

COMMENTS

Effective Removal of Article III Judges: Case Suspensions and the Constitutional Limits of Judicial Self-Policing

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Under the Judicial Conduct and Disability Act of 1980 (JCDA), it falls to federal judges in each circuit to investigate and redress complaints about their colleagues' behavior. A controversial provision of the Act authorizes the temporary suspension of misbehaving judges from new case assignments. Judges suspended under the Act—most recently, Judge Pauline Newman in the Federal Circuit—have argued that this amounts to effectively removing them from office without impeachment, violating constitutional protections of judicial tenure and independence. No court has invalidated a suspension on this basis so far. Yet courts have reserved the question taken up here, namely whether a long-term suspension could, by its practical effect, cross the line into removal.

Returning to first principles, this Comment develops and defends a bright-line rule for conceptualizing effective removal. Article III vests federal judges with the power to decide legal cases and controversies within limits set by the Constitution and Congress. Individual judges are not entitled to dockets of any particular size or scope. Yet possessing some measure of case-deciding power is a necessary condition for holding judicial office. It follows that a judge does not hold office if she does not wield any judicial power, as when a categorical prohibition on hearing cases eliminates her entire docket. When a case-suspension sanction under the JCDA even temporarily has that effect, disqualifying a judge who lacks assigned cases from further assignments, it unconstitutionally removes the judge from office.

After crystallizing the concept of effective removal, the Comment attends to non-merits-related reasons that courts are unlikely to accept this challenge to the JCDA even in compelling cases; assesses the risk that the Act's case-suspension provision could be abused to effectively remove judges for improper reasons; and ultimately proposes a targeted amendment to the provision that would foreclose the possibility of effective removal and conform the Act's scheme of judicial self-discipline to the Constitution's separation of powers.

INTRODUCTION 1112

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I.	THE LAW OF JUDICIAL DISCIPLINE	1118
A.	The Judicial Conduct and Disability Act	1120
B.	The Constitutionality of Case Suspensions	1123
1.	The Supreme Court declines to delimit judicial councils' pre-JCDA authority to (re)assign judges' cases.	1124
2.	Lower courts have left unsettled whether long-term case suspensions are constitutional.	1126
3.	Judge Newman's predicament illustrates that the JCDA is insulated from even very strong effective removal challenges.	1129
II.	DRAWING THE LINE AT EFFECTIVE REMOVAL	1133
A.	Eligibility to Exercise Case-Deciding Power Is a Necessary Condition of Holding Judicial Office	1133
B.	Depriving a Judge of All Case-Deciding Power Effectively Removes the Judge from Office	1137
1.	Substantively, the deprivation of case-deciding power must be categorical, but it need not be permanent.	1138
2.	Procedurally, the deprivation of case-deciding power must be imposed on an individual judge as a legal sanction for (mis)conduct.	1141
C.	The Constitution Prohibits Congress from Delegating Effective Removal Power to the Judicial Councils.	1145
III.	IMPLICATIONS AND RECOMMENDATIONS	1149
	CONCLUSION	1154

INTRODUCTION

The oldest federal judge currently stands barred from hearing cases.¹ In September 2023, the Judicial Council of the Federal Circuit suspended Judge Pauline Newman, now 96, from case assignments after determining that she had committed “serious misconduct.”² Her offense? Refusing to cooperate with the Council’s investigation into whether she remained mentally fit for her judicial duties, thereby impeding the judiciary’s “self-policing”

¹ Rachel Weiner, *96-Year-Old Judge Who Refuses to Retire Suspended for “Misconduct”*, WASH. POST (Sept. 20, 2023), <https://perma.cc/VLW9-52SR>; Ryan Davis, *How Newman’s Battle with Colleagues Shook the Fed. Circ.*, LAW360 (Dec. 20, 2023), <https://perma.cc/6QJG-58TJ>.

² Order of the Judicial Council of the Federal Circuit at 9, *In re* Complaint No. 23-90015 (Fed. Cir. Sept. 20, 2023) [hereinafter Newman Order]; Report and Recommendation of the Special Committee at 8–9, *In re* Complaint No. 23-90015 (Fed. Cir. July 31, 2023) [hereinafter Newman R&R].

mechanism.³ Congress established that mechanism with the Judicial Conduct and Disability Act of 1980⁴ (JCDA), which empowers each circuit’s judicial council to investigate complaints about lower court judges and impose appropriate sanctions.⁵ For instance, as in the Federal Circuit, a council can order that “no further cases be assigned” to a sanctioned judge “on a temporary basis [and] for a time certain.”⁶ Judge Newman’s suspension is set to last until she submits to a detailed cognitive evaluation arranged by the Council.⁷ Yet she has ruled out complying with that condition, having previously submitted her own medical records attesting to her competency.⁸ This standoff has continued since Judge Newman circulated the final opinion assigned before her suspension.⁹ She may never hear a case or write an opinion again.¹⁰

Does the Council’s sanction amount to effectively removing Judge Newman from office—in violation of the Constitution’s protection of judicial tenure and in circumvention of its provision for congressional impeachment?¹¹ That “effective removal” question remains largely untested and ultimately unsettled. Scholars have recognized the possibility of effective removal in principle but have not set its exact parameters; they have not drawn a clear

³ Newman R&R, *supra* note 2, at 8–9, 110; *see also* Newman Order, *supra* note 2, at 68.

⁴ 28 U.S.C. §§ 351–364.

⁵ *See infra* Part I.A.

⁶ 28 U.S.C. § 354(a)(2)(A)(i); *see also* STEPHEN BREYER, SARAH EVANS BARKER, PASCO M. BOWMAN, D. BROCK HORNBY, SALLY M. RIDER & J. HARVIE WILKINSON III, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 17 (2006) (characterizing this sanction as a “temporary halt in case assignments”).

⁷ *See* Newman Order, *supra* note 2, at 69–73 (establishing an initial one-year term for the suspension that is renewable until this condition is met).

⁸ *See* Rule 20(A) Response to the Special Committee’s Report and Recommendation at 105 n.60, *In re* Complaint No. 23-90015 (Fed. Cir. Aug. 31, 2023) [hereinafter Newman Response to R&R].

⁹ Michael Shapiro, *Fed. Circuit’s Newman, 96, Fights Colleagues from Sideline*, BLOOMBERG L. (Dec. 19, 2023), <https://perma.cc/8ZPS-PVMH>.

¹⁰ *Cf.* Newman Order, *supra* note 2, at 9 (expressing sorrow that the suspension was “not a fitting capstone to Judge Newman’s exemplary and storied career” (emphasis added)); Edith H. Jones, *Federal Judges Deserve Due Process, Too*, WALL ST. J. (Aug. 15, 2023), <https://perma.cc/5CA7-FDA3> (“But in Judge Newman’s case, it appears that *career-ending removal* from her judicial duties is being imposed by her court.” (emphasis added)).

¹¹ *See* U.S. CONST. art. III, § 1, cl. 2 (Good Behavior Clause); *id.* art. II, § 4 (Impeachment Clause).

line where depriving a judge of cases crosses the removal Rubicon.¹² Courts, for their part, have declined to confront the paradigm case of effective removal: the complete elimination of a judge's docket.¹³ The last appellate court to consider an effective removal-style argument rejected the plaintiff-judge's challenge to his short-term suspension but explicitly reserved the question of whether a sufficiently long-term suspension could result, de facto, in termination of judicial tenure, a consequence that the Constitution reserves for Congress to impose through impeachment.¹⁴ It stands to reason that, at *some* point, a suspended judge can no longer fairly be said to "hold [] Office[]."¹⁵ The question is how to draw the line where suspension from cases becomes removal from office.

In the absence of case law, this Comment develops an account of effective removal from first principles. The Constitution provides that federal judges shall "hold their Offices during good Behaviour," that is, unless impeached.¹⁶ Though Article III does not define judicial "[o]ffice[]," it vests judges with the "judicial Power of the United States" to decide certain categories of cases and controversies.¹⁷ "It is emphatically the province and duty of the judicial department to say what the law is" and to "apply the [appropriate legal] rule to particular cases."¹⁸ And, as deciding cases is the judiciary's core collective function, it also becomes the central job requirement of individual judges when they swear, upon confirmation to the bench, to "well and faithfully discharge the duties of the[ir] office."¹⁹ These premises set up a syllogism. If holding judicial office requires wielding judicial power, and if wielding judicial power means hearing and deciding cases, then a judge that cannot hear and decide cases does not hold judicial office.²⁰

¹² For studies recognizing the effective removal problem, see, for example, Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1131–32 (1985), and Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 U. MICH. L. REV. 765, 766 (1989).

¹³ Newman Response to R&R, *supra* note 8, at 118; see also *infra* Part I.B.2.

¹⁴ *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of the Jud. Conf. of the U.S. (McBryde II)*, 264 F.3d 52, 67 n.5 (D.C. Cir. 2001).

¹⁵ U.S. CONST. art. III, § 1, cl. 2.

¹⁶ *Id.*

¹⁷ *Id.* art. III, § 1, cl. 1.

¹⁸ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁹ 5 U.S.C. § 3331; see also U.S. CONST. art. VI, cl. 3 (providing that "judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution").

²⁰ See *infra* Part II.A.

Filling in this formalism requires determining the quantum of case-deciding power that suffices for holding judicial office. The JCDA carefully limits permissible suspensions to those that apply “on a temporary basis [and] for a time certain,”²¹ implying that the relevant metric is temporal: if a judge will resume hearing cases in the future, he has not been removed.²² Yet nothing compels this approach—the concept of temporary removal, followed by reinstatement, does not offend language or logic²³—and in fact there are compelling reasons not to fixate on a suspension’s duration. Even a suspension originally imposed for a “time certain” can be renewed indefinitely. Setting a cumulative upper limit on months or years that a suspension can last before it qualifies as removal would be inevitably arbitrary. Most importantly, a time limit simply does not address the relevant constitutional concerns. A suspension could last for mere weeks and still do grave harm to judicial independence if, for example, it determined the outcome of specific cases.

This Comment accordingly focuses not on the duration of a suspension but on its effect.²⁴ The structure of Article III, the Constitution’s separation of powers, and the principle of judicial independence guide the analysis. On one hand, the Constitution assigns Congress near-plenary power to set the lower federal courts’ jurisdiction (at least within the outer bounds of Article III), and by extension to shape judges’ caseloads.²⁵ On the other hand, the Constitution also preserves judicial independence by imposing substantive and procedural limits on Congress’s removal power: a judge may be removed from office by Congress only for “high Crimes and Misdemeanors”²⁶ and upon conviction by two-thirds of the Senate.²⁷ So while the amount of case-deciding power that an individual judge is constitutionally entitled to wield necessarily remains minimal, the only legal process that can deprive a judge of that power is impeachment. Hence the Comment’s

²¹ 28 U.S.C. § 354(a)(2)(A)(i).

²² Cf. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 487 (2007) (suggesting that temporary deprivations of case-deciding power do not rise to the level of “constructive removal” in the context of withholding “designation” and assignment of cases to senior judges).

²³ See 2 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* 492 (6th ed. 1785) (defining the verb “remove” as “[t]o put from its place; to take or put away” and the noun “removal” as “[d]ismission from a post”).

²⁴ See *infra* Part II.B.

²⁵ U.S. CONST. art. III, § 1.

²⁶ *Id.* art. II § 4.

²⁷ *Id.* art. I, § 3, cl. 6.

bright-line rule: any legal proceeding that directly and categorically deprives a judge of all case-deciding power thereby removes him or her from office—even if the deprivation, couched as a “suspension,” is temporary.²⁸ A suspension that is short-term or limited to certain types of cases may never achieve this forbidden effect. But if all a judge’s current cases are reassigned at the same time that his new assignments are suspended, or if the suspension is so lengthy that he finishes his prior assignments while still barred from taking on new ones, then the deprivation of case-deciding power is complete and the judge stands effectively removed.

To illustrate this account, it suggests that Judge Newman was effectively removed from office once she circulated her last assigned opinion in November 2023, with nearly the full year of her initial suspension left to run. After that she lacked any opportunity to contribute to the work of the Federal Circuit, whether through participating in oral arguments, voting on case dispositions, issuing opinions, or sitting with her colleagues en banc.²⁹ Even if her suspension ultimately ends with reinstatement, she will have been removed because there will have been a point in time when she was categorically deprived of case-deciding power through a legal process purporting to sanction her misbehavior.

This stark example of effective removal should serve as an inflection point for assessing case suspensions under the JCDA—their constitutionality and their wisdom. Though suspensions have remained infrequent over the past four decades,³⁰ they are poised—like discipline proceedings more generally—to become more common as the federal judiciary grows in size and greys in age.³¹ The median member of Article III now approaches 70 years old, and political polarization creates pressure for elderly judges to delay retirement until conditions exist for the appointment of

²⁸ See *infra* Part II.B.

²⁹ See *infra* Part III.

³⁰ See *infra* notes 79–83 and accompanying text (noting incomplete data, but documenting at least four suspensions, including Judge Newman’s, in the past decade).

³¹ See Jackson Hobbs, Comment, *So Delicate a Subject: Maintaining an Independent and Self-Regulated Judiciary in the Face of Judicial Aging and Disability*, 85 *UMKC L. REV.* 805, 805 (2017); cf. Francis X. Shen, *Aging Judges*, 81 *OHIO ST. L.J.* 235, 241 (2020) (reporting that the average judge is now nearly 70 years old).

like-minded replacements.³² Even if suspensions remain infrequent, moreover, they deserve scrutiny given the magnitude of constitutional and political harm that would result from their abuse.³³ Prior criticism has focused on the risk that judicial councils will exercise “guild favoritism” to protect their peers from accountability, which if anything diminishes the likelihood of effective removal.³⁴ Yet an even greater risk is that the JCDA process could be (or appear to be) wielded to target judges for ideological reasons, a charge that Judge Newman and her defenders have levied.³⁵ While no evidence of such abuse exists in Judge Newman’s case, the prospect is unsettling: imagine a politically inflected suspension that tipped the balance of en banc review in a high-profile circuit case. Proponents of the JCDA have traditionally maintained that judges can be trusted to exercise more evenhanded oversight of their colleagues’ conduct than external, political actors.³⁶ But mounting political and ideological polarization within the judiciary could destabilize that normative foundation of judicial self-policing.³⁷

Congress should prophylactically amend the JCDA to defuse the constitutional land mine that is effective removal. An amendment should clarify that Article III judges may only be categorically disqualified from new case assignments so long as

³² See C. Ryan Barber & Camilia DeChalus, *Alzheimer’s Disease, Retirement “Pacts,” and Serving Until You’re 104 Years Old: Inside the Federal Judiciary’s Reckoning with Age*, BUS. INSIDER (Sept. 27, 2022), <https://perma.cc/K6DF-48QR>.

³³ On the potential for abuse, see, for example, *Hastings v. Jud. Conf. of the U.S.* (*Hastings ID*), 770 F.2d 1093, 1107 (D.C. Cir. 1985) (Edwards, J., concurring); *Chandler v. Jud. Council of the Tenth Cir.* (*Chandler ID*), 398 U.S. 74, 136–37 (1970) (Douglas, J., dissenting); *id.* at 142 (Black, J., dissenting); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 703–10 (1979).

³⁴ BREYER ET AL., *supra* note 6, at 1; see also Anthony D’Amato, *Self-Regulation of Judicial Conduct Could Be Mis-Regulation*, 89 MICH. L. REV. 609, 610–17 (1990); Peter Graham Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 223–25 (1970); Donald E. Campbell, *Should the Rooster Guard the Henhouse: Evaluating the Judicial Conduct and Disability Act of 1980*, 28 MISS. C. L. REV. 381, 397–99 (2009).

³⁵ See Michael Shapiro, *96-Year-Old Judge Releases Medical Test as Suspension Vote Looms*, BLOOMBERG L. (Sept. 7, 2023), <https://perma.cc/HJA8-D26G> (quoting Judge Newman’s insistence that she “should not succumb or set a pattern of judicial colleagues being able to bully and intimidate and force out a colleague they don’t like who writes dissents”); see also *infra* note 278 and accompanying text (recounting similar claims by Judge Newman’s defenders within the judicial branch).

³⁶ See, e.g., *McBryde II*, 264 F.3d at 66; *In re Certain Complaints Under Investigation by an Investigating Comm. of the Jud. Council of the Eleventh Cir.* (*Hastings III*), 783 F.2d 1488, 1507–10 (11th Cir. 1986).

³⁷ See generally Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019); THOMAS M. KECK, *JUDICIAL POLITICS IN POLARIZED TIMES* (2014).

they retain previously assigned cases on their dockets; and that the “time certain” standard applies only to less-than-categorical suspensions from certain kinds of cases or those involving certain (or certain kinds of) litigants. This narrow approach to amending the JCDA would maximize political feasibility and preserve the overall system of judicial self-discipline. It could also provide a springboard for considering more significant reforms to address looming issues of judicial old-age disability, which the Comment briefly canvasses in conclusion.

The Comment proceeds as follows. Part I elaborates the law of judicial discipline, focusing on the JCDA and distilling legal principles from prior challenges to the constitutionality of case-suspension sanctions under the Act. Part II develops the Comment’s two core moves, establishing the parameters of effective removal from judicial office and elaborating the constitutional defects of granting an effective removal power to judicial councils. Part III reassesses the JCDA in light of this argument and proposes an amendment to the case-suspension provision.

I. THE LAW OF JUDICIAL DISCIPLINE

The modern system of judicial administration came into view with the Administrative Office Act of 1939.³⁸ That legislation constituted “judicial councils” from the appellate judges of each circuit and granted them “broad responsibility and authority” for administering circuit business.³⁹ As revised and recodified by Congress in 1948, the key provision of 28 U.S.C. § 332 empowered each council to “make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.”⁴⁰ Case-assignment power figured centrally in the new system.⁴¹ Section 332 required councils to ensure that “a judge who

³⁸ Pub. L. No. 76-299, § 306, 53 Stat. 1223 (1939) (codified as amended at 28 U.S.C. § 332). In the nineteenth century, Congress had generally left day-to-day operations of the (modestly sized) federal courts to the discretion of district judges. See Fish, *supra* note 34, at 203.

³⁹ JUD. CONF. OF THE U.S., REPORT ON THE POWERS AND RESPONSIBILITIES OF THE JUDICIAL COUNCILS, H.R. DOC. NO. 87-201, at v (1961), *reprinted in* S. COMM. ON THE JUD., THE INDEPENDENCE OF FEDERAL JUDGES: HEARINGS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS, 189–204 (1970) [hereinafter REP. ON JUD. COUNCILS]; see also H.R. REP. NO. 76-702, at 2 (1939).

⁴⁰ 28 U.S.C. § 332(d)(1).

⁴¹ See generally Fred M. Vinson, *The Business of Judicial Administration: Suggestions to the Conference of Chief Justices*, 35 ABA J., no. 11, 1949; Fish, *supra* note 34.

has an accumulation of submitted cases [did] not take on any further trial work until such cases have been decided.”⁴² The councils exercised this power repeatedly in the first decades of their existence to deal with laggard judges.⁴³

The councils initially lacked explicit disciplinary powers, however.⁴⁴ Discipline instead occurred informally through private and sometimes public pressure on misbehaving judges to resign their offices.⁴⁵ This system seeded perceptions of secrecy and unfairness, spurring reform in the post-Watergate era.⁴⁶ Legislative proposals throughout the 1970s contemplated the creation of centralized bodies for judicial discipline, perhaps even comprised of non-judges.⁴⁷ In some incarnations these bodies would have possessed explicit removal power.⁴⁸ Such proposals provoked constitutional objections⁴⁹ and organized opposition from the Judicial Conference of the United States, the national organization setting policy for the judiciary and representing its interests to Congress.⁵⁰ Yet, with time, interbranch dialogue produced a compromise between judicial accountability and independence: a scheme

⁴² *Chandler II*, 398 U.S. at 121 (Harlan, J., concurring) (citing REP. ON JUD. COUNCILS at 10).

⁴³ Fish, *supra* note 34, at 230.

⁴⁴ See RUSSELL R. WHEELER & A. LEO LEVIN, *JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES* 34–36 (1979).

⁴⁵ Edwards, *supra* note 12, at 794 (noting the efficacy of “informal means based on judicial persuasion and peer pressure”).

⁴⁶ See Sam Nunn, *Judicial Tenure*, 54 CHI.-KENT L. REV. 29, 29 (1977); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 123 (1970); WHEELER & LEVIN, *supra* note 44, at 3–4.

⁴⁷ See *In re Complaint of Jud. Misconduct*, 570 F.3d 1144, 1146–47 (9th Cir. 2009); Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 29 (1993).

⁴⁸ See Nunn, *supra* note 46, at 37–38 (describing the powers of the councils in responding to allegations of judicial misconduct); Ervin, *supra* note 46, at 123 (“[T]he Conference would have the power to remove the judge.”); Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 283–84 (1982); Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 GEO. J. LEGAL ETHICS 341, 348–52 (2019).

⁴⁹ See Hellman, *Unfinished Dialogue*, *supra* note 48, at 349.

⁵⁰ See, e.g., *Judicial Tenure and Discipline, 1979–80: Hearings Before the Subcomm. on Cts., C.L. & the Admin. of Just.*, 96th Cong. 68 (1980) (statement of Hon. Elmo B. Hunter, Chairman, Comm. on Ct. Admin. of the Jud. Conf. of the U.S.).

whereby complaints against judges would be addressed within the existing framework⁵¹ of the judicial councils.⁵²

A. The Judicial Conduct and Disability Act

The JCDA accordingly provides litigants, members of the public, and other judges with a process to allege that a district or circuit court judge⁵³ is “unable to discharge all the duties of office by reason of mental or physical disability,” or has engaged in “conduct prejudicial to the effective and expeditious administration of the business of the courts,” including but not limited to criminal misconduct.⁵⁴ Initial responsibility for assessing complaints falls to the chief judge of each circuit.⁵⁵ The chief judge has broad discretion to conduct an inquiry and to dismiss complaints that are frivolous, related to the merits of a ruling, or already resolved by a judge having voluntarily taken “appropriate corrective action.”⁵⁶

For complaints that clear this threshold, the chief judge may proceed to “appoint . . . herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint.”⁵⁷ Once convened, this special committee “shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council.”⁵⁸

⁵¹ While retaining the overall structure of the judicial councils, the JCDA reorganized them to comprise an equal number of district judges and circuit judges elected by majority vote of all judges in each circuit. See 28 U.S.C. § 332(a).

⁵² Barr & Willging, *supra* note 47, at 29; Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 771–72 (1988).

⁵³ The law does not apply to Supreme Court Justices. See Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 452 (2013). The judicial self-policing model thus does not extend to Supreme Court Justices, who are removable only through impeachment. Cf. Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 404 (2021) (discussing unique constitutional and practical limitations to regulating the Justices’ conduct).

⁵⁴ 28 U.S.C. § 351(a); *id.* § 364; see also 2 GUIDE TO JUDICIARY POLICY art. II (2019).

⁵⁵ 28 U.S.C. § 352; see also Barr & Willging, *supra* note 47, at 32–40.

⁵⁶ 28 U.S.C. § 352(b)(2); see also *id.* § 352(c) (providing that a complainant or subject judge may petition for the judicial council to review the chief judge’s disposition of the complaint at this stage, but that denial of petition for review is not appealable); GUIDE TO JUDICIARY POLICY, *supra* note 54, at 37; Barr & Willging, *supra* note 47, at 92–94 (surveying corrective actions in the circuit courts).

⁵⁷ 28 U.S.C. § 353(a)(1).

⁵⁸ *Id.* § 353(c).

Then the council can investigate further,⁵⁹ dismiss the complaint,⁶⁰ or take “such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.”⁶¹

A judge or complainant may appeal the council’s decision to the Judicial Conference’s Committee on Conduct and Disability, a panel of judges appointed to review disciplinary orders for errors of law, clear errors of fact, or abuses of discretion.⁶² This is the sole means of challenging specific “orders and determinations” made by judicial councils in JCDA proceedings.⁶³ The Act precludes collateral as-applied challenges, meaning that a judge subject to disciplinary proceedings under the JCDA cannot sue to enjoin or invalidate them in district court or appeal a council’s sanction order in circuit court.⁶⁴ Notably, however, courts have interpreted this language to allow facial constitutional challenges to the Act in general.⁶⁵

The councils’ authority to impose sanctions, up to and including suspension, derives from JCDA § 354, which lists several possible actions to address misconduct or disability.⁶⁶ These include issuing a private or public censure,⁶⁷ requesting a judge’s voluntary retirement,⁶⁸ or formally certifying the judge’s disability, triggering a “substitution” process whereby the president nominates another judge to serve alongside (but in a senior position to) the disabled judge.⁶⁹ Crucially, the section also authorizes councils to “order[] that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint.”⁷⁰ This provision has been read to grant a broad case-suspension power: since it does not specify a time

⁵⁹ *Id.* § 354(a)(1)(A).

⁶⁰ *Id.* § 354(a)(1)(B).

⁶¹ *Id.* § 354(a)(1)(C); *see also* GUIDE TO JUDICIARY POLICY, *supra* note 54, at 41.

⁶² 28 U.S.C. § 357(a)–(b); GUIDE TO JUDICIARY POLICY, *supra* note 54, at 45–46.

⁶³ 28 U.S.C. § 357(c).

⁶⁴ *Id.* § 357(c) (“[A]ll orders and determinations . . . shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.”).

⁶⁵ *See infra* note 110.

⁶⁶ *Cf.* GUIDE TO JUDICIARY POLICY, *supra* note 54, at 44 (clarifying that the list of “remedial actions enumerated in 28 U.S.C. § 354(a)(2) . . . is not exhaustive”); Burbank, *supra* note 48, at 287–88.

⁶⁷ 28 U.S.C. § 354(a)(2)(A)(ii)–(iii).

⁶⁸ *Id.* § 354(a)(2)(B)(ii).

⁶⁹ *Id.* § 354(a)(2)(B)(i).

⁷⁰ *Id.* § 354(a)(2)(A)(i); *see also* GUIDE TO JUDICIARY POLICY, *supra* note 54, at 41.

limit, it facially prohibits only open-ended suspensions while permitting, for instance, very long-term or renewable ones.⁷¹ Still, the provision only applies to “*further*” cases; it does not permit reassignment of *pending* cases as a sanction for misconduct.⁷² And elsewhere, § 354 makes explicit that “[u]nder no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.”⁷³ If the council determines that a judge’s misconduct warrants removal, it is authorized to certify a recommendation of impeachment to the House.⁷⁴

Since 1980, both Congress and the federal judiciary have periodically taken stock of proceedings under the JCDA. A 1987 report by the circuits’ chief judges struck a dismal note, describing a high volume of “patently frivolous” complaints by disgruntled litigants.⁷⁵ In 2006, the so-called Breyer Report confirmed that a significant majority of complaints were dismissed by chief judges as frivolous or merits-related.⁷⁶ Most complaints involved a party accusing the judge in its case of bias, abuse of power, or corruption, while allegations of mental or physical disability were less common.⁷⁷ Despite some dissatisfaction with the perceived lack of efficiency and uniformity in JCDA proceedings, Congress has enacted only minor, technical amendments, preserving the Act’s general structure.⁷⁸

The Breyer Report also provided the most comprehensive survey to date of sanctions issued under the JCDA. From 2001 to 2005, the Report found, special committees investigated fifteen complaints against nine judges, resulting in two public censures and one private censure.⁷⁹ No suspensions were recorded during this period.⁸⁰ However, recent years appear to have seen an uptick in sanctions generally and perhaps also in suspensions. In 2020,

⁷¹ See *Hastings II*, 770 F.2d 1093, 1108 (D.C. Cir. 1985) (Edwards, J., concurring in the judgment).

⁷² In contrast, 28 U.S.C. § 332(d) authorizes reassignment of pending cases when judges have a backlog or otherwise cannot complete their work for logistical reasons. See *In re McBryde (McBryde I)*, 117 F.3d 208, 229 (5th Cir. 1997).

⁷³ 28 U.S.C. § 354(a)(3)(A).

⁷⁴ *Id.* § 354(b)(1)–(2).

⁷⁵ Edwards, *supra* note 12, at 789, 791–92.

⁷⁶ BREYER ET AL., *supra* note 6, at 42.

⁷⁷ *Id.* at 26.

⁷⁸ See generally Kastenmeier & Remington, *supra* note 52; Hellman, *supra* note 48.

⁷⁹ BREYER ET AL., *supra* note 6, at 29; see also Barr & Willging, *supra* note 47, 112–15 (noting eight reprimands between 1980 and 1992).

⁸⁰ BREYER ET AL., *supra* note 6, at 30.

the most recent year for which the Judicial Conference provides aggregate data, special committees were appointed to investigate sixteen out of 1,253 complaints, resulting in five remedial actions.⁸¹ While the exact number of suspensions remains unclear due to data limitations,⁸² the Judicial Conference's Committee on Judicial Conduct and Disability has reviewed at least four suspensions (including Judge Newman's) since 2014.⁸³ The total number of suspensions imposed in the past decade is certainly higher.⁸⁴ And even the total number of suspensions ultimately imposed upon judges understates the practical importance of that sanction, since judges may resign when faced with serious discipline under the JCDA.⁸⁵

B. The Constitutionality of Case Suspensions

Judges disciplined under the JCDA have raised—for the most part, unavailingly—a bevy of constitutional objections. The Act's asserted defects include that its procedures deprive judges of adequate notice and opportunity to be heard; that it vests judicial councils with quintessentially prosecutorial powers, which only executive branch actors can wield; and that it invites bias by permitting an investigated judge's colleagues to sanction him, without requiring recusal.⁸⁶ Yet this Comment brackets challenges directed at the JCDA's *procedures*, attending only to whether the

⁸¹ See Admin. Off. of the U.S. Cts., *Complaints Against Judges—Judicial Business 2020*, U.S. CTS., <https://perma.cc/XZB8-6RGY>.

⁸² See Barr & Willging, *supra* note 47, at 196–99 (addressing the possibilities of missing and misclassified data).

⁸³ See *In re* Complaint of Judicial Misconduct, C.C.D. No. 13-01 (Comm. on Jud. Conduct and Disability of the Jud. Conf. of the U.S. Jan. 17, 2014) (six-month suspension); *In re* Complaint of Judicial Misconduct, C.C.D. No. 16-01 (Committee on Jud. Conduct and Disability of the Jud. Conf. of the U.S. July 8, 2016) (one-year suspension); *In re* Complaint of Judicial Misconduct, C.C.D. No. 17-01 (2017) (Comm. on Jud. Conduct and Disability of the Jud. Conf. of the U.S. Aug. 14, 2017) (two-year suspension and transfer of pending cases); *In re* Complaint No. 23-01 (Comm. on Jud. Conduct & Disability of the Jud. Conf. of the U.S. Feb. 7, 2024) (renewable one-year suspension).

⁸⁴ See, e.g., Arthur D. Hellman, *Proposed Amendments to the Federal Misconduct rules: Comments and Suggestions* 20 (Univ. of Pittsburgh Sch. of L. Legal Studs. Research Paper No. 2015-10, 2015) (reporting a de facto case-suspension sanction imposed outside of the formal JCDA process).

⁸⁵ See, e.g., Barr & Willging, *supra* note 47, at 104–06; Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NW. U. L. REV. 953, 967–79; John P. Sahl, *Secret Discipline in the Federal Courts: Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 221–24 (1999).

⁸⁶ *Hastings III*, 783 F.2d at 1502 (providing an overview of these claims).

Act authorizes an unconstitutional *outcome*: the removal of Article III judges by means other than impeachment.⁸⁷

Effective removal implicates “delicate and difficult questions of constitutional law” that arise from the collision of two principles—separation of powers and judicial independence.⁸⁸ On one hand, the Impeachment Clauses vest the sole power for removing judges in Congress,⁸⁹ establishing a high threshold for removal that ensures they enjoy “all-but-life tenure.”⁹⁰ On the other hand, it remains contested whether the judicial independence that such tenure protection ultimately serves is compromised by discipline meted out within the judicial branch itself.⁹¹ As the D.C. Circuit has recognized, these principles can be more easily reconciled for lesser forms of judicially imposed discipline, like reprimands, which the Constitution does not reserve to Congress; but they come to a head with effective removal.⁹²

Nonetheless, courts have managed mostly to avoid ruling on the merits of effective removal-style claims, typically on preclusion or standing grounds.⁹³ Whether this indicates a “guild mentality”⁹⁴ or a lack of well-pled claims, no court has directly ruled on the constitutionality of a categorical long-term suspension. To be sure, courts have recognized that some uses of the judicial councils’ case-assignment and -suspension power might transgress constitutional limits in principle. Yet they have not yet had occasion to draw a clear demarcating line.

1. The Supreme Court declines to delimit judicial councils’ pre-JCDA authority to (re)assign judges’ cases.

The sole Supreme Court case to consider the judicial councils’ case-assignment authority, *Chandler v. Judicial Council of the*

⁸⁷ Cf. *Hastings v. Jud. Conf. of the U.S. (Hastings IV)*, 829 F.2d 91, 103–04 (D.C. Cir. 1987).

⁸⁸ See *Hastings II*, 770 F.2d at 1104–06 (Edwards, J., concurring in the judgment).

⁸⁹ See U.S. CONST. art. I, § 2, cl. 5 (vesting the power to impeach in the House of Representatives); *id.* art. I, § 3, cl. 6 (vesting the power to try impeachments in the Senate); *id.* art. II, § 4 (establishing that “all civil Officers” shall be removed from office upon impeachment by the House and conviction in the Senate); see also *infra* Part II.C.

⁹⁰ William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1515 (2020).

⁹¹ See, e.g., *infra* notes 106–07 and accompanying text.

⁹² *McBryde II*, 264 F.3d at 65–67.

⁹³ See *infra* Part I.B.2.

⁹⁴ Donald E. Campbell, *Should the Rooster Guard the Henhouse: A Critical Analysis of the Judicial Conduct and Disability Act of 1980*, 28 MISS. C.L. REV. 381, 397 (2009).

Tenth Circuit,⁹⁵ preceded the JCDA by a decade.⁹⁶ Judge Stephen Chandler of the Western District of Oklahoma had found himself personally entangled in years of civil and criminal litigation, which detracted from his focus on official duties.⁹⁷ Exercising its administrative authority under 28 U.S.C. § 332, the Tenth Circuit Judicial Council determined that Judge Chandler was “unable[] or unwilling” to perform his duties and ordered an indefinite suspension of his case assignments as well as reassignment of his pending cases.⁹⁸ The Supreme Court declined to stay this first order, citing its “interlocutory” nature given ongoing proceedings in the circuit.⁹⁹ “There then followed, in rapid succession, a series of procedural maneuvers and substantive changes that resulted in a new order by the Council, vacating its previous order and allowing Judge Chandler to retain the cases already assigned to him, but providing that no new cases be assigned to him.”¹⁰⁰ Judge Chandler once again sought reinstatement via a writ of mandamus from the Supreme Court on the basis that the Council’s actions were “tantamount to his removal from office.”¹⁰¹

The Court agreed to review the Council’s modified order but ultimately declined to rule on the merits of Judge Chandler’s effective removal argument. That argument did find favor with two members of the Court. Justices William O. Douglas and Hugo Black concluded that the Council had “move[d] to disqualify [Judge Chandler] from sitting, removing him pro tanto from office” and imposing “all of the sting and much of the stigma that impeachment carries.”¹⁰² The Court’s majority struck a different tone, however, signaling approval of the judicial councils’ general case-assignment power and some skepticism of effective removal.¹⁰³ The majority did not reach that issue because Judge Chandler had not exhausted his opportunities to challenge the

⁹⁵ 398 U.S. 74 (1970). The footnotes refer to this case as *Chandler II* to distinguish it from the Supreme Court’s earlier decision not to stay the Tenth Circuit Judicial Council’s interim disciplinary order. See *infra* note 99.

⁹⁶ Nunn, *supra* note 46, at 34.

⁹⁷ See *Chandler II*, 398 U.S. at 78–81.

⁹⁸ *Id.* at 77 (quoting an order of the Tenth Circuit judicial council).

⁹⁹ See *Chandler v. Jud. Council of Tenth Cir. (Chandler D)*, 382 U.S. 1003, 1003 (1966) (declining to stay the original order because it was temporary).

¹⁰⁰ WHEELER & LEVIN, *supra* note 44, at 39–40; see also 28 U.S.C. § 137.

¹⁰¹ *Chandler II*, 398 U.S. at 114 (Harlan, J., concurring).

¹⁰² *Id.* at 135 (Douglas, J., dissenting); see also *id.* at 142 (Black, J., dissenting).

¹⁰³ See *id.* at 91 (Harlan, J., concurring) (“Although the Court states that it does not decide the merits of this [removal] claim, . . . I can read its opinion only as a determination that the claim is insubstantial.”).

Tenth Circuit Council's order before the Council itself, and in fact had appeared to acquiesce to the second order.¹⁰⁴ Appealing to doctrines of standing and constitutional avoidance, the majority determined that there was no need to “defin[e] the maximum permissible intervention” by judicial councils in judges' case assignments that was “consistent with the constitutional requirement of judicial independence.”¹⁰⁵

This reasoning foreshadowed how courts would eventually dispose of challenges to case-suspension sanctions under the JCDA.¹⁰⁶ Ultimately, however, the most lasting consequence of *Chandler* was to rekindle Congress's interest in the issue of how much judicial discipline was consistent with judicial independence, culminating in the JCDA—and further litigation.¹⁰⁷

2. Lower courts have left unsettled whether long-term case suspensions are constitutional.

The first significant challenge to the JCDA arose quickly following its enactment. In 1981, Judge Alcee Hastings of the Southern District of Florida was indicted for conspiracy to solicit a \$150,000 bribe in exchange for imposing lenient sentences in a racketeering case.¹⁰⁸ He was acquitted at trial but faced a complaint based on the same conduct before the Judicial Council of the Eleventh Circuit.¹⁰⁹ Judge Hastings sued to enjoin the Council's investigation on the grounds that it “interfere[d] with the constitutional guarantee of an independent judiciary by providing machinery for disciplining judges and delegating impeachment powers to the judiciary.”¹¹⁰

The district court first considered whether the JCDA precluded these claims.¹¹¹ In a move that future courts would uniformly follow, the district court interpreted the JCDA to preclude

¹⁰⁴ *Id.* at 88; see also Joshua E. Kastenberg, *The Right to an Independent Judiciary and the Avoidance of Constitutional Conflict: The Burger Court's Flawed Reasoning in Chandler v. Judicial Council of the Tenth Circuit and Its Unfortunate Legacy*, 8 ST. MARY'S J.L. MALPRACTICE & ETHICS 90, 140–47 (2018); WHEELER & LEVIN, *supra* note 44, at 37.

¹⁰⁵ See *Chandler II*, 398 U.S. at 84.

¹⁰⁶ *Cf. id.* at 86 (discussing reasons not to reach the merits).

¹⁰⁷ WHEELER & LEVIN, *supra* note 44, at 43–48; Kastenberg, *supra* note 104, at 93, 147–56.

¹⁰⁸ See generally *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982).

¹⁰⁹ See *Hastings IV*, 829 F.2d at 95–96 (D.C. Cir. 1987).

¹¹⁰ *Hastings v. Jud. Conf. of the U.S. (Hastings I)*, 593 F. Supp. 1371, 1373 (D.D.C. 1984).

¹¹¹ *Id.* at 1378.

only collateral *as-applied* challenges; the court proceeded to consider—and reject—Judge Hastings’s *facial* challenges to the Act’s overall constitutionality.¹¹² On the merits, the district court adopted a highly departmentalist view that “the integrity and independence of the branch must take precedence over the independence of the individual officeholder”;¹¹³ moreover, the “remote chance of loss of office through impeachment” was plainly insufficient to keep misbehaving judges in check.¹¹⁴ These propositions justified Congress’s decision to authorize judicial self-policing through “other forms of discipline” besides removal, which the JCDA nominally forbade.¹¹⁵

A panel of the D.C. Circuit Court of Appeals reversed on the ground that the district court had erred in reaching the merits of the facial challenges.¹¹⁶ Even if Judge Hastings’s claims were not precluded by the Act, the panel held, they were not yet ripe because the Judicial Council had not concluded its investigation or imposed any sanctions upon him.¹¹⁷ The concurring opinion of Judge Harry Edwards further suggests that the district court had erred in its analysis of the constitutional issues.¹¹⁸ While Congress undoubtedly could establish “administrative” and “housekeeping” procedures for the federal judiciary, the JCDA authorizes something more: “suspension—the *total* removal of a particular judge’s cases,” which “interfered in the most basic way with a judge’s decisionmaking authority.”¹¹⁹ Moreover, Judge Edwards recognized that a long-term suspension might constitute “the *functional equivalent of removal*,” which would “unlawfully delegate congressional responsibility under the Impeachment Clause to the judiciary.”¹²⁰

Following his loss in the D.C. Circuit, Judge Hastings sued again, this time in the Eleventh Circuit, which similarly declined to interfere with the Judicial Council’s investigation.¹²¹ Cleared to proceed, the Council ultimately concluded that Judge Hastings

¹¹² *Id.*

¹¹³ *Id.* at 1379.

¹¹⁴ *Id.* at 1380.

¹¹⁵ *Hastings I*, 593 F. Supp. at 1379–81.

¹¹⁶ *Hastings II*, 770 F.2d at 1094–95.

¹¹⁷ *Id.* at 1103.

¹¹⁸ *Id.* at 1107–08 (Edwards, J., concurring in the judgment).

¹¹⁹ *Id.* at 1108 (emphasis in original).

¹²⁰ *Id.* at 1109 (emphasis added).

¹²¹ See *Hastings III*, 783 F.2d at 1525. Like the D.C. Circuit, the Eleventh Circuit deemed premature any challenge to the sanctions that the investigation might yield, including potential suspension. See *id.* at 1503–07.

had committed impeachable offenses and reported this finding to the Judicial Conference of the United States, which in turn certified it to the House of Representatives.¹²² The House impeached Judge Hastings in 1988, and he was removed from office upon his conviction by the Senate the following year.¹²³

Yet another extended controversy soon tested the JCDA system. It began in 1995 with complaints that Judge John McBryde of the Northern District of Texas had feuded with other judges, behaved abusively toward litigants, and unjustifiably threatened a court clerk with contempt.¹²⁴ The Judicial Council of the Fifth Circuit subsequently initiated JCDA proceedings.¹²⁵ An investigation culminated in the Council sanctioning Judge McBryde with a public reprimand, a one-year suspension from new case assignments, and a three-year suspension from cases involving the lawyers that had participated in the investigation.¹²⁶ Judge McBryde sued, “claiming that the Act, both facially and as applied, violated the due process clause and the Constitution’s separation of powers doctrine.”¹²⁷

When this lawsuit reached the D.C. Circuit on appeal, that court “recognize[d] that docket limitations can be a very serious matter” but held that Judge McBryde’s as-applied claims relating to the suspensions were moot because the one- and three-year periods had already elapsed.¹²⁸ The remainder of his as-applied claims were held precluded by the JCDA.¹²⁹ Only two of his facial challenges survived mootness and preclusion: first, that “the clause vesting the impeachment power in Congress” ruled out “*all* other methods of disciplining judges”; second, “that the principle of judicial independence . . . bars discipline of judges for actions *in any way* connected to his actions while on the bench.”¹³⁰

The appellate panel divided on these questions according to their views of judicial independence.¹³¹ The two-judge majority ruled against Judge McBryde. It concluded that, though the “framers lodged the powers of removal and disqualification solely

¹²² See *Hastings IV*, 829 F.2d at 93–94.

¹²³ See *Hastings v. United States (Hastings V)*, 988 F.2d 1280 (D.C. Cir. 1993).

¹²⁴ *McBryde I*, 117 F.3d at 216.

¹²⁵ *McBryde II*, 264 F.3d at 54.

¹²⁶ *Id.* at 54.

¹²⁷ *Id.* at 55.

¹²⁸ *Id.* at 56.

¹²⁹ *Id.* at 62–63.

¹³⁰ *McBryde II*, 264 F.3d at 64 (emphasis in original).

¹³¹ Compare *id.* at 65, with *id.* at 77 (Tatel, J., concurring in part and dissenting in part).

in Congress, in the form of impeachment,” the Constitution included “no mention of discipline generally.”¹³² Judge McBryde’s argument that the Impeachment Clause rendered the JCDA unconstitutional *in toto* relied upon his ultimately unconvincing “attempt to fudge the distinction between impeachment and discipline.”¹³³ Still, the court was careful to state what it was *not* deciding, namely, “whether a long-term disqualification from cases could, by its practical effect, [e]ffect an unconstitutional ‘removal.’”¹³⁴

3. Judge Newman’s predicament illustrates that the JCDA is insulated from even very strong effective removal challenges.

In March 2023, the Federal Circuit Judicial Council voted unanimously to disqualify Judge Pauline Newman from new case assignments while she worked to clear her backlog of opinions.¹³⁵ The Council took this action, which it ratified with a written order on June 5, 2023, pursuant to its § 332 authority to administer the court’s business.¹³⁶ Following the initial vote in March, however, new allegations of Judge Newman’s concerning behavior—confusion, memory loss, belligerent treatment of court staff—“increas[ed] doubts about whether [she was] still fit to perform the duties of her office.”¹³⁷ On April 7, 2023, a special committee appointed under the JCDA, comprising Chief Judge Moore and two other circuit judges, issued an order requiring Judge Newman to undergo a series of psychological evaluations and turn over medical records.¹³⁸ After Judge Newman repeatedly refused to comply, thwarting an “informed assessment” of her cognitive abilities, the committee determined that this constituted serious misconduct under the Act.¹³⁹ The committee therefore recommended a temporary “suspension of all [Judge Newman’s] case assignments for a fixed time period of one year, subject to consideration of renewal if the refusal” to undergo a cognitive evaluation persisted, “and to consideration of modification or rescission if justified by an end of

¹³² *Id.* at 66–67, 65 (majority opinion).

¹³³ *Id.* at 65.

¹³⁴ *McBryde II*, 264 F.3d at 67 n.5.

¹³⁵ See Newman R&R, *supra* note 2, at 56–57.

¹³⁶ Memorandum Opinion and Order at 6, *Newman v. Moore*, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334).

¹³⁷ Newman Order, *supra* note 2, at 1; see also Newman R&R, *supra* note 2, at 3–4.

¹³⁸ Newman Order, *supra* note 2, at 4, 12–14.

¹³⁹ Newman R&R, *supra* note 2, at 22; see also Newman Order, *supra* note 2, at 68.

the refusal.”¹⁴⁰ The full Federal Circuit Judicial Council accepted the committee’s findings and imposed the recommended suspension in an order dated September 20, 2023.¹⁴¹

Judge Newman sued in federal district court.¹⁴² Filed in May 2023, the complaint in *Newman v. Moore*¹⁴³ charged that the Council’s March order excluding Judge Newman from cases until she cleared her backlog already “constitute[d] an attempt to remove [her] from office . . . without impeachment and in violation of the Constitution, in substance if not form.”¹⁴⁴ Following a failed attempt at mediation, the defendants moved to dismiss the complaint on September 1, 2023, still several weeks before the Judicial Council imposed the suspension sanction.¹⁴⁵ The crux of their argument on the merits was that “Judge Newman ha[d] not been removed from office” because she remained able to “perform routine judicial functions,” including “ruling on the controversies brought before the court”; she was not only “allowed” but “encouraged” to “work on her current case assignments, including her three outstanding cases.”¹⁴⁶

Yet this position fundamentally changed when the Judicial Council’s September 20, 2023, order suspended Judge Newman from case assignments for at least a further year as a sanction under the JCDA. Responding to defendants’ motion to dismiss after this order, Judge Newman sharpened her argument that the JCDA was facially unconstitutional because the “suspension power [was] a power of removal.”¹⁴⁷ Since she was poised to dispose of her previously assigned cases, it was “hard to understand what ‘routine judicial functions’ Judge Newman [would] continue to exercise going forward while serving her suspension. [] [I]f she

¹⁴⁰ Newman R&R, *supra* note 2, at 9.

¹⁴¹ See Newman Order, *supra* note 2, at 72–73.

¹⁴² See Complaint at 13, *Newman v. Moore*, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334).

¹⁴³ 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334).

¹⁴⁴ *Id.* at 13; see also *id.* at 14 (noting that the order had “exclude[ed her] from regular duties of an Article III judge”).

¹⁴⁵ See generally Joint Status Report and Request for Briefing Schedule, *Newman v. Moore*, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334); Defendants’ Combined Memorandum in Support of Their Motion to Dismiss and Opposition to Plaintiff’s Preliminary-Injunction Motion at 2, 19–24, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334) [hereinafter Defendants’ Motion to Dismiss Mem.].

¹⁴⁶ Defendants’ Motion to Dismiss Mem., *supra* note 145, at 29.

¹⁴⁷ Plaintiff’s Combined Memorandum of Law in Response to Defendants’ Motion to Dismiss and in Reply to Defendants’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction at 29–30, *Newman v. Moore*, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334) [hereinafter Newman Reply to MTD Mem.].

does not and is not expected to exercise any such functions, then she *effectively does not continue to hold judicial office*.”¹⁴⁸ Indeed, Judge Newman issued her last outstanding opinion on November 11, 2023, which the Judicial Council subsequently conceded meant that, “as a factual matter,” she would “have no work to do” for the remainder of her suspension.¹⁴⁹ The Council denied that this could “change the constitutional analysis,” however, since a “lack of cases” was merely “the natural result of intrabranch discipline allowed by the [JCDA].”¹⁵⁰

On February 12, 2024, the district court denied Judge Newman’s request for injunctive relief and dismissed most of her claims on jurisdictional grounds, as either moot or precluded.¹⁵¹ Considering the effective removal–style argument, the court deemed this a facial challenge but proceeded to dismiss it on the merits as foreclosed by the D.C. Circuit’s decision in *McBryde II*.¹⁵² The court acknowledged that *McBryde II* had reserved the question of “whether a long-term disqualification from cases could, by its practical effect, [impose] an unconstitutional ‘removal’”;¹⁵³ but the court declined to decide that question in the context of a facial challenge, the only kind of challenge over which it retained jurisdiction.¹⁵⁴ For a “facial challenge . . . must establish that no set of circumstances exists under which the Act would be valid.”¹⁵⁵ And *McBryde II* had settled that “at least some suspensions do not unconstitutionally arrogate Congress’s impeachment power.”¹⁵⁶ A claim that the specific circumstances of Judge

¹⁴⁸ *Id.* at 30 (emphasis added).

¹⁴⁹ Defendants’ Reply Mem. in Support of Their Motion to Dismiss at 12–13, *Newman v. Moore*, No. 23-cv-1334 (D.D.C. Nov. 17, 2023) [hereinafter Defendants’ Reply Mem.].

¹⁵⁰ *Id.* at 12–13. However, Judge Newman’s clearing her backlog did cause the Council to lift its June 2023 order imposing an administrative suspension under § 332(d). *See* Defendants’ Response to Plaintiff’s Surreply, *Newman v. Moore*, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334) (arguing that this rendered the complaint moot).

¹⁵¹ *See* Memorandum Opinion and Order at 3, *Newman v. Moore*, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334) [hereinafter Memorandum Opinion and Order] (providing an overview of the disposition of Judge Newman’s claims). Notably, the order preserved Judge Newman’s claim that the JCDA is unconstitutionally vague with respect to what constitutes a “mental disability.” *See id.* at 25.

¹⁵² *Id.* at 32–33 (quoting *McBryde II*, 264 F.3d at 65).

¹⁵³ *Id.* at 33 (quoting *McBryde II*, 264 F.3d at 67 n.5).

¹⁵⁴ *Id.*

¹⁵⁵ Memorandum Opinion and Order, *supra* note 151, at 33 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

¹⁵⁶ *Id.* (citing *McBryde II*, 264 F.3d at 65).

Newman's suspension transgressed a constitutional boundary could be directed only to the Judicial Conference.¹⁵⁷

Yet the Judicial Conference's Committee on Judicial Conduct and Disability was not receptive to such a claim either.¹⁵⁸ The Committee denied Judge Newman's petition for review and upheld her "one-year suspension of cases [as] not grossly in excess of other suspensions imposed under the Act."¹⁵⁹ Its consideration of constitutional issues was limited to a single parenthetical summary of the D.C. Circuit's holding in *McBryde II*.¹⁶⁰ This was not entirely surprising. As *McBryde II* itself noted, the Committee typically "disclaimed" any authority to rule on constitutional challenges on the grounds that it was "not a court" and had "no competence to adjudicate the facial constitutionality" of the JCDA.¹⁶¹

These tandem opinions from the district court and Judicial Conference Committee lay bare the lacuna of judicial review that shields the JCDA from effective removal-style challenges. Directed to a district court and framed as a facial challenge to the constitutionality of the Act's case-suspension provision, an effective removal claim will fail because most applications of that provision do not cross the line into removal.¹⁶² Directed to the Judicial Conference and framed as an as-applied challenge to a particular application of the case-suspension power, an effective removal claim will fail because many prior applications of the case-suspension power have extended just as far.¹⁶³ So long as constitutionally problematic case-suspension sanctions remain a just-

¹⁵⁷ *Id.* at 34; see also Michael Shapiro, *Nation's Oldest Judge Claps Back as She Seeks Reinstatement*, BLOOMBERG L. (Oct. 26, 2023), <https://perma.cc/GZ7Q-2R8Q> (recounting that Judge Newman had sought review with the committee of the Council's September 2023 suspension order).

¹⁵⁸ *Cf.* Michael Shapiro, *Judge Newman's Upheld Suspension Has Some Questioning Ethics Law*, BLOOMBERG L. (Feb. 8, 2024), <https://perma.cc/99TV-ARQV> (reporting on criticism that the "committee was too deferential to Newman's colleagues on the [j]udicial [c]ouncil").

¹⁵⁹ See Memorandum of Decision at 14, 27, *In re Complaint No. 23-01* (Comm. on Jud. Conduct & Disability of the Jud. Conf. of the U.S. Feb. 7, 2024).

¹⁶⁰ *Id.* at 28 (citing *McBryde II*, 264 F.3d at 66–67).

¹⁶¹ Memorandum Opinion and Order, *supra* note 151, at 18 (quoting *McBryde II*, 264 F.3d at 62).

¹⁶² *Cf.* *Wash. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (explaining that a facial challenge succeeds only when a "substantial number" of a statute's applications are unconstitutional "judged in relation to the statute's plainly legitimate sweep" (citation omitted)).

¹⁶³ *Cf.* Memorandum of Decision at 27, *In re Complaint No. 23-01* (Comm. on Jud. Conduct & Disability of the Jud. Conf. of the U.S. Feb. 7, 2024) (rejecting Judge Newman's argument that her suspension was too onerous because "[t]here are numerous examples of suspensions of similar length that have been issued by Judicial Councils").

common-enough minority of all suspensions, they cannot be challenged. This catch-22 not only poses a normative problem because suspended judges are practically denied recourse. It also poses an analytic problem because courts can hold out the possibility of effective removal in principle without ever evaluating whether a particular suspension qualifies as such.

II. DRAWING THE LINE AT EFFECTIVE REMOVAL

In the absence of case law drawing a line where case suspension becomes effective removal, this Part returns to first principles. The Impeachment Clause of Article II provides that “civil Officers,” including judges, “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”¹⁶⁴ Impeachment is reserved to Congress; the JCDA accordingly denies judicial councils formal removal power.¹⁶⁵ The key question is whether the Act’s case-suspension provision authorizes “constructive impeachment”—the *de facto* removal of a judge from office in all but name.¹⁶⁶

While the Constitution is silent on this question, the Impeachment Clause nonetheless provides a useful reference point for explicating the concept of effective removal. This Part defines the *substantive* component of removal in relation to judicial “[o]ffice”—removal entails depriving a judge of a necessary condition of holding that office. And the Part defines the *procedural* component of removal in relation to “[i]mpeachment . . . and [c]onviction” by Congress—removal entails being subject to a disciplinary process that is analogous to the individual, formal, and official conduct-related process of impeachment. Thus, if a judge is deprived of a necessary condition of his office through a process analogous to impeachment, he has been effectively removed.

A. Eligibility to Exercise Case-Deciding Power Is a Necessary Condition of Holding Judicial Office

Traditional tools of constitutional interpretation support a conception of judicial office that is at least partly functionalist. The text of Article III itself offers little guidance: it provides that judges shall “hold their Offices during good Behaviour” but does

¹⁶⁴ U.S. CONST. art II, § 4.

¹⁶⁵ 28 U.S.C. § 354(a)(3)(A).

¹⁶⁶ *Cf. Stras & Scott, supra* note 22, at 487; *see also id.* at 457 (“[S]tripping a judge of the power to decide cases amounts to a constructive removal from office.”).

not delineate the scope of that entitlement.¹⁶⁷ Nor does the Constitution more generally define the terms “office” or “officer,” though they appear more than twenty times throughout the document.¹⁶⁸ Founding-era dictionaries define “office” simply as any “publick [sic] charge or employment,” leaving ample room for interpretation by courts and commentators.¹⁶⁹

Courts have consistently defined constitutional “offices” in terms of the powers and duties that attach to them. The “fullest early explication” of the Constitution’s use of “office” dates to 1822:¹⁷⁰ the Supreme Judicial Court of Maine held that “‘office’ implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office.”¹⁷¹ Chief Justice John Marshall reached a similar conclusion the following year while sitting as a circuit judge.¹⁷² More than mere “employment,” an “office” required a “duty” that was “continuing” and “defined by rules prescribed by the government.”¹⁷³ The Supreme Court later affirmed this approach in a pair of oft-cited mid-nineteenth-century cases, *United States v. Hartwell*¹⁷⁴ and *United States v. Germaine*,¹⁷⁵ which identified an office with the duties and powers that attached to it.¹⁷⁶

Granted, these early cases involved executive branch offices and officers, but scholars have long assumed that those terms have consistent meanings.¹⁷⁷ Moreover, early definitions of “office” were understood generally, to extend beyond the executive branch. For instance, in 1899, the House Judiciary Committee reported that “the creation and conferring of an office” entailed “a delegation to the individual of . . . sovereign functions,” that is,

¹⁶⁷ U.S. CONST. art. III, § 1.

¹⁶⁸ See Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part I: An Introduction*, 61 S. TEX. L. REV. 309, 309–15 (2021) [hereinafter Tillman & Blackman, *Offices & Officers, Part I*].

¹⁶⁹ 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 228 (6th ed. 1785); see also 2 FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY 217 (1773).

¹⁷⁰ *Lucia v. SEC*, 585 U.S. 237, 269 (2018) (Sotomayor, J., dissenting).

¹⁷¹ Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 83 (2007) (quoting *Opinion of the Justices*, 3 Greenl. (Me.) 481, 482 (1822)).

¹⁷² See *United States v. Maurice*, 26 F. Cas. 1211 (1823) (turning on whether an “agent of fortifications” was an “officer of the United States”).

¹⁷³ *Id.* at 1214.

¹⁷⁴ 73 U.S. 385 (1868).

¹⁷⁵ 99 U.S. 508 (1879).

¹⁷⁶ See, e.g., *Hartwell*, 73 U.S. at 393, 399–402; *Germaine*, 99 U.S. at 509–12 (same).

¹⁷⁷ See, e.g., Tillman & Blackman, *Offices and Officers, Part I*, *supra* note 168, at 314 (explaining that the relevant “office”- and “officer”-related phrases refer in common to “appointed positions in the Executive and Judicial branches”).

“the power to . . . legislate, . . . execute law, or . . . *hear and determine judicially questions submitted.*”¹⁷⁸ As the Office of Legal Counsel has summarized this historical usage, an “essential element of an office under the United States is the delegation by legal authority of a portion of the sovereign powers of the federal government,” namely, the authority inherent in “administering, executing, or *authoritatively interpreting the laws.*”¹⁷⁹

A similarly functionalist conception of “office” has figured centrally in the Supreme Court’s contemporary Appointments Clause jurisprudence.¹⁸⁰ The seminal case of *Buckley v. Valeo*,¹⁸¹ concerning the procedures for selecting members of the Federal Election Commission,¹⁸² held that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States’” and thus must be installed in office according to the Appointments Clause.¹⁸³ Most recently, in *Lucia v. SEC*,¹⁸⁴ the Court confronted whether administrative law judges qualified as constitutional officers. Justice Elena Kagan’s majority opinion distills the Court’s inquiry in this line of cases as “focused on the extent of power an individual wields in carrying out his assigned functions.”¹⁸⁵ Again, these cases involved executive-branch officials. But the phrase “Officers of the United States” in the Appointments Clause, which the cases interpreted, encompasses judges as well.¹⁸⁶

The key question for defining judicial office thus becomes, according to Justice Kagan’s formulation: What are judges’ “assigned functions” under the Constitution? The authorities align even more closely on this point. As Chief Justice Marshall famously declared in *Marbury v. Madison*,¹⁸⁷ “[i]t is emphatically the province and duty of the judicial department to say what the

¹⁷⁸ *Lucia*, 585 U.S. at 270 (Sotomayor, J., dissenting) (emphasis added) (quoting 1 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 607 (1907)).

¹⁷⁹ Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. at 77–78 (emphasis added); see also *id.* at 80–83.

¹⁸⁰ U.S. CONST. art. II, § 2, cl. 2.

¹⁸¹ 424 U.S. 1 (1976) (per curiam).

¹⁸² *Id.* at 143.

¹⁸³ *Id.* at 125–26.

¹⁸⁴ 585 U.S. 237 (2018).

¹⁸⁵ *Id.* at 245.

¹⁸⁶ See Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part III: The Appointments, Impeachment, Commissions, and Oath or Affirmation Clauses*, S. TEX. L. REV. 349, 377–400 (2023) [hereinafter Tillman & Blackman, *Offices & Officers, Part III*].

¹⁸⁷ 5 U.S. 137 (1803).

law is” and to “apply the [appropriate legal] rule to particular cases.”¹⁸⁸ Judicial office inheres in exercising the “judicial Power of the United States,”¹⁸⁹ which is the power to hear “Cases” and “Controversies” according to the limits prescribed by the Constitution and Congress.¹⁹⁰ In short, judges wield the “judgment power.”¹⁹¹ This conclusion follows directly from the constitutional text.¹⁹²

If the proposition requires additional support, there are several other indications that hearing and deciding cases is an indispensable part of each judge’s job description. Federal law provides that “[e]ach district court shall consist of the district judge or judges for the district in regular active service,” and that the “judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge.”¹⁹³ “Circuit judges *shall* sit on the court and its panels in such order and at such times as the court directs. . . . Cases and controversies shall be heard and determined by a court or panel.”¹⁹⁴ Moreover, both district judges and circuit judges swear two oaths upon taking office.¹⁹⁵ First, like all federal officials, judges swear to “well and faithfully discharge the duties of the[ir] office.”¹⁹⁶ Second, with a special judicial oath, they additionally swear to “administer justice without respect to persons, and do equal right to the poor and to the rich.”¹⁹⁷ The existence of these oaths is—or at least was, for Chief Justice Marshall in *Marbury*—dispositive of the fact that the judge’s job is to apply the law.¹⁹⁸

¹⁸⁸ *Id.* at 177; *see also* Dist. of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 477 (1983) (“A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.”).

¹⁸⁹ U.S. CONST. art. III, § 1.

¹⁹⁰ *Id.* art. III, § 2, cl. 1. For Supreme Court cases identifying the exercise of judicial power with the resolution of legal cases and controversies, *see, for example*, Osborn v. U.S. Bank, 22 U.S. 738, 819 (1824); Muskrat v. United States, 219 U.S. 346, 356–57 (1911); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); Old Colony Tr. Co. v. Comm’r, 279 U.S. 716, 724 (1929).

¹⁹¹ William Baude, *The Judgment Power*, 96 GEO. L. REV. 1807, 1815–18 (2008); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (“[A] ‘judicial Power’ is one to render dispositive judgments.”).

¹⁹² *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. at 79–80.

¹⁹³ 28 U.S.C. § 132(b)–(c).

¹⁹⁴ *Id.* § 46(a), (c) (emphasis added).

¹⁹⁵ *See* U.S. CONST. art. VI, cl. 3 (providing that all “judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution”).

¹⁹⁶ 5 U.S.C. § 3331.

¹⁹⁷ 28 U.S.C. § 453.

¹⁹⁸ *Marbury*, 5 U.S. at 180.

Synthesizing these two propositions—the functional account of constitutional office and *Marbury*’s seminal account of the judicial function—yields the conclusion that judges “hold office” because they wield the power to decide cases and controversies. True, judicial salaries also receive explicitly constitutional protection.¹⁹⁹ Diminishing or eliminating a judge’s compensation, apart from violating the Compensation Clause, could plausibly constitute effective removal from office.²⁰⁰ Yet even if undiminished compensation is a *necessary* condition of holding judicial office, it is plainly not a *sufficient* condition.²⁰¹ After all, retired judges continue to receive their salaries too.²⁰² And the Constitution separately guarantees judges good-behavior tenure in office and undiminished compensation, suggesting these are not coextensive. In any event, the effective removal argument can proceed even if wielding judicial power is one of two—or several—necessary conditions of holding office.

B. Depriving a Judge of All Case-Deciding Power Effectively Removes the Judge from Office

Neither constitutional text nor case law provides a clear principle for assessing when a judge has been de facto removed from office. In the absence of other authorities, the account of judicial office developed above produces a key corollary. Since wielding judicial power is a necessary condition of holding office, it follows that being deprived of that power constitutes de facto or effective removal from office. This logic reflects the purpose of the Constitution’s protection of individual judges’ tenure in office, which was to blunt the ability of removal threats to cow judges in their exercise of judicial power as a check on political actors.²⁰³ The logic of effective removal is also consistent with the Supreme Court’s analysis of the other mainstay of judicial independence: the Compensation Clause necessarily protects against laws that “precisely

¹⁹⁹ U.S. CONST. art. III § 1.

²⁰⁰ See Report of the Nat’l Comm’n on Jud. Discipline and Removal, 152 F.R.D. 265, 287 (1993).

²⁰¹ Baker, *supra* note 12, at 1132.

²⁰² See 28 U.S.C. § 371; see also *United States v. United Steelworkers of Am.*, 271 F.2d 676, 680 n.1 (3d Cir.), *aff’d*, 361 U.S. 39 (1959) (distinguishing between “hold[ing] office” and receiving compensation).

²⁰³ Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 410–21 (2008).

but indirectly achieve[] the forbidden effect” of decreasing judicial salaries.²⁰⁴ The parallel point is that depriving a judge of case-deciding power “precisely but indirectly” achieves the “forbidden effect” of removing him or her from office.

The remainder of this Section sharpens the contours of the effective removal concept, proposing several substantive and procedural criteria for determining when the deprivation of case-deciding power achieves that “forbidden effect.” First, the substantive criteria turn on what quantum of case-deciding power a judge must retain in order to hold office. The Section shows that the only workable standard is a categorical one—that only a complete deprivation of case-deciding power removes a judge from office. Second, the procedural criteria derive from an analogy to impeachment. The Section shows that the kind of deprivations that concern the Constitution are formal legal sanctions imposed on judges as a consequence of their behavior in office.

1. Substantively, the deprivation of case-deciding power must be categorical, but it need not be permanent.

Effective removal occurs only when the deprivation of case-deciding power is categorical. A judge must be deprived of the ability to hear any and all cases—not just certain categories of cases or those involving certain litigants. After all, no lower court judge has the right to hear particular cases.²⁰⁵ The composition of a judge’s docket remains in large part outside of her control,²⁰⁶ shaped in aggregate by Congress setting the scope of courts’ jurisdiction and in particular by parties engaging in practices like forum shopping and settlement. While all lower court judges possess the same quantum of judicial power, that does not mean each judge is entitled to hear the same number or same type of cases; and in fact, federal judges’ caseloads vary widely.²⁰⁷

Furthermore, any attempt to compare how much power individual judges wield would face an incommensurability problem.

²⁰⁴ *United States v. Hatter*, 532 U.S. 557, 569 (2001); *see also* *McBryde v. United States (McBryde III)*, 299 F.3d 1357, 1369 (Fed. Cir. 2002) (“A tax [] provides a uniquely dangerous opportunity . . . for the government to exert undue influence over an independent judiciary.”).

²⁰⁵ *See, e.g., Chandler II*, 398 U.S. at 81.

²⁰⁶ *See* Stras & Scott, *supra* note 22, at 467 (“Active judges . . . have little or no control over their dockets.”); *see also* 28 U.S.C. § 137 (providing for the division of business among district courts); *id.* § 46 (providing for the assignment of circuit judges to panels).

²⁰⁷ *See generally* Philip Habel & Kevin Scott, *New Measures of Judges’ Caseload for the Federal District Courts, 1964–2012*, 2 J.L. & CTS., no. 1, 2014.

Comparing raw case totals obscures qualitative differences among judges' dockets that would be relevant to assessing their relative "power." How much power is exercised in a bankruptcy case versus an administrative law case versus a criminal trial? How does a lengthy, fact-intensive civil trial compare to an appeal presenting complex and novel constitutional issues? Indexing judicial power to the number and types of cases that judges decide would create an imperative to address these questions and adjust judges' dockets accordingly. For there is no such thing as a "second-class judge"; each has the "right to share equally with all other federal judges in the privileges and responsibilities of the Federal Judiciary."²⁰⁸ This principle of equality can hardly be jettisoned. But the relevant *kind* of equality need not, and cannot, turn on fine-grained distinctions about judges' dockets.

Practical considerations, in short, require a categorical approach: either a judge possesses judicial power or he does not.²⁰⁹ This reorients the inquiry toward determining the minimum amount of case-deciding power one can exercise and still qualify as holding office. The clear-cut case of effective removal occurs when a judge ceases to wield any such power and is completely deprived of cases. The more difficult question involves what might be called the *de minimis* docket, comprising so few cases that it is as if the judge wields no case-deciding power at all.

Several factors militate against adopting a *de minimis* rule for effective removal. First, determining a numerical *de minimis* threshold would present the same problems of arbitrariness and incommensurability discussed above. Second, the JCDA does not permit the sort of piecemeal or partial suspension that a *de minimis* rule would be most useful for addressing. Judicial councils can order only that "*no* further cases be assigned" to the sanctioned judge.²¹⁰ Their power is itself categorical: councils cannot suspend judges' assignment to all but a certain kind of case, to all cases but one at a time, etc.²¹¹ Finally, prudence suggests erring

²⁰⁸ *Chandler II*, 398 U.S. at 142 (Douglas, J., dissenting); cf. 28 U.S.C. § 332(a)(1)–(2) (providing that judicial councils, which establish the rules for assigning cases to judges, shall be elected "by majority vote of all such judges of the circuit in regular active service").

²⁰⁹ Cf. *Booth v. United States*, 291 U.S. 339, 351 (1934) ("Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it.").

²¹⁰ 28 U.S.C. § 354(a)(2)(A)(i) (emphasis added).

²¹¹ In keeping with this statutory language, the suspension order discussed above, *supra* Part I.B, applied categorically to all further cases. However, seeming to read greater flexibility into the statute, circuit councils sometimes have tailored suspensions to cases

on the side of underinclusiveness, defining effective removal narrowly so as to preserve the workaday procedures of judicial administration from constitutional challenge. A de minimis rule might, for instance, impinge upon the use of § 332 to address backlogs, as when judges' case assignments are suspended (or some of their cases are reassigned) until they clear their dockets.²¹² In sum, a de minimis threshold of constitutionally guaranteed case-deciding power would be all but impossible to identify in a principled way, would not solve a practical problem under the JCDA, and could sweep in valuable (and constitutional) tools of judicial administration. The Comment proceeds under the view that effective removal requires a categorical deprivation of case-deciding power, which in turn requires the complete elimination of a judge's docket. A judge continues to hold office so long as he or she is assigned even a single case. While this categorical approach concededly limits the scope of effective removal, that is a virtue.

The outcome-oriented nature of this argument bears emphasis. Effective removal does not occur merely because a judge has been subject to a categorical case-suspension order. Rather, it occurs when a suspension order has the *effect* of rendering a judge categorically deprived of case-deciding power—with no case assignments and no eligibility to receive them for the time being. Short-term suspensions do not result in effective removal if the judges subject to them do not complete their pending cases before the suspensions abate. Conversely, the implication is that a suspended judge who has a backlog of cases when the suspension starts will determine the moment that she is removed based on how fast she works. This reflects that the JCDA only authorizes a judge's suspension from "further cases" on account of misconduct;²¹³ if the Act permitted suspension from current and future cases, then effective removal could coincide with the issuing of the order. In any event, this implication of the theory should be welcome; it likely incentivizes a suspended judge to clear her docket quickly in order to have a ripe effective removal claim. That is obviously preferable to the alternative. If a suspended judge refused to work on her previously assigned opinions, it is not clear

involving particular litigants. See Memorandum of Decision at 28, *In re* Complaint No. 23-01 (Comm. on Jud. Conduct & Disability of the Jud. Conf. of the U.S. Feb. 7, 2024) (citing cases).

²¹² Cf. *Chandler II*, 398 U.S. at 85 (upholding this kind of reassignment).

²¹³ 28 U.S.C. § 354(a)(2)(A)(i).

that a judicial council would have the authority to reassign the cases, which would languish for the suspension's duration.²¹⁴

A categorical deprivation of case-deciding power can effect removal even if it is not permanent. Nothing hangs on labeling the deprivation a temporary "suspension." The duration of a suspension of new case assignments is relevant to an effective removal claim only in an indirect sense. The longer the suspension, the more likely it is that the suspended judge will issue her outstanding opinions, clear her docket, and thus stand effectively removed from office for the duration of the suspension. Notwithstanding the JCDA's apparent presumption that an anything-less-than-permanent suspension cannot result in removal, nothing forecloses the possibility of temporary or short-term removal as a linguistic or logical matter.²¹⁵ A judge that is categorically deprived of case-deciding power simply ceases to hold office for the duration of the deprivation.

Any other rule would furnish absurd results. If short-term removals did not count, a simple majority of Congress could dispense with the arduous process of impeachment and strip disfavored judges of power for weeks or months at a time, perhaps while crucial and controversial cases wound their way through the courts. Quintessential removal—barring a judge from the courthouse and filling her seat with a replacement—would be constitutional even without impeachment so long as it lasted for a definite period of ten (or fifty) years. Thus, a bright-line rule—that the categorical deprivation of case-deciding power effects removal regardless of its duration—comports with common sense and the purpose of constitutional protection for judicial tenure.

2. Procedurally, the deprivation of case-deciding power must be imposed on an individual judge as a legal sanction for (mis)conduct.

While the mere passage of time cannot delimit effective removal, the concept as explicated so far does require limiting principles—everything that results in a judge's temporary inability to decide cases cannot be cause for constitutional concern. Judges fall ill and take vacations; eventually, many choose to retire. The

²¹⁴ Cf. *McBryde I*, 117 F.3d at 225 (holding that cases already assigned to a judge's docket can be reassigned only for administrative reasons and not on account of misconduct).

²¹⁵ See *Chandler I*, 382 U.S. at 1004 (Douglas, J., dissenting); *Hastings II*, 770 F.2d at 1004–06 (Edwards, J., concurring in the judgment); Baker, *supra* note 12, at 1132.

Constitution is not offended when forces of nature or a judge's own choices result in his being deprived of case-deciding power. Rather, the forbidden kind of deprivation is that which the Constitution reserves for impeachment.

The Impeachment Clauses disclose several key elements. First, the relevant powers are vested in Congress. The House of Representatives "shall have the sole Power of Impeachment,"²¹⁶ while the Senate "shall have the sole Power to try all Impeachments."²¹⁷ Second, grounds for impeachment are limited to "high Crimes and Misdemeanors."²¹⁸ While the meaning of that phrase remains contested, it at least embraces serious official misconduct, what Framers Alexander Hamilton called "the abuse or violation of some public trust."²¹⁹ Third, the sanction for impeachment and conviction is removal and potential disqualification from office.²²⁰ Based on these elements, the analogy to impeachment reveals that effective removal has certain procedural requirements, namely, (1) an entity wielding legal authority (2) assesses an individual judge's behavior in office and (3) sanctions him on that basis.

First, removal in the constitutionally relevant sense is imposed upon a judge by a body purporting to wield legal authority. Again, the Constitution protects judges' tenure in office in order to insulate them from pressure by political actors, thereby preserving the neutrality of the courts as a safeguard of interbranch balance and, ultimately, individual liberty. The Framers clearly contemplated the removal of judges *against their will*.²²¹ In contrast, removal does not occur when a judge voluntarily relinquishes case-deciding power, as upon retirement or taking senior status.²²² Nor does removal occur when forces outside of the constitutional structure cause the judge to be unable to exercise

²¹⁶ U.S. CONST. art. I, § 2, cl. 6.

²¹⁷ *Id.* art. I, § 3, cl. 6.

²¹⁸ *Id.* art. II, § 4.

²¹⁹ See THE FEDERALIST NO. 65, at 349 (Alexander Hamilton) (Hackett ed., 2005).

²²⁰ U.S. CONST. art. I, § 3, cl. 7.

²²¹ Kaufman, *supra* note 33, at 691–702; Ervin, *supra* note 46, at 110–14.

²²² Senior judges are not effectively removed from office insofar as they have consented to the change in their authority. Notably, federal law permits senior judges to "retain [] office," 28 U.S.C. § 371(b)(1), on the basis of "*substantial administrative duties*," even without hearing any cases, so long as the administrative work "is equal to the full-time work of an employee of the judicial branch." *Id.* § 371(e)(1)(D) (emphasis added). *But see* Stras & Scott, *supra* note 22, at 520 (arguing that this is a constitutional problem and that, if judges perform only administrative duties, they have been constructively removed from office).

judicial power. That holds true for forces of nature (whether personal illness or a global pandemic) *and* for individuals acting without legal sanction (such as a would-be kidnapper and assassin acting out of personal derangement).

Second, the deprivation of case-deciding power must be targeted at an individual judge, not at the judicial branch as a whole. This reflects the balance struck by the Framers of “giving individual judges enormous independence while placing them within an institution that is highly susceptible to political control.”²²³ While Congress cannot determine the outcome of specific cases, it has broad authority to adjust the jurisdiction of the federal courts within constitutional constraints.²²⁴ The Constitution explicitly grants Congress authority to establish lower federal courts and to fix their jurisdiction.²²⁵ It would be perverse if once Congress had expanded the federal courts it was prevented by the Good Behavior Clause from paring them back.²²⁶ Suggesting that the Framers did not intend this one-way ratchet, the Constitution accords tenure protections to individual judges, preventing Congress (or the president) from targeting individuals with removal in order to influence their resolution of judicial questions, while leaving Congress to broadly determine the questions that reach the courts in the first place.²²⁷ Thus, while legislation stripping individual judges of jurisdiction could amount to effective removal,²²⁸ adjusting the overall jurisdiction of the courts would not, even though this might result in individual judges having no cases to decide.²²⁹ To be sure, manipulating the jurisdiction of the Article III courts might be politically motivated and thus strike at the separation

²²³ John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary*, 77 N.Y.U. L. REV. 962, 962–63 (2002); *see also* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 52–60 (1995).

²²⁴ *See* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018).

²²⁵ U.S. CONST. art. III, § 1; *id.* art. I, § 8, cl. 18.

²²⁶ *But see* Ervin, *supra* note 46, at 118; Lawrence Sager, *Foreword: Constitutional Limitations on Congress’s Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 68–80 (1981) (noting that Congress could use its power over jurisdiction to pursue unconstitutional ends).

²²⁷ *See* Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 670–78 (1969) (evaluating this trade-off in the context of the Judiciary Act of 1801).

²²⁸ *Cf.* Alicia Bannon, *Supreme Court Term Limits*, BRENNAN CTR. (June 20, 2023), <https://perma.cc/4LW9-5K95> (“Congress could not ‘lighten’ justices’ duties out of existence altogether such that they held office in name only.”).

²²⁹ *Cf.* Tillman & Blackman, *Offices & Officers, Part III*, *supra* note 186, at 386.

of powers; but the Constitution itself settles this question by explicitly limiting the cases and controversies that must be reserved to Article III tribunals.

Finally, in order to effect removal, a deprivation of case-deciding power must be imposed directly as a sanction for the subject judge's (non)performance of official duties. As a matter of first principles, "the concept of judicial independence protects judges *only as judges*."²³⁰ So generally applicable laws—which apply to judges only incidentally, as citizens—do not threaten judicial independence.²³¹ It is well-established, for instance, that holding judicial office does not confer general immunity from the criminal laws.²³² Several circuits (though never the Supreme Court) have held that judges may be subject to criminal indictment and imprisonment prior to impeachment.²³³ Assuming that these cases are correctly decided, sentencing a judge to prison following a criminal conviction can be distinguished from suspending him from hearing cases under the JCDA. For while an imprisoned judge cannot hear cases as a practical matter, he retains all components of his office.²³⁴ Absent impeachment, he is entitled to return to the bench and resume hearing cases upon serving his sentence.²³⁵

Seen from a different angle, the reason that an imprisoned judge cannot hear cases—assuming that he has not been impeached or suspended under the JCDA—is simply that he is physically confined and unable to come to the courthouse. A judge suffering a prolonged illness may also be absent from work against his will. The difference, of course, is that an imprisoned judge's non-volitional absence is caused by the government. But for that distinction to matter, it must key into a constitutional principle

²³⁰ Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 80 (1989).

²³¹ See Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 845–56; cf. *Evans v. Gore*, 253 U.S. 245, 265 (1920) (Holmes, J., dissenting) (applying this logic in the Compensation Clause context).

²³² See Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 388–90 (1993).

²³³ See, e.g., *United States v. Isaacs*, 493 F.2d 1124, 1141–44 (7th Cir. 1974); *United States v. Hastings*, 681 F.2d 706, 709–11 (11th Cir. 1982); *United States v. Claiborne*, 727 F.2d 842, 849 (9th Cir. 1984); cf. Gerhardt, *supra* note 230, at 77 (critically analyzing the claim that prosecuted judges are “effectively removed” from office).

²³⁴ Cf. Van Tassel, *supra* note 232, at 337 (noting that imprisoned judges have continued to draw their salaries until impeached); Edwards, *supra* note 12, at 768 (same).

²³⁵ See Robert S. Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103, 116–18 (1986); Van Tassel, *supra* note 232, at 391; Gerhardt, *supra* note 230, at 81; Newman Reply to MTD Mem. at 29 n.15.

such as judicial independence. And as noted above, judicial independence is not generally at risk when a member of the judiciary is subject to the same laws as everyone else. Judicial independence comes under threat only when government power is wielded selectively to target judges.

The Framers' desire to subject public officials, including judges, to the restraints of criminal law provides another reason to distinguish the pre-impeachment incarceration of a judge from his effective removal under the JCDA. Exempting judges from criminal prosecution so long as they held office would give them "license to commit crime" as well as "amnesty" for earlier misdeeds.²³⁶ "[T]he Framers of the Constitution did not intend such a result."²³⁷ Indeed, a core principle of constitutional government is that "[n]o man . . . is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."²³⁸ To promote this principle, the Constitution provides that an officer removed through impeachment remains "subject to Indictment, Trial, Judgment and Punishment, according to Law."²³⁹ It is telling that removal from office does not substitute for criminal sanctions for the same underlying conduct. For the Framers evidently did intend for impeachment to supplant other judicial proceedings—such as those involving the common law writ of *scire facias*, with which English judges were removed prior to the Founding.²⁴⁰

In sum, policy and history support a categorical distinction between removal proceedings, which sanction judges as judges, and criminal proceedings, which sanction judges as citizens. Like *scire facias* before it, case suspension under the JCDA implicates the former category, thereby trenching on the domain of impeachment.

C. The Constitution Prohibits Congress from Delegating Effective Removal Power to the Judicial Councils

A judge has been effectively removed from office when, as a legally authorized sanction for official misconduct, he has been

²³⁶ *Isaacs*, 493 F.2d at 1142.

²³⁷ *Id.*

²³⁸ *United States v. Lee*, 106 U.S. 196, 220 (1882).

²³⁹ U.S. CONST. art. I, § 3, cl. 7.

²⁴⁰ See Martha A. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 152–53.

categorically deprived of case-deciding power. This account of effective removal looks primarily to the effect of a legal sanction rather than to its form. Thus, while the JCDA explicitly disavows granting a removal power,²⁴¹ JCDA proceedings remove judges from office when they achieve this forbidden effect. With this point established, it stands to ask whether judicial councils can constitutionally wield the effective removal power. They cannot. As this Section demonstrates, the Constitution establishes impeachment as the sole means of judicial removal and reserves the impeachment power to Congress alone. Congressional delegation of effective removal power to the judicial councils both subverts the separation of powers and compromises judicial independence.

This is an area where formalist and functionalist modes of constitutional analysis converge. Mindful that judges directly controlled neither the purse nor the sword, the Framers sought to ensure the judiciary's independence from the legislature and the executive, thereby preserving it as a guarantor of individual liberties and check against the political branches.²⁴² The protection of judicial tenure and salary emerged as the chief means of ensuring judicial independence.²⁴³ Accordingly, Article III ensures that judges "shall hold their Offices during good Behaviour," which in practice means that (barring death or retirement) they continue in office unless impeached.²⁴⁴ Impeachment is, in Hamilton's words, the "only provision on the point" of judicial removal in the Constitution.²⁴⁵ A revisionist view proposes that the Constitution did not disturb earlier methods of judicial removal existing at common law, including *scire facias* proceedings whereby judges could be found to have "forfeited [their] good-behavior tenure" through misconduct.²⁴⁶ Yet the consensus view among scholars,

²⁴¹ 28 U.S.C. § 354(a)(3)(A); *see also* Burbank, *supra* note 48, at 295–98.

²⁴² Kaufman, *supra* note 33, at 691.

²⁴³ Baude, *Adjudication Outside Article III*, *supra* note 90, at 1515; Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 420 n.15 (1997) ("The Framers provided federal judges with life tenure and constitutionalized the sanctity of their paychecks precisely to protect the independence of the federal judiciary.").

²⁴⁴ *See* Cong. Rsch. Serv., *Good Behavior Clause Doctrine*, CONST. ANNOTATED, <https://perma.cc/6V9D-ALZH>; Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 211–13 (1993); Edwards, *supra* note 12, at 776.

²⁴⁵ THE FEDERALIST NO. 79, at 420 (Alexander Hamilton) (Hackett ed., 2005). Other commentators agreed, both Federalists, *see* Baker, *supra* note 12, at 1132, and Antifederalists, *see* Shane, *supra* note 244, at 217–18.

²⁴⁶ Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 74–77 (2006); *see also* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL

repeatedly endorsed by the Supreme Court,²⁴⁷ is that the Constitution's enumeration of impeachment implied the exclusion of other forms of removal.²⁴⁸ Indeed, the Framers considered but ultimately rejected other means of judicial removal, including proposals that would have involved the Supreme Court.²⁴⁹ And in practice, no judge has ever been removed from office except through impeachment.²⁵⁰

Consistent with the aim of protecting judicial independence, removal of a judge through impeachment and conviction is “deliberately . . . unwieldy.”²⁵¹ The Constitution makes impeachment applicable only to “Treason, Bribery, or other high Crimes and Misdemeanors.”²⁵² Misconduct that does not rise to this level cannot serve as the basis for removal. Moreover, impeachment requires a majority of votes in the House of Representatives; conviction, two-thirds of votes in the Senate.²⁵³ Reflecting this “deliberately cumbersome removal mechanism,”²⁵⁴ Congress has impeached only fourteen federal judges and has convicted a mere eight,²⁵⁵ for offenses ranging from “intoxication on the bench” to “perjury and income tax evasion.”²⁵⁶

For proponents of the JCDA, these high substantive and procedural thresholds for impeachment render it inadequate as a means of judicial discipline.²⁵⁷ Congress can enact legislation like the JCDA, then, because it is “necessary and proper” for the administration of the courts, or perhaps because it simply ratifies the judiciary's inherent power to organize itself as necessary to

PROBLEMS 127–88 (2d ed. 1974); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 723, 727–30 (1931).

²⁴⁷ See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16–18 (1955); Kurland, *supra* note 227, at 669 nn.7–8 (collecting cases).

²⁴⁸ Ervin, *supra* note 46, at 117.

²⁴⁹ James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1232–45 (2007); Krotoszynski, *supra* note 243, at 458; CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 36 (4th ed. 2008).

²⁵⁰ Kaufman, *supra* note 33, at 692 n.75.

²⁵¹ *Id.* at 683.

²⁵² U.S. CONST. art II, § 4.

²⁵³ *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

²⁵⁴ Edwards, *supra* note 12, at 767.

²⁵⁵ See Van Tassel, *supra* note 232, at 336–37. Additionally, two judges have resigned upon impeachment, before they were convicted. *Id.* at 351.

²⁵⁶ *Good Behavior Clause Doctrine*, *supra* note 244; see also Shane, *supra* note 244, at 213; WILLIAM REHNQUIST, *GRAND INQUESTS* 119–27 (1992).

²⁵⁷ See Nunn, *supra* note 46, at 40.

perform its functions.²⁵⁸ Courts have signaled greater tolerance for judicially administered forms of discipline given the concomitantly lower risk of this infringing the branch's independence.²⁵⁹ Prior evaluations of the JCDA thus have concluded that it comports with the spirit of the Constitution by reconciling judicial accountability with judicial independence.²⁶⁰

While these functionalist arguments may work for lesser forms of discipline, they are unavailing with respect to removal.²⁶¹ Even a highly "flexible understanding of separation of powers,"²⁶² such as the Supreme Court adopted in *Morrison v. Olson*²⁶³ and *Mistretta v. United States*,²⁶⁴ only countenanced Congress delegating to judges "nonadjudicatory functions that *do not trench upon the prerogatives of another Branch*."²⁶⁵ Impeachment is, of course, a core prerogative of the legislature, which it cannot delegate to other actors.²⁶⁶ That prohibition becomes especially clear in light of the formalist mode of analysis to which the Supreme Court has increasingly turned in separation of powers cases since *Morrison* and *Mistretta*.²⁶⁷ But it also reflects an important functionalist logic, since delegating impeachment power to judicial councils would allow Congress to evade the Constitution's institutional and political safeguards for judicial tenure.²⁶⁸ The Constitution not only requires a supermajority vote for conviction in the Senate; more fundamentally, it vests removal power in a body that is politically accountable for abuse of that power.²⁶⁹ When it comes

²⁵⁸ See Hastings I, 593 F. Supp. at 1380; see also Alexander Volokh, *Judicial Non-Delegation, the Inherent Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1397–1408 (2017).

²⁵⁹ See Shane, *supra* note 244, at 223; Nixon v. United States, 506 U.S. 224, 235 (1993).

²⁶⁰ See, e.g., Paula Abrams, *Spare the Rod and Spoil the Judge: Discipline of Federal Judges and the Separation of Powers*, 41 DEPAUL L. REV. 59, 89–90 (1991); Shane, *supra* note 244, at 223; Edwards, *supra* note 12, at 766; Nunn, *supra* note 46, at 40; *McBryde II*, 264 F.3d at 67.

²⁶¹ See Shane, *supra* note 244, at 220; Edwards, *supra* note 12, at 787; cf. Chandler II, 398 U.S. 74, 85 (1970) (distinguishing removal from lesser sanctions); *McBryde II*, 264 F.3d 52, 66 (D.C. Cir. 2001) (same).

²⁶² *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

²⁶³ 487 U.S. 654 (1988).

²⁶⁴ 488 U.S. 361 (1989).

²⁶⁵ *Id.* at 388 (emphasis added).

²⁶⁶ Cf. Lemos, *The Other Delegate*, *supra* note 203, at 436–37 nn.151–52.

²⁶⁷ Cf. Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting). See generally Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088 (2022).

²⁶⁸ Cf. Krotoszynski, *supra* note 243, at 475–84.

²⁶⁹ Lemos, *supra* note 203, at 449–50; Krotoszynski, *supra* note 243, at 421–22; Gerhard, *supra* note 230, at 96; Baker, *supra* note 12, at 1127.

to protecting judicial independence, formalists and functionalists agree, “[c]onvenience and efficiency” are hardly “hallmarks” of a system of removal.²⁷⁰

Consequently, it is more—not less—constitutionally problematic to vest removal power in judicial councils whose members are insulated from political accountability. Judicial self-regulation generally draws support from the view that, as apolitical actors, “judges are uniquely well-equipped to be fair in assessing claims of misconduct and disability.”²⁷¹ Yet even defenders of this ideal concede that “any system of peer control will produce some questionable cases.”²⁷² And since “[j]udges are not fungible,” the “power to keep a particular judge from sitting” on a case could determine the outcome.²⁷³ This prospect strikes at the fundamental purpose of protecting individual judges’ tenure in office, namely, to insulate them from pressure that could sway the outcome of specific cases.²⁷⁴ Such pressure likely becomes all the more effective when applied by a judge’s peers.²⁷⁵

III. IMPLICATIONS AND RECOMMENDATIONS

In sum, the Constitution forbids judicial councils from effectively removing a judge from office, which occurs when a sanction imposed under the JCDA results in the judge’s complete deprivation of case-deciding power. The immediate implication of this argument is that Judge Newman has been unconstitutionally removed from office since the moment in November 2023 when, having circulated the last opinion assigned before her suspension, she stood completely deprived of cases.²⁷⁶ Prior suspensions may also have crossed the line into effective removal.²⁷⁷ In any event,

²⁷⁰ *INS v. Chadha*, 462 U.S. 919, 944 (1983).

²⁷¹ Edwards, *supra* note 12, at 780; *see also* Shane, *supra* note 244, at 240; *Hastings III*, 783 F.2d at 1508.

²⁷² Edwards, *supra* note 12, at 779.

²⁷³ *Chandler II*, 398 U.S. at 136–37 (Douglas, J., dissenting).

²⁷⁴ Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 707 (1995); Krotoszynski, *supra* note 243, at 430, 451, 470–71; Kaufman, *supra* note 33, at 698–700.

²⁷⁵ *See McBryde v. United States*, 299 F.3d 1357, 1372 (Fed. Cir. 2002) (Newman, J., dissenting); Ervin, *supra* note 46, at 125; Kaufman, *supra* note 33, at 712–15.

²⁷⁶ *Cf.* Memorandum Opinion and Order at 33, *Newman v. Moore*, 2024 WL 551836 (D.D.C. Feb. 12, 2024) (No. 23-cv-1334) (assuming that Judge Newman’s suspension constituted a “lesser sanction” than removal).

²⁷⁷ *See* Defendants’ Reply Mem., *supra* note 149, at 12–13 (speculating that Judge Chandler or Judge McBryde may have “cleared [their] pending cases, resulting in no cases to adjudicate during” their suspensions).

the infrequency of effective removal belies its disproportionate importance. Not only does the greying of the judiciary augur an increase in JCDA proceedings. But mounting political polarization, from which the judiciary is hardly immune, increases the risk that such proceedings could be abused for ideological ends.²⁷⁸

Consider the following scenario: An aging and irascible circuit judge, revered by many for his staunch liberalism, falls behind on his case assignments and engages in bizarre outbursts from the bench. Spurning his colleagues' entreaties, the judge refuses to retire and grant the Republican president a chance to appoint a conservative successor. The circuit council unanimously appoints a special committee to investigate whether the judge remains able to hear cases; the committee concludes that the judge has thwarted its investigation by intimating that clerks and court staff will face professional consequences if they assist it in any way; and a divided council accepts the committee's recommendation to suspend the judge from new case assignments until he assures the committee that he is not disabled. The judge completes his remaining opinions shortly after the suspension order takes effect. In due course, a high-profile challenge to the president's policies reaches the circuit, which goes en banc to decide the politically charged question. The liberal judge is excluded from participating due to the suspension order, determining the outcome of the case: his vote to strike down the policy would have been decisive.

It is worth taking this scenario seriously given the magnitude of harm it would cause. Even if all members of the judicial council had acted in good faith, the clearly political outcome of the suspension would corrode public confidence in judicial neutrality. Compounding this harm, the suspended judge would fail to achieve meaningful judicial review of the suspension.²⁷⁹

Congress can still defuse the constitutional land mine of effective removal, however. Most simply, Congress could prophylactically amend § 354(a)(2)(i) to include the additional limitations that "no categorical suspension from case-assignment eligibility

²⁷⁸ Judge Newman's defenders within Article III have raised the specter of such abuse in her case. See Paul Michel, *Chief Judge Moore v. Judge Newman: An Unacceptable Breakdown of Court Governance, Collegiality, and Procedural Fairness*, IP WATCHDOG (July 9, 2023), <https://perma.cc/6P5X-XFTJ>; Randall Rader, *The Federal Circuit Owes Judge Newman an Apology*, IP WATCHDOG (July 12, 2023), <https://perma.cc/6BGF-HBNP>; Jones, *supra* note 10.

²⁷⁹ See *supra* notes 162–63 and accompanying text.

shall last beyond when a sanctioned judge has completed her previously assigned cases, nor extend to a circuit judge's participation in cases heard en banc; and under no circumstances shall an order under this provision result in the complete elimination of a sanctioned judge's docket." A complementary amendment would clarify that judicial councils may impose non-categorical, case- or litigant-specific, suspensions subject only to the "time certain" limitation.²⁸⁰ (To further limit the possibility of abuse and facilitate effective review, an amended provision could require that narrowly tailored suspensions bear a rational relationship to the content of the complaints justifying their imposition.)

These modest amendments would preserve the JCDA's overall scheme for judicial self-discipline, including other sanctions that do not effect removal.²⁸¹ And they seem politically plausible, especially since it is not clear that one party benefits more than the other from the availability of effective removal under the JCDA.²⁸² Conversely, limiting the application of § 354 in this way would render case suspension a less significant sanction and thus, conceivably, a marginally less effective deterrent for misconduct. That price seems reasonable given the concomitant reduction in risk to judicial independence.

Judicial councils also would remain free to formally recommend impeachment to the House where they determined that removing a judge from office was warranted.²⁸³ This implicates the limitations of impeachment that motivated the JCDA in the first place. Three major limitations exist, which are redressable to different degrees.

First, impeachments are time-consuming and politically fraught affairs, which may lead Congress to avoid taking up plausible cases.²⁸⁴ This problem is the most easily addressed. The inconvenience of impeachment can be mitigated with novel procedures, such as the use of special committees to take testimony and gather evidence, followed by a full vote meeting the requisite

²⁸⁰ See *supra* note 211.

²⁸¹ Private and public censures would remain available, as would informal pressure from colleagues. See Edwards, *supra* note 12, at 794; Van Tassel, *supra* note 232, at 369; Kaufman, *supra* note 33, 706–09.

²⁸² Judge Newman was appointed by President Ronald Reagan, but Judge Moore by President George W. Bush. Judge Newman is represented by the conservative New Civil Liberties Alliance, but some of the JCDA's sharpest critics have been arch liberals.

²⁸³ 28 U.S.C. § 354(b)(1)–(2).

²⁸⁴ Kastenmeier & Remington, *supra* note 52, at 778.

thresholds in the House and Senate.²⁸⁵ It is also quite plausible that only a few successful impeachments would be needed to send a strong signal that certain forms of misconduct will not be tolerated, leading future judges to resign rather than to face being formally removed from office in disgrace.²⁸⁶

Second, as the ultimate manifestation of political control over the judiciary, impeachment could be abused to compromise judicial independence.²⁸⁷ The norm against politically motivated impeachments of judges is strong but not ironclad.²⁸⁸ Yet at least Congress—unlike the judicial councils—is directly accountable to the people. And at least impeachments—unlike judicial discipline proceedings—are public affairs subject to significant scrutiny. Moreover, the supermajority requirement for conviction in the Senate makes purely partisan or ideological impeachments unlikely.

Finally, the most substantial limitation of impeachment is that the “high crimes and misdemeanors” standard for impeachable conduct may be too high as a normative matter, permitting judges to engage in misconduct that nonetheless does not warrant removal under the Constitution.²⁸⁹ The most acute problem is that the standard seems to rule out removal for reasons of disability.²⁹⁰ Hamilton’s justification for “[t]he want of a provision for removing [] judges on account of inability” bears emphasis: “An attempt to fix the boundary between the regions of ability and inability would,” he believed, “much oftener give scope to personal and party attachments and enmities, than advance the interests of justice or the public good.”²⁹¹ The intuition here is that the existence of a disability poses particular *definitional* problems; there is more room for good-faith debate over whether a judge suffers from a disability, let alone whether the disability merits removal

²⁸⁵ See generally *Nixon v. United States*, 506 U.S. 224 (1993) (finding that such procedures presented a nonjusticiable political question).

²⁸⁶ See Van Tassel, *supra* note 232, at 333, 351 (accounting for resignations under threat of impeachment and removal); WHEELER & LEVIN, *supra* note 44, at 11; Barr & Willging, *supra* note 47, at 156.

²⁸⁷ See *Hastings v. United States*, 802 F. Supp. 490, 495–96 (D.C. Cir. 1993).

²⁸⁸ Compare Geyh, *supra* note 249, at 125, with Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 67–69 (2016).

²⁸⁹ See Edwards, *supra* note 12, at 773–78; Kaufman, *supra* note 33, at 699; Ervin, *supra* note 46, at 116; Hobbs, *supra* note 31, at 812. But see Alexa J. Smith, Note, *Federal Judicial Impeachment: Defining Process Due*, 46 HASTINGS L.J. 639, 640 (1995).

²⁹⁰ BERGER, *supra* note 246, at 189–95.

²⁹¹ THE FEDERALIST NO. 79, at 420; see also Kaufman, *supra* note 33, at 703.

from office.²⁹² If Hamilton's intuition is correct, it calls into question the JCDA's approach of treating misconduct and disability as two sides of the same coin.

Disability clearly merits a more conciliatory approach, primarily involving positive incentives, such as structuring compensation to make senior status or retirement maximally attractive and prestigious.²⁹³ When a judge becomes permanently disabled, 28 U.S.C. § 371 allows a majority of judges in the circuit to vote to certify that fact to the president, who may then appoint a new judge to serve alongside (but in a senior position to) the disabled judge.²⁹⁴ This provision is rarely used.²⁹⁵ And as the case of Judge Newman shows, the provision is also vulnerable to the judge impeding her colleagues' ability to determine whether a certifiable disability exists.

Those problems could be addressed by the creation of an independent disability commission under the Judicial Conference but separate from the judicial councils, comprising administrators and medical professionals. Upon application from a judicial council, the commission would assess whether a judge suffered a disability within the meaning of § 371 such that the judicial council could vote to trigger a vacancy. For judges otherwise eligible to take senior status, the burden before the commission could be on the judge to prove that he or she remained able to perform all official duties. By bolstering § 371, this reform would at least ensure that an adequate number of capable judges held office.

That solution would not, however, directly bar even clearly disabled judges from continuing in office. If such judges became more than merely inefficient—if their disabilities led them to act belligerently or abusively toward court staff or litigants, for example—then they could be impeached for that misconduct, even if not for the underlying disability. To the extent that these tools remain insufficient to deal with judicial disability, this does not justify effective removal but rather lends support to more structural reform, such as term limits and mandatory retirement ages. Such reforms could in some guises require constitutional amendments. Yet they at least merit further consideration given the aging judiciary and

²⁹² WHEELER & LEVIN, *supra* note 44, at 3; Hobbs, *supra* note 31, at 817.

²⁹³ See generally David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397 (2006). See also Van Tassel, *supra* note 232, at 395–402.

²⁹⁴ See 28 U.S.C. § 372(b); see also Nunn, *supra* note 46, at 35; Van Tassel, *supra* note 232, at 400.

²⁹⁵ Barr & Willging, *supra* note 47, at 116.

concomitant likelihood of an increased incidence of age-related disabilities.²⁹⁶

CONCLUSION

The Constitution protects the independence of federal judges by guaranteeing that they hold office unless impeached. If this guarantee is to mean anything, judges cannot be wholly deprived of the case-deciding power inherent in judicial office by means other than impeachment. This Comment has drawn upon both formalist and functionalist modes of constitutional interpretation and argument to show that case-suspension sanctions under the Judicial Conduct and Disability Act of 1980 can effectively remove an Article III judge from office, undermining both the separation of powers and judicial independence. No doubt judicial councils will exercise effective removal power responsibly in most cases. But perfect forbearance is not assured. And the Constitution forbids this end run around the Impeachment Clause even if the results prove mostly benign.

²⁹⁶ See Shen, *supra* note 31, at 237–38 n.5.