. Allegedly directed at all district judges, it addresses a very specific problem. Indeed, the Solicitor for the Securities and Exchange Commission informed the court that this was the only instance in which he had seen the particular circumstance arise. The problem was compounded by the circuit judges' exposure to "highly defamatory accusations" against Nolan by opposing counsel. The second aspect of the order troubling the majority was its denial of any discretion in the district judge. Assuming that an order was necessary, the council should have allowed Nolan a hearing and allowed the district judge the discretion to determine whether a conflict in fact existed or was threatened. The court affirmed the dismissal of the mandamus action but remanded the original removal order for a hearing on the possibility of reemploying Nolan. The majority thus upheld the councils' powers as an administrative body to issue general orders and established a method of review for those cases where a district court order is issued as a result of a council resolution.

Judge Lumbard dissented. He would have affirmed both the dismissal of the petition for mandamus—on the grounds that the district court was "powerless to entertain a petition to mandamus the circuit council"—and the order removing Nolan as counsel for the trustee in bankruptcy. Agreeing with Justice Harlan, Judge Lumbard stated that Nolan had but two recourses: to petition the council itself for review and to petition the Supreme Court for leave to file a mandamus petition. On the merits, Judge Lumbard argued that control of conflicts of interest is within the powers of section 332 and that the order in question, issued to resolve a specific problem and provide guidance in future cases, was well within the council's statutory powers. He did not address the question whether the council was an administrative or a judicial body.

What occurred following issuance of the opinions in *Imperial* only added more confusion. Petitions for rehearing and rehearing en banc were presented and, as per Third Circuit rules, were to be voted upon by both the panel and the active circuit judges. The panel voted to deny rehearing but could not vote on whether there should be a rehearing en banc since it consisted of senior judges from other circuits who

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114 Id. at 47.
115 Id. at 47-49.
116 Id. at 49.
117 Id.
118 Id. at 50.
119 Id. Judge Lumbard himself noted, however, that the Supreme Court had already denied Nolan's petition for leave to file a writ. 409 U.S. 822 (1972).
could not vote with the Third Circuit judges on that part of the petition. The six active circuit judges voted that the issues were of such significance as to merit an en banc hearing. However, despite Judge Lumbard’s urgings, they decided that they must continue to recuse themselves. They concluded:

[W]e are hopeful that the Supreme Court will see fit to review this important matter, especially since we are impelled to recuse ourselves from sitting in banc on these petitions.\(^{120}\)

The Supreme Court denied certiorari.\(^{121}\)

The Post-Imperial Judicial Council

Primarily because the Supreme Court did not decide the basic issues in Chandler, we are left with a picture of the powers of the Judicial Councils which is very tentative. It appears that most interpret the legislative history as mandating a body with administrative powers only, though those powers are allegedly very broad. Nothing has been said by the courts to suggest that the informal actions taken by the councils, usually through the Chief Judges, is in any way an abuse of those powers. From Hilbert v. Dooling, we can surmise that the issuance of general orders applicable to all district judges in the circuit is also permissible, though Judge Friendly’s dissent, together with the majority opinion in Imperial, suggest some problem when the orders impinge on a judge’s discretion. The majority in Imperial finds a method of review in those circumstances where a district court order is promulgated to compel compliance with a council order. Beyond that, it is difficult to identify the extent of the power of the Judicial Council.

Evaluating the four reported cases dealing with the Judicial Council’s powers, one writer has developed some guidelines for future councils’ actions.\(^{122}\) He contends that informal actions and general orders directed at all district judges are still permissible. The third type of activity which he deems safe is the issuance of “specific orders, directed to individual judges, and limited to the correction of a specific situation for which that judge can be held directly responsible.”\(^{123}\) Under these guidelines, the orders in Rodebaugh and Imperial should not have issued, since the specific situations—alleged improper conduct by a court officer other than the judge—were beyond the enforcement scope of the statute. Due to section 332(d), only the district judge is compelled to comply

\(^{120}\) 481 F.2d at 57.
\(^{121}\) 414 U.S. 880 (1973).
\(^{122}\) See Comment, Judicial Councils, supra note 66, at 859–63.
\(^{123}\) Id. at 860.
with council orders; any attempt to expand those enforcement powers is inviting a problem such as that in *Imperial*. He suggests that there are other avenues open for dealing with this problem. The council might simply have brought Rodebaugh's misconduct to the attention of the district judge; if the judge himself made the same order and the reporter failed to obey, he could be fired without involving the Judicial Council at all. In *Imperial*, the circuit might simply have reversed the district judge's decision allowing Nolan to continue as counsel for the trustee when the case was appealed. That author concedes, however, that the *Chandler* order would have been issued under his third guideline. When a judge refuses to comply with an order, some problems are created. However, he contends that judicial restraint might also have solved this problem. The argument is that if the initial order had merely restricted the assignment of new cases until the judge's backlog was reduced, the situation might not have gotten out of hand. Alternatively, the author suggests that the circuit judges might have refrained from all action as a Judicial Council and continued to deal with Judge Chandler on a case-by-case basis.

Enforcement and review remain the big problems. Perhaps by emphasizing the informal tools and general resolutions, confrontation with those problems can be minimized or even avoided. Adopting that approach is a concession that certain problem judges simply cannot be dealt with by the Judicial Councils. That is exactly as many would have it; whether, however, that is the role Congress foresaw when it granted the supposedly broad powers to the Judicial Councils is a question Congress itself must answer. Adoption of the Nunn bill would be one way to negate the intent the courts have seen in the legislative history of section 332. On the other hand, Congress could demonstrate a contrary intent by making any necessary amendments to section 332.

**Conclusion**

In comparing the Nunn bill with the Judicial Councils, some may well argue that comparison has been made between apples and oranges.

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124 As a court reporter, Rodebaugh was subject to removal by the district court [citing 28 U.S.C. § 753(c) (1970)]. If he failed to carry out a directive of the Administrative Office, that court should have removed him.

*Id.* at 861.

125 Indeed, the case came before a three-judge panel of the Third Circuit, from which it was referred to the council. 481 F.2d at 44. The case-by-case approach appears to have been adopted by the Tenth Circuit in dealing with Judge Willis Ritter. *See, e.g.*, United States v. Ritter, 273 F.2d 30 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960); United States v. Hatahley, 220 F.2d 666 (10th Cir. 1955), *rev'd*, 351 U.S. 173 (1956), *on remand*, 257 F.2d 920 (10th Cir. 1958), *cert. denied*, 358 U.S. 899 (1958).
While conceding a certain validity to that point, this article is primarily concerned with a larger problem: identification of some of the options on the spectrum of alternative infringements upon the independence of the judiciary. We hear too often that Congress is certain to act in controlling the judiciary and that the Nunn bill must be accepted and endorsed by the judiciary lest some more lethal method be adopted. The primary purpose of this article is only to refute such an argument and to indicate that there is a reasonable and acceptable alternative to the Nunn bill.

But an important threshold consideration has been only tangentially mentioned in discussing alternatives; that is, should there be any additional controls placed upon the federal judiciary? There is a substantial portion—perhaps a majority—of federal judges who would argue that no control at all is the only constitutionally mandated position. The best recent statement of this view is made by Judge Battisti.\(^1\) His article merits consideration by anyone interested in the problem under discussion here. Judge Battisti argues that even the power assigned to the Judicial Council to attempt to speed up the disposition of cases in the federal courts, conceded by Justices Black and Douglas,\(^1\) is an unconstitutional foray by Congress into the independence of the judiciary.

However, assuming some control is constitutionally allowed, the cases discussed here suggest several alternatives. Justices Black and Douglas would apparently allow some administrative controls aimed only at expediting the flow of cases through the district courts. However, they would reject any attempts—arguably either formal or informal—at censure, removal, or other forms of discipline of judges by judges.

The next alternative on the spectrum is probably the Judicial Council of the Circuit with the powers it may have after the developments of Chandler and Imperial. Even without congressional clarification, the council has powers to deal with a fairly wide variety of problems. Within the limits of reasonable restraint, the council can be effective, as demonstrated in Professor Fish's book.\(^1\) Indeed, even now section 372 remains available to the council if a judge is physically or mentally unable to carry out his duties.\(^1\)

The mere existence of the Judicial Council allows informal correction of unfortunate practices without the spotlight of more formal action. Without applause or publicity, the Chief Judges of the circuits

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\(^1\) Battisti, supra note 54.


\(^1\) P. Fish, supra note 64.

\(^1\) See note 51 supra.
have effectively used their persuasive powers to eradicate problems which might otherwise have caused serious difficulties in our judicial system.

The next alternative would be congressional modification of section 332 to provide more definition of, if not an increase in, the power of the Judicial Council, as suggested by the majority in *Chandler*. In fairness, at least an amendment is necessary so that the circuit judges would be brought within the scope of the councils’ rulemaking and persuasive powers. Further, while it seems unlikely that the courts will adopt the positions taken by Justice Harlan and Judge Lumbard, Congress might amend section 332 in any number of ways to give the councils more power than they appear currently to possess. By specifying a standard of review and a reviewing court—possibly a designated panel such as used in *Imperial*, the circuit court itself (as suggested in *Imperial*), or the Supreme Court—Congress could expand the councils’ powers to include those actions approved by Justice Harlan and Judge Lumbard, possibly without even specifying whether the Judicial Councils are to act as administrative bodies or as courts. Congress might also enumerate the powers of the councils and rescind the general power of section 332. Such an approach is probably a more difficult one than Congress might wish to undertake but it may well end debate on the subject more effectively than any of the alternatives other than that propounded by Judge Battisti.

Judicial removal, such as proposed in the Nunn bill, is the last alternative on the continuum. As discussed earlier, its constitutionality is suspect. Strong policy arguments also militate against its adoption. On the other hand, it would remove from the scope of section 332 most of the problems that have plagued the Judicial Councils and would provide a powerful tool for dealing with errant judges.

Perhaps what should be done can be determined only when horizons are expanded beyond the individualized problem being considered. It would be unfortunate indeed for overreaction to bring about a “solution” which cures a malady but kills or cripples the patient. That horizon expansion occurs when we inject the basic premise that the separation of powers is not only a basic concept of our form of government, but its continuing vitality is the only method available to check and to prevent imbalance and possible tyranny. That separation of power is effective only so long as there is an independence of the judiciary, not merely as one of the three branches of government, but such that each judge can carry out his responsibility unfettered by political pressure. Thus, even assuming a case can be made for some form of control, Professor Kurland’s caveat should be kept in mind:
When dealing with so fundamental and fragile a notion as the independence of the judiciary, one ought to treat warily lest the ultimate cost far outweigh the immediate gain.\textsuperscript{180}

If a case for reform has been made, the necessary control mechanisms should be carefully devised and implemented. Unless that case has been made, it would be imprudent to tinker with a system that has functioned with only minor difficulties for nearly two centuries.

\textsuperscript{180} Kurland, \textit{supra} note 10, at 666.