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Reflections on the Senate’s Role in the Judicial Impeachment Process and Proposals for Change

BY MITCH MCCONNELL*

INTRODUCTION

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Harry E. Claiborne, U.S. district judge for the district of Nevada.¹

With this tradition-bound invocation from the Sergeant at Arms, the United States Senate began consideration of the impeachment of Judge Harry E. Claiborne—the first judicial impeachment in fifty years, and one of only eleven since the establishment of the federal judiciary. Four months after presentation of the impeachment articles,² and after a dramatic appearance by Judge Claiborne at the eleventh hour, the Senate voted overwhelmingly to convict Harry Claiborne of three out

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* United States Senator. B.A., University of Louisville, 1964; J.D., University of Kentucky, 1967. The author would like to extend his appreciation to Steven J. Law, Legislative Assistant for Judiciary Committee matters, and to E. Neil Trautwein, Legislative Assistant for Education and Health matters, for their valuable assistance in preparing this Article.

of the four articles of impeachment and to strip him of his title and office.\(^3\)

To lay the foundation for this rare and complex proceeding, a special Senate Committee was appointed. This Committee, on which the author served, labored intensely for more than two months, amassing the necessary evidence and testimony as well as processing the numerous motions made by Judge Claiborne regarding the scope of the impeachment trial and the constitutionality of the entire proceeding.

Not surprisingly, many believed that the impeachment of Judge Claiborne would never be undertaken by the Senate because of the tremendous burden imposed under the century-old procedure for judicial impeachments. Judge Claiborne had been convicted of tax fraud and had served three months of his two-year sentence before the Senate even began consideration of the matter. Nevertheless, Claiborne had contested his conviction, claiming to be the hapless victim of a "government vendetta."\(^4\) He also refused to resign his office and continued to collect his $78,700 yearly salary and pension benefits while in prison.

Finally, the House Judiciary Committee, under the chairmanship of Representative Peter Rodino, was goaded\(^5\) into drafting four articles of impeachment against the convicted Judge.\(^6\) After one hour of debate on the House floor, during which no member spoke in Claiborne's defense, the House unanimously approved the articles and sent them to the Senate.\(^7\)

This Article is divided into two parts. Part One discusses in detail the Senate's role in impeaching Judge Claiborne, with

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\(^3\) Two-thirds of the Senators duly elected to serve and present are required to convict for high crimes and misdemeanors in any judicial impeachment proceeding. The Senate found Claiborne guilty under Article I by 87-10 (Roll Call No. 335), guilty under Article II by 90-7 (Roll Call No. 336), not guilty under Article III by 46-17 (Roll Call No. 337), and guilty under Article IV by 89-8 (Roll Call No. 338), 99th Cong., 2d Sess. (1986).


\(^5\) The press and public became inflamed with statements such as those by Rep. Henry J. Hyde, who repeatedly remarked that "[e]very day that Judge Claiborne continues to collect his salary is an insult to every law-abiding citizen in this country." N.Y. Times, Oct. 8, 1986, at A14.

\(^6\) Id.

particular attention to the aspects of the proceeding that imposed onerous burdens on the members' time and resources. With the reader's indulgence, the author intends to draw extensively from his own experiences and perceptions as a key participant in this proceeding.

Part Two analyzes several recent and proposed changes in the impeachment process, some of which were prompted by the Senate's often frustrating and time-consuming experience with the Claiborne matter. This analysis considers these changes in the context of the recent impeachment proceedings as well as the underlying governmental values that the impeachment process is intended to protect.

I. THE CLAIBORNE IMPEACHMENT: SOME PERSONAL REFLECTIONS

A. The Controversy of the Special Senate Committee

Long before the articles of impeachment were exhibited to the Senate, Judge Claiborne had shown every intention of mounting a formidable, unrelenting procedural defense. Claiborne attacked the propriety of the investigation that resulted in his original conviction and planned to call more than sixty witnesses to testify, including then Chief Justice Warren Burger, then F.B.I. Director William Webster, and former Attorney General William French Smith.8

To complicate matters further, the managers of the impeachment, on behalf of the House of Representatives, filed a motion seeking summary disposition of the impeachment on the basis of the Third Article of impeachment.9 This Article provided that Congress could rely on Claiborne's earlier criminal conviction as sufficient grounds for finding Claiborne guilty of "high crimes and misdemeanors"10 and move immediately to convict the Judge and to strip him of office. Although such a motion, if granted, would greatly expedite the impeachment, its reliance on a sepa-

rate judicial determination had never been tested before, and the motion presented novel procedural and constitutional ques-
tions.

Therefore, the Senate created by resolution\(^{11}\) a special Senate Committee to "receive evidence and take testimony \^[and]\exercise all powers and functions conferred upon the Senate and the Presiding Officer of the Senate.\(^{12}\) In order to conserve the resources of the full Senate, which faced a clogged legislative calendar near the end of the Ninety-Ninth Congress, this impeachement resolution gave the special committee broad powers to prepare the impeachment record.\(^{13}\)

Although the committee expressly was constrained from rendering judgment on the articles of impeachment, its mandate to prepare the case arguably gave the committee considerable latitude to decide it as well.\(^{14}\) Ultimately, the committee was to submit a final report to the Senate, which would be considered, to all intents and purposes, subject to the right of the Senate to determine competency, relevancy and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.\(^{15}\)

The special committee innovation allowed the full Senate to return to its legislative calendar, although it disrupted the legislative activities of the committee's twelve constituent members. Further, it gave Claiborne a basis to challenge the constitution-ality of the proceedings against him.\(^{16}\)


\(^{12}\) Id.

\(^{13}\) Id.

\(^{14}\) This is implicit in the language of the Resolution and reflected in the motions filed by Judge Claiborne urging the full Senate to convene as a court of impeachment and not delegate its responsibility to a committee.

\(^{15}\) Id.

\(^{16}\) Claiborne argued that the Constitution requires the \emph{full} Senate to decide whether to impeach and that the committee process undermines the deliberative process involving the entire body. \emph{See infra} text accompanying notes 17-23.
Claiborne promptly moved to have Senate Impeachment Rule XI\(^\text{17}\) declared unconstitutional for delegating the Senate's impeachment powers to an ad hoc committee. He simultaneously moved that the full Senate convene as a court of impeachment to resolve his pretrial motions. He also insisted that the committee desist from receiving further evidence until his motions had been ruled on.\(^\text{18}\)

Claiborne's collateral attack was short-lived, however. Senator Charles Mathias, Chairman of the Impeachment Committee, decided that his committee did not have the authority to rule on any of the motions before it (including the House Managers' motion for summary disposition)\(^\text{19}\) and referred all of them to the full Senate for later consideration.\(^\text{20}\)

At the same time, Chairman Mathias flatly denied Claiborne's demand that the committee stop all further proceedings until the full Senate convened to consider his motions.\(^\text{21}\) Arguing that the enabling resolution did not abrogate any of the Senate's investigative and decision-making authority, the Chairman ruled that the committee could proceed and that Claiborne could raise his objections to the committee's existence and actions before the full Senate when the Senate received the committee's final report.\(^\text{22}\)

Claiborne probably first moved against the special committee for dilatory purposes. Had he been able to stall all further proceedings until the full Senate convened in trial, Claiborne might have been able to force the impeachment into the following year because of the Senate's already overflowing agenda.

After the dilatory strategy failed, Claiborne continued to attack the constitutionality of the special committee. This attack came in connection with his second main defensive position that


\(^{18}\) See transcript of the Impeachment Committee's Pretrial Conference, Sept. 10, 1986 (meeting to hear and dispose of motions from counsel for Judge Claiborne, and from the House Managers) [hereinafter Pretrial Conference].

\(^{19}\) Id.

\(^{20}\) See Pretrial Conference, supra note 18, and accompanying text.

\(^{21}\) See supra note 11 and accompanying text (Chairman Mathias exercised this power as would a presiding judge, ruling on all motions put before the Committee).

\(^{22}\) Id.
the Senate should consider evidence of improprieties in the original investigation that led to his earlier criminal conviction.23

B. Defining the Proper Scope of the Senate’s Investigation

In terms of popular appeal, Judge Claiborne’s most effective line of defense was his assertion that the original investigation that produced his criminal conviction was a “frame-up” in which politically-motivated federal agents “burglarized” his home, used perjured testimony, and “brainwashed” witnesses for the prosecution.24

Claiborne argued that these improprieties tainted the evidence from the earlier criminal proceeding and moved that the Senate exclude “all of the evidence” from the impeachment record.25 In addition, Claiborne sought to compel the appearances and testimony of sixty-six top-ranking government officials, either to prove the allegations of investigative impropriety or to impose staggering delays in the proceeding.26

Although Claiborne’s self-portrait as a “stalked man”27 generated a modicum of popular support, this line of defense proved utterly futile in the Judge’s efforts to exclude some evidence and to compel other evidence. The special committee refused to call most of the witnesses Claiborne requested and referred the exclusionary motion to the full Senate.28

After the special committee submitted its final report to the full Senate, Claiborne moved to reopen the impeachment trial de novo and to compel testimony from a modified list of fifty-eight proposed witnesses.29 On the second day of deliberation, however, the Senate voted sixty-one to thirty-two to reject Claiborne’s motion for a new, greatly expanded trial.30

23 See infra notes 24-41 and accompanying text.
28 Pretrial Conference, supra note 18, and accompanying text.
In response, Claiborne tried to involve the judiciary in the proceeding by filing an action in United States District Court against the United States Senate. His complaint asserted that, because the special committee had refused unilaterally to gather or to report evidence of investigative wrongdoing for the full Senate, the special committee procedure effectively "deprived [him] of the type of trial that every other impeached official has had a full trial in front of the Senate." Claiborne asked the court to find, as he had asserted previously, that the special committee procedure was unconstitutional. He further asked the court for an injunction to stay further proceedings in the Senate, pending resolution of the judicial action. The court denied both requests, holding that the committee’s management of the impeachment trial, while "unfortunate" and a "shortcut used for the first time," did not unconstitutionally deprive Claiborne of his right to a trial before the full Senate.

For the first time in the impeachment proceedings, the Senate showed its frustration with Claiborne’s dilatory tactics. The author of this Article and others protested the request for injunctive relief, citing the case Williams v Bush as authority that "there has never been an instance in our history when the Federal courts have presumed to tell a body of Congress, in the middle of its deliberations, how it should deliberate." Further, in order to discourage Claiborne from appealing the District Court ruling, the author urged Senate counsel in the lawsuit to move for the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure.

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31 See Pretrial Conference, supra note 18.
33 See Pretrial Conference, supra note 18.
34 Id.
35 Id.
37 Id.
38 Rule 11 requires that any motion filed by an attorney be:
to the best of [the attorney’s] knowledge warranted by existing law or a good faith extension and that it [not be] interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless
There were two reasons why Judge Claiborne's collateral attack on the earlier investigation did not succeed. First, the court found that the special committee's refusal to delve into the issue was not an unconstitutional deprivation of Claiborne's right to a hearing on this matter by the full Senate. The court concluded that the resolution creating the special committee preserved the Senate's authority to go beyond the evidence provided by the committee and to order a complete investigation of Claiborne's allegations of investigative wrongdoing.39

The second, less apparent reason was that the special committee already had decided to base the conviction on a full, separate investigation of the tax fraud counts of which Claiborne previously had been convicted.40 This early decision by the committee distanced the impeachment proceeding from the original investigation, criminal trial, and jury verdict, and therefore made Claiborne's attack on the handling of the first investigation irrelevant, even if meritorious.41

Increase in the cost of litigation.

FED. R. CIV. P 11. If violated, Rule 11 then provides that:
the court shall impose upon the person who signed the [motion], a represented party, or both, an appropriate sanction, which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the [motion],

Id.

39 See Pretrial Conference, supra note 18.

40 Id.

41 This author, for one, expressed concern regarding the improper and seemingly vindictive manner in which the original investigation and prosecution of Judge Claiborne was conducted:
As just mentioned, however, I am disturbed by the allegations of prosecutorial targeting in the case of then Judge Claiborne. I am concerned about the possible overzealousness on the part of the Justice Department, the special strike force, and agents of the Internal Revenue Service.

Although our common law has traditionally granted prosecutors wide discretion in how they prosecute, that discretion surely has its limits. The prosecution of Harry Claiborne, I believe, may have been at the outer limits of that discretion.

Consequently, I support the establishment of a special investigatory committee which will inquire into these allegations of I.R.S. and Strike Force improprieties.

C. Relevance of the Criminal Conviction and the Senate’s Decision to Reject the Third Article of Impeachment

The creation of a special committee to manage the impeachment trial indicated the Senate’s desire to streamline the process and to minimize the full body’s responsibility for amassing and digesting evidence. Yet, from the moment that the House presented its four articles of impeachment to the Senate, there was considerable resistance to adopting the most streamlined approach embodied in Article Three:

On August 10, 1984, in the U.S. District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing a false income tax return for the calendar year 1979 and 1980. Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of high crimes.42

As previously mentioned, the House Managers had immediately moved in the special committee for a summary disposition of the impeachment conviction43 based wholly on the jury verdict and the criminal conviction of two years earlier.44 Of course, the committee did not possess the authority to rule on the motion. Nonetheless, the Chairman went to great lengths to dissuade his colleagues from such a facile strategy.45

First, the Chair stressed that the constitutional design of the impeachment process demonstrated the framers’ intentions to construct a system entirely separate from the judicial branch.46 Alexander Hamilton, writing in Federalist No. 65,47 described the process as a “double prosecution,” intended to provide impeached officials with the “double security intended them by a double trial.”48 Excessive reliance on the findings or the verdict of a prior trial would deprive the official of a unique procedural protection embedded in the Constitution.

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42 See supra note 2.
44 Id.
45 See infra notes 46-56 and accompanying text.
46 Pretrial Conference, supra note 18.
47 The Federalist No. 65, at 333 (A. Hamilton) (Gary Willis, ed. 1982).
48 Id.
Further, there were several practical reasons for granting, in effect, a trial de novo on the tax fraud charges against Claiborne. Although the two-year-old criminal conviction appeared secure, a subsequent reversal would at least embarrass the Senate and could undermine the entire impeachment if the Senate relied too much on the earlier proceeding.

In addition, the committee did not want to tie the hands of future Senates by establishing a precedent for deferring to courts of law. Some Senators, including the author, expressed the concern that such a precedent could estop the Senate from impeaching an official for improprieties of which he had been acquitted for narrow technical reasons. In fact, one such case already had appeared on the horizon: United States District Court Judge Alcee Hastings of Florida was acquitted of bribery charges but was the subject of judicial disciplinary proceedings and considered a likely target for impeachment.

Last, a hornet's nest of allegations of investigative and prosecutorial wrongdoing surrounded Claiborne's criminal conviction. Relying too heavily on the findings and results of that case could obligate the Senate to pass on these allegations, a burden that the committee wanted to avoid at all costs. This path not only would require extensive testimony and delay, but it also would force the Senate to decide the legitimacy of a prior judicial action; nothing could be further from the Hamiltonian ideal of a "double trial," with clear demarcations between the judicial and Senate proceedings.

Therefore, to balance the competing interests of expediency and senatorial independence, the committee struck a compromise: it would allow into the impeachment record much of the testimony and evidence presented at Claiborne's criminal trial and preserve Claiborne's right to challenge such evidence before the full Senate on the basis of the alleged improprieties.

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50 Id.
53 See Pretrial Conference, supra note 18.
54 The Federalist No. 65, supra note 47.
55 See Pretrial Conference, supra note 18.
Second, the committee would conduct an entirely new trial on the tax fraud charges and counsel against basing the impeachment conviction on Article Three. In the words of Chairman Mathias, quoting in part from a report by the Senate Select Committee on Ethics on the expulsion of former Senator Harrison Williams:

Its report stated, and I’m quoting, "The [Ethics] Committee's unanimous recommendation of expulsion reflects its strong conviction that its own determination of the matter and that of the Senate must be made independently of the jury's verdict. " Our responsibility to exercise independent judgment is certainly no less, and indeed may even be greater, when the question before us is the removal of an officer of another branch of the Federal government.56

On October 9, 1986, after receiving and considering the six-inch-thick transcript of the special impeachment committee, ninety-seven Senators solemnly cast their votes on the four articles of impeachment against Judge Claiborne.57 The compromise worked out in pretrial conference effectively carried the day Senators voted overwhelmingly in favor of conviction on the first, second, and fourth articles of impeachment, each of which had been fully tried de novo by the special committee.58 Claiborne was acquitted on the third article, which urged his removal solely on the basis of the prior conviction, by a vote of forty-six in favor of conviction and seventeen against.59

The Senate also accepted the evidentiary record prepared by the special committee,60 much of which had been culled from the criminal trial,61 and heard Claiborne's personal testimony on how his conviction was tainted by prosecutorial and investigative wrongdoing;62 however, the Senate refused to convene a full trial

56 Id.
57 See supra note 3.
58 Id.
60 The Committee Report was not formally incorporated into the Congressional Record. It was used, as any other committee report, as an authoritative body of information.
61 See supra note 52.
on Claiborne's allegations or to order witnesses on his motion because the impeachment "sought to determine the wrongdoing of only Judge Harry E. Claiborne" and because the committee and several other Senators already had decided to forego conviction on Article Three, minimizing their reliance on the criminal trial.

The labors and the tactical decisions of the Special Impeachment Committee played a determinative role in the Senate's impeachment of Judge Harry E. Claiborne. The committee not only saved countless hours of the full Senate's time, but it also exerted tremendous influence on the Senate's ultimate decision. The Senate Impeachment Rules establishing the committee emphatically preserved the Senate's investigative powers and provided that the Senate could entirely set aside the committee's report and convene a full impeachment trial de novo. Nonetheless, the creation of a special committee by Senate resolution demonstrated that the Senate intended to defer largely to the committee and to accord the committee broad latitude in managing the impeachment proceedings.

At the same time, the special committee procedure should not be interpreted as an abdication of the Senate's profound responsibilities with respect to the impeachment process. In voting against Article Three, or impeachment by prior conviction, the full Senate explicitly declared its intention of retaining strict control over judicial impeachments—an intention that must be given consideration when examining proposed changes to the tradition-bound, constitutionally-rich impeachment process.

II. Proposals to Change the Senate's Role in Judicial Impeachments

The author emerged from the Claiborne impeachment, as did many of his colleagues, with mixed feelings concerning the

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63 See supra note 41. See Senate Impeachment Rules, supra note 11.
64 Referring to the negative vote on impeachment Article III, Sen. Alan J. Dixon (D-Ill.) stated that many Senators did not want "to set the precedent that a conviction would be equivalent to impeachment or that a person who was acquitted would be found not eligible for impeachment." Wash. Post, Oct. 10, 1986, at A18.
65 See Senate Impeachment Rules, supra note 11.
66 Id.
impeachment mechanism. Although the process is every bit as cumbersome as it is often described, this was the likely intent of the framers of the Constitution. As Senator Mathias noted,

The Founding Fathers were deeply concerned over the conflict between judicial independence and judicial accountability. They were well aware, as Justice Black noted in his dissent in *Chandler v Judicial Council*, 398 U.S. 74, 143 (1970), “that the judges of the past—good patriotic judges—had occasionally lost not only their offices but had also sometimes lost their freedom and their heads because of the actions and decrees of other judges. They were determined that no such things should happen here.” They came to the Constitutional Convention with these lessons from history well in mind.67

The author shares his former colleague’s belief that the framers were wise to ensure the independence of the judicial branch of our government. Further, Congress would do well to keep that concern firmly in mind. Lord Bryce, an eminent observer of the American political system, once observed:

> 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 power to fire it, and a large mark to aim at.68

Indeed, Congress has a very large mark at which to aim when it considers judicial impeachments: an equal, coordinate branch of government without sufficient means to defend itself against majoritarian excesses. Thus, the author views proposals to change the process of judicial discipline and impeachment with some trepidation.

The last major reform in judicial discipline, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,69 was enacted despite substantial constitutional concerns of some members of Congress for the independence of the

judicial branch. Further, many members expressed concern, which the author shares, about the prospect of increased demands on limited Senate resources imposed by growing numbers of impeachment trials generated by the administrative simplifications of that Act.

Senator Heflin’s proposed constitutional amendment would grant Congress the authority to provide alternative procedures to impeachment for removal of federal judges. This amendment should be approached with some caution. Congress should not lightly disregard the framers’ legitimate concerns for the independence of the federal judiciary.

A. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

Frustrations with the impeachment process are hardly new. In 1980, the Senate Judiciary Committee recognized that the impeachment process has become unduly cumbersome and ineffective. It requires more time than either the House of Representatives or the Senate may realistically be able to provide. [It] has fallen into disuse because the legislature cannot divert time from their increasing and relatively more important legislative assignments. More importantly, the Committee recognizes that most judicial discipline will involve conduct which falls short of the conduct required for the commencement of impeachment proceedings. Thus the Act attempts to fill the void which currently exists between the impeachable offenses and doing nothing at all.

The 96th Congress sought to provide the federal judiciary with the means to keep its house in order and, at the same time, provide an orderly procedure for screening complaints of impeachable offenses and then forwarding them to the House of Representatives for consideration.

72 S. REP. No. 362, 96th Cong., 1st Sess. 4-5 (1979). This report also noted that the average Senate impeachment trial lasted 16 days and some have taken as long as six weeks.
Although the rudimentary disciplinary powers granted to the federal judiciary by the 96th Congress in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 seem both necessary and logical, they are not without constitutional implications. Further, the administrative mechanism created to receive, to evaluate, and to refer complaints of impeachable conduct may well present Congress with increasing numbers of possible impeachments to consider.

The administrative framework created by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 contemplates three layers of review and evaluation for complaints of judicial misconduct: (1) by the chief judge of the circuit in which the judge sits; (2) by the judicial council of the circuit; and (3) by the Judicial Conference of the United States.

At the entry level, the chief judge of the circuit screens complaints. Complaints enter the system at the circuit court of appeals level, and the judge whose conduct is in question is afforded initial notice of the complaint. The chief judge may summarily dispose of the complaint if it directly relates to the merits of a ruling or if it is frivolous. Alternately, the chief judge may simply conclude the proceedings if the appropriate corrective action has already been taken.

If the complaint cannot be disposed of at this level, the chief judge must then appoint a special committee, composed of the chief judge and an equal number of circuit and district judges, to further investigate the complaint. The committee holds full subpoena powers to effectuate its investigation.

The judicial council of the circuit has initial responsibility for sanctions, if deemed necessary. The special committee ap-

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73 See infra notes 96-98 and accompanying text.
74 See supra note 69.
75 Id.
76 28 U.S.C. at § 372(c)(1-2).
77 Id.
78 Id. at § 372(c)(2).
79 Id. at § 372(c)(3)(A).
80 Id. at § 372(c)(3)(B).
81 Id. at § 372(c)(4).
82 Id. at § 372(9)(A).
83 Id. at § 372(c)(11)-(12).
pointed by the chief judge forwards its findings to the judicial council of the circuit, which determines whether and which sanctions are appropriate. The judicial council wields a wide array of disciplinary powers provided to the federal bench to correct lesser judicial malfeasance.

The statute enumerates six possible disciplinary actions the judicial council may take, short of actual removal of the judge. When warranted, the judicial council may issue an order directing the chief judge of the district to take such action as the judicial council considers appropriate, most probably an informal reprimand. Alternatively, the judicial council may issue an order certifying the disability of the judge and requesting that he or she voluntarily retire, prohibiting further assignment of cases to the judge, or censuring the judge by either private communication or public announcement. Due process rights are accorded the judge by a combination of prior notice and a full and fair opportunity to be heard.

Finally, the judicial council may forward the complaint to the Judicial Conference of the United States, particularly where conduct approaches the constitutional grounds for impeachment: "treason, bribery, or other high crimes and misdemeanors." At this juncture, the Judicial Conference would then conduct such further investigation as it deemed necessary, adopt one of the alternatives described above, or, by majority vote, recommend to the House of Representatives that its consideration of impeachment may be warranted.

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84 Id. at § 372(c)(4).
85 Id. at § 372(c)(5).
86 Id. at § 372(c)(6)(B).
87 Id. at § 372(c)(6)(B)(i).
88 Id.
89 Id. at § 372(c)(6)(B)(iii) (cross referencing 28 U.S.C. § 372(b)).
90 Id. at § 372(c)(6)(B)(iii).
91 Id. at § 372(c)(6)(B)(iv).
92 Id. at § 372(c)(6)(B)(v)-(vi).
93 Id. at § 372(c)(11). The judge is given the opportunity to compel the attendance of witnesses and the production of documents, to cross-examine witnesses, and to present argument orally or in writing. Id. at § 372(c)(11)(A-C).
94 Id. at § 372(c)(7).
95 Id. at § 372(c)(8).
The crux of the constitutional dilemma, which framed the debate on the Judicial Councils Reform Act, was whether Congress could constitutionally enact a system of judicial discipline short of impeachment. Opponents of the legislation, particularly Senator Heflin, argued that impeachment was the sole constitutional means of judicial discipline. Arguably, the Judicial Conference's role in recommending consideration of impeachment comes close to being an unconstitutional burden on the lifetime tenure guaranteed by the Constitution to members of the federal judiciary.

Both the Senate and House Judiciary Committees were careful to distinguish the disciplinary structure created by the Judicial Councils Reform Act from the constitutional roles of the House and the Senate in the impeachment process. They argued that the disciplinary structure of the Judicial Councils Reform Act was a necessary supplement to the burdensome remedy of impeachment, preserving the constitutional procedures of impeachment and Senate trial. The author believes that the provisions of the Judicial Councils Reform Act are constitutional, as both a logical and a necessary implication of the growth in the federal judiciary; however, the wisdom of the Judicial Conference's role in recommending consideration of impeachments is a different question entirely.

The administrative mechanism contained in the Judicial Councils Reform Act may have some potentially troubling implications for the House and the Senate. To date, only eleven federal judges have ever been impeached, a figure that might well be higher but for the cumbersome impeachment process. The administrative mechanism now in place quite conceivably could funnel increasing numbers of impeachments into the House.

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98 The Senate report emphasized that the purpose and goal of these new provisions is to establish a mechanism which deals with matters which for the most part fall short of being subject to impeachment. And, where impeachment may be appropriate, traditional constitutional procedures continue to govern.
for consideration. Even assuming that the House only acts to
impeach a very small number of these, the Senate might increas-
ingly be forced to perform its constitutional role as the forum
and the jury for the impeachment trial.

Although some argue for more impeachments, contending
that the present system may “keep venal and incompetent judges
on the bench, sullying the reputation of the Federal Judiciary,”
others believe assuring the independence of the federal judicial
branch is equally important. Gerald McDowell, Justice De-
partment prosecutor in the federal criminal prosecutions of Judge
Harry Claiborne and Judge Walter L. Nixon Jr., was quoted as
saying that, although he was outraged by the facts of these
cases, “it’s a reasonable price to pay It’s not a terrible abuse
when you consider that the judges who are honest have a sense
of independence.”

The author would agree with McDowell that the more
streamlined judicial impeachments become, the less independent
the federal judiciary will be. Also, whether the prospect of
weeding out a few venal and incompetent judges is worth the
cost of losing the independence of one of our three equal branches
of government is questionable. Thus, the author approaches
proposals to streamline the impeachment process with consider-
able caution.

B. Senate Joint Resolution 113

Senator Heflin’s proposed constitutional amendment arose
from his concern that the impeachment mechanism is simply
unworkable. Discussing his opposition to passage of the Ju-
dicial Councils Reform Act, Senator Heflin noted that he
shared “this Committee’s concern that the greatly enlarged size
of the federal judiciary, as well as its expanding role in today’s
society, demand the formulation of some method of judicial

100 Id.
101 Id.
accountability other than the time-consuming process of impeachment.  

There is no question that the Senator is correct in judging the current impeachment process as cumbersome in the extreme, but the author would add a note of caution against undercutting the independence of the judiciary. The judicial branch itself is understandably sensitive to the danger. The House report on the Act noted that

Although Senator Heflin seeks to avoid these questions by proposing a constitutional amendment to allow Congress to provide alternative procedures for removal of Article III judges, his proposal has serious implications for the balance of powers between the different branches of the government.

Senate Joint Resolution 113 is a deceptively simple grant of power to Congress. The joint resolution provides in relevant part:

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104 Sen. Heflin was careful to define judicial accountability as pertaining to the non-decision rather than the decision-making function of judges. As he rightly stated, disciplinary measures against a judge must not be undertaken out of philosophical differences. S. REP. No. 362, 96th Cong., 1st Sess. 20 (1979).

105 Id.

106 In his "Dear Colleague" letter circulated prior to introduction of S.J. Res. 113, Sen. Heflin argued that "the Senate is no longer structurally able to conduct a long and complicated impeachment trial and that it is unrealistic to expect 100 Senators to act as both judge and jury during such a trial." Letter from Howell Heflin to Senate Members (undated) (see Appendix A, infra).

107 H. REP. No. 1313, 96th Cong., 2d Sess. 3 (1980).


Section 1. The Congress shall have the power to provide procedures for the removal from office of Federal judges serving pursuant to Article III of the Constitution, found to have committed treason, bribery, or other high crimes and misdemeanors.110

After ratification, Congress could then delegate, in whole or in part, its removal power over Article III judges. The author questions whether Congress is capable of devising sufficient procedural safeguards to ensure the continued independence of the judicial branch.

Senate Joint Resolution 113 may raise more questions than it solves. The crux of the problem lies in the generality of its language.111 Although Senator Heflin sought "in no way [to] alter the reasons for which a federal judge can be removed,"112 by drawing "the causes for removal directly from the Constitution,"113 his amendment does not specify who ultimately would determine whether removal is warranted.114

If exclusive control of the impeachment mechanism is vested in the judiciary, that body may well be subjected to internal as well as external political pressures, from which it should be instead insulated. As Senator Paul Laxalt commented,

"The Federal Courts are the final link in our system of checks and balances. They are the last to act, and the last to change. After the legislature and executive branches have acted, after the press has analyzed, reported and commented, and even after the public has experienced changes and additions to our systems and to our laws, the courts finally rule on the legality, the constitutionality, the application, and the scope of those changes and laws."

That review follows the debate on the need for and the advisability of such changes with good cause. Making that

110 Id.
111 Bazan, supra note 108.
112 See supra note 106 and accompanying text.
113 Found to have committed treason, bribery, or other high crimes and misdemeanors. See supra note 108 and accompanying text.
114 Id.
process more susceptible to political pressure will not, in my own opinion, improve our system of Government.\textsuperscript{116}

Insulation of the judicial branch from political pressure by the other coordinate branches is a quality of our system that should not be lightly discarded. At the same time, if the judiciary is granted the power to determine whether judges are “found to have committed”\textsuperscript{117} impeachable offenses, Congress may be relinquishing its best “check” on the judicial branch of the government.\textsuperscript{118}

The chief concern of the author is that a “fast-track” procedure for removal of federal judges could compromise the independence of the federal judiciary Senator Mathias cogently set forth the dilemma during Senate impeachment proceedings against Judge Harry Claiborne:

> Beyond the fate of this man lies one of the great checks and balances of the Constitution. Given the vastly increased workload of the Senate, there is the question of whether the institution of impeachment can survive as an efficient, effective instrument or whether it must lumber along for five or six weeks as in the past.

> On the other hand, if the process is made too simple and too easy it may lead to usurpation of power down the line. It could be open to abuse if people were toppled from power for the wrong reason.\textsuperscript{119}

Perhaps, as some have suggested, alternative means to the current impeachment mechanism can be devised to meet these concerns. Once the precisely correct balance of power between coordinated, equal branches of government is struck, however, the question that arises is whether the resulting complexity might be worse than the “illness” sought to be cured.

**CONCLUSION**

Looking back on the impeachment trial of Judge Harry E. Claiborne, the author is struck by the immense burden of the


\textsuperscript{117} S.J. Res. 113, 100th Cong., 1st Sess. (1987).

\textsuperscript{118} Bazan, supra note 108.

Senate's role in judicial impeachment proceedings imposed by the Constitution. The author was privileged, not only to be a member of the Senate during these proceedings, but also to be a member of the Special Impeachment Senate Committee appointed to hear evidence and to prepare the impeachment record for the full Senate. As the first section of this Article explains, the Committee saved countless hours of the full Senate's time and exerted tremendous influence on the Senate's ultimate decision.

Although the author can fully appreciate the universal description of the impeachment process as extremely cumbersome, he would dispute the contention that Congress' responsibility is an unwarranted burden. The respective roles of the House and the Senate in judicial impeachments were carefully planned by the framers of the Constitution. Even though the Congress of today is faced with a legislative burden far beyond what the framers could have envisioned, that in no way diminishes the core value of coordinated, equal branches of government and the importance of Congress' role in preserving the balance of power.

The institutional weakness of the judiciary, the branch of government most vulnerable to the storms of political pressure, should not be readily exposed to such influence. The author does not profess to have a solution to the dilemma at hand, but rather he urges caution and meditations upon the Constitution in analyzing proposals to change the procedures of judicial impeachment.
Appendix A

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

Dear Colleague:

Within the next couple of weeks, I will introduce a constitutional amendment to give Congress the power to provide for alternative procedures for removing federal judges from office.

At the end of the 99th Congress, after participating in the Claiborne impeachment proceedings, I determined that the current method of impeaching federal judges was unworkable. I feel that the Senate is no longer structurally able to conduct a long and complicated impeachment trial and that it is unrealistic to expect 100 Senators to act as both judge and jury during such a trial.

The amendment which I will propose will in no way alter the reasons for which a federal judge can be removed. Further, the causes for removal stated in the amendment have been drawn directly from the Constitution. As our federal judiciary grows, it is very possible that we will be faced with more than one impeachment trial every 50 years. We must devise a method of removing federal judges which is both fair to the individual and maintains one of the essential requirements of justice—an independent judiciary.

If you are interested in cosponsoring the enclosed constitutional amendment, please contact Tom Young of my Judiciary staff at 4-4022.

Sincerely,

Howell Heflin

HH/ty
Enc