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# 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

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## ARTICLE

*Joshua Kastenber*

### 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

**Abstract.** In 1970, the United States Supreme Court issued *Chandler v. Judicial Council of the Tenth Circuit* in which five Justices determined that the federal courts of appeals possessed an administrative authority to manage the district court judges within an appellate court's respective circuit. The decision enabled the Tenth Circuit to decide the fitness of a judge to preside over cases without a formal motion from a litigant. Although Congress had enabled the courts of appeals to oversee basic judicial functions (such as temporarily assigning district court judges to overworked districts), Congress did not intend to grant the power to remove the judicial duties of a district court judge; such an act could equate to a judicial impeachment by the Judicial Branch. The Justices who dissented in *Chandler*, Hugo Black and William O. Douglas, argued that the Court had taken a substantial step in undermining the independence of the Nation's federal trial judges. Although Congress has since statutorily reduced the impact of *Chandler*, it remains a flawed influence on the investigation and potential disciplining of the Nation's federal judges. This Article examines the underlying causes and impact of *Chandler*, and suggests an argument for curtailing the decision's impact by limiting it to purely administrative matters.

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in the United States Air Force as a judge advocate, including the last five as a military trial judge.

## ARTICLE CONTENTS

I.	Judge Chandler, the Court of Appeals for the Tenth Circuit, and Oklahoma.....	97
	A. Judge Chandler’s Public and Private Conduct .....	98
	B. The Legislative Purpose of the Judicial Council ...	106
	C. The Judicial Council of the Tenth Circuit and Judge Chandler .....	114
II.	Judge Chandler, the Legislative Branch, and Ethics Reform.....	123
	A. Congress, the Court, and Judicial Ethics Reforms .....	126
	B. House Judiciary Investigation into Judge Chandler and the Judicial Council.....	130
III.	Judicial Deliberations and Decision.....	135
	A. The Court’s Deliberations .....	136
	B. The Decision .....	140
IV.	The Use of <i>Chandler</i> .....	147
	A. Legislative Responses to <i>Chandler</i> .....	148
	B. Judicial Use of <i>Chandler</i> .....	152
V.	Conclusion .....	156

When the Article III judiciary is called upon to police itself after receiving allegations of judicial malfeasance, or a judge's inability to advance cases, the courts of appeals will investigate through a process which involves an administrative institution known as a judicial council.<sup>1</sup> The investigation operates much like an administrative proceeding, but it is largely closeted from the public and—with only one minor step—there is a lack of a meaningful standard of proof employed throughout.<sup>2</sup> The process has improved since its inception, but it remains flawed—subjecting federal judges (other than Supreme Court Justices) to a process which does not mirror the standards United States courts employ in cases and hearings.<sup>3</sup> In essence, the structure which exists today for internal judicial investigations can be used to undermine the independence of individual trial judges.<sup>4</sup> This flawed process was shaped by Chief Justice Warren Burger in *Chandler v. Judicial Council of the Tenth Circuit (Chandler II)*.<sup>5</sup>

Issued on June 1, 1970, the Supreme Court recognized in *Chandler II* that the eleven judicial councils possessed the administrative authority to remove district court judges from individual cases and from sitting on trials for specified periods of time without first requiring a litigant's appeal.<sup>6</sup> This decision essentially meant that an appellate court could—on its own and without articulating a defined standard of proof—remove a district court judge without first requiring a litigant to appeal through a writ of mandamus or prohibition.<sup>7</sup>

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1. See *Chandler v. Judicial Council of the Tenth Circuit of the U.S. (Chandler II)*, 398 U.S. 74, 76 n.1 (1970) (“Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.” (quoting 28 U.S.C. § 332)).

2. *Infra* Part I–II.

3. *Infra* Part II–III.

4. *Infra* Part III–IV.

5. *Chandler v. Judicial Council of the Tenth Circuit of the U.S. (Chandler II)*, 398 U.S. 74 (1970). At the time of *Chandler II*, there were eleven circuit courts of appeals including the United States Court of Appeals for the District of Columbia. See Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 GA. ST. U. L. REV. 363, 363 (1992) (emphasizing the creation of the “new eleventh circuit” occurred in 1981). This new circuit, the Court of Appeals for the Eleventh Circuit, was created from the Court of Appeals for the Fifth Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 5, 94 Stat. 1994, 1994.

6. See *Chandler II*, 398 U.S. at 86 n.7 (“We find nothing in the legislative history [of 28 U.S.C. § 332] to suggest that the Judicial Council was intended to be anything other than an administrative body functioning in a very limited area in a narrow sense as a ‘board of directors’ for the circuit.”).

7. *Id.* at 91–94 (Harlan, J., concurring) (“[T]he Court’s action had the effect of rejecting the appellant’s claim of a right to obtain relief without further proceedings in a lower tribunal.”).

Created in 1939, a judicial council is a statutory mechanism that authorizes each federal appeals court to administratively manage the federal district courts within the circuit.<sup>8</sup> Contemporaneous with the Supreme Court's review in Chief Justice Warren Burger in *Chandler v. Judicial Council of the Tenth Circuit (Chandler I)*<sup>9</sup> and *Chandler II*, a number of congressmen, including Emanuel Celler (the Chairman of the House Judiciary Committee), concluded that because the Constitution vests Congress with the sole authority to remove federal judges through the impeachment process, the action of appellate court judges in removing a district judge from trials through an administrative, rather than appellate, process threatened the independence of the Nation's federal trial judges.<sup>10</sup> In principle, Congressman Celler's Committee determined that the administrative removal of a trial judge constituted an end run around both the Legislative Branch's power and the rights of litigants to contest the removal.<sup>11</sup> In fact, more than one legislator argued that the existence of such an administrative process was a blatant unconstitutional extension of judicial power.<sup>12</sup> Although the Supreme Court infrequently cites to

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8. See *id.* at 76 n.1 (majority opinion) (discussing a judicial council's role in making "necessary orders for the effective and expeditious administration . . . within its circuit").

9. *Chandler v. Judicial Council of the Tenth Circuit of the U.S. (Chandler I)*, 382 U.S. 1003 (1966).

10. Cf. Letter from Emanuel Celler, Chairman of the House Judiciary Comm., to Sam Ervin, U.S. Senator (Jan. 26, 1966) (on file with the Library of Congress) ("I am watching developments [of *Chandler*] with a careful eye. I am not unaware of the far-reaching implications in this unprecedented matter.").

11. See Lee R. West, *Biographical Sketch for the Historical Society of the Tenth Circuit on Judge Stephen S. Chandler, Jr.*, TENTH CIR. HIST. SOC'Y, at 13, [https://static1.squarespace.com/static/54170cd0e4b00eba52a2db00/t/54516653e4b09e9c97c0b22b/1414620755682/Chandler\\_bio.pdf](https://static1.squarespace.com/static/54170cd0e4b00eba52a2db00/t/54516653e4b09e9c97c0b22b/1414620755682/Chandler_bio.pdf) [perma.cc/ND5V-3NMS] (emphasizing the House Judiciary Committee's findings after investigating Judge Chandler's behavior, and urging that "[i]f any of the judges should be removed because they are unfit to discharge their responsibilities, the only mechanism provided by the Constitution, impeachment, is not available" (citation omitted)).

12. See *Judicial Fitness: Hearings Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary U.S. S.*, 89th Cong., pt. I, at 5 (1966) [hereinafter *U.S. S. Judicial Fitness Hearings*] (statement of Sen. Sam J. Ervin, Jr., as presented by Sen. Joseph D. Tydings, Chairman, S. Subcomm. on Improvements in Judicial Mach.) ("The action of the Judicial Council of the Tenth Circuit in dismissing Judge Chandler was unwarranted and precipitous, and I agree completely with Justices Black and Douglas that the Supreme Court should have stayed the Order."); Letter from Emanuel Celler to Sam Ervin, *supra* note 10 (expounding the Supreme Court's action in *Chandler* was over-reaching and inappropriate). Further, it is evident some legislators still had faith in a different approach. In 1966, Congressman Harold Royce Gross introduced House Resolution 739 "to inquire into and investigate the official conduct" of Judge Chandler. H.R. Res. 739, 89th Cong. (1966) (enacted).

*Chandler II*,<sup>13</sup> the decision serves as an important marker in relations between the legislative and judicial branches—not only influencing judicial relationships between trial and appellate courts, but also shaping judicial ethics.<sup>14</sup>

The majority's decision is brief, and without reading Justice John Harlan's lengthy concurrence or Justice William O. Douglas's dissent, it might appear that the Court casually determined that no constitutional impediment existed in the administrative removal of federal trial judges.<sup>15</sup> Likewise, the majority's decision is sterilized from any discussion of the constitutional—if not ethical—implications for the extra-legislative removal and discipline of judges.<sup>16</sup> As a result, one might infer that *Chandler II* presents legal scholars, not only a study on how Chief Justice Burger led the majority of Justices to avoid a significant constitutional issue and remove judicial ethics considerations from a decision rife with questions in both categories, but—because Chief Justice Burger also ignored congressional determinations which, if followed, could have reasonably led the Court to issue a ruling inapposite of *Chandler II*—the decision also presents a study in legislative and judicial relations.

Although, normally the judiciary should immunize itself from political considerations, in this particular instance, it is noteworthy that in 1939 Congress created the judicial councils by passing the Administrative Office Act;<sup>17</sup> and, between 1965 and 1969, the House Judiciary Committee determined that the Judicial Council of the Tenth Circuit violated that Act.<sup>18</sup> Additionally, Congressman Celler—a long-serving congressman and

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13. Only eight Supreme Court cases appear to use *Chandler II* as a citing reference. Search of U.S. Supreme Court Cases Citing *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, WESTLAW, <https://next.westlaw.com> (locate *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 398 U.S. 74 (1970); click the “Citing References” tab; select the “Cases” option; select the “Federal” option; then choose “Supreme Court” under the “Jurisdiction” category).

14. Cf. Carl L. Shipley, *Legislative Control of Judicial Behavior*, 35 DUKE L. & CONTEMP. PROBS. 178, 179–87 (1970) (defining constitutional issues within the *Chandler* opinion that are fundamental to our Nation's foundation).

15. See generally *Chandler II*, 398 U.S. at 74–89 (failing to find a constitutional impediment existed in the Judicial Council's actions).

16. *Id.*

17. Administrative Office Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223.

18. See John P. MacKenzie, *House Probe Reports Judge Lost Seat Unfairly*, ST. PETERSBURG TIMES, Dec. 19, 1969, at 12-A (“A secret House Judiciary Committee report has concluded that the Tenth U.S. Circuit Court of Appeals went beyond the law and the Constitution when it stripped Oklahoma Federal Judge Stephen S. Chandler of his judicial duties in 1965.”).

member of the House Judiciary Committee—assisted in the Act’s creation.<sup>19</sup>

*Chandler II* has never been analyzed as a legal history, and particularly not so in terms of the jurisdictional positions and motives of the participants, including an ad hoc panel of the House Judiciary Committee that investigated Judge Chandler as well as two other judges involved in the Judicial Council of the Tenth Circuit’s actions.<sup>20</sup> That House Committee panel (headed by Congressman Jack Brooks, a Texas Democrat, William St. Onge, a Connecticut Democrat, and Nathan Poff, a Virginia Republican) determined that the Judicial Council had acted beyond its statutory and constitutional powers in its supervision of Judge Chandler.<sup>21</sup> From the time of its issuance to the present, *Chandler II* has occasionally been discussed, but there are no articles or books which analyze the interplay between Congress and the Supreme Court in regard to the issues leading to the decision. No studies citing to *Chandler II* analyze how Judge Chandler’s conduct and personality (as well as that of Judge Alfred P. Murrah, Judge Chandler’s opponent on the Tenth Circuit) affected the Court’s decisional processes. Yet, Judge Chandler’s conduct—both on and off the bench—is a reasonable part of the decision’s analysis, in part because newspapers ranging from the *Daily Oklahoman* to the *New York Times* reported on Judge Chandler, making his conduct notorious to the public.<sup>22</sup> In addition, the Justices deciding *Chandler II* were also well aware of Judge Chandler’s conduct; Justice Hugo Black attended the Tenth Circuit Judicial Council’s conference in 1961 and 1964 and was hosted by Judge Chandler during

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19. Cf. Peter Graham Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 206 (1970) (discussing Congressman Celler’s involvement in the hearing, regarding the 1939 Act); Shipley, *supra* note 14, at 189 (establishing Congressman Celler was Chairman of the House Judiciary Committee in 1970, and portraying him as a contender in the early effort to address the regulation of judicial behavior).

20. See Shipley, *supra* note 14, at 178–80 (discussing a few of the participants in the storm ultimately leading to the *Chandler II* opinion).

21. See Fish, *supra* note 19, at 232, 240–41 (analyzing the Judicial Council’s overreach in its supervision of Judge Chandler).

22. See U.S. Judge Stephen Chandler, 89; *Often Feuded with His Colleagues*, N.Y. TIMES, Apr. 29, 1989, available at <http://www.nytimes.com/1989/04/29/obituaries/us-judge-stephen-chandler-89-often-feuded-with-his-colleagues.html> [perma.cc/F94Z-MZD7] (“Twice [Judge Chandler] was removed from hearing lawsuits because of allegations of personal interest or bias and prejudice.”); accord Katherine Hatch, *Judge’s Role in Two Cases Under Attack*, DAILY OKLAHOMAN, Aug. 19, 1965, at 1 (covering one of Judge Chandler’s controversies).

both.<sup>23</sup> In light of Judge Chandler's well-known exploits, one could presume the Court's avoidance of examining the significant underlying issues resulted in a poorly constructed decision.

This Article is divided into four sections. The first details the conduct of Judge Chandler and the Tenth Circuit Court of Appeals that lead to the issuance of the Council's Order barring Judge Chandler from serving on trials. This section also presents an analysis underlying the purpose for the creation of judicial councils. Because the Act creating the judicial councils had never been challenged in the courts, Judge Chandler's appeal presented a case of first impression when it came before the Supreme Court.<sup>24</sup>

The second section of this Article analyzes the legislative branch's investigation into Judge Chandler and the Tenth Circuit Judicial Council, as well as the opinions of several legislators who did not take a role in the investigation, but did serve on one of Congress' two judiciary committees and opposed both the Council's actions and the Supreme Court's rulings. Importantly, not only did the House Judiciary Committee conclude that the Judicial Council had unconstitutionally exercised a non-existent authority, three prominent legislators—including a senator on the Senate Judiciary Committee—also criticized the Council's actions.

The third section of this Article details the Supreme Court's deliberative findings through the personal correspondences of the Justices involved in the decision, as well as the various drafts of the *Chandler I* and *Chandler II* majority and dissenting opinions.

The fourth section provides an analysis on how the Court's majority created an unintended consequence in rendering its decision in *Chandler II*, and does so by examining how the judiciary has made use of it. This Article concludes with a suggested applicability guideline for the use of *Chandler II* in future decisions arising from challenges to judicial supervision actions and judicial rule-making.

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23. See Letter from Hugo Black, Justice, U.S. Supreme Court, to Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla. (June 29, 1961) (on file with the Library of Congress) (commenting favorably on the meeting).

24. See generally *Chandler II*, 398 U.S. at 75–76 (addressing the “scope and constitutionality of the powers of the Judicial Councils under 28 U.S.C. §§ 137 and 332[j]” and proclaiming the issues as questions of first impression).



I. JUDGE CHANDLER, THE COURT OF APPEALS FOR THE TENTH CIRCUIT,  
AND OKLAHOMA

In 1929, Congress formed the Court of Appeals for the Tenth Circuit to alleviate a growing appellate docket in the Eighth and Seventh Circuits.<sup>25</sup> Then, the Tenth Circuit was composed of the United States Districts for Wyoming, Utah, Oklahoma, Kansas, Colorado, and New Mexico.<sup>26</sup> In 1906, Congress divided the State of Oklahoma into two Territories, establishing the start of Oklahoma's Eastern and Western Districts.<sup>27</sup> Congress created a third district in 1925, titled the United States District for the Northern District of Oklahoma.<sup>28</sup> In its early history, the Eastern and Western Districts shared a judgeship. For instance, Judge Alfred Murrah and Judge Bower Slack Broaddus served as district judges in both districts.<sup>29</sup> Judge Chandler was appointed exclusively to the Western District in 1943, and he served on the bench until he took senior status in 1975.<sup>30</sup> The Senate confirmed him by a close vote of thirty-seven to twenty-eight, with thirty-one senators not voting.<sup>31</sup> In 1956, as a result of judicial retirements and deaths, Judge Chandler became the Chief Judge of Oklahoma's Western

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25. See Arthur J. Stanley, Jr. & Irma S. Russell, *The Political and Administrative History of the United States Court of Appeals for the Tenth Circuit*, 66 DENV. L.J. 119, 122 (1982) (indicating the "creation of the Tenth Circuit in 1929 was actually the second time a 'Tenth Circuit' was created by the judicial system).

26. See Act of Feb. 28, 1929, Pub. L. No. 70-840, ch. 363, 45 Stat. 1346, 1347 ("[T]he [T]enth [C]ircuit shall include the districts of Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico"); CHARLES L. ZELDEN, *THE JUDICIAL BRANCH OF FEDERAL GOVERNMENT: PEOPLE, PROCESSES, AND POLITICS* xxvii (2007) ("This act divided the Eighth Circuit into two circuits, organizing the judicial districts of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming as the Tenth Circuit.").

27. See Act of June 16, 1906, Pub. L. No. 59-234, ch. 3335, § 2, 34 Stat. 267, 268 (enabling the Indian Territory and the Territory of Oklahoma).

28. See Act to Amend Section 101 of the Judicial Code, Pub. L. No. 68-418, ch. 233, § 101, 43 Stat. 945, 945 (1925) ("The State of Oklahoma is divided into three judicial districts, to be known as the northern, the eastern, and the western districts of Oklahoma.").

29. See *Murrah, Alfred Paul*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/murrah-alfred-paul> [<https://perma.cc/JTC6-YFPB>] (indicating Judge Murrah concurrently occupied a seat in the Western, Eastern, and Northern Districts of Oklahoma); see also *Broaddus, Bower Slack*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/broaddus-bower-slack> [<https://perma.cc/M2ZC-R5P4>] (reporting Judge Broaddus replaced Judge Murrah, sitting concurrently in the Western, Eastern, and Northern Districts of Oklahoma).

30. See *Chandler, Stephen Sanders, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/chandler-stephen-sanders-jr> [<https://perma.cc/XFT6-KAAP>] (indicating Judge Chandler served in the Western District from 1943 until 1975).

31. See West, *supra* note 11, at 3 ("[Judge] Chandler's nomination was finally confirmed in May of 1943, by the rather narrow margin of 37 yeas and 28 nays, with 31 not voting.").

District.<sup>32</sup> In 1965 the other judges in the district included Judge Luther Bohanon, Judge Ross Rizley, Judge Alvin Daugherty, and Judge Luther Burbank.<sup>33</sup> Judge Bohanon, who was a long-time friend of Judge Murrah, clashed with Judge Chandler.<sup>34</sup>

A. *Judge Chandler's Public and Private Conduct*

Judge Chandler was a contentious judge. In 1981, Judge A. Leon Higginbotham, of the Court of Appeals for the Third Circuit, called Judge Chandler “cantankerous to the extreme and in all probability mentally ill.”<sup>35</sup> Judge Julius Hoffman on the United States District Court for the Northern District of Illinois was Judge Chandler’s closest judicial acquaintance on a federal court, and the two men appear to have had a similar demeanor—characterized by angry outbursts at counsel and witnesses.<sup>36</sup> When Judge Hoffman became well-known for his role in the politicized trials of the so-called “Chicago Seven” in 1969, Judge Chandler lauded his treatment of that trial’s defense counsel.<sup>37</sup> In 1965, Oklahoma’s newspaper readers were greeted with front-page news detailing Judge Chandler’s various controversies with a local district attorney.<sup>38</sup> On his death in 1988, the *New York Times* reported, “Stephen S. Chandler, a

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32. *See id.* at 4 (“[Judge] Chandler was appointed chief justice of the district in 1956, and assumed greater administrative duties.”).

33. *See U.S. District Court for the Western District of Oklahoma: Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-district-court-western-district-oklahoma-judges> [<https://perma.cc/S67U-1NBN>] (listing the judges who have served the Western District of Oklahoma and the years in which they served).

34. *See West, supra* note 11, at 4 (“[The feud] began to positively boil once Murrah’s long-time friend, Luther Bohanon, was appointed judge for the Western District of Oklahoma in 1961.”).

35. *Hoots v. Pennsylvania*, 639 F.2d 972, 987 (3d Cir. 1981) (Higginbotham, J., concurring). The author wishes to note that because Judge Chandler was still alive, this characterization was not only unseemly and unfair to Judge Chandler, but there was no evidence of Judge Chandler suffering from a diagnosed mental illness. Judge Chandler may have been mentally ill, but he may have also been irascible.

36. *Cf.* Letter from Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla., to Julius Hoffman, Judge, U.S. Dist. Court for the N. Dist. of Ill. (1970) (on file with the Library of Congress) (“All real Americans should be deeply grateful to you. We need more like you.”).

37. *Cf.* Letter from Julius Hoffman, Judge, U.S. Dist. Court for the N. Dist. of Ill., to Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla. (Sept. 10, 1970) (on file with the Library of Congress) (“Here is my long delayed expression of appreciation for the kind and generous message you sent to me . . .”). There was much public notoriety of this trial in which Judge Hoffman held the defense counsel in contempt. *See* Eric A. Posner, *Political Trials in Domestic & International Law*, 55 DUKE L.J. 75, 121 (2005) (“The judge in the Chicago 8 case jailed many of the defendants and their lawyers for contempt . . .”).

38. Hatch, *supra* note 22.

federal judge who often feuded with other judges and lawyers, died at a hospital here early Thursday.”<sup>39</sup> In 1962, Judge Chandler testified that other judges had treated him spitefully, that his telephone had been tapped, and that he was afraid of being poisoned.<sup>40</sup> On April 21, 1962, the *Daily Oklahoman* headlined its front page: “U.S. Appeals Court Bars Judge Chandler from Oil Firm Case[.]” and on a following page: “Reprimand Jolts Judge Chandler[.]”<sup>41</sup>

In early 1964, Judge Chandler published an article in the *American Bar Association Journal*<sup>42</sup> that served notice to the courts of appeals that the Nation’s federal trial judges were in constant danger of having their independence usurped through the administrative acts of the appellate judges.<sup>43</sup> Judge Chandler expressed a particular concern regarding the appellate courts’ use of judicial councils.<sup>44</sup> He may have presciently known that he would soon become enmeshed in a dispute with the Judicial Council of the Tenth Circuit and sought to create a preemptive legal defense, but the record seems silent on this matter.<sup>45</sup> Interestingly, the personal collections of Senators Samuel Ervin (a North Carolina Democrat) and James Eastland (a Mississippi Democrat) contain Judge Chandler’s article, and the senators—who both served on the Senate Judiciary Committee—later sided with Judge Chandler in the dispute against the Council.<sup>46</sup>

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39. *U.S. Judge Stephen Chandler, 89; Often Feuded with His Colleagues, supra* note 22.

40. *Cf. West, supra* note 11, at 1 (“Chandler was certain that his enemies employed agents to spy upon him, tapped his phones, surveilled his house, and stood at the ready to poison his water carafe or even strap a bomb beneath the hood of his long white Cadillac convertible.”).

41. *See U.S. Appeals Court Bars Judge Chandler from Oil Firm Case, DAILY OKLAHOMAN*, Apr. 21, 1962, at 1.

42. Stephen S. Chandler, *The Role of the Trial Judge in the Anglo-American Legal System*, 50 A.B.A.J. 125 (1964).

43. *Id.* at 129 (“The judicial reform movement is tending too far in the direction of subordinating the administrative authority of the trial judge.”).

44. *See id.* at 129–30 (“The inestimable benefits of a judicial system handled by trial judges who are answerable to no man, and under no control other than that of their own consciences, could well be lost by a change calculated to create the feeling on the part of the judge that he was just another employee taking orders from a judicial council acting as a quasi[-]board of directors.” (citation omitted)).

45. *Cf. id.* at 125 (“It is time to suggest, nevertheless, that [judicial reform] organizations [like the Senate Judiciary Committee] have . . . completely overlooked the negative effect on the more important fundamental principles as well as the psychological factors that exist in the judicial process.”).

46. *See Nominations of Abe Fortas & Homer Thornberry: Hearing Before the Comm. on the Judiciary U.S. S., 90th Cong. 2* (1968) [hereinafter *Nominations of Fortas & Thornberry Hearing*] (listing James Eastland and Senator Sam Ervin as members of the Committee on the Judiciary).

Judge Chandler was born in Tennessee in 1899.<sup>47</sup> He graduated from Kansas University's law school in 1922 and entered into private practice in Oklahoma.<sup>48</sup> In 1940, President Franklin Roosevelt, on the advice of Senator Elmer Thomas, nominated Judge Chandler for a federal judgeship.<sup>49</sup> It took the Senate three years to hold a vote, and, as noted, Judge Chandler was confirmed by bare majority.<sup>50</sup> Yet, Judge Chandler had powerful friends in Congress; Senator Robert Kerr, a long-serving Oklahoman legislator and ally of Lyndon Johnson, had been one of his confidants.<sup>51</sup>

In 1974, journalist Joseph C. Goulden published *The Benchwarmers*, a study of federal district court judges, including Judge Chandler.<sup>52</sup> Although one could examine newspaper reports to piece together aspects of Judge Chandler's life (and there is a brief biographical sketch written for the Tenth Circuit Historical Society<sup>53</sup>), one would likely agree that Goulden's book provides a vivid account of Judge Chandler's legacy. According to Goulden, over the course of his career, Judge Chandler accused Judge Murrah and Judge Bohanon of conspiring to force him off the

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47. See West, *supra* note 11, at 2 ("Stephen Chandler was born on September 13, 1899 in Blount County, Tennessee, in the shadow of the Great Smokey Mountains.").

48. See *id.* ("After earning his law degree at the University of Kansas in 1922, [Judge] Chandler spent 21 years in private practice before being tapped . . . for one of Oklahoma's three district court vacancies.").

49. See Chandler, *Stephen Sanders, Jr.*, *supra* note 30 (showing President F. Roosevelt nominated Judge Chandler on February 1, 1943); see also West, *supra* note 11, at 2 (noting Senator Elmer Thomas tapped Judge Chandler for a court vacancy).

50. See West, *supra* note 11, at 2-3 (noting Judge Chandler's nomination was "proposed" to the U.S. Department of Justice in 1940, but that he was not confirmed until 1943).

51. See, e.g., Letter from Burl Hays, Admin. Assistant, Senator Robert S. Kerr, to Stephen Chandler, Chief Judge, U.S. Dist. Court for West Dist. of Okla. (on file with the Library of Congress) (showing the close relationship between Senator Kerr and Judge Chandler through Kerr's assistant's letter to Judge Chandler stating his desire "to always be able to come by and smoke one of [Judge Chandler's] good cigars and enjoy [Judge Chandler's] company").

52. See generally JOSEPH C. GOULDEN, *THE BENCHWARMERS* (Weybright & Talley 1974) [hereinafter *THE BENCHWARMERS*] (discussing reigns of several prominent U.S. judges). This book was not without its critics. For instance, one critic argued that the book concentrated on a small number of federal judges to the detriment of the Judiciary as a whole. See, e.g., James G. France, *Review of "The Benchwarmers," By Joseph C. Goulden*, 1975 WASH. U. L.Q. 262, 265 (1975) (book review) ("Here the work is, perversely, at its readable best, although admittedly it does not paint a true picture of the bulk of the federal judiciary.").

53. Lee R. West, *Biographical Sketch for the Historical Society of the Tenth Circuit on Judge Stephen S. Chandler, Jr.*, TENTH CIR. HIST. SOC'Y, [https://static1.squarespace.com/static/54170cd0e4b00eba52a2db00/t/54516653e4b09c9c97c0b22b/1414620755682/Chandler\\_bio.pdf](https://static1.squarespace.com/static/54170cd0e4b00eba52a2db00/t/54516653e4b09c9c97c0b22b/1414620755682/Chandler_bio.pdf) [perma.cc/ND5V-3NMS].

court.<sup>54</sup> But there was also a seamy aspect to Judge Chandler's conduct. He made bad investments in real estate which caused him to fall into debt.<sup>55</sup> He named the particular bank to which he was most indebted the trustee in a multi-million-dollar investment corporation's bankruptcy action, which happened to be pending in his court.<sup>56</sup> This raised many questions surrounding Judge Chandler's judicial status.<sup>57</sup>

Centering on three particular instances of Judge Chandler's conduct in order to highlight questions as to his judicial fitness, temperament, and impartiality, it is important to note that Goulden had interviewed Judge Chandler, and that he did not portray him as being unethical in the same manner that he depicted other judges in his book.<sup>58</sup> The first instance had to do with Judge Chandler's handling of the bankruptcy of Selected Investments.<sup>59</sup> In 1960, Patrick O'Bryan, a tax attorney retained by Selected, successfully contested an IRS judgment.<sup>60</sup> In an appeal to the Tenth Circuit, O'Bryan argued that several banks (and notably the very bank where Judge Chandler had property loans) were responsible for Selected's loss of revenue and legal difficulties.<sup>61</sup> Judge Chandler had, in fact, invested heavily in his daughter's land development project—a tract of homes outside of Oklahoma City called Smiling Hills—and was in debt to the bank for thousands of dollars.<sup>62</sup> O'Bryan used this point in his arguments.<sup>63</sup>

But O'Bryan also had personal difficulties with Judge Chandler. During O'Bryan's representation of Selected, he billed the company over one-million dollars in attorneys' fees.<sup>64</sup> To prove he was entitled to the fees, he provided Judge Chandler with a contract purported to have been drafted by Selected.<sup>65</sup> In 1961, Judge Chandler discovered discrepancies in

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54. THE BENCHWARMERS, *supra* note 52, at 212–13.

55. *Id.* at 208.

56. *Id.*

57. *Id.* at 209.

58. *See generally id.* (garnering several judges in the book as unethical, but failing to name Judge Chandler amongst them). In spite of this, Goulden did not turn a blind eye to Judge Chandler's more risqué tendencies. *See* France, *supra* note 52 (“The second chapter . . . records a stirring account of the judicial career of the Honorable Stephen S. Chandler . . . . No phase of the judge's activities, if derogatory, is left untouched.”).

59. THE BENCHWARMERS, *supra* note 52, at 216.

60. *Id.* at 217.

61. *Id.*

62. *Id.* at 220.

63. *Id.* at 217–18.

64. *Id.* at 221.

65. *Id.*

the letter-head of the contract and barred O'Bryan from practice in the federal courts.<sup>66</sup> O'Bryan did not initially deny fabricating the letter, and Judge Chandler tried to pressure the United States Attorney into prosecuting O'Bryan for perjury.<sup>67</sup> When the Justice Department determined there was insufficient evidence to seek an indictment, Judge Chandler, on his own volition, secured an indictment against O'Bryan in a standing grand jury.<sup>68</sup> During a pretrial hearing in which O'Bryan moved the court to quash the indictment, the United States Attorney opined to the trial court that Judge Chandler had departed from his judicial duties and pressured the grand jury to indict.<sup>69</sup> In response, Judge Chandler threatened to hold the United States Attorney in contempt.<sup>70</sup> Judge Daugherty—one of Judge Chandler's peers—sided with the United States Attorney and dismissed the indictment without prejudice to the government, thereby enabling the government to seek a new indictment if it so chose.<sup>71</sup>

Over the next decade, O'Bryan tried to sue Judge Chandler for defamation, and in one instance he won an award of damages in state court that was later overturned.<sup>72</sup> The *New York Times* covered this lawsuit.<sup>73</sup> All the while, O'Bryan remained a disbarred attorney.<sup>74</sup>

One of the few judicial impediments to arise from this issue occurred in 1965, when Judge Chandler refused to disqualify himself from a contested case between Texaco Oil and an Oklahoma corporation.<sup>75</sup> The local attorney who defended Judge Chandler in state court against O'Bryan's libel claim also represented the Oklahoma based corporation, and Judge Chandler refused to transfer the case to another judge.<sup>76</sup> In response

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66. *Id.*

67. *Id.*

68. *Id.* at 222.

69. *Id.* at 223.

70. *Cf. id.* ("The action infuriated Chandler.").

71. *Id.*

72. West, *supra* note 11, at 9.

73. See *Judge Loses in Libel Suit*, N.Y. TIMES, Feb. 26, 1967, at 72 (reporting on disbarred attorney W.H. Pat O'Bryan's suit against Judge Chandler).

74. See THE BENCHWARMERS, *supra* note 52, at 221–22 (outlining how O'Bryan was disbarred in the federal courts and later also disbarred in the state courts).

75. See *Texaco v. Chandler*, 354 F.2d 655, 656 (10th Cir. 1965) (detailing Judge Chandler's refusal to disqualify himself from the *Texaco* suit in violation of 28 U.S.C. § 455).

76. See *id.* (explaining Judge Chandler's connection to attorney John M. Cantrell).

to Texaco's appeals, the Tenth Circuit issued a writ of mandamus and disqualified Judge Chandler from the trial.<sup>77</sup>

Another aspect of judicial conduct highlighted in Goulden's book had to do with Judge Chandler's visible animus towards Armand Hammer and Occidental Petroleum.<sup>78</sup> Hammer, a wealthy oil magnate, owned a large portion of Parker Petroleum, an Oklahoma-based oil corporation. In 1962, he tried to reorganize Parker Petroleum.<sup>79</sup> Judge Chandler was assigned this case pursuant to the district court's case assignment rules.<sup>80</sup> In turn, Judge Bohanon objected to Judge Chandler's appointment, but to no avail.<sup>81</sup> Judge Chandler held a number of ex-parte hearings—without the presence of Hammer or Occidental—in which he cast aspersions on them.<sup>82</sup> The hearings were transcribed, yet Judge Chandler refused to provide them to any party—even directing the transcriptionist not to turn them over until the Tenth Circuit ordered him to produce them.<sup>83</sup> This led the Tenth Circuit to disqualify Judge Chandler from the Parker Petroleum reorganization case.<sup>84</sup> Again, following disqualification, Judge Chandler filed an interlocutory appeal and a writ of mandamus.<sup>85</sup>

Finally, in April of 1965, a state district attorney secured an indictment against Judge Chandler for defrauding the state of its tax revenues.<sup>86</sup> The indictment alleged that Judge Chandler had pressured the state to build

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77. *See id.* at 657 (finding inapposite Judge Chandler, and holding he could no longer proceed in the *Texaco* case).

78. *See* THE BENCHWARMERS, *supra* note 52, at 226 (“Chandler said he felt Hammer was trying to ‘choke his company to death . . . so that they can milk it . . . . I intend to say that from the bench because I verily believe it to be true.’” (citation omitted)).

79. *See id.* at 224 (examining the plan to reorganize Parker Petroleum set forth by Dr. Armand Hammer of Occidental Petroleum).

80. *See id.* (showing Judge Chandler began presiding over the *Occidental* case after Judge Wallace's death).

81. *See id.* at 225 (“Bohanon was arguing with [Judge] Chandler that bankruptcy and other reorganization cases should be split equitably among the four judges of the Western District.”).

82. *Id.* at 226.

83. *Id.* at 227.

84. *Id.* at 229; *see also* Occidental Petroleum v. Chandler, 303 F.2d 55, 57 (10th Cir. 1962) (“It is therefore ordered that the Honorable Stephen S. Chandler, respondent herein, shall proceed no further in the matter of Parker Petroleum Co. . . .”).

85. *Cf.* THE BENCHWARMERS, *supra* note 52, at 232 (attempting to overturn the judgement, Judge Chandler spent several years filing appeals and unsuccessfully tried to have the Order reversed by the Supreme Court).

86. *See* Preliminary Information, Oklahoma v. Chandler (1965) (on file with the Library of Congress) (indicting Judge Chandler for conspiring to defraud the State of Oklahoma).

roads into the Smiling Hills development at the taxpayers' expense.<sup>87</sup> Claiming judicial immunity, Judge Chandler refused to appear at his own arraignment and then filed disbarment actions against the district attorney.<sup>88</sup> On November 3, 1965, the state's major newspaper, the *Daily Oklahoman*, reported on its front page that a state grand jury had summoned Judge Chandler to testify.<sup>89</sup> The next day, the newspaper reported Judge Chandler's attorneys' statement that the grand jury lacked authority to issue the subpoena.<sup>90</sup> Not even a week later, the *Daily Oklahoman* headlined its front page with "Grand Jury Indicts Chandler."<sup>91</sup> Ultimately, a state trial judge dismissed the indictment after learning that the contested roads existed prior to Smiling Hills being contemplated.<sup>92</sup> Although Judge Chandler had not broken any state laws, his dismissiveness of the State's legal system brought his judicial abilities into further question.<sup>93</sup>

There are other aspects of Judge Chandler's personality, judicial actions, and extra-judicial activities that Goulden did not cover, but are still pertinent to the legislative investigation of him, as well as to the process of his judicial appeals. In 1962, Harlan Grimes, an Oklahoma attorney, complained to Congressman Celler that Judge Chandler had received payoffs from parties appearing in his court, and for two years, Grimes pressed Congressman Celler to take action against Judge Chandler.<sup>94</sup> In 1964,

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87. *See id.* (alleging Judge Chandler conspired to use material belonging to Oklahoma County to construct a private road); *see also* THE BENCHWARMERS, *supra* note 52, at 236 (referring to the criminal case against Judge Chandler).

88. THE BENCHWARMERS, *supra* note 52, at 236.

89. *Grand Jurors Call Chandler*, DAILY OKLAHOMAN, Nov. 3, 1965, at 1.

90. Mary Goddard, *Chandler's Challenge of Subpoena Denied, Jury Date Up in Air*, DAILY OKLAHOMAN, Nov. 4, 1965, at 1 [hereinafter Goddard, *Chandler's Challenge*]; Mary Goddard, *Chandler's Date with Jury Remains Up in Air*, DAILY OKLAHOMAN, Nov. 4, 1965, at 1.

91. Katherine Hatch, *Grand Jury Indicts Chandler, Kessler*, DAILY OKLAHOMAN, Nov. 10, 1965, at 1.

92. *See* THE BENCHWARMERS, *supra* note 52, at 236 (asserting Judge Chandler's exoneration ultimately occurred because "the county had owned the roads since 1957"); West, *supra* note 11, at 10 ("The indictment was quashed when an Oklahoma State judge found the evidence presented to the grand jury was insufficient to show that a crime had been committed.").

93. *See* Goddard, *Chandler's Challenge*, *supra* note 90 (advancing Judge Chandler's opposition of the state legal system through his attorneys' assertion that the grand jury had no authority to indict him).

94. Letter from Jack Brooks, U.S. Representative, to Emanuel Celler, Chairman, House Judiciary Comm. (July 6, 1962) (on file with the Library of Congress). Congressman Brooks, in his response to Congressman Celler, indicated that neither congressman had any knowledge of Grimes or Judge Chandler. *Id.* Specifically, Brooks wrote:



Grimes insisted to Congressman Celler that he had evidence Judge Chandler pressure a party to deed property to his daughter for a significant reduction in price over the property's value.<sup>95</sup> By this time, Grimes had gained notoriety for exposing corruption, particularly bribes, in the Oklahoma Supreme Court.<sup>96</sup> Grimes uncovered that three state justices had accepted payoffs in exchange for issuing favorable decisions.<sup>97</sup> The press covered Chief Judge N.S. Corn's acceptance of over \$150,000 in payoffs,<sup>98</sup> and the *Daily Oklahoman* attempted to link Judge Chandler with Chief Judge Corn.<sup>99</sup> However, there was no link between the state justices and Judge Chandler, and, in fact, there was evidence that Judge Chandler had independently accused the state supreme court justice of corruption.<sup>100</sup>

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I received your inquiry concerning a letter from Mr. Harlan Grimes of Dallas concerning information he has received in regard to a member of the Federal Judiciary.

I have not heard any reports along the lines that Mr. Grimes relates in his letter . . . . And as a matter of fact, I don't believe I have ever heard of this particular charge before.

*Id.* Congressman Celler responded, "May I suggest that you make some very discreet inquiries concerning the conduct of the charge and let me know what, if anything, you have found." Letter from Emanuel Celler, Chairman of the House Judiciary Comm., to Jack Brooks, U.S. Representative (Feb. 23, 1966) (on file with the Library of Congress).

95. Letter from Harlan Grimes, to Emanuel Celler, Chairman of the House Judiciary Comm. (June 1, 1964) (on file with the Library of Congress). Grimes claimed:

[I]n June 1956, when Judge Chandler walked into his, Abbott's office, laid a deed form with ten-dollar check attached on his desk and informed Mr. Abbott that he, Chandler, was going to give him, Abbott, five thousand dollars for an acre of land that had a market value of at least fifteen thousand dollars at the time, that [Judge] Chandler told Abbott[,] "You are in trouble and I am going to help you[.]"

*Id.*

96. *See State ex rel. Okla. Bar Ass'n v. Grimes*, 436 P.2d 40, 43 (Okla. 1967) ("The complaint charged [Grimes] with making three separate false charges of bribery against various members of this Court.").

97. *See, e.g., In re Grimes*, 364 F.2d 654, 655–56 (10th Cir. 1966) (explaining how the Oklahoma Bar association commenced disbarment proceedings against Grimes after he had publicly accused "members of the Supreme Court of the state of Oklahoma with having received a bribe for the rendering of an opinion"). In 1949, Grimes published a pamphlet claiming that several judges in Oklahoma were corrupt. *Id.*

98. *Scandal Shakes Oklahoma Court*, N.Y. TIMES, July 19, 1964, <http://www.nytimes.com/1964/07/19/scandal-shakes-oklahoma-court.html> [perma.cc/3JR2-UKZH].

99. *See Tarred with Same Brush*, DAILY OKLAHOMAN, July 3, 1964, at 12 ("For the integrity of the whole court is affected as matters stand.").

100. *Cf. West, supra* note 11, at 6–8 (showing Judge Chandler's actions in relation to Judge Corn's behavior).

Like O'Bryan, Grimes professionally suffered as a result of his allegations against Judge Chandler. In 1959, the Oklahoma Supreme Court ordered Grimes be disbarred from the practice of law after he first alleged that the state justices had accepted bribes.<sup>101</sup> In spite of Judge Chandler's innocence in regard to the state corruption, Grimes' accusation was recognized and taken into consideration by the Council when it investigated Judge Chandler.<sup>102</sup>

B. *The Legislative Purpose of the Judicial Council*

Even with the notoriety of Judge Chandler's conduct, failure of both the House Judiciary Committee and Congress to seek an impeachment against him was reasonable. There was no clear evidence that Judge Chandler had accepted bribes.<sup>103</sup> He appeared, at worst, to lack judgment and was overly irascible toward litigants.<sup>104</sup> Questions arising from judicial impartiality and temperament are generally matters for appeal only, and in the absence of evidence of corruption, judicial irascibility—a trait complained of throughout the history of the Republic—is not a basis for impeachment.<sup>105</sup>

On the other hand, there was an apparent need for some amount of judicial supervision over Judge Chandler, given his demeanor, if not his obstinacy in refusing to recuse himself. Whether the law enabled such supervision was a matter of interpretation. Under the law, a chief justice could have exercised supervisory authority to assign Judge Chandler cases, or to temporarily add federal judges to Judge Chandler's district so as to

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101. See *In re Application of Grimes for Reinstatement to the Practice of Law*, 494 P.2d 635, 637 (Okla. 1971) (denying Grimes' application for reinstatement into the Oklahoma state bar after being disbarred in May of 1960, and detailing Grimes' accusations against the justices).

102. Cf. West, *supra* note 11, at 10 (“[Judge Chandler’s] travails were a regular feature in the local newspapers and they were an unending source of frustration and embarrassment to the Tenth Circuit Court of Appeals. Inexorably, they led to a showdown with the Tenth Circuit Judicial Council.”).

103. *But cf. id.* at 7 (implying Judge Chandler was fearful an “outraged public might demand wholesale reform” of judicial conduct in light of Judge Corn’s sworn statement admitting to accepting bribes).

104. See *id.* at 5 (detailing an order removing Judge Chandler from a case because of his “personal enmity, hostility, bias and prejudice against [the litigant party]”).

105. Cf. Timothy S. Huebner, *Emory Speer and Federal Enforcement of the Rights of African Americans*, 55 AM. J. LEGAL HIST. 34, 61–62 (2015) (assigning a subcommittee of the House Judiciary Committee to investigate the unseemly behavior of Judge Emory Speer, and finding “the inconclusive nature of most of the testimony forced the subcommittee to forego impeachment”). Judge Emory Speer, an aged Civil War veteran appointed by President Chester Arthur, was accused of intemperate conduct while on the bench. *Id.* at 61. However, no vote was taken to impeach, and he continued in his judicial duties until his death in 1918. *Id.* at 62–63.

minimize Judge Chandler's case load.<sup>106</sup> Congress passed the law establishing this in 1922, and upon recommendation of President William H. Taft, also established the Judicial Conference of the United States.<sup>107</sup> The 1922 Act enabled the United States Supreme Court Chief Justice to call an annual conference of the senior appellate judges to propose legislation to Congress regarding the administration of the judiciary—in addition to authorizing the Chief Justice to temporarily reassign district court judges to districts that were inundated with large numbers of trials.<sup>108</sup> The 1922 Act was a predecessor to the establishment of judicial councils.<sup>109</sup>

In 1939, Congress passed an act known as the Administrative Office Act, empowering the federal judiciary to regulate itself.<sup>110</sup> This was partly the result of a judicial assertion against President Franklin Roosevelt's "court-packing" plan.<sup>111</sup> The part of the 1939 Act which is now codified as 28 U.S.C. §§ 601–10 created the Administrative Office of the United States Courts.<sup>112</sup> In a sense, the 1939 Act was an expansion of the 1922 Act; the composition of the Conference created by the 1922 Act remained the same, although, the 1939 Act expanded its duties and authority.<sup>113</sup> The 1922 Act required the United States Supreme Court Chief Justice to annually convene

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106. See 28 U.S.C. § 331 (2012) (codifying section 2 of chapter 306 of Pub. L. No. 67-298, and establishing the Conference of Circuit Judges of the United States).

107. Act of Sept. 14, 1922, Pub. L. No. 67-298, ch. 306, 42 Stat. 837 (codified at 28 U.S.C. § 331 (2012)); PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 30–31 (1973).

108. Act of Sept. 14, 1922, ch. 306, 42 Stat. at 838–39; see also J. Clifford Wallace, *Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits*, 51 *IND. L.J.* 297, 311–12 (1976) (explaining the creation and purpose of the Judicial Conference).

109. Cf. FISH, *supra* note 107, at 30–31 (portraying the Act as a seed spawned by President Taft with the intent to develop the Act into a reform of "inferior federal courts").

110. Administrative Office Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223 (codified as amended at 28 U.S.C. §§ 601–10 (2012)); see Fish, *supra* note 18, at 203–06 (describing the Act of 1939, which provided the Federal Judiciary with a complete administrative system in both the United States Judicial Conference and the federal judicial councils). Congress acted in concert with the advice of Chief Justice Charles Evans Hughes, along with Chief Judges John J. Parker of the Court of Appeals for the Fourth Circuit, and Duncan Groener of the Court of Appeals for the District of Columbia. *Id.* at 205–08; accord JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 114 (Boston, Little, Brown & Co. 1950) (discussing the Act of 1939).

111. Fish, *supra* note 19, at 205–06.

112. Administrative Office Act, § 302, 53 Stat. at 1223.

113. Compare Act of Sept. 14, 1922, ch. 306, 42 Stat. at 838 (establishing the Conference of Circuit Judges of the United States), with Administrative Office Act of 1939, § 302–305, 53 Stat. at 1223–24 (amending the 1922 Act, and adding to the Conference's duties and authority associated with the AO).

a meeting of the chief judges of the courts of appeals.<sup>114</sup> The meeting, titled “Judicial Conference of the United States,” was charged with the duty of compiling statistics on matters such as the individual case-loads of the district courts, judicial finances, the need to create new judgeships, and the requirement to temporarily transfer district court judges to districts experiencing an increase in the number of trials.<sup>115</sup> The 1922 Act empowered the United States Supreme Court Chief Justice to summon the Attorney General of the United States to report on the numbers and types of cases to which the United States was a party, as well as provide the Attorney General a means for bringing complaints against judges.<sup>116</sup> The Conference was also tasked with the duty of providing an annual report to Congress for the purpose of evaluating the need to create new judicial positions or increase fiscal expenditures for the judiciary.<sup>117</sup> Today, the Judicial Conference is the pinnacle of the internal hierarchy for assessing federal judicial policies and rules, as well as examining judicial conduct.<sup>118</sup>

In 1966, the *New York Times* informed its readers that the Conference was in the process of weighing proposals for the removal of unfit judges, and noted that Judge Chandler was one of the reasons for this effort.<sup>119</sup>

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114. Act of Sept. 14, 1922, ch. 306, 42 Stat. at 838.

115. The 1922 Act specifically required:

Said conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business.

*See id.* In 1948, the Judicial Code renamed the Conference of Circuit Judges of the United States to the Judicial Conference of the United States. *See* Judicial Code of 1948, Pub. L. No. 80-773, ch. 646, 62 Stat. 902, 902 (codified at 28 U.S.C. § 331 (2012)).

116. Act of Sept. 14, 1922, ch. 306, 42 Stat. at 839 (“The Attorney General shall, upon request of the Chief Justice, report to said conference on matters relating to the business of the several courts of the United States, with particular reference to causes or proceedings in which the United States may be a party.”).

117. *Id.* at 838 (requiring circuit court judges to provide information regarding the caseload in their docket, and recommendations for additional “judicial assistance” for the disposal of their caseload, which will in turn be converted into a survey).

118. *Cf.* RULES FOR JUD. CONDUCT & JUD. DISABILITY PROC. § 320, r. 2 cmt. (JUD. CONF. U.S. 2015) [hereinafter RULES FOR JUD. CONDUCT], available at <http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability> [perma.cc/L7X9-ZV2Q] (providing “nationally uniform provisions” governing judicial misconduct and ethics).

119. *U.S. Judges Weigh Proposals for Removal of Unfit Jurists*, N.Y. TIMES, Mar. 30, 1966, at 31.

The part of the 1939 Act that is now codified as 28 U.S.C. § 332 created a system of judicial councils within each circuit in an effort to make trials more efficient.<sup>120</sup> In this, Congress empowered each circuit court of appeals to curtail an administrative mechanism for court governance.<sup>121</sup> Today, under 28 U.S.C. § 332, each circuit has a council, “consisting of the chief judge of the circuit . . . and an equal number of circuit judges and district judges of the circuit.”<sup>122</sup> In 1939, no appellate judge—except for those on senior status—was exempt from serving on a council.<sup>123</sup> One of the administrative aspects of a council was that it could allocate trials to judges in the district courts containing more than one district court judge, particularly in instances when the district court judges were unable to agree upon the assignment of cases.<sup>124</sup> Congress’ purpose in empowering a judicial council to assign cases in an administrative capacity, rather than a circuit court doing so in a judicial capacity, was to preserve litigants their right to move a trial judge for recusal.<sup>125</sup> In 1948, Congress amended this part of the 1939 Act to enable the councils to “freeze” an overburdened judge’s caseload until the case “backload” was alleviated.<sup>126</sup> In 1976, John

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120. Administrative Office Act of 1939, Pub. L. No. 76-299, §§ 306–07, 53 Stat. 1223, 1223–24 (codified as amended in 28 U.S.C. § 332 (2012)); *see also* WOLF HEYDERBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF THE FEDERAL DISTRICT COURTS* 37 (1990) (explaining the establishment of the judicial councils and their purpose).

121. Administrative Office Act of 1939, § 306–07, 53 Stat. at 1223–24.

122. 28 U.S.C. § 332 (2012).

123. Administrative Office Act of 1939, § 307, 53 Stat. at 1223–24 (“A conference shall be held . . . which conference shall be composed of circuit and district judges in such circuit who reside within the continental United States, with participation in such conference on the part of members of the bar under rules to be prescribed by the circuit court . . .”).

124. Notably the 1939 Act stated:

The senior judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2), and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed.

*Id.* at § 306, 53 Stat. at 1224. *Cf.* Fish, *supra* note 19, at 207 (“Although wide agreement existed on the scope of the councils’ powers, judges differed over the manner of exercising this power and over the degree of permitted coercion.”).

125. *Cf.* Fish, *supra* note 19, at 208 (suggesting one argument for a multi-judge council is to promote “greater confidence on the part of the bar and public”).

126. Judicial Code of 1948, Pub. L. No. 80-773, ch. 646, 62 Stat. 902, 902 (codified at 28 U.S.C. § 332 (2012)) (“Each judicial council shall make all necessary orders for the effective and expeditious

Clifford Wallace, a judge on the Court of Appeals for the Ninth Circuit, opined that 28 U.S.C. § 332 was “a broad grant of power” to the courts of appeals.<sup>127</sup> However, as the Ninth Circuit noted in 1980, a judicial council’s rules do not provide an additional means for appeal.<sup>128</sup>

To fully place the Judicial Council of the Tenth Circuit’s conduct concerning Judge Chandler into perspective, a third act requires mention; Congress never directly delegated authority to the courts of appeals to determine judicial case assignments. Under 28 U.S.C. § 137, districts, containing more than one district court judge, are to allocate their case-loads according to local district court rules.<sup>129</sup> These rules are proposed by the chief district court judge and agreed upon by a majority of judges within the district to ensure an equitable distribution of cases.<sup>130</sup> However, in

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administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.”); accord MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE 10 (1993) (arguing the 1939 Act provided councils the authority to “freeze judges’ caseloads until backlogs were cleared, assign judges to virtually nonexistent jurisdictions, and certify judges’ physical and mental disability”).

127. See Wallace, *supra* note 108, at 312–13 (“There seems to be little doubt that Congress intended a broad grant of power under section 332(d).”). It is noteworthy that Judge Wallace also acknowledged that there was a disagreement over the nature of the council’s powers. He penned:

Some view the councils as purely administrative bodies without any judicial powers whose role is to deal with the problems of administering the courts. Others see the councils as a body with certain judicial powers, including the power to determine the fitness of a judge to hear cases. The legislative history is subject to both interpretations. But it should be noted that the creation of the councils was part of an Act, the overall purpose of which was to speed the administration of justice.

*Id.* at 313.

128. See *In re Charge of Judicial Misconduct*, 613 F.2d 768, 769 (9th Cir. 1980) (“The Procedures are not intended to provide an alternative avenue for appealing a judge’s rulings in a particular case.”). This decision arose from a suit brought by inmates housed in the Arizona state penal system. *Id.* The inmates sought habeas review (“administrative remedies”) from the district court. *Id.* When the district court did not grant a review, the inmate petitioners alleged the judge was biased and that recusal was required. *Id.* However, they alleged this claim to the Council. *Id.* The Ninth Circuit held that administrative remedies were not available as a substitute for judicial remedies, and, because there was a mechanism for the disqualification of judges, the inmate petitioners could not seek redress through the Council. *Id.*

129. See 28 U.S.C. § 137 (1976) (“The business of a court having more than one judge shall be divided among the judges . . .”).

130. See *id.* (explaining the role district court judges have in managing case-loads). This section reads in its entirety:

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far

instances where the district court judges are unable to agree to the division of cases (or the adoption of case allocation rules), the judicial councils possess the authority to “make necessary orders” for case distribution.<sup>131</sup> This system is designed to enable administrative oversight over the district courts without impinging on their independence.<sup>132</sup> In theory, as long as the district court judges agree to the division of cases (and as long as the case assignment rules do not enable litigants to obtain a judge of their choice), a judicial council possesses no authority to encroach into district court administration.<sup>133</sup>

Judge Chandler became Chief Judge of the United States District Court for the Western District of Oklahoma in 1956,<sup>134</sup> and as Chief Judge, he inherited a scheme for the distribution of cases from the previous chief under 28 U.S.C. § 137—by “secret lot.”<sup>135</sup> He did not alter this arrangement, and the other judges of Oklahoma’s Western District agreed with the case assignment scheme, thus, it was consistent with 28 U.S.C. § 137.<sup>136</sup> Assuming the 28 U.S.C. § 137 “secret lot” system was designed to prevent forum shopping by litigants, it is important to note that there is no evidence that any judge in the Western District of Oklahoma opposed this system.

Prior to *Chandler I* and *II*, the United States Supreme Court had not addressed 28 U.S.C. § 137, or §§ 331–32.<sup>137</sup> In 1964, the D.C. Circuit Court

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as such rules and orders do not otherwise prescribe. If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

*Id.*

131. *Id.*

132. *Cf.* Fish, *supra* note 19, at 222 (asserting the absence of subpoena powers make it difficult for a judicial council to interfere with relations between litigants and judges, and implying that necessity of such intervention is evidently necessary).

133. *See, e.g.*, Fish, *supra* note 19, at 216–17 (“Circuit councils have been formally designated as arbiters of disagreements over administrative policies in the lower courts.”).

134. *U.S. Judge Stephen Chandler, 89; Often Feuded with His Colleagues, supra* note 22.

135. *See* Stanley, Jr. & Russell, *supra* note 25, at 136 (discussing the Order requesting a stay of Judge Chandler’s inherited cases).

136. *See id.* at 137 (“If the judges of a district court are unable to agree upon rules and orders for dividing the workload among them, then by statute, the circuit councils must issue the needed orders.” (citing 28 U.S.C. § 137)).

137. *See generally Chandler II*, 398 U.S. at 75–76 (addressing the “scope and constitutionality of the powers of the Judicial Councils under 28 U.S.C. §§ 137 and 332[.]” and proclaiming the issues as questions of first impression).

of Appeals held in *Washington v. Clemmer*,<sup>138</sup> a per curiam decision, that a judge possessed the administrative authority to order a grand jury commissioner to supply a stenographer for a preliminary hearing convened to determine whether a defendant could be held in confinement pending a grand jury.<sup>139</sup> In *Washington*, however, the commissioner not only refused to order a stenographer for the preliminary hearing, but he also refused to issue subpoenas to potential alibi witnesses that could have altered the grand jury's decision on the indictment.<sup>140</sup> After the district court judge erroneously ruled that he lacked the authority to issue a habeas writ or to order the commissioner to supply the stenographer and issue subpoenas, the appellate court vacated the district court's ruling, ordering the judge to abide by his authority to force the commissioner to comply with the fundamental fairness requirements of due process.<sup>141</sup> In his dissent, Judge John Anthony Danaher argued that the majority's order to the defendant was administrative in nature and should have been resolved through the circuit's judicial council under 28 U.S.C. § 332 rather than through the formal habeas writ.<sup>142</sup>

In 1957, the Supreme Court, in *La Buy v. Howes Leather Co.*,<sup>143</sup>—a decision Justice Harlan cited to explain his concurrence in *Chandler*—held that courts of appeals possessed the discretionary authority to issue writs of mandamus to compel a district court to proceed to trial.<sup>144</sup> Leading up to that decision, District Court Judge Walter A. La Buy (a Franklin Roosevelt appointee) had become flustered with a large number of plaintiffs and defendants in two civil anti-trust cases involving allegations of monopolistic price fixing in the production and sale of shoe repair items.<sup>145</sup> Instead of

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138. *Washington v. Clemmer*, 339 F.2d 715 (D.C. Cir. 1964) (per curiam).

139. *See id.* at 717–18 (granting a judge the right to order a stenographer during a preliminary hearing on behalf of a defendant).

140. *Id.* at 716, 718.

141. *See id.* at 718 (“We are sure that the Commissioner and the District Court will have no difficulty in providing a procedure for the formal approval of indigent subpoenas by a judge which Rule 17(b) seems to require.”).

142. *See id.* at 722–23 (Danaher, J., dissenting) (“28 U.S.C. § 332 (1958) authorizes the Judicial Council composed of all the active judges of the circuit to ‘make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.’” (quoting 28 U.S.C. § 332 (1958))).

143. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

144. *See id.* at 259–60 (holding the court of appeals may exert control over district courts in order to administer the federal judicial system).

145. *See id.* at 252 (showcasing how “[t]he record indicates that the cases had been burdensome to the petitioner”).



continuing with the two cases, Judge La Buy consolidated them and then transferred them to a special master.<sup>146</sup> With the consent of the parties, a special master could be appointed to determine contested interlocutory matters as well as shepherd the parties into a settlement.<sup>147</sup> However, none of the parties consented to Judge La Buy's transfer of duties. Instead, they appealed to the Court of Appeals for the Seventh Circuit.<sup>148</sup> The Seventh Circuit issued a writ of mandamus and ordered Judge La Buy to proceed with the case.<sup>149</sup> In response, Judge La Buy appealed to the Supreme Court, which held that a federal appellate court could—within its judicial function—exercise supervisory authority over its district courts.<sup>150</sup> Justice William Brennan, joined by Justices Felix Frankfurter, Harold Burton, and John Marshall Harlan, dissented from the decision on the basis that Judge La Buy's action did not create an exceptional circumstance under the All Writs Act to justify the issuance of the writ of mandamus.<sup>151</sup> The dissenters also urged that the Court's decision would enable appellate court intrusions into trial processes under a theory that any matter which might later arise in an appeal could be appealable during a trial.<sup>152</sup> If this occurred, the Justices cautioned, trials could last for years.<sup>153</sup>

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146. *Id.*

147. *See id.* at 266 (“The references to the master were made under the authority of Rule 53(b) of the Federal Rules of Civil Procedure.”).

148. *See generally* *Howes Leather Co. v. La Buy*, 226 F.2d 703 (7th Cir. 1955) (manifesting the parties’ appeal to the Seventh Circuit in light of La Buy’s transfer to a special master).

149. *Id.* at 706.

150. *See La Buy*, 352 U.S. at 259–60 (“We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system.”).

151. *See id.* at 260 (Brennan, J., dissenting) (“I do not agree that the writ directing Judge La Buy to vacate the order of reference was within the bounds of the discretionary power of the Court of Appeals to issue extraordinary writ under the All Writs Act.”).

152. *See id.* at 263 (“What this Court is saying, therefore, is that the All Writs Act confers an independent appellate power in the Courts of Appeals to review interlocutory orders. I have always understood the law to be precisely to the contrary.”).

153. *See id.* at 267–68 (“That standard allows interlocutory appeals by leave of the appellate court. The federal policy of limited interlocutory review stresses the inconvenience and expense of piecemeal reviews and the strong public interest in favor of a single and complete trial with a single and complete review.”). The dissent goes on to say,

I protest, not only because we invade a domain reserved by the Constitution exclusively to the Congress, but as well because the encouragement to interlocutory appeals offered by this decision must necessarily aggravate further the already bad condition of calendar congestion in some of our District Courts and also add to the burden of work of some of our busiest Courts of Appeals. More petitions for interlocutory review, requiring the attention of the Courts of Appeals, add, of course, to the burden of work of those courts.

*La Buy* did not arise from facts similar to those at issue in the Supreme Court's *Chandler I* opinion, and the Seventh Circuit's use of the mandamus writ required it only to comply with a set legal standard for interlocutory appeals granted in federal court.<sup>154</sup> In *Chandler I*, there was no legal standard employed by the Judicial Council of the Tenth Circuit, that is, the Council never determined the issues before it under a preponderance of the evidence—or any other articulated standard.<sup>155</sup> On the other hand, one might presume that Justice Brennan's action in dissenting in *La Buy* may have forced him to join with the majority in *Chandler I*. In an early draft of his *La Buy* dissent, Justice Brennan argued that the Seventh Circuit had an obligation through its Judicial Council to conduct an "efficient, business-like calendar," and it should have used the Council—rather than expand the narrow mandamus legal doctrine—to order Judge La Buy to proceed.<sup>156</sup>

### C. *The Judicial Council of the Tenth Circuit and Judge Chandler*

On January 21, 1966, the Supreme Court refused to issue a stay against the Tenth Circuit Judicial Council from acting against Judge Chandler.<sup>157</sup> This date (aside from its obvious importance as a date of issuance) puts the rapidity of the Council's actions into context. The Court, for reasons noted below, appeared to have been confused as to how to address Judge Chandler's appeal, for at no time did the investigating judges of the Council explain why they could impartially review Judge Chandler's actions.<sup>158</sup>

Understanding the Court of Appeals for the Tenth Circuit's composition is important to contextualize its actions. Alfred Murrah served as the Chief Judge of the Tenth Circuit Court of Appeals (President Roosevelt appointed

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*Id.* at 268 (Brennan, J., dissenting) (citations omitted).

154. *La Buy*, 352 U.S. at 249.

155. *Cf. Chandler I*, 382 U.S. at 1003 (Black, J., dissenting) ("The reason given by the Council for this drastic action is that it 'finds that Judge Chandler is presently unable, or unwilling to discharge efficiently the duties of his office.'").

156. *See* William Brennan, Justice, U.S. Supreme Court, Unpublished Draft Dissent (Dec. 17, 1956), in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (on file with the Library of Congress) (explaining 28 U.S.C. § 332 grants the Seventh Circuit the authority to use its Judicial Council to carry out administrative functions of the court). This language did not make it into the published dissent after Justice Frankfurter advised against it. Letter from Felix Frankfurter, Justice, U.S. Supreme Court, to William Brennan, Justice, U.S. Supreme Court (1956) (on file with the Library of Congress).

157. *Chandler I*, 382 U.S. at 1003.

158. *Cf. id.* at 1003 (Black, J., dissenting) ("The reason given by the Council for this drastic action is that it 'finds that Judge Chandler is presently unable, or unwilling to discharge efficiently the duties of his office.'").

him in 1940) but, from 1937 through 1940, Judge Murrah was a United States District Court Judge for the Western District of Oklahoma.<sup>159</sup> When Judge Murrah left to serve for the Tenth Circuit, Roosevelt appointed Judge Chandler to replace him in Oklahoma's Western District.<sup>160</sup> Thus, the Tenth Circuit members were Judge David T. Lewis, Judge Jean S. Breitenstein, Judge Delmas C. Hill, Judge Oliver Seth, and Judge Murrah.<sup>161</sup> President Dwight David Eisenhower appointed Judge Lewis and Judge Breitenstein, while Judge Hill and Judge Seth were both appointed by President John F. Kennedy.<sup>162</sup> In 1964, Judge Chandler criticized the entire Tenth Circuit—and singled out Judge Murrah—in a speech.<sup>163</sup> Judge Murrah recused himself from voting in the Judicial Council on any matters involving Judge Chandler.<sup>164</sup> Judge Murrah also disqualified himself from appointing any district court judges to replace Judge Chandler on pending cases.<sup>165</sup> Because Judge Chandler attacked Judge Murrah's credibility in a public forum, it might have been required that a different judicial council examine Judge Chandler's conduct, yet no statutory mechanism existed to force this issue.<sup>166</sup>

On December 13, 1965, the Judicial Council held a secret meeting, excluding Judge Chandler, and then issued an Order effectively stripping

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159. See GREAT AMERICAN JUDGES AN ENCYCLOPEDIA, VOL. II, L–Z 564 (John R. Vile ed., 2003) (outlining Murrah's route to appointment).

160. See *id.* at 564, 569 (detailing Murrah's rise to the Tenth Circuit Court of Appeals, and his disagreements with Judge Chandler). Vile wrote that Murrah, despite being a talented jurist, was ineffective in handling his dispute with Judge Chandler. *Id.*

161. Order from the Special Session of the Judicial Council of the Tenth Circuit of the U.S. at 1, *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 382 U.S. 1004 (1966) (No. 1111, Misc.) [hereinafter Order No. 1111] (on file with the Library of Congress).

162. *Judges of the Tenth Circuit Court of Appeals*, TENTH CIR. HIST. SOC'Y, <http://www.10thcircuithistory.org/list-tenth-circuit-judges> [perma.cc/D93F-EK7E] (listing judges on the Tenth Circuit Court of Appeals, and the president who appointed each judge).

163. Cf. Terence Kern, *Judge Alfred P. Murrah—A Vision of Things*, 29 OKLA. CITY U. L. REV. 737, 752 (2004) (mentioning Judge Chandler and Murrah had several conflicting issues, and highlighting Judge Chandler's public criticism of Murrah).

164. See Order No. 1111, *supra* note 161, at 1–2 (noting Murrah's absence in a proceeding related to Judge Chandler).

165. Letter from John F. Davis, Clerk, U.S. Supreme Court, to Byron White, Justice, U.S. Supreme Court (Feb. 3, 1966) (on file with the Library of Congress) (reporting Judge Murrah disqualified himself from the O'Bryan v. Chandler case, and that he wrote to Judge Lewis suggesting Judge Lewis act in the matter).

166. See Order No. 1111, *supra* note 161, at 2 (“The Council noted the reference by the Supreme Court to the statement in the response of the Solicitor General that the Council contemplated further proceedings and the order of the Supreme Court that the application for stay be denied ‘pending this contemplated prompt action of the Judicial Council.’” (citation omitted)).

him of his judicial powers by barring him from serving on cases.<sup>167</sup> The secret meeting—even if administrative—would have violated the constitutional principles of notice and opportunity to be heard, unless, perhaps, it could be determined that Judge Chandler had no substantial interest in the outcome.<sup>168</sup> While it was true that the December 13 Order did not cost Judge Chandler his income, his ability to function as an Article III judge with full constitutional protections certainly was affected.<sup>169</sup> Additionally, the Council's December 13 Order declared that because Judge Chandler was “unable or unwilling to discharge efficiently [his] duties . . .” he could no longer be assigned to cases.<sup>170</sup> But there was no proof of this charge, and the findings of the Council did not include any standards of proof or evidence to sustain it.<sup>171</sup>

On January 21, 1966, Judge Chandler appealed to Justice Byron White to stay the Council's December 13 Order.<sup>172</sup> Justice White did not grant the Stay on the basis that Judge Chandler's appeal was “interlocutory in character” and therefore not ripe for a grant of review.<sup>173</sup> Although Justice White issued the denial of a stay on January 21, initially it was Chief Justice Warren who authored the draft denial, assuming that since he was Chief Justice and head of the Judicial Conference, the duty fell to him.<sup>174</sup> Chief Justice Warren's draft simply held that the Court would not consider interlocutory appeals from administrative acts.<sup>175</sup> However, Justice Harlan objected to Chief Justice Warren's terse, single-sentence denial.<sup>176</sup>

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167. *See id.* (mentioning the December 13 meeting).

168. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970) (establishing required procedures to deprive a person of substantial rights).

169. *See* Order No. 1111, *supra* note 161, at 2 (suggesting Judge Chandler appear before the Judicial Council for a hearing to determine whether he would continue to preside over cases).

170. *Chandler I*, 382 U.S. 1003, 1003 (1966) (Black, J., dissenting).

171. *See id.* (majority opinion) (failing to discuss the proof of the charge against Judge Chandler, or to adopt a standard by which to evaluate the Judicial Council's charge); Order No. 1111, *supra* note 161, at 2 (defining the Judicial Council's findings without an analysis under an appropriate standard).

172. *See Chandler I*, 382 U.S. at 1003 (discussing Judge Chandler's appeal to stay the Council's Order).

173. *See id.* at 1003–04 (noting a final judgment was to be rendered before the decision could be appealed to the Supreme Court).

174. Memorandum from Earl Warren, Chief Justice, U.S. Supreme Court, to Conference (Jan. 19, 1966) (on file with the Library of Congress) (discussing his prior draft denial).

175. *Id.*

176. *See* Letter from Jane to Byron White, Justice, U.S. Supreme Court (Jan. 20, 1966) (on file with the Library of Congress) (noting Justice Harlan had concerns over the draft denial and requested further discussion with Justice White).

Because Chief Justice Warren, at the time, was in Missouri on holiday, he asked Justice Fortas to improve on the draft denial.<sup>177</sup> This time, Justice Fortas expanded on the denial, but once more rested it on the basis that Judge Chandler's motion was an "entirely interlocutory matter."<sup>178</sup> Justice White disagreed with Justice Fortas, and countered that it was necessary to acknowledge that at a future date—and based on the Judicial Council's future actions—Judge Chandler could have a basis for a motion.<sup>179</sup> Likely because Justice White was responsible for the Tenth Circuit Judicial Council, he authored the Court's published Order denying Judge Chandler a stay of the December 13 Order.<sup>180</sup>

At the same time, Solicitor General Thurgood Marshall informed the Court that the Council had notified Judge Chandler that after he exhausted his docket, he could apply to the Council and certify that he was willing and able to "undertake new business" in order to become eligible to serve on new cases.<sup>181</sup> The Council also appointed Judge Daugherty to temporarily take over the assignment of cases.<sup>182</sup> Judge Chandler, in turn, objected to the December 13 Order on the basis that it affixed a new condition to the exercise of his judicial office.<sup>183</sup> Arguably, Judge Chandler's objection

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177. See Memorandum from Abraham Fortas, Justice, U.S. Supreme Court, to the Brethren (Jan. 18, 1966) (on file with the Library of Congress) ("At the suggestion of the Chief Justice I am circulating the following as a possible substitute *per curiam* for this case . . .").

178. See *id.* ("It appearing to the Court from the response submitted by the Solicitor General on behalf of the Judicial Council of the Tenth Circuit that the order from which relief is sought is entirely interlocutory in character . . .").

179. See Letter from Byron White, Justice, U.S. Supreme Court, to Earl Warren, Chief Justice, U.S. Supreme Court (Jan. 19, 1966) (on file with the Library of Congress) ("I prefer your formulation of the denial of stay to that of Brother Fortas and I have no objection to your entering it in this form.").

180. See Letter to Byron White, Justice, U.S. Supreme Court (Jan. 19, 1966) (on file with the Library of Congress) (echoing *Chandler*'s *per curiam* opinion was Justice White's "formulation").

181. See *Chandler II*, 398 U.S. at 78–97 (explaining the Council's Order to Judge Chandler). The extent of the Order read:

[The] Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.

*Id.* at 78.

182. See *id.* (ordering agreement on the division of cases and that if one could not be internally reached, the Judicial Council would take further steps).

183. See, e.g., Renewal of Application for Stay, Reply to Memorandum Opposing Initial Application for Stay, and Motion to Strike and Expunge Said Memorandum at 8–9, *Chandler v. Judicial*

maintained the ripeness of his appeal despite the majority's conclusion otherwise. Once more, the Court denied Judge Chandler relief.<sup>184</sup>

While Justices Douglas and Black dissented from the denial of the stay, they acknowledged that judicial councils for each federal court of appeals had been statutorily created, and that the law vested administrative authority in the courts of appeals over the district courts within their respective circuits.<sup>185</sup> They dissented on the basis that the Council had overstepped its constitutional authority and intruded into the legislative prerogative to impeach.<sup>186</sup> The Council's action against Judge Chandler, they concluded, had threatened the independence of the judiciary.<sup>187</sup> Perhaps it was in reaction to the January 21 Dissent that Judge Chandler, on the same day, filed a motion to reconsider in which he accused the Council of engaging in a "shocking departure from customary bounds of accepted standards by the inclusion of gratuitous defamatory statements."<sup>188</sup>

Both Judge Chandler and the Council were active during the Court's deliberations. On January 14, 1966, Judge Chandler informed the other district court judges of the Council's December 13 Order demanding that he cease from hearing cases, and that he desired that the other judges' confirm his conclusion that the Council had (in effect) issued a de facto writ

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Council of the Tenth Circuit of the U.S., 382 U.S. 1003 (1966) (No. 1111, Misc.) [hereinafter *Renewal of Application for Stay*] ("Failure to grant a stay will only compound the confusion for litigants in Judge Chandler's court . . . [he] regrets the additional burden this entails for the other judges in his court.").

184. *See Chandler I*, 382 U.S. at 1003–04 (noting Judge Chandler was denied relief pursuant to his *Renewal of Application for Stay*).

185. *Id.* at 1004.

186. *See id.* at 1005–06 (Black, J., dissenting) (noting the powers of impeachment granted to the Legislative Branch by the Constitution).

187. *Id.* at 1006. Justice Black's conclusory statement reads:

To hold that judges can do what this Judicial Council has tried to do to Judge Chandler here would in my judgment violate the plan of our Constitution to preserve, as far as possible, the liberty of the people by guaranteeing that they have judges wholly independent of the Government or any of its agents with the exception of the United States Congress acting under its limited power of impeachment. We should stop in its infancy, before it has any growth at all, this idea that the United States district judges can be made accountable for their efficiency or lack of it to the judges just over them in the federal judicial system.

*Id.*

188. *Renewal of Application for Stay*, *supra* note 183, at 1.

of prohibition against him.<sup>189</sup> Judge Chandler also explained his reasons for seeking relief from the Court rather than appearing before the panel.<sup>190</sup> He pointed out that because no litigant in any pending case had sought his recusal or filed a writ of mandamus to the appellate court, he believed the Council was without any power to act under its governing statute, and that his appearance before the Council would be interpreted (in essence) as waiving this argument.<sup>191</sup> Second, in regards to the cases already under adjudication, Judge Chandler claimed that as the sitting District Chief Judge, he was the only judge with the authority to issue orders or rulings to the litigant parties.<sup>192</sup>

Additionally, Judge Chandler had a conversation with his colleague, Judge Daugherty, in which he protested the division of his pending cases to the other judges.<sup>193</sup> As previously noted, customarily, the district chief judge was responsible for creating a “secret lot” in which cases were assigned to available judges based on the date in which the various actions were filed with the court.<sup>194</sup> However, Judge Daugherty had attempted an equitable division of future cases, which negated the secrecy required by the existing rules.<sup>195</sup> Judge Daugherty responded by suggesting that he convene a meeting of the district court judges to work out an agreement on how to divide Judge Chandler’s cases amongst themselves.<sup>196</sup> But this too nullified the existing local rules on case division because it ignored the principle of the “secret lot.”

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189. Letter from Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla., to the Judges on the U.S. Dist. Court for the W. Dist. of Okla. 1 (Jan. 14, 1966) (on file with the Library of Congress).

190. *Id.* at 2.

191. *Id.*

192. *Id.* at 3.

193. See Letter from Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla., to Fred Daugherty, Judge, U.S. Dist. Court for the W. Dist. of Okla. (Jan. 24, 1966) (on file with the Library of Congress) (“There is no provision of law that grants a Judicial Council Jurisdiction over cases pending before a Judge in the various stages of the judicial process after valid assignment to him.”).

194. 28 U.S.C. § 137 (1976); see also *Chandler II*, 398 U.S. at 77 (noting the chief justice of the court is primarily responsible for assigning cases).

195. See Letter from Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla., to Clerk’s Office (Jan. 19, 1966) (on file with the Library of Congress) (suggesting implications of Daugherty’s actions).

196. Letter from Fred Daugherty, Judge, U.S. Dist. Court for the W. Dist. of Okla., to Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla. (Jan. 21, 1966) (on file with the Library of Congress).

On January 24, 1966, Judge Chandler wrote to his fellow district judges informing them that while “he objected to the removal and the reassignment” of his cases that were pending as of December 28, 1965, he did not object “to the assignment of all new cases to judges other than himself.”<sup>197</sup> On the next day, the district court judges notified the Council that while they “had agreed on the division of new business . . . they could not agree on the assignment to other judges of cases then pending before Judge Chandler.”<sup>198</sup> Contemporaneously, the Justice Department motioned Judge Chandler to recuse himself from a trial between the United States and an Oklahoma litigant arising from a tax dispute.<sup>199</sup> The *New York Times* covered Judge Chandler’s initial refusal to withdraw from the case, and his later agreement to recuse himself.<sup>200</sup>

In response to the district court judges’ inability to agree on a division of cases, the Council instructed them that it would hold a new hearing on February 10, 1966. However, after being informed that no district court judge intended to appear before it, the Council decided not to hold this meeting; instead it decided to consider the disagreement of case assignments at the February 4 meeting.<sup>201</sup> Judge Chandler had independently notified the Council that he objected to its assertion of jurisdiction in prospectively removing all cases from him, and suggested that he would not attend the administrative proceedings.<sup>202</sup> Regardless, the Council maintained its December 13 Order prohibiting Judge Chandler from presiding over any new trials until the hearing.<sup>203</sup>

On the last day of January, the Oklahoma Transportation Company’s counsel filed a notice of amicus brief to the Court siding with

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197. *Chandler II*, 398 U.S. at 79; Letter from Stephen Chandler to Fred Daugherty, *supra* note 193 (copying to the letter other district court judges).

198. *See Chandler II*, 398 U.S. at 79 (expressing an attempt by the Judges to form an agreement).

199. *See* Fred P. Graham, *Oklahoma Judge Clashes with U.S.: Justice Department Objects to His Hearing Tax Case*, N.Y. TIMES, Jan. 31, 1966, at 51 (suggesting the Justice Department would object to Judge Chandler’s hearing of a Federal tax dispute).

200. *See id.* (insisting Judge Chandler initially refused to withdraw from the case); *Chandler Averts Clash with U.S.: Federal Judge Withdraws from Oklahoma City Case*, N.Y. TIMES, Feb. 1, 1966, at 13 (detailing Judge Chandler’s eventual agreement to recuse himself, however, noting that “[Judge] Chandler seems determined to continue to try private cases, in defiance of the [Judicial] Council’s order, until the Supreme Court rules on his case”).

201. *See Chandler II*, 398 U.S. at 79–80 (discussing the Council’s consideration of the disagreement amongst the district judges on the division of business).

202. *See* Letter from Stephen Chandler to Clerk’s Office, *supra* note 195 (outlining Judge Chandler’s objection to the Council’s Order).

203. *See Chandler II*, 398 U.S. at 80 (suggesting the Council maintained its Order).



Judge Chandler and requesting reconsideration.<sup>204</sup> The company was a party in an action against the United States on Judge Chandler's docket scheduled for trial on February 1, 1966.<sup>205</sup> The company's counsel insisted that the Council's action would result in a trial delay to the financial detriment of the company and enable the government to seek reconsideration of rulings favorable to the company that Judge Chandler had already issued.<sup>206</sup> It also argued that the Council's action bypassed the two recognized means for judicial disqualification: a motion for judicial recusal based on bias or prejudice subject to appellate review, and voluntary disqualification.<sup>207</sup> Although the corporation raised a meritorious claim in the sense that the losing party would be able to argue several motions for reconsideration, this did not lead Justice White to rethink his position. After conferring with the Court, Justice White appointed Richard Bevan Austin, a United States District Court Judge serving in the Northern District of Illinois, to the trial involving the corporation.<sup>208</sup>

On February 4, the Council—still asserting it was acting under 28 U.S.C §§ 137 and 332—issued a second Order which authorized Judge Chandler to proceed with the cases already assigned to him.<sup>209</sup> The February 4 Order also barred Judge Chandler from serving on any new cases.<sup>210</sup> This February 4 Order did not mollify Judge Chandler; again, he asked the Court for a writ of mandamus.<sup>211</sup> Judge Chandler's objection was two-fold.<sup>212</sup> First, he argued the Council, acting within its administrative capacity, lacked authority to reassign a district court's cases; and second, if the Council was

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204. *See* Motion of Real Parties in Interest for Leave to File and Motion to Stay Amicus Curiae at 4, *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 382 U.S. 1003 (1966) (No. 1111, Misc.) (requesting immediate adjudication of the case, noting that any further delay would be “disastrous to hundreds of litigants and attorneys”).

205. *Id.* at 1. This letter was sent via Western Union telegram. *Id.*

206. *Id.* at 4. The telegram claimed \$400,000 in damages were at stake, alleging “[t]he very life and future operation of the Oklahoma Transportation Company and Affiliated Public Utility Motor Carriers make immediate trial vital.” *Id.* at 1–2.

207. *Id.* at 2.

208. Letter from Byron White, Justice, U.S. Supreme Court, to John Davis, Clerk, U.S. Supreme Court (Feb. 3, 1966) (on file with the Library of Congress). Apparently, because the Northern District of Illinois resided within the Court of Appeals for the Seventh Circuit, Justice White believed that the appearance of favoritism to the government was nullified. *Id.*

209. *See Chandler II*, 398 U.S. at 80 (citing to the Order rendered from the February 4, 1966 meeting of the Judicial Council).

210. *Id.*

211. *Id.* at 75–76.

212. *See id.* at 82 (evaluating the arguments of (1) the constitutional rights of a confirmed federal judge; and (2) the statutory authorization of judicial councils to supersede those constitutional rights).

acting as the Tenth Circuit en banc, it exceeded its authority to order a blanket recusal against a district court judge.<sup>213</sup>

Five days after the February 4 Order's issuance, Solicitor General Marshall filed a memorandum to the Court arguing Judge Chandler's appeal had become moot because Judge Chandler had essentially agreed to the Council's February 4 Order.<sup>214</sup> Judge Chandler, in turn, filed a notice to the Court disagreeing with the Solicitor General's assertion that he had acquiesced to the February 4 Order, and further stated that he had only "acquiesced" to the other district court judges' memorandum to the Council in order to prevent the Council's intervention under 28 U.S.C. § 127.<sup>215</sup> Yet, Judge Chandler also believed that he made it clear that he had not acquiesced to any bar from serving on future trials, because he had refrained from specifically addressing the Council's stated reasons for his removal.<sup>216</sup> This became a contested issue in the Court when it finally granted review.

On July 12, 1967, the Council reconvened, and this time, it modified its February 4 Order by asking the district court judges to internally agree on a new division of cases.<sup>217</sup> Judge Chandler argued in a memorandum to the other district court judges that the Council had "illegally" attempted to "create a situation in which the Council could assert its powers under 28 U.S.C. § 137" because the judges were already in agreement as to the division of cases, with the exception of Judge Chandler—who was barred from being assigned new cases.<sup>218</sup> The district court judges, including

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213. *Id.* at 83–84. *But see id.* at 83 n.5 ("We note that nothing in the statute or its legislative history indicates that Congress intended or anyone considered the Circuit Judicial Councils to be courts of appeals en banc.").

214. *Id.* at 84. The Solicitor General essentially argued that the Court had jurisdiction to rule on the writ of mandamus filed by Judge Chandler. *Id.* However, he concluded: "[T]hat even though there is appellate jurisdiction in this Court, nonetheless it ought not to be exercised since the Order of December 13 has been superseded for four years by the Order of February 4, the terms of which have been expressly approved by petitioner." *Id.*

215. *Id.* at 81.

216. *Id.* Judge Chandler argued:

[H]is acquiescence in the division of new business settled upon by his fellow district judges was given deliberately for reasons of "strategy" in order to prevent any possibility that the Council could find that "the district judges are unable to agree upon the adoption of rules of orders" for the distribution of business and assignment of cases under 28 U.S.C. § 137.

*Id.*

217. *Id.* at 81–82 (indicating the reconvening of the Judicial Council).

218. Letter from Stephen Chandler to Clerk's Office, *supra* note 195. The Western District Judges, including Judge Chandler himself, wrote the Judicial Council: "[T]he current order for the division of business in this district is agreeable under the circumstances." *Chandler II*, 398 U.S. at 82.

Judge Chandler, finally responded to the Council that the division of cases was “agreeable,” and that it was not necessary to issue another order.<sup>219</sup> Judge Chandler, of course, still believed a constitutional impediment to the Council’s actions remained, and filed an appeal to the Court.<sup>220</sup> It took two years and a new Chief Justice for the Court to decide to grant review.<sup>221</sup>

## II. JUDGE CHANDLER, THE LEGISLATIVE BRANCH, AND ETHICS REFORM

On February 15, 1966, Senator Joseph Tydings (a Maryland Democrat and Chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary) convened a hearing for the purpose of determining whether federal judges could be removed only through the impeachment process, and if so, whether there should be a new law empowering the judiciary to remove “unfit” judges.<sup>222</sup> Senator Fred Hart (a Michigan Democrat) joined Senator Tydings in the hearing, but the Committee’s third member, Senator Hugh Scott (a Republican from Pennsylvania), did not.<sup>223</sup> Senator Tydings called the Council’s actions against Judge Chandler a “charade,” and stated that “[the] Judicial Council’s abortive action in the *Chandler* case created havoc in the Western District of Oklahoma.”<sup>224</sup> Senator Tydings listed a number of shortcomings on the part of the Council, including that the appellate judges failed to give Judge Chandler notice of the first hearing, provided no evidence to him, specified no charges against him, and refused to give him an opportunity to defend himself.<sup>225</sup> Although Senator Tydings may have exaggerated the impact of the Council’s conduct on the district courts, one might agree with

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However, Judge Chandler retained his argument that “the Council has usurped the impeachment power, committed by the Constitution to the Congress exclusively.” *Id.* While Judge Chandler agreed that there were some “legitimate administrative purposes” under the statute, they “do not include stripping a judge of his judicial function as he claims was done here.” *Id.*

219. *Chandler II*, 398 U.S. at 88–89.

220. *Id.* at 75–76.

221. *Compare id.* at 82 (indicating the Judicial Council met in late September 1967 to reconsider the need for the February 4th Order to stay), *with id.* at 74 (noting the date of oral argument before the Supreme Court was set for December 10, 1969).

222. *U.S. S. Judicial Fitness Hearings*, *supra* note 12, pt. I, at 1 (statement of Joseph D. Tydings, Chairman, S. Subcomm. on Improvements in Judicial Mach.).

223. *Id.*

224. *Id.* at 2. It should be noted that Tydings wanted to make it clear that he did not have enough evidence to refute an allegation that Judge Chandler was unfit, or that the Council did not rely on any evidence. *See id.* at 3 (mentioning the legal issues and facts surrounding the situation between Judge Chandler and the Judicial Council of the Tenth Circuit had not yet been determined).

225. *Id.* at 2.

him when he accused it of “bringing ridicule” to the federal judiciary.<sup>226</sup> Senator Tydings then read Senator Samuel Ervin’s statement into the record, in which Senator Ervin argued that the Council had acted unconstitutionally against Judge Chandler, and that Justices Douglas and Black were correct in their dissents.<sup>227</sup>

Senator Ervin had also privately defended Judge Chandler against the Tenth Circuit.<sup>228</sup> He admitted to a constituent that he had no personal knowledge of Judge Chandler, but insisted that the Tenth Circuit had engaged in unjustified and dangerous actions.<sup>229</sup> That a senator issued this criticism should have caused concern in the Judicial Branch, but it was cause for greater concern that at the time, Senator Ervin was also a member of the Senate Committee on the Judiciary.<sup>230</sup>

Finally, one of the witnesses, Joseph Borkin, an attorney who authored a book titled *The Corrupt Judge*,<sup>231</sup> testified that even if the allegations against Judge Chandler (regarding his unwillingness to adjudicate cases) were true, the Council had acted unjustly by failing to provide any evidence to substantiate the charges.<sup>232</sup> Although the Subcommittee hearing evidenced a complete legislative disagreement with the Council, this did not result in the Court reconsidering its earlier ruling, or in the Council altering its February 4 Order. While several other events in fact did open the door to the Court addressing Judge Chandler’s second petition, the Court’s actions should be studied with regard to its own internal difficulties.

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226. *Id.* at 2–3.

227. *Id.* at 5 (statement of Sen. Sam J. Ervin, Jr., as presented by Sen. Joseph D. Tydings, Chairman, S. Subcomm. on Improvements in Judicial Mach.).

228. *Id.* In this speech, Senator Ervin reminded Congress that he had previously come to Judge Chandler’s defense. *See id.* pt. II, at 206–07 (statement of Hon. William L. Murray, J. of the Superior Court of the State of Cal. and response by Sen. Joseph D. Tydings, Chairman, S. Subcomm. on Improvements in Judicial Mach.) (admitting the rule utilized in the *Chandler* case had come up in a private lunch in which it was referred to as an awful provision).

229. Letter from Sam Ervin, U.S. Senator, to Professor Phillip Kurland (Jan. 14, 1966) (on file with the Library of Congress).

230. *See Nominations of Fortas & Thornberry Hearing, supra* note 46, at 2 (showing Senator Ervin as a member of the Senate Judiciary Committee).

231. JOSEPH BORKIN, *THE CORRUPT JUDGE* (World Publ’g Co. 1966). The full description of Borkin’s book is *The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts. Id.* at iii. The book is not about Judge Chandler. *Id.* at 300–01.

232. U.S. S. *Judicial Fitness Hearings, supra* note 12, pt. I, at 71–72 (statement of Joseph Borkin, esquire).

In 1969, Justice Abe Fortas resigned from the Supreme Court rather than face a probable impeachment trial.<sup>233</sup> The previous year, during Justice Fortas's Chief Justice confirmation hearings, journalists discovered that he had been paid a large sum of money for serving as an adjunct professor at the American University Law School.<sup>234</sup> The ethics rules governing federal judges did not prohibit employment as an adjunct professor, and arguably such employment was consistent with a judge's duty to serve as an ambassador of the law.<sup>235</sup> Moreover, the students who studied under a Supreme Court Justice had theoretically benefitted in their legal education. However, Justice Fortas's salary was paid through an endowment created by Louis Wolfson—a convicted financier who Justice Fortas had previously advised.<sup>236</sup> Justice Fortas's association with Wolfson alone might not have been cause for an impeachment hearing, but he also failed to testify accurately to the Senate during his confirmation hearings regarding his advice to President Johnson on the United States' involvement in the Vietnam Conflict.<sup>237</sup>

In addition to accusations against Justice Fortas, on April 15, 1970, Congressman Gerald Ford—the Republican minority leader in the House of Representatives—accused Justice Douglas of violating several ethics rules, as well as undermining United States national security.<sup>238</sup> Several of Congressman Ford's allegations were not new to the House. Throughout the 1960s, several legislators, in particular Southern Democrats, had demanded investigations into Justice Douglas, based on the Justice's four marriages as well as his financial relationship to a casino owner.<sup>239</sup> However, Congressman Ford also alleged that Justice Douglas's political activities—and publication of a book titled *Points of Rebellion*—proved the

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233. Robert Taft, Jr., Statement on the Resignation of Supreme Court Justice Abe Fortas (May 15, 1969) (on file with the Library of Congress) [hereinafter 'Taft's Statement on Justice Fortas' Resignation].

234. BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 142–49 (1988).

235. *Cf. id.* (outlining the ethical duties of federal judges in regards to Justice Fortas).

236. *Id.*

237. *Id.*

238. See 116 CONG. REC. 11915 (1970) (“But this is only the beginning of the insolence by which Mr. Justice Douglas has evidently decided to sully the high standards of his profession and defy the conventions and convictions of decent Americans.”).

239. See *Judgment Day for Justice Douglas*, CHI. TRIB., Apr. 27, 1970, at 20 (reporting on Mr. Ford's proposal to investigate the conduct of Justice Douglas).

Justice wanted the government toppled.<sup>240</sup> The House Judiciary Committee investigated Congressman Ford's allegations against Justice Douglas but found no wrongdoing.<sup>241</sup>

A. *Congress, the Court, and Judicial Ethics Reforms*

By the end of 1968, there was a general perception in Congress that the ethical standards of the federal judiciary were far too malleable. On February 25, 1969, Senator Ervin referred a draft bill to the Senate Committee on the Judiciary which would have prohibited federal judges and magistrates from “engag[ing] or participat[ing] [in] . . . ‘the exercise of any power, or the discharge of any duty, which is conferred or imposed upon any officer or employee of the executive branch or the legislative branch of the government.’”<sup>242</sup> Senator Ervin's Bill sought to prevent judges from advising a president regarding drafting a non-judicial legislation.<sup>243</sup>

At the same time, Senator Tydings introduced a bill to create a “Commission on Judicial Disabilities and Tenure” which would be composed of five judges and chaired by the chief justice.<sup>244</sup> This proposed Commission would have the power to inquire into the conduct of all federal judges.<sup>245</sup> If four or more of the judges agreed that a federal judge had violated judicial standards, the Commission would recommend to the House Judiciary Committee that the judge be subject to impeachment.<sup>246</sup> On November 6, 1969, Senator Tydings addressed the Catholic University Law School on the need for judicial reform in which he claimed that Congress had to legislate a standard of “good behavior” for the judiciary

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240. See 116 CONG. REC. 11914–17 (1970) (contending Justice Douglas's activities and behavior while serving on the Supreme Court evidenced seditious intent).

241. See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 29 (Princeton Univ. Press ed. 1966) (“Although Justice Douglas's life-style, including his four marriages, and much of his decision making provoked hostile reactions from many Republicans, the impeachment investigation ultimately exposed and perhaps diffused the personal or partisan motivations for his attempted impeachment.” (citation omitted)).

242. 115 CONG. REC. 4299 (1969) (quoting S. 1097, 91st Cong. (1969)).

243. See *id.* at 4298–99 (noting the dangers of allowing the President to appoint judges to positions in which they would be performing non-judicial duties).

244. *Id.* at 6218.

245. See *id.* (stating the commission “would act to retire or remove a judge only after an investigation and a formal hearing held in accordance with the requirements of due process”).

246. Judicial Disabilities, Tenure and Conflicts of Interests Acts, S. 1516, 91st Cong. § 377, 115 CONG. REC. 6226–27 (1969) (enacted).

because the judiciary had failed to follow its own standards.<sup>247</sup> Senator Tydings cited to Justice Fortas's resignation, as well as "the Chandler case," as his reason to push for new legislation.<sup>248</sup> He also reminded his audience that on June 10, 1969, when Chief Justice Warren pushed the Judicial Conference to prepare a code of ethics, his efforts faltered because of "dimming of judicial resolve" by the Supreme Court.<sup>249</sup> Senator Tydings, moreover, argued that mandatory reporting of income and gifts (as well as regulations on judicial activities) were not a threat to the judiciary's independence, but rather, that such regulations would serve to bolster public confidence in the judiciary.<sup>250</sup> He concluded: "The threat will pass only when the members of the federal judiciary realize that not every attempt to monitor their conduct constitutes 'hazing' . . . ."<sup>251</sup>

On May 8, 1969, then Congressman Robert Alphonso Taft, Jr., the grandson of Chief Justice and former president William Howard Taft, introduced H.R. 11109—a Bill that would have required federal judges to provide to the Comptroller General their complete tax filings (including any spousal incomes) as well as the names and addresses of professional corporations, businesses, foundations, or other enterprises in which the judge served as a compensated officer or consultant.<sup>252</sup> The Bill would

247. Joseph D. Tydings, Senator, Address at the Catholic Univ. of Am. (Nov. 6, 1969) (transcript on file with the Library of Congress).

248. *See id.* (commenting on the controversies surrounding the Judiciary and how each controversy "demonstrated anew critical problems of judicial temperament and public disapproval of undisclosed outside activities of judges and undisclosed financial holdings").

249. *See id.* (discussing the Judicial Conference's move to reform the Judiciary, and the Supreme Court's failure to implement reform guidelines imposed on other federal judges on itself).

250. *See id.* (emphasizing the need for judges to disclose the amount of compensation received for any "off-the-bench activity").

251. *Id.*

252. H.R. 11109, 91st Cong. § 470 (1969); Letter from Robert Taft, Jr., U.S. Representative, to Emanuel Celler, Chairman of the House Judiciary Comm. (May 26, 1969) (on file with the Library of Congress). Taft wrote:

As you know, on May 8, the Honorable Gerald Ford and I introduced H.R. 11109, to provide for financial disclosure by members of the Federal judiciary.

In view of recent developments, I feel the Committee should consider whether it would be appropriate at this time to schedule hearings on this proposal. In making this request, I recognize, of course, the recent call by the Chief Justice for action by the Judicial Conference, as well as the constitutional questions involved.

*Id.* Additionally, Gerald Ford wrote separately to Congressman Celler on May 28, stating: "Honorable Robert Taft, Jr., and I have introduced H.R. 11109, to provide for financial disclosure by members of the Federal judiciary. This legislation has been referred to your committee and I would very much

have also required judges to list their real property, personal property, and trust interests valued at over \$10,000.<sup>253</sup> Finally, Congressman Taft's Bill required judges to report all financial liabilities (such as home loans and lines of credit) valued at over \$5,000.<sup>254</sup> Ostensibly, Congressman Taft's Bill, like Senator Ervin's and Senator Tydings', was introduced as a means to build public confidence in the impartiality of federal judges following Justice Fortas's resignation.<sup>255</sup> On November 4, 1969, Congressman Taft, along with Congressman Ford, formally requested that Congressman Celler schedule a hearing on H.R. 11109—particularly because three days earlier, the Judicial Conference rescinded a rule prohibiting judges from earning outside income.<sup>256</sup> Congressman Celler, however, was non-committal about when a hearing would be scheduled.<sup>257</sup> Congressman Taft's inability to move the Bill to a House Judiciary Committee hearing proved frustrating, and he complained to a University of Cincinnati Law School professor, explaining that he saw “no reason why a thorough investigation of such conflicts of interest should not be carried out[.]” adding that Congressman Ford was in the process of investigating “at least one member of the Court.”<sup>258</sup> Arguably, because of Judge Chandler's investments and financial relationships, he would have had to alter his extra-judicial behavior if any of these Bills became law.

In concert with these legislators, Chief Justice Warren was concerned with the Justices' extra-judicial activities and convened a Judicial Conference to convince the Justices to adopt a more stringent ethics code, mirroring the code governing the lower federal courts.<sup>259</sup> On June 10, 1969, the Judicial

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appreciate anything which you may do to schedule hearings on the proposal.” Letter from Gerald Ford, U.S. Representative, to Emanuel Celler, Chairman of the House Judiciary Comm. (May 28, 1969) (on file with the Library of Congress).

253. H.R. 11109, § 470(b)–(c).

254. *Id.* § 470(e).

255. See Taft's Statement on Justice Fortas' Resignation, *supra* note 233 (referring to Justice Fortas' resignation as “a solution which maintains the integrity of the Court”).

256. Letter from Robert Taft, Jr., U.S. Representative, to Emanuel Celler, Chairman of the House Judiciary Comm. (Nov. 4, 1969) (on file with the Library of Congress).

257. See Letter from Emanuel Celler, Chairman of the House Judiciary Comm., to Robert Taft, Jr., U.S. Representative (Nov. 7, 1969) (on file with the Library of Congress) (stating the Committee would address the issue “as soon as [the Committee's] schedule permits”).

258. Letter from Robert Taft, Jr., U.S. Representative, to C.M. Hulley, Professor (Dec. 5, 1969) (on file with the Library of Congress).

259. See Fred P. Graham, *Justices Rebuff Warren on Code: Most of Colleagues Defer Action on Suggestion on Ethics Until Fall Term*, N.Y. TIMES, June 18, 1969, at 1 (discussing Justice Warren's conference



Conference issued guidelines to govern the conduct of judges.<sup>260</sup> The Judicial Conference was, in effect, responding to Tydings' Bill, and, indeed, matched its guidelines to the proposed Bill.<sup>261</sup> The guidelines included the creation of a judicial board to monitor the income and assets of other judges.<sup>262</sup> Several judges opposed these guidelines, and petitioned Chief Justice Burger (who had succeeded Chief Justice Warren) to re-evaluate their efficacy.<sup>263</sup> Justice Douglas took the step of explaining to the Justices his reasons for opposing the Judicial Conference's new rules.<sup>264</sup> He challenged that judges should have no role in telling each other what to do, and asked whether the Supreme Court would also be monitored and overseen by judges in the lower judiciary.<sup>265</sup> Any new requirements on judges, he urged, had to be enacted by Congress.<sup>266</sup> It also likely galled Justice Douglas that judges would now have to first seek the Conference's approval before publishing an article, travelling, or accepting compensation for lecturing or writing.<sup>267</sup> He claimed he deplored seeing a cloistered life of the judiciary and believed a rule requiring judges to submit their literary work or speeches for review was merely a form of judicial censorship.<sup>268</sup>

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proposal to "formally adopt a standard of judicial conduct similar to that approved . . . by the Judicial Conference" which "applies only to lower court judges").

260. See JUD. CONF. U.S., REP. PROCS. SPECIAL MEETING JUD. CONF. U.S. 42–43 (1969) [hereinafter JUD. CONF. U.S. REP. (1969)], available at <http://www.uscourts.gov/sites/default/files/1969-03.pdf> [perma.cc/6AVL-R76F] (listing the resolutions passed at the meeting).

261. See Judicial Reform Act, S. 1506, 91st Cong., 115 CONG. REC. 6220–24 (1969) (enacted) (proposing guidelines similar to those suggested by Tydings).

262. S. 1510, 91st Cong., 115 CONG. REC. 6225 (1969) (enacted).

263. See, e.g., Letter from John Harlan, Justice, U.S. Supreme Court, to Warren Burger, Chief Justice, U.S. Supreme Court (Mar. 31, 1970) (on file with the Library of Congress) (explaining to the Chief Justice reasons why actions of the Judicial Conference should be suspended).

264. Memorandum from William Douglas, Justice, U.S. Supreme Court, to the Judicial Conference of the U.S. (Aug. 8, 1970) (on file with the Library of Congress).

265. Cf. *Douglas Defends Judge's Rights*, LONGVIEW NEWS J. (Texas), Jun. 4, 1970, at 6 ("William O. Douglas, the Supreme Court's most controversial justice, has entered an impassioned defense of the right of federal judges to speak their minds and pursue an independent course.").

266. See Memorandum from William Douglas to the Judicial Conference of the U.S., *supra* note 264 ("[I]t is plainly not in the competence of the judges to write such a law as I said in the *Chandler* case.").

267. Cf. JUD. CONF. U.S. REP. (1969), *supra* note 260, at 42 ("A judge in regular active service shall not accept compensation of any kind, whether in the form of loans, gifts, gratuities, honoraria or otherwise, for services hereafter performed or to be performed . . .").

268. See *Douglas Defends Judge's Rights*, *supra* note 265 ("William O. Douglas, the Supreme Court's most controversial justice, has entered an impassioned defense of the right of federal judges to speak their minds and pursue an independent course.").

B. *House Judiciary Investigation into Judge Chandler and the Judicial Council*

On February 22, 1966, Congressman Harold Royce Gross, a Republican from Iowa, introduced H.R. Res. 739, authorizing and directing the Committee on the Judiciary “as a whole or by subcommittee, to inquire into and investigate the official conduct” of Judge Chandler, Judge Murrah, and Judge Bohanon.<sup>269</sup> Congressman Gross did not specifically seek an impeachment against any of the judges, rather, he drafted H.R. Res. 739 “to determine whether in the opinion of said committee the said judges or any of them have been guilty of any high crime or misdemeanor which in the contemplation of the Constitution requires the interposition of the constitutional powers of the House.”<sup>270</sup> Thus, while Congressman Gross did not overtly seek impeachment through H.R. Res. 739, its use of the “high crime or misdemeanor” standard contemplated impeachment as a possibility—even though it did not propose whether Judge Chandler, Judge Murrah, or Judge Bohanon should be the investigation’s greater focus.<sup>271</sup>

Impeachment is a different matter than an investigation into judicial conduct.<sup>272</sup> Impeachment processes begin at the Judiciary Committee, and then, if articles of impeachment are drafted, these are provided to the full House.<sup>273</sup> If the full House approves the articles by a majority vote, the articles transition into the Senate for an impeachment trial.<sup>274</sup>

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269. H.R. Res. 739, 89th Cong. (1966) (enacted). It is difficult to discern Gross’s connection to this particular investigation: he was not appointed to the Judiciary Committee, he did not appear to have a connection to any of the parties, and his state (Iowa) resided on the Court of Appeals for the Eighth Circuit. *See generally* David W. Schwieder & Dorothy Schwieder, *The Power of Prickliness: Iowa’s H.R. Gross in the U.S. House of Representatives*, 65 ANNALS IOWA 329 (2006) (presenting biographical details on Harold R. Gross). However, he had a reputation for being a conservative Republican, often at odds with his own party. *See* BILL KAUFFMAN, *AIN’T MY AMERICA: THE LONG NOBLE HISTORY OF ANTIWAR CONSERVATISM* 124 (1st ed. 2008) (showing that Gross voted against the Marshall Plan, the space program, and military spending, often against the Eisenhower and Nixon Administrations); *see also* Schwieder & Schwieder, *supra*, at 334 (“Not surprisingly, party leaders opposed Gross’s candidacy.”). As an exasperated Gerald Ford once quipped, “[t]here are three parties in the House: Democrats, Republicans, and H. R. Gross.” *Id.* at 358.

270. H.R. Res. 739, 89th Cong. (1966) (enacted).

271. *See id.* (outlining the high crimes and misdemeanors standard for determining whether the House is in a position to exercise its constitutional powers).

272. *See, e.g.,* GERHARDT, *supra* note 241, at 26 (distinguishing between the impeachment process and an investigation into judicial misconduct).

273. *See id.* (detailing the impeachment process).

274. *See* U.S. CONST. art. I, § 2, cl. 5 (assigning the power of impeachment solely to the House of Representatives); U.S. CONST. art. I, § 3, cl. 6 (delegating the power to try all impeachments solely to the Senate).

Constitutionally, a single member of the House may initiate an impeachment vote against a president, vice president, or executive officer whose position occurred as a result of the Senate confirmation process.<sup>275</sup> The Constitution requires two-thirds of the senators present to concur on the individual's removal from office.<sup>276</sup> The operative basis for impeachment, as noted, is the commission of "high Crimes and Misdemeanors."<sup>277</sup> Fifteen federal judges, since the Nation's founding, have been impeached, and only eight of them have been convicted and removed.<sup>278</sup>

On receipt of Congressman Gross's request, Congressman Celler consulted with Congressman Howard W. Smith, the Chairman of the Rules Committee, before forming a subcommittee under H.R. Res. 739 to investigate Judge Chandler, Judge Murrah, and Judge Bohanon.<sup>279</sup> The reason for Congressman Celler's consultation related to the unusual nature of H.R. Res. 739, which did not directly call for impeachment.<sup>280</sup> Given the language of H.R. Res. 739, the investigation may have had no choice but to adopt the standards associated with impeachment.<sup>281</sup> As Chairman of the House Judiciary Committee, Congressman Celler had the authority to appoint two other congressmen.<sup>282</sup> To this end, he selected Jack Brooks of Texas, and William St. Onge of Connecticut.<sup>283</sup> Congressman William

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275. See, e.g., III ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2342, 2400, 2469 (1907) ("The impeachment . . . was set in motion on the responsibility of one [m]ember of the House . . .").

276. See U.S. CONST. art. I, § 3, cl. 6 (requiring two-thirds of the members of the Senate to be present to render a conviction in an impeachment proceeding).

277. U.S. CONST. art. II, § 4.

278. *U.S. S. Judicial Fitness Hearings*, *supra* note 12, pt. I, at 55 (statement of Joseph Borkin, esquire).

279. Letter from Emanuel Celler, Chairman of the House Judiciary Comm., to Howard W. Smith, Chairman of the House Rules Comm. (Feb. 23, 1966) (on file with the Library of Congress); Letter from Emanuel Celler to Jack Brooks, *supra* note 94.

280. Cf. H.R. Res. 739, 89th Cong. (1966) (enacted) (calling for findings and resolutions of impeachment); Letter from Emanuel Celler to Jack Brooks, *supra* note 94 (suggesting Mr. Brooks consult additional information regarding H.R. Res. 739).

281. See H.R. Res. 739 ("Said committee shall report its findings to the House, together with such resolutions of impeachment or other recommendations as it deems proper.").

282. See Letter from Emanuel Celler, Chairman of the House Judiciary Comm., to William St. Onge (Feb. 23, 1966) (on file with the Library of Congress) (advising St. Onge that he had appointed members of the subcommittee); Letter from Emanuel Celler to Jack Brooks, *supra* note 94 (asking Brooks to chair the Ad Hoc Special Subcommittee).

283. Letter from Emanuel Celler, Chairman of the House Judiciary Comm., to H.R. Gross, U.S. Representative (Feb. 23, 1966) (on file with the Library of Congress).

McCulloch (the ranking Republican on the Judiciary Committee) appointed Congressman Richard Poff of Virginia.<sup>284</sup>

All three of the congressmen were lawyers.<sup>285</sup> Brooks was born in 1922, served in the Marine Corps in World War II, and graduated from the University of Texas School of Law in 1949.<sup>286</sup> He was first elected to Congress in 1953, and he served for four decades.<sup>287</sup> St. Onge was born in 1914, served in the Army during World War II, and (after the war) graduated from the University of Connecticut's School of Law.<sup>288</sup> He had been appointed as a prosecutor and municipal judge, and was then elected Mayor of Putnam Township before his election to Congress in 1962.<sup>289</sup> Like Brooks and St. Onge, Poff was a World War II veteran.<sup>290</sup> He graduated from the University of Virginia's School of Law and was elected to Congress at the age of twenty-nine.<sup>291</sup> In 1970 (after the failed nominations of Clement Haynsworth and G. Harrold Carswell to the Supreme Court), President Richard Nixon considered nominating Congressman Poff to the Court—but Congressman Poff asked him to withdraw his name from consideration.<sup>292</sup>

On April 30, 1968, the H.R. Res. 739 subcommittee issued its final report—concluding that all three of the judges “brought discredit” to themselves and had “demeaned [the] administration of justice in their courts.”<sup>293</sup> The investigation found fault in each judge, but it specifically noted the Tenth Circuit Judicial Council's lack of discretion in dealing with

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284. *Id.*

285. See LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* 259 (2017) (stating Poff graduated from the University of Virginia School of Law); Douglas Martin, *Jack Brooks, Former Texas Congressman, Dies at 89*, N.Y. TIMES (Dec. 5, 2012), <http://www.nytimes.com/2012/12/06/us/politics/jack-brooks-former-texas-congressman-dies-at-89.html> [perma.cc/A42E-LQTF] (stating Congressman Brooks studied law at the University of Texas); *St. Onge, William Leon, (1914-1970)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000769> [perma.cc/4NAS-4WUU] (acknowledging St. Onge “was admitted to the bar in 1948 . . . [and] commenced the practice of law in Putnam”).

286. Martin, *supra* note 285.

287. *Id.*

288. *St. Onge, William Leon, supra* note 285.

289. *William St. Onge of Connecticut*, N.Y. TIMES, May 2, 1970, at 33.

290. EARL JOHNSON, *TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES* 226 (2014).

291. *Id.*

292. JOHN C. JEFFRIES, JR., *JUSTICE LEWIS POWELL JR.* 3 (Maxwell Macmillian Int'l ed. 1994); KALMAN, *supra* note 285, at 259–65.

293. West, *supra* note 11, at 13 (citation omitted).

Judge Chandler.<sup>294</sup> The report concluded by criticizing how the judges let themselves become embroiled in undignified “personal and political rivalries.”<sup>295</sup> Ultimately, the House Judiciary Committee concluded there was insufficient evidence for impeachment.<sup>296</sup>

Although the report, for a variety of reasons, might have made for salacious reading based on Judge Chandler’s personal history, the most important aspect of it had to do with its conclusion regarding the constitutionality of the Council’s action in removing cases from Judge Chandler. It declared the attempt to squelch Judge Chandler was “completely beyond the legal authority of the Council . . . . Congress has never authorized circuit judges to inquire into the fitness of a district judge to hold his office and to remove him if they so determine.”<sup>297</sup> Thus, the subcommittee issued its definitive answer to the Council’s removal of Judge Chandler from adjudicating cases: its action was unconstitutional.<sup>298</sup> Equally important is the difference between the House investigation and the Senate investigation—the House investigation was convened to examine the conduct of these specific judges and not to examine whether new laws were required for judicial governance.<sup>299</sup>

Perhaps less significant to the Supreme Court (and not in the public’s general knowledge) was that other prominent legislators outside of the House Judiciary Committee took an interest in Judge Chandler, and indeed, sided with him. For instance, Judge Chandler himself questioned the Assistant Attorney General as to why the Justice Department had not assigned a federal prosecutor to represent him against O’Bryan and the local district attorney, or to appoint him counsel when he argued his cause before the Court.<sup>300</sup> Further, because on two occasions Justices Black and

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294. *Id.* at 13–14 (citation omitted).

295. *Id.* at 13 (citation omitted).

296. *Id.* (citation omitted).

297. *Id.* at 13–14 (citations omitted); *see also Chandler II*, 398 U.S. at 137 (Douglas, J., dissenting) (“[T]here is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.”).

298. *See West*, *supra* note 11, at 13–14 (citation omitted) (pronouncing the action against Judge Chandler “forbidden by the Constitution”).

299. *Compare* H.R. Res. 739, 89th Cong. (1966) (enacted) (requesting specific examination of Judge Chandler, Judge Murrah, and Judge Bohanon), *with* Shipley, *supra* note 14, at 178 (analyzing Tydings’ efforts to reform the Judiciary by commencing an investigation into “the availability of and need for procedures to govern removal, retirement, and disciplining of unfit Federal judges” (quoting *U.S. S. Judicial Fitness Hearings*, *supra* note 12, pt. I, at 1)).

300. Letter from Stephen Chandler, Chief Judge, U.S. Dist. Court for the W. Dist. of Okla., to John Douglas, Assistant U.S. Attorney General (Mar. 4, 1966) (on file with the Library of Congress).

Douglas sided with Judge Chandler in his appeals,<sup>301</sup> it might have surprised them that Judge Chandler was never accused of corruption by the Republican Senator John J. Williams.<sup>302</sup> Senator Williams publicly called for Justice Douglas' resignation throughout his career,<sup>303</sup> and was known as "The Conscience of the Senate," for investigating corruption in government.<sup>304</sup> In doing so, Senator Williams sometimes communicated with Chicago entrepreneur E.L. Albright.<sup>305</sup> It was Albright who provided Senator Williams with derogatory information on both Justice Douglas and Judge William Campbell (of the Northern District of Illinois) over their relationship to Albert Parvin, a Las Vegas casino owner who funded a foundation designed to promote democracy in Latin America.<sup>306</sup> Evidently, it was true that Justice Douglas received a yearly stipend from Parvin's foundation.<sup>307</sup> Consequently, during his communication with

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301. See *Chandler II*, 398 U.S. at 129–41 (Douglas, J., dissenting) ("Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting."); *Chandler I*, 382 U.S. at 1004–06 (Black, J., dissenting) (showing Justice Black's disagreement with the Judicial Council's Order issued against Judge Chandler, and that Justice Douglas sided with Justice Black).

302. Williams was also known as the "Sherlock Holmes of Capitol Hill." *John J. Williams*, SPARTACUS EDUC., <http://spartacus-educational.com/JFKwilliamsJ.htm> [perma.cc/FZ58-TLYZ]. His "Sherlock" antics attributed to an effort to unseat Justice Douglas. CAROL E. HOFFECKER, HONEST JOHN WILLIAMS: U.S. SENATOR FROM DELAWARE 224 (2000). Ultimately, although Senator Williams found distaste in Justice Douglas' behavior, he never accused Judge Chandler of any sort of corruption. Cf. Jim Lichtman, *The Conscience of the Senate*, IT'S ETHICS, STUPID! (July 30, 2008), <https://ethicsstupid.com/personalities/the-conscience-of-the-senate/> [perma.cc/2V8N-VMKY] ("[Williams] always informed the subject of an investigation of his findings personally before he announced them publicly, and never once in twenty-four years did he falsely accuse anyone.").

303. HOFFECKER, *supra* note 302, at 224.

304. Lichtman, *supra* note 302.

305. See, e.g., Letter from E.J. Albright to John Williams, U.S. Senator (Jan. 5, 1966) (on file with the Library of Congress) [hereinafter January 5th Letter from Albright to Williams] (expounding on the unsavory behavior of Justice Douglas and Judge William Campbell—a federal district judge).

306. January 5th Letter from Albright to Williams, *supra* note 305; Letter from E.J. Albright to John Williams, U.S. Senator (Jan. 7, 1966) (on file with the Library of Congress) [hereinafter January 7th letter from Albright to Williams].

307. See *F.B.I. Kept Close Watch on Douglas*, N.Y. TIMES, July 22, 1984, <http://www.nytimes.com/1984/07/22> [perma.cc/H67X-LDY5] (reporting on the investigations into connections between Douglas and organized crime related to gambling); Fred Barbash, *Justice Douglas' Memoirs*, WASH. POST, Sept. 11, 1980, [https://www.washingtonpost.com/archive/politics/1980/09/11/justice-douglas-memoirs/7c3f55c5-bed8-4359-8a9a-5306bbdfce93/?utm\\_term=.47eef16ba70f](https://www.washingtonpost.com/archive/politics/1980/09/11/justice-douglas-memoirs/7c3f55c5-bed8-4359-8a9a-5306bbdfce93/?utm_term=.47eef16ba70f) [perma.cc/KH8]-MWGY] (highlighting Justice Douglas' speculation that the "news stories about his receipt of a salary from the Parvin Foundation" was an attempt to "tie him in" with Parvin's gambling concessions); *Judgment Day for Justice Douglas*, *supra* note 239 ("Most recently, there has been some evidence that [Justice Douglas] performed legal work for the private Parvin Foundation in violation of the rules of his office (in addition to collecting a \$20,000 annual fee from it) . . .").

Senator Williams, Albright suggests it was Judge Chandler who informed him that “hoodlum[s]” in Chicago boasted of making payoffs to “certain members of the U.S. Supreme Court.”<sup>308</sup>

### III. JUDICIAL DELIBERATIONS AND DECISION

As discussed above, by 1970, three independent efforts for judicial reform—one in the House, one in the Senate, and one within the federal judiciary itself—were underway.<sup>309</sup> These efforts contextualize the Supreme Court’s approach to *Chandler II*, particularly in light of the majority’s failure to note any legislative action regarding Judge Chandler in its opinion.<sup>310</sup> On December 10, 1969, the Court heard argument on Judge Chandler’s new appeal, but it was not until June 1, 1970, that the Justices issued their decision.<sup>311</sup> Befittingly, not long after the decision’s publication, Judge Chandler filed a statement saying that he refused to disclose his personal assets to the Conference despite the new disclosure rule, and argued that only Congress had the authority to force him to do so.<sup>312</sup> Eight days after oral arguments on *Chandler II*, a news report issued announcing that the House Judiciary Committee had issued a confidential report criticizing the Judicial Council for exceeding its authority.<sup>313</sup> The paper also recognized that the House Committee was sharply critical of Judge Chandler and his colleagues for engaging in personal and political rivalries “that have ‘brought discredit on [their] courts.’”<sup>314</sup>

308. *Cf.* January 7th Letter from Albright to Williams, *supra* note 306 (“As Judge Stephens Chandler told me some time ago . . .”).

309. *See supra* Part II (outlining the different independent efforts for judicial reform underway).

310. *See generally Chandler II*, 398 U.S. at 77–89 (failing to consider legislative action regarding Judge Chandler in the majority opinion).

311. *Id.* at 74.

312. Stephen Chandler, Statement Regarding Filing of Financial Report Required by Judicial Conference of the U.S. (1970) (on file with the Library of Congress). After arguing that only Congress could place such requirements on judges, Judge Chandler added:

It is not a proper judicial function for one judge or body of judges to lay down personal rules of conduct for other judges. I am not curious about the financial affairs of other judges. Their conduct is none of my personal or official business nor is it the proper business of any other judge or body of judges.

*Id.* News media reported Judge Chandler’s refusal, but this did not alter the Court’s decision. *See, e.g., Judge Cites His Reasons for Refusal*, OKLA. CITY TIMES, Aug. 7, 1970, at 10 (providing an account of Judge Chandler’s refusal to comply with financial disclosure requests).

313. MacKenzie, *supra* note 18, at 12-A.

314. *Id.*

In a new brief, Judge Chandler argued to the Court that all of the Council's orders relating to him placed conditions on the exercise of his constitutional power as a judge, and that in issuing these orders, the Council usurped Congress' impeachment power and undermined judicial independence.<sup>315</sup> He conceded that the Council was statutorily vested with administrative authorities, but argued that the stripping of any judicial functions was a constitutional act, and therefore exceeded any administrative authority.<sup>316</sup> Judge Chandler's argument essentially aligned with the House Judiciary Committee's conclusions.<sup>317</sup> The Council argued that the Court lacked jurisdiction because in issuing the Orders against Judge Chandler it had acted in an administrative, rather than judicial, capacity.<sup>318</sup> The Council's arguments rested on the assumption that because Congress had not authorized judicial review when it enacted the statutes creating the Judicial Conference and judicial councils, the Court could not exercise jurisdiction over its administrative positions, unless Judge Chandler had been removed from all judicial duties.<sup>319</sup> Solicitor General Erwin Griswold (Marshall's successor) argued in an amicus brief that because the Council had acted in an en banc capacity, any appeal had to be considered through the All Writs Act, and that Judge Chandler's complaint merited a review—even under the high standards of the Act.<sup>320</sup> However, Griswold ended with the argument that Chief Justice Burger would parrot, namely, that Judge Chandler had rendered his appeal to the Court moot because he had acquiesced to the Council's final Order.<sup>321</sup>

#### A. *The Court's Deliberations*

On March 27, 1970, Chief Justice Burger circulated his first draft to the Justices with the caveat that he wanted to dispose of the appeal "on the narrowest basis [he saw] as valid."<sup>322</sup> Chief Justice Burger's first draft

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315. *Chandler II*, 398 U.S. at 82–83.

316. *See id.* ("[P]etitioner contends that the legitimate administrative purposes to which it may be turned do not include stripping a judge of his judicial functions as he claims was done here.").

317. *Compare* West, *supra* note 11, at 13–14 (discussing the Commission on the Judiciary Committee report which found only Congress had impeachment authority over judges), *with Chandler II*, 398 U.S. at 80 (looking to Judge Chandler's brief which suggested the same).

318. *Chandler II*, 398 U.S. at 83.

319. *Id.*

320. *Id.* at 83–84.

321. *Id.* at 84.

322. Memorandum from Warren Burger, Chief Justice, U.S. Supreme Court, to the U.S. Supreme Court (Mar. 27, 1970) (on file with the Library of Congress).



contained a scant, one paragraph legal analysis, in which he concluded that only if the Council had acted in a judicial capacity could the Court review Judge Chandler's appeal "without doing violence to the constitutional requirement that such review be appellate."<sup>323</sup> Essentially, this meant that Chief Justice Burger agreed with the Council's determination that (unlike judicial decisions) a Council's administrative acts were not subject to appellate review.<sup>324</sup> Yet, Chief Justice Burger believed there was a secondary basis to deny Judge Chandler an appeal.<sup>325</sup> He opined that even if the Council had engaged in a judicial act, Judge Chandler made an express agreement to the February 4 Order, and therefore, any case or controversy had been eliminated by Judge Chandler himself.<sup>326</sup> But this conclusion ignored Judge Chandler's reasonable argument that he had not acquiesced to the Council's February 4 Order,<sup>327</sup> and that the House subcommittee investigation had sided with Judge Chandler and against the Council.<sup>328</sup> Regardless, on March 30, Justice White informed Chief Justice Burger that he would join in his opinion without seeking any modification.<sup>329</sup>

Although Justice Brennan agreed with Chief Justice Burger's conclusions, he took issue with the statement that Judge Chandler had acquiesced to the February 4 Order.<sup>330</sup> He discerned that Judge Chandler's agreement with the February 4 Order was not "express"—as both the Council and the Solicitor General had characterized it—but rather that Judge Chandler only agreed with the limited purpose of preventing the Council from acting under 28 U.S.C. § 137.<sup>331</sup> To Justice Brennan, this proved that Judge Chandler's

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323. Warren Burger, Chief Justice, U.S. Supreme Court, Unpublished Draft Opinion (Mar. 27, 1970), *in* Chandler v. Judicial Council of the Tenth Circuit of the U.S., 398 U.S. 74 (1970) (on file with the Library of Congress) [hereinafter Burger, March 27 Unpublished Draft Opinion].

324. *See id.* ("If the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal, then perhaps it could be reviewed by this Court without doing violence to the constitutional requirement that such review be appellate.").

325. *See id.* (commenting on a missing requirement of "case or controversy").

326. *Id.*

327. *See Chandler II*, 398 U.S. at 90 (Harlan, J., concurring) ("Judge Chandler immediately responded that he did not in any way concede the Council's power to enter the February 4 Order, and that his indication of acquiescence made to the Council did not constitute such a concession.").

328. *See* West, *supra* note 11, at 13–14 (discussing the House subcommittee's report which found the Council's actions forbidden by the Constitution).

329. *Cf.* Letter from Byron White, Justice, U.S. Supreme Court, to Warren Burger, Chief Justice, U.S. Supreme Court (Mar. 30, 1970) (on file with the Library of Congress) (requesting the Chief Justice to join Justice White in the opinion).

330. Letter from William Brennan, Justice, U.S. Supreme Court, to Warren Burger, Chief Justice, U.S. Supreme Court (Apr. 1, 1970) (on file with the Library of Congress).

331. *Id.*

agreement with the Order did not “eliminate[] whatever case or controversy theretofore existed.”<sup>332</sup> Justice Brennan added that Judge Chandler’s “tenacity in pursuing his case here for several years seems quite inconsistent with any conduct indicating acquiescence.”<sup>333</sup> Nonetheless, like Chief Justice Burger, Justice Brennan wanted the decision to maintain the principle that the Court could not review the Council’s administrative decisions, and he remained willing to join with Chief Justice Burger as to the ultimate conclusion of the appeal.<sup>334</sup>

On May 15, Chief Justice Burger circulated another draft and, for the first time, emphasized that Judge Chandler had been a defendant in suits involving both civil and criminal matters.<sup>335</sup> While Chief Justice Burger’s reasoning is absent from the papers of the other Justices, it may have been the case that he wanted to assure the legal academy that the Council had acted reasonably.<sup>336</sup> Chief Justice Burger also conceded that Judge Chandler may have believed he had not acquiesced to the Council’s Orders, but the opinion still maintained that Judge Chandler had in fact done so through his actions.<sup>337</sup> On May 19, 1970, Chief Justice Burger circulated another draft opinion, which contained only stylistic alterations from the May 15 draft.<sup>338</sup> A few days later, Justice Brennan informed Chief Justice Burger that he would join in the opinion.<sup>339</sup> At that point, Chief

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332. *Id.* (quoting Burger, March 27 Unpublished Draft Opinion, *supra* note 323).

333. *Id.*

334. *Id.*

335. Warren Burger, Chief Justice, U.S. Supreme Court, Unpublished Draft Opinion (May 15, 1970), *in* Chandler v. Judicial Council of the Tenth Circuit of the U.S., 398 U.S. 74 (1970) (on file with the Library of Congress) [hereinafter Burger, May 15 Unpublished Draft Opinion].

336. *Cf.* Hugo Black, Justice, U.S. Supreme Court, Unpublished Draft Dissent (1970), *in* Chandler v. Judicial Council of the Tenth Circuit of the U.S., 398 U.S. 74 (1970) (on file with the Library of Congress) [hereinafter Black, Unpublished Draft Dissent] (responding to Chief Justice Burger’s draft opinion, and asserting that the mention of the two suits was irrelevant since the criminal complaint had been quashed and the civil suit arose from a defendant in a criminal case who charged Judge Chandler with malicious prosecution and sought compensation). This suit likewise was dismissed. *Chandler II*, 398 U.S. at 89.

337. *Chandler II*, 398 U.S. at 86–87.

338. *Compare* Burger, May 15 Unpublished Draft Opinion, *supra* note 335 (noting the language and format), *with* Warren Burger, Chief Justice, U.S. Supreme Court, Unpublished Draft Opinion (May 19, 1970), *in* Chandler v. Judicial Council of the Tenth Circuit of the U.S., 398 U.S. 74 (1970) (on file with the Library of Congress) (including almost identical language and format to the May 15 draft).

339. Letter from William Brennan to Warren Burger, *supra* note 330.

Justice Burger only needed three other justices to join with him since Justice Marshall had recused himself, and Justice Fortas had resigned.<sup>340</sup>

In December of 1969, Justice Douglas conveyed his draft dissent to Justice Black who informed him that he intended to join in it, but suggested modifying some of Justice Douglas' strident language.<sup>341</sup> Justice Black also told Justice Douglas that while he would join in the dissent, he intended to separately dissent as well.<sup>342</sup> Justice Black's original dissent, written in pencil, is almost verbatim to his published dissent.<sup>343</sup> Justice Black designed his dissent as a defense of Justice Douglas, rather than attack on the majority.<sup>344</sup>

Justice Douglas' dissent characterized Judge Chandler's appeal as one of the "liveliest, most controversial contest[s] involving a federal judge in modern United States history."<sup>345</sup> It is clear—whether Justice Douglas intended to use his dissent as an attack on the various efforts to amend the code of judicial ethics as well as to defend against attacks on himself—that the dissent carried strong language against any encroachment into judicial independence.<sup>346</sup>

340. See *Chandler II*, 398 U.S. at 88 ("Mr. Justice MARSHALL took no part in the consideration or decision of this case."); Taft's Statement on Justice Fortas' Resignation, *supra* note 233 (noting Justice Fortas had resigned from the Court).

341. Letter from William Douglas, Justice, U.S. Supreme Court, to Hugo Black, Justice, U.S. Supreme Court (Dec. 31, 1969) (on file with the Library of Congress); see also Memorandum from Hugo Black, Justice, U.S. Supreme Court, to the Justices of the U.S. Supreme Court (Jan. 5, 1970) (on file with the Library of Congress) [hereinafter Memorandum from Black to Justices]; William Douglas, Justice, U.S. Supreme Court, Unpublished Draft Dissent (Dec. 1969), in *Chandler v. Judicial Council of the Tenth Circuit of the U.S.*, 398 U.S. 74 (1970) (on file with the Library of Congress) (noting Justice Black's hand-written notes on Justice Douglas's draft dissent indicated approval).

342. Memorandum from Black to Justices, *supra* note 341.

343. Compare Black, Unpublished Draft Dissent, *supra* note 336 (setting forth an opinion almost exactly the same to the one Justice Black authored in *Chandler II*), with *Chandler II*, 398 U.S. at 141–43 (Black, J., dissenting) (exhibiting the same language as Justice Black's earlier penciled dissent).

344. See Black, Unpublished Draft Dissent, *supra* note 336 (indicating the dissent is a defense of Justice Douglas' opinion).

345. *Chandler II*, 398 U.S. at 130 (Douglas, J., dissenting).

346. See, e.g., *id.* at 136–37 ("An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge."). Justice Douglas specifically wrote:

The mood of some federal judges is opposed to this view and they are active in attempting to make all federal judges walk in some uniform step. What has happened to petitioner is not a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren. The result is that the nonconformist has suffered greatly at the hands of his fellow judges.

### B. *The Decision*

Chief Justice Burger began his published decision with a brief but incomplete history of Judge Chandler's appeal.<sup>347</sup> For instance, nowhere in the majority opinion was there a mention of the House Judiciary Committee's inquiry into Judge Chandler, Judge Murrah, and Judge Bohanon's conduct.<sup>348</sup> Instead, Chief Justice Burger noted simply that in December 1965, the Judicial Council of the Tenth Circuit convened a special session and issued an order—and this description, he felt, adequately detailed the “long history of controversy between [Judge Chandler] and the Council.”<sup>349</sup> After this brief description of the story between Judge Chandler and the Judicial Council, Chief Justice Burger then moved to the question of whether the Council had diminished Judge Chandler's constitutional powers.<sup>350</sup> Chief Justice Burger recognized Judge Chandler's allegation that the Council effectively stripped him of his judicial authority, but also wrote that the Council countered by arguing that it had merely undertaken an administrative prerogative granted by Congress.<sup>351</sup> Chief Justice Burger also acknowledged Judge Chandler's argument that the Council usurped Congress' impeachment authority through its March 27 Order removing him from further cases.<sup>352</sup>

He then turned to the constitutional nature of the issue, that is, whether the actions of the Council had negatively impacted the judicial independence of the federal trial judges in the Western District of Oklahoma.<sup>353</sup> He made

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*Id.* at 137. He also coined: “All power is heady thing as evidenced by the increasing efforts of groups of federal judges to act as referees over other federal judges.” *Id.*

347. *Id.* at 75–82 (majority opinion).

348. *See generally id.* (failing to mention the investigation that spawned from H.R. Res. 739).

349. *Id.* at 77. Chief Justice Burger also placed 28 U.S.C. § 332—the operative statute establishing judicial councils—into a footnote, and noted that the Council based its authority on this decision. *Id.* at 76 n.1.

350. *Id.* at 75–82, 84.

351. *Id.* at 82–83. In addition to recognizing the Council's primary argument, Chief Justice Burger also noted that the Council effectively urged the Court to find that the controversy no longer existed because Judge Chandler and the other district court judges had agreed to the division of judicial labor in the district. *Id.* at 84.

352. *Id.* at 82.

353. *Id.* at 84. Here, Chief Justice Burger noted:

Whether the action taken by the Council with respect to the division of business in Judge Chandler's district falls to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence is the ultimate question on which review is sought in the petition now before us.

it clear that the majority recognized that judicial independence was a hallmark of democracy.<sup>354</sup> However, having recognized the importance of the constitutional question at hand, he then turned to the reason the Court would not grant review of the actual question involved.<sup>355</sup> A writ of mandamus, or prohibition such as Judge Chandler had sought, could only be granted by the Court if the writ was issued “in aid of [the Court’s] jurisdiction.”<sup>356</sup> Because Judge Chandler had acquiesced to the Council’s February 4 Order, Chief Justice Burger reasoned that he could not seek relief in the Court.<sup>357</sup> Instead, Chief Justice Burger determined that Judge Chandler would first have had to seek relief in the Council—in order to present a true case or controversy—and, that at the time the Court reviewed Judge Chandler’s appeal, no justiciable case or controversy existed.<sup>358</sup>

In short, Chief Justice Burger led the majority of the Court to find that because the Council had acted within its administrative authority, and Judge Chandler had either acquiesced to this authority or had not sought a further remedy through the Council, no constitutional dispute between the

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*Id.*

354. *Id.* The Court specifically held:

There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.

*Id.*

355. *Id.* at 86. Under the “All Writs Act,” 28 U.S.C. § 1651(a), the Court had to determine whether to grant a writ in light of an aid to its own jurisdiction. *Id.* at 86 (citing *Marbury v. Madison*, 5 U.S. 137, 173–80 (1803)). The specific wording of the Act is: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* at 76 n.2 (quoting 28 U.S.C. § 1651(a) (1988)). One might conclude that Judge Chandler’s appeal clearly fell within the plain language of this Act because his allegation against the Judicial Council was that it interfered with the independence of the district courts to the detriment of not only of the Judge, but also the principle of separation of powers, as well as the right to an impartial trial judge. *See id.* at 84 (delineating aspects of the reasoning behind Judge Chandler’s appeal). Moreover, it was highly probable after the Council issued its Order that one appeal to the Supreme Court would originate in the United States District Court for the Western District of Oklahoma—or at least within one of the other districts within the Tenth Circuit. *Cf. id.* at 86 (referring to a challenged Judicial Council action, and suggesting, “perhaps it could be reviewed by this Court”).

356. *Id.* at 86 (quoting *Ex parte Republic of Peru*, 318 U.S. 578, 582 (1943)).

357. *Id.* at 87–89.

358. *Id.*

district court and the Council existed.<sup>359</sup> Although Chief Justice Burger did not overtly apply an exhaustion of administrative remedies test to the decision, it can be inferred that he adopted the basic tenets of this test by implication.<sup>360</sup> To this end, Chief Justice Burger finished the decision by acknowledging that Judge Chandler could, in the future and under narrow circumstances, refile an appeal for a writ of mandamus or prohibition against the Council.<sup>361</sup>

Justice Harlan concurred with the result, but chastised the majority for acknowledging that the first question in Judge Chandler's appeal was one of jurisdiction, yet failing to answer whether jurisdiction existed.<sup>362</sup> The central question, Justice Harlan believed, was whether the Council's actions were administrative; that is, whether the actions fell outside of Article III review, or whether they were judicial and therefore subject to appellate review.<sup>363</sup> He conceded in the middle of his concurrence that while several of the roles Congress provided for the Council to undertake (such as appointing and firing clerks, designing process forms and court seals, or designating court times) were "trivial" and, therefore, unlikely to be reviewable in an Article III court, none of these "trivial" duties had an effect on the independence of trial judges.<sup>364</sup> But he maintained that the Council's actions presented an issue of constitutional dimension.<sup>365</sup> Further, Justice Harlan pointed out that Congress had never addressed the question of whether the actions of the councils were exempted from the All Writs Act.<sup>366</sup>

To Justice Harlan, there were three aspects of Judge Chandler's appeal that required the Court to rule. First, whether the actions of the Council presented a case or controversy.<sup>367</sup> Second, whether the Court had

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359. *Id.*

360. *See generally* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (“[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”). *See also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424–58 (1965) (laying out the basic tenants of the test for exhaustion of administrative remedies).

361. *See Chandler II*, 398 U.S. at 89 (implying the Court could not review Judge Chandler's appeal plainly because he did “not ma[k]e a case for the *extraordinary* relief of mandamus or prohibition” (emphasis added)).

362. *Id.* at 89–90 (Harlan, J., concurring).

363. *Id.* at 95.

364. *Id.* at 110–11.

365. *Id.* at 111.

366. *Id.* at 112.

367. *Id.* at 89.

jurisdiction.<sup>368</sup> Finally, whether the Judicial Council had acted within its statutory authority.<sup>369</sup> Regardless of whether Judge Chandler was pressured to acquiesce to the Council's February 4 Order or whether he volunteered to accept the February 4 Order, Justice Harlan pointed out that the Court still had an independent duty to assess whether the Council had acted within its constitutional and statutory authority.<sup>370</sup> Moreover, Justice Harlan disagreed with the majority's belief that Judge Chandler had to renounce his acquiescence to the Council in order to prove that a controversy still existed.<sup>371</sup> He further criticized the majority for suggesting that a district court could review the Council's decisions since the decisions were purely administrative.<sup>372</sup>

Justice Harlan next turned to the question of the Court's jurisdiction to hear Judge Chandler's appeal. After reviewing the legislative intent underlying the creation of the councils, he determined that the Court did affirmatively possess jurisdiction.<sup>373</sup> He reasoned that because the judicial councils were statutorily created, partly to ensure judicial efficiency in the district courts, this meant that the councils had the ability to participate in the "management of the judicial work of the circuit."<sup>374</sup> In other words, the councils possessed a supervisory role over the district courts, and in the event an order was issued from a council (such as the Orders issued to Judge Chandler as well as the other judges in the Western District of Oklahoma), the Orders necessarily affected the litigation in the district

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368. *Id.* at 95.

369. *Id.* at 111.

370. *Id.* at 90–92.

371. *Id.* at 91–92. Justice Harlan specifically criticized the majority for stretching *Rescue Army v. Municipal Court of Los Angeles* and concluding that Judge Chandler's failure to seek an administrative remedy deprived the Court of jurisdiction. *Id.* at 92–93 (citing *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549 (1947)). *Rescue Army* arose from a challenge against a municipal ordinance prohibiting "door to door" solicitations for charity. *Rescue Army*, 331 U.S. at 550. The California Supreme Court determined, somewhat ambiguously, that although it would not issue a writ of prohibition against Los Angeles' enforcement of the ordinance, the plaintiffs still had a route to challenge the ordinance through a trial in case the plaintiffs were convicted. *Id.* at 579. Additionally, the plaintiffs had twice been convicted in municipal court, but the superior court had reversed the convictions. *Id.* at 553. Because *Rescue Army* arose from a state enforcement action and the plaintiff had another trial pending with the possibility of full state appellate review, one might conclude that Justice Harlan's criticism of the majority appears justified. See generally *id.* ("As in [Judge Chandler's] case, the Court's action had the effect of rejecting the appellant's claim of a right to obtain relief without further proceedings in a lower tribunal[.]" (quoting *Chandler II*, 398 U.S. at 93 (Harlan, J., concurring))).

372. *Chandler II*, 398 U.S. at 93–94 (Harlan, J., concurring).

373. *Id.* at 103–05.

374. *Id.* at 98.

courts.<sup>375</sup> To Justice Harlan, this meant that the Orders were judicial, not administrative, and therefore, the Court possessed jurisdiction under the All Writs Act to review orders, such as the March 27 Order issued by the Council to Judge Chandler.<sup>376</sup>

Justice Harlan next assessed whether the Council had acted lawfully. He conceded that the March 27 Order was problematic, but because the Council superseded its March 27 Order in its February 4 Order, and because this second Order was purely administrative (he coined it as “an effort to move along judicial traffic in the District Court”), no constitutional infirmity, such as the removal of a judge short of impeachment, arose from it.<sup>377</sup> Justice Harlan cited *United States v. Malmin*,<sup>378</sup> a 1921 decision, for the proposition that courts of appeals have the administrative authority to ensure the continual movement of cases through the district courts.<sup>379</sup> In *Malmin*, the governor general of the United States Virgin Islands removed a duly appointed federal judge and appointed a new judge without Senate confirmation.<sup>380</sup> The Third Circuit ordered the dismissed judge to return to his judicial duties because the governor general had acted without authority.<sup>381</sup> Justice Harlan, however, concluded that the Judicial Council’s February 4 Order, unlike the governor general’s in *Malmin*, placed a requirement on Judge Chandler only to certify that he was able to conduct further trials, and that therefore no permanent bar existed.<sup>382</sup>

Finally, Justice Harlan found it dispositive that the Council’s February 4 Order comported with the legislative intent underlying 28 U.S.C. § 332, and found it unnecessary to address the Council’s secondary argument that it had also complied with 28 U.S.C. § 137.<sup>383</sup> Notwithstanding Justice Harlan’s comprehensive analysis of the majority, he too seems to have missed a critical point in the history of Judge Chandler’s appeal. Despite one’s feelings about Judge Chandler’s dubious conduct, one might clearly

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375. *Id.* at 106.

376. *Id.* Justice Harlan reasoned that if the Court were to determine that the Council’s action was administrative in nature, then the Council would have usurped the authority of the district court. *Id.* at 102.

377. *Id.* at 118–19.

378. *United States v. Malmin*, 272 F. 785 (3d Cir. 1921).

379. *See id.* at 792 (“[C]onfessedly this court has power to restore the orderly proceedings of the trial court by commanding the absent judge to return and transact its business.”).

380. *Id.* at 787–88.

381. *Id.* at 792.

382. *Chandler II*, 398 U.S. at 120–21 (Harlan, J., concurring).

383. *Id.* at 126.



recognize the Council's failure to assert a strong quantum of evidence that he had been slow to rule on cases or that a backlog of trials existed.

Like Justice Harlan, Justice Douglas chastised the majority for not considering the constitutional questions raised by the Council's actions.<sup>384</sup> While it was true that the majority determined Judge Chandler had "acquiesced" to the Council's February 4 Order, the Council had clearly concluded that there was an ongoing controversy between Judge Chandler and itself by continuing the March 27 Order.<sup>385</sup> Like the majority, Justice Douglas did not note that the Legislative Branch had already taken cognizance of the in-fighting between Judge Chandler and Judge Murrah.<sup>386</sup> Instead, Justice Douglas reminded his fellow Justices that in 1941, in *Textile Mills Securities Corp. v. Commissioner*,<sup>387</sup> the Court found efforts by courts of appeals to expedite cases through the district courts through the establishment of rules governing en banc hearings to be characterized as functions that are inherently judicial, rather than administrative.<sup>388</sup> To Justice Douglas, the Council's February 4 Order to Judge Chandler did not erase the impact of its March 27 Order because Judge Chandler remained disqualified from serving on new cases and remained under the stigma of the March 27 Order.<sup>389</sup>

Justice Douglas then turned to the constitutional implications in the majority's decision. "An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge[.]" Justice Douglas argued.<sup>390</sup> "He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him."<sup>391</sup> Justice Douglas tried to remind the majority that only Congress could determine whether a judge had the qualifications or proper conduct for continued judicial

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384. *Cf. id.* at 132–33 (Douglas, J., dissenting) (noting Judge Chandler's central argument was that it was "illegal for the Council to deprive him of new cases").

385. *See id.* at 90 (Harlan, J., concurring) ("In light of this continued challenge to the order, the Solicitor General in March 1966 agreed 'that the case can no longer be deemed moot.'").

386. *See generally id.* 129–42 (Douglas, J., dissenting) (omitting legislative notice of an altercation between Judge Chandler and Judge Murrah).

387. *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326 (1941).

388. *Chandler II*, 398 U.S. at 134–35 (Douglas, J., dissenting) (citing *Textile Mills*, 314 U.S. at 326).

389. *Id.* at 135.

390. *Id.* at 136.

391. *Id.*

service.<sup>392</sup> Additionally, he noted the Supreme Court lacked the authority to censor or discipline any federal judge.<sup>393</sup> The dangers inherent in the Council's actions, he concluded, "may have profound consequences" in that they enable any of the councils to ensure a particular district court judge is foreclosed from sitting on "a racial case, church-and-state case, [or] a free press case . . . ."<sup>394</sup> Had Justice Douglas ended on this note, his argument might have appeared to be a pure constitutional disagreement between the dissent and the Burger-led majority. However, Justice Douglas turned to a list of his complaints about judicial administration.

Oddly, Justice Douglas's primary anger appears to have been directed at the actions of the Judicial Conference of the United States—the statutorily created "administrative function" consisting of the chief justices of the circuit courts, the chief justice of the Supreme Court, and occasionally chief judges of the district courts.<sup>395</sup> Today, among its myriad of duties, the Judicial Conference is responsible for studying the performance of the courts in order to promote judicial efficiency, but it can also conduct investigations, and it has subpoena authority.<sup>396</sup> Moreover, as previously noted, the Conference annually reports to Congress on its proceedings.<sup>397</sup> Perhaps in response to the Senate investigation into Justice Fortas and his eventual resignation in May 1969, the Conference issued a resolution which authorized the judicial councils to pass judgment as to whether a judge could serve as the executor of a will or teach at a law school.<sup>398</sup> Justice Douglas pointed out that none of these constraints on judges were constitutional until, perhaps, Congress enacted new rules, but such judicially imposed constraints (Justice Douglas labelled them judicial "hazing") suggested they could likewise be used to intimidate judges and encroach on their independence.<sup>399</sup> Justice Douglas concluded: "It is time we put an end to

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392. *Id.*

393. *See id.* at 136–37 (emphasizing no federal judge nor a group of federal judges may sanction another federal judge).

394. *Id.*

395. *Id.* at 136–39; *see also* Judicial Code of 1948, Pub. L. No. 80-773, ch. 646, § 331, 62 Stat. 902, 902 (proposing the parties attend the Judicial Conference).

396. 28 U.S.C. § 331 (2012).

397. *Id.*

398. *See Chandler II*, 398 U.S. at 137–38 (Douglas, J., dissenting) ("On June 10, 1969, the Judicial Conference adopted resolutions for the governance of many activities of circuit judges and district judges."); *see also* Taft's Statement on Justice Fortas' Resignation, *supra* note 233 (referencing charges against Justice Fortas that ultimately led to his resignation in May of 1969).

399. *Chandler II*, 398 U.S. at 140–41.

the monstrous practices that seem about to overtake us, by vacating the orders of the Judicial Council that brand Judge Chandler as unfit to sit in oncoming cases.”<sup>400</sup> Although Justice Black joined in Justice Douglas’ dissent, he also separately dissented, and accused the majority of “break[ing] faith with [the] grand constitutional principle” of an independent judiciary.<sup>401</sup>

#### IV. THE USE OF *CHANDLER*

For almost a decade after *Chandler II*, neither the judicial nor legislative branches acted to clarify the extent to which the judicial councils could administratively supervise district court judges, or for that matter, the judges on the courts of appeals. In 1973, the Third Circuit Court of Appeals, in *In re Imperial “400” National Inc.*,<sup>402</sup> addressed its own Judicial Council’s authority to promulgate rules through a tortuous examination of the relationship between the Council and a district court.<sup>403</sup> One year earlier, the Judicial Council for the Third Circuit issued a rule preventing a lawyer from representing a trustee if the lawyer’s firm had also submitted a bankruptcy plan or overseen a bankruptcy proceeding involving the trustee.<sup>404</sup> The United States District Court for the District of New Jersey upheld the rule after an attorney challenged that its application created a forced severance of an existing attorney-client relationship.<sup>405</sup> While the rule may have been important, the fact that the Third Circuit ultimately sat in judgment of its own rule—or that a district court found that the Council’s rule was lawful—should have raised a question as to whether the right to an independent and impartial appellate review existed in this situation. The appellate court determined, however, that it was not sitting in judgment of

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400. *Id.* at 141.

401. *Id.* at 142 (Black, J., dissenting). It should be noted that Justice Douglas joined Justice Black in this separate dissent. *Id.* at 141.

402. *In re Imperial “400” Nat’l, Inc.*, 481 F.2d 41 (3d Cir. 1973).

403. *Id.* at 45–46.

404. *Id.* at 42.

405. *Id.* However, it should be noted that in *Nolan v. Judicial Council of the Third Circuit*, the Judicial Council advanced the argument of the district court that, the district court did not possess jurisdiction to examine its rule on the basis that “no case or controversy” arose as a result of its implementation. 346 F. Supp. 500, 511 (D. N.J. 1972), *aff’d*, *In re Imperial “400” Nat’l, Inc.*, 481 F.2d 41 (3d Cir. 1973). *Nolan* was the predecessor decision to *Imperial*. See *Imperial*, 481 F.2d 41, 42 (3d Cir. 1973) (“On May 2, 1972[,] the district court, pursuant to this resolution, removed appellant, Joseph M. Nolan, Esq., as counsel[.]”).

itself, rather, it determined that it sat in judgment of the lower court.<sup>406</sup> Although the aggrieved party sought certiorari, the Supreme Court never granted review.<sup>407</sup>

One legal scholar commented that the majority in *Chandler II* “sidestepped [the] core issue” in front of the Court.<sup>408</sup> As evidenced by *In re Imperial*, this is a charitable description of what the majority accomplished in *Chandler II*, for its legacy in one significant area—the lack of a formal standard of proof to assess any judicial discipline—created an unintended means for diminishing judicial independence.<sup>409</sup> This is not to argue that there is the same lack of standards in the present time as there was in 1970, or that Judge Chandler’s conduct would be acceptable under present standards. Concededly, since *Chandler II*’s issuance, one might believe that both Congress and the courts have brought greater clarity and discernable standards to judicial regulation. Nonetheless, there remain dangers to judicial independence that the Court could have solved in 1970.

#### A. Legislative Responses to Chandler

In 1980, and in response to *Chandler II*, Congress enacted 28 U.S.C § 372, an act referred to as the Judicial Councils Reform and Judicial Conduct and Disability Act.<sup>410</sup> This Act empowered the judicial councils to determine when a judge is encumbered by a disability.<sup>411</sup> It was also enacted to provide greater public transparency to the adjudication of complaints against judges.<sup>412</sup> Today, the Act essentially enables a judicial council to find that if a judge is unable to function due to physical or mental disability, the president may appoint another judge (subject to Senate confirmation),

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406. *Imperial*, 481 F.2d at 42.

407. *Judicial Council of the Third Circuit v. Nolan*, 414 U.S. 880 (1973) (mem.).

408. Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POL’Y REV. 33, 41 (2012).

409. *See, e.g., Imperial*, 481 F.2d at 42 (“The circuit council, while composed of judges, is an administrative body, and not a court.”).

410. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as 28 U.S.C § 372 (2012)). *See also* *United States v. Washington*, 98 F.3d 1159, 1165 (9th Cir. 1996) (Kozinski, J., concurring) (citation omitted) (acknowledging *Chandler* was the impetus for the 1980 Act).

411. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, § 3(a)(6), 94 Stat. at 2037.

412. *Cf.* Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 792 (2015) (discussing a different bill founded upon questions of “the judiciary’s ability to self-regulate[.]” where speakers at its hearing argued the bill would “strengthen judicial independence and give the public ‘greater faith’ in the judiciary”).

preventing the disabled judge from serving on cases.<sup>413</sup> This Act was part of an update to both 28 U.S.C. §§ 331 and 332.<sup>414</sup> The federal courts have interpreted the 1980 Act as empowering the judicial councils to internally investigate the conduct of district court judges, which includes equating a lack of “judicial temperament” to an inability to perform judicial duties.<sup>415</sup> In 1980, Judge Gerhard Gesell of the United States District Court for the District of Columbia noted that the 1980 Act, unlike the 1939 Act establishing the judicial councils, was an express statutory grant of authority to the Judicial Branch “to put its own house in order.”<sup>416</sup>

Another significant addition to judicial governance and the authority of the judicial councils was enacted in 2002.<sup>417</sup> Now, when an aggrieved person or party files a complaint against a judge, the chief judge on the court of appeals determines whether the complaint is frivolous or should be

413. 28 U.S.C. § 372(b) (2012).

414. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, § 3(a), 94 Stat. at 2035, 2038–39.

415. *See, e.g.,* McBryde v. Comm. to Review Circuit Council Conduct, 83 F. Supp. 2d 135, 140 (D. D.C. 1999) (“The conduct targeted by the Act ranges from such intangibles as a lack of ‘judicial temperament’ to patterns of abusive behavior that threatens to undermine the integrity of the judiciary as a whole, as well as behavior symptomatic of an underlying disease.”), *aff’d in part and vacated in part*, McBryde v. Comm. to Review Circuit Council Conduct, 264 F.2d 52 (D.C. Cir. 2001). This decision originated within the Court of Appeals for the Fifth Circuit, in which the Judicial Council for that circuit determined that Judge John J. McBryde of the United States District Court for the Northern District of Texas had engaged in “conduct prejudicial to the effective administration of the business of the courts.” *Id.* at 139. The Council reprimanded Judge McBryde and disqualified him from hearing new cases for a one year period. *Id.* He was also prohibited from hearing cases with certain attorneys for a three-year period. *Id.* When Judge McBryde challenged the decision, the District Court for the District of Columbia was appointed to determine the appeal. *Id.* at 135. The District Court in this decision alleged that McBryde had adopted Justice Douglas’s dissent in his arguments that only Congress could discipline him in this manner. *Id.* at 154, 156. The difference, however, between *Chandler II* and *McBryde*, is that by the time of McBryde’s appeal, Congress had authorized the Council to act as it had. *See id.* at 156 (recognizing a group of judges may act “in an administrative capacity to investigate and remedy ‘conduct prejudicial to the effective and expeditious administration of the business of the courts’” (citing 28 U.S.C. § 372(c)(1))); Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, § 3(c), 94 Stat. at 2040 (authorizing, in 1980, judicial councils to act as they did in *McBryde*); *Chandler II*, 398 U.S. at 142 (warning of “a blatant effort on the part of the Council . . . to make Judge Chandler a ‘second-class judge,’ depriving him of the full power of his office[.]” and stressing a lack of authority, both in the Constitution and in statutes, authorizing judges to appropriate such authority).

416. *Hastings v. Judicial Conference of U.S.*, 593 F. Supp. 1371, 1374 (D. D.C. 1984), *aff’d in part and vacated in part*, *Hastings v. Judicial Conference of the U.S.*, 770 F.2d 1093 (D.C. Cir. 1985).

417. Judicial Improvements Act of 2002, Pub. L. No. 107-273, 116 Stat. 1848 (codified as amended at 28 U.S.C. §§ 351–64 (2012)).

investigated.<sup>418</sup> Informal investigations that result in counseling do not require a council's intervention.<sup>419</sup> If a chief judge determines that no formal investigation is necessary, neither the complaining party nor the judge has standing to challenge this determination in court.<sup>420</sup> However, if the chief judge determines that an investigation is necessary, she or he may refer the matter to a judicial council that, in turn, can decide by a majority vote whether to investigate the complaint by the appointment of five judges.<sup>421</sup>

One improvement since *Chandler II* is that there is now a minimum requirement that two district court judges must serve on an investigation panel—in the event that the subject of the complaint is a district court judge.<sup>422</sup> The chief judge may also convene an investigation panel composed of the chief judge, and an equal number of district court and circuit court judges.<sup>423</sup> In the event the chief judge forms such an investigation panel, the panel may only make recommendations to the circuit's judicial council.<sup>424</sup> A judicial council, in turn, determines whether

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418. 28 U.S.C. § 352(b) (2012).

419. *Id.* § 352(a).

420. *Id.* § 352(c). This section reads:

A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof. The denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

*Id.*

421. *Id.* § 352(d). "Each judicial council may, pursuant to rules prescribed under section 358, refer a petition for review filed under subsection (c) to a panel of no fewer than [five] members of the council, at least [two] of whom shall be district judges." *Id.*

422. *Id.*

423. *Id.* § 353(a). Specifically, section 353(a) reads:

Appointment.—If the chief judge does not enter an order under section 352(b), the chief judge shall promptly—

- (1) appoint himself or 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;
- (2) certify the complaint and any other documents pertaining thereto to each member of such committee; and
- (3) provide written notice to the complainant and the judge whose conduct is the subject of the complaint of the action taken under this subsection.

*Id.*

424. *Id.* § 353(c). Section 353(c) explains that a committee conducting an investigation must execute such investigation as thorough as necessary. *Id.* The committee is required to "file a

to dismiss the complaint, investigate further, or “take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.”<sup>425</sup> A judicial council has the authority to prevent the assignment of new cases to a trial judge, as well as the authority to privately or publicly reprimand or censure the judge.<sup>426</sup> However, any order prohibiting the assignment of new cases to a judge must have a defined termination date.<sup>427</sup> The Judicial Conference is the only level of review to which a judge is entitled when challenging a council’s disciplinary decision.<sup>428</sup> The Conference may recommend impeachment to Congress, adopt the judicial council’s determination, or make a separate determination.<sup>429</sup> Again, such determinations are not judicially reviewable.<sup>430</sup>

While Congress has provided a right of notice for investigated judges, there is no right for an amicus brief to be filed on behalf of a judge, and there is an absence of a standard of proof required to justify any quantum of discipline against a judge.<sup>431</sup> Instead, Congress left to the judicial

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comprehensive written report . . . with the judicial council of the circuit.” *Id.* “Such report shall present both the findings of the investigation and the committee’s recommendations for necessary and appropriate action by the judicial council of the circuit.” *Id.*

425. *Id.* § 354(a)(1)(C).

426. *Id.* § 354(a)(2)(A).

427. *Id.* § 354(a)(2)(A)(i).

428. *See id.* § 355 (allowing investigated judges to seek an independent review of a judicial council’s determination by the Judicial Conference); *see also id.* § 357 (setting forth the restriction for judicial review). Particularly, section 357(a) states: “A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof.” *Id.* 357(a). This section allows the Judicial Conference, or a standing committee, to grant or deny filed petitions. *Id.* 357(b).

429. *Id.* § 355(b).

430. *Id.* § 357(c) (refusing judicial review of final decision).

431. In particular, section 358(b) requires rules promulgated under subsection (a) to include terms requiring:

- (1) adequate prior notice of any investigation be given in writing to the judge whose conduct is the subject of a complaint under this chapter;
- (2) the judge whose conduct is the subject of a complaint under this chapter be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and
- (3) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

councils and the Judicial Conference the authority to prescribe rules for the conduct of their own proceedings.<sup>432</sup> While Congress adhered to the separation of powers principles in enacting these procedures, the lack of a continuous legal standard of proof remains a deficiency for both the rights of an individual judge as well as a potential source to undermine the independence of trial judges. *Chandler II* should have served as a warning to cure this deficiency.

#### B. *Judicial Use of Chandler*

It is true that in the past two decades the judicial councils have addressed allegations of judicial misconduct far more transparently and appropriately than when the Judicial Council of the Tenth Circuit examined Judge Chandler in 1965. For instance, in 2010, the Judicial Council for the Ninth Circuit held that the judicial councils are not the appropriate vehicle for reviewing a judge's decision not to recuse himself or herself when accused of bias.<sup>433</sup> But transparency has not been true in all matters.

In 2005, the Judicial Council for the Second Circuit admonished a judge who—during a 2004 American Constitutional Law Society meeting—analagized the Supreme Court's *Bush v. Gore*<sup>434</sup> decision to the 1922 installation of Benito Mussolini as Italian Prime Minister by King Victor Emmanuel III, and encouraged the audience not to vote for George W. Bush.<sup>435</sup> The Judicial Council for the Second Circuit did not inform the public that the subject of the investigation was Judge Guido Calabresi, even though it found that Judge Calabresi had violated a prohibition within the judicial ethics canons.<sup>436</sup> On the other hand, in 2014, the Judicial Conference Committee on Judicial Conduct and Disability determined that the Ninth Circuit Judicial Council's reprimand of Judge Richard F. Cebull (of the United States District Court for the District of Montana) was meritorious as it was based on the fact that Judge Cebull had sent racist

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*Id.* § 358(b). Section 359(b) reads: "No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this chapter."

*Id.* § 359(b).

432. *Id.* § 358(b).

433. *In re* Complaint of Judicial Misconduct, 605 F.3d 1060, 1061 (9th Cir. 2010).

434. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

435. *In re* Charges of Judicial Misconduct, 404 F.3d 688, 700 (2d Cir. Jud. Council 2005).

436. *Id.*



e-mails regarding President Barack Obama.<sup>437</sup> The difference between Judge Calabresi and Judge Cebull is that Judge Cebull expressly waived confidentiality.<sup>438</sup>

In 2008, the Judicial Conference promulgated rules governing investigations by judicial councils.<sup>439</sup> The rules took effect following a committee headed by Justice Steven Breyer, and were drafted to compliment the 1980 Judicial Conduct and Disability Act.<sup>440</sup> Once a complaint against a judge is forwarded to the chief judge of a court of appeals, the chief judge must determine whether there is “clear and convincing evidence” of misconduct, and if so, whether to forward the complaint for a formal investigation.<sup>441</sup> This is the only step in which a legal standard exists.<sup>442</sup> As a result, the federal judiciary has not adequately addressed *Chandler I*’s key deficiency, that is, the lack of a clear legal standard for determining judicial misconduct throughout the entire process, as well as standards for the chosen remedies.

Since its issuance, *Chandler II* has been cited over one hundred times—generally for the proposition that appellate judges serving in their council capacity possess supervisory authority over lower court judges.<sup>443</sup> As an example, in *In re Certain Complaints Under Investigation*,<sup>444</sup> the Court of

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437. See *In re Complaint of Judicial Misconduct*, 751 F.3d 611, 613 (Jud. Conf. U.S. 2014) (finding the investigation was warranted based on an email sent from a judicial account making race-related remark about President Obama and his mother after “this incident became public through media reports”).

438. Compare *id.* at 614 (expressly waiving confidentiality), with *Charges of Judicial Misconduct*, 404 F.3d at 700 (failing to expressly waive confidentiality).

439. RULES FOR JUD. CONDUCT, *supra* note 118. See generally Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 325, 325–29 (2008) (“This article examines the newly adopted misconduct rules against the background of these recent controversies and the concerns they have generated in Congress . . .”).

440. Scirica, *supra* note 412, at 787.

441. GUIDE TO JUDICIARY POLICY vol. 2, pt. E, ch. 3, art. II, r. 5 (JUD. CONF. U.S. 2015), <http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf> [perma.cc/9DTK-B8MZ].

442. See generally *id.* at vol. 2, pt. E, ch. 3 (promulgating the “clear and convincing” standard—and only the “clear and convincing” standard).

443. See, e.g., *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1505 (11th Cir. Jud. Council 1986) (“The majority in *Chandler [II]* indicated that there was no constitutional obstacle to the broadly worded grant of authority to judicial councils . . .”), *superseded by statute*, Judicial Discipline & Removal Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5124 (1990) (codified as 28 U.S.C. § 332(d)(2) (2012)).

444. *In re Certain Complaints Under Investigation*, 783 F.2d 1488 (11th Cir. Jud. Council 1986), *superseded by statute*, Judicial Discipline & Removal Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5124 (1990) (codified as 28 U.S.C. § 332(d)(2) (2012)).

Appeals for the Eleventh Circuit noted that the Burger Court had recognized that some “management power” existed in the judicial councils, but the appellate court also correctly discerned that the *Chandler II* majority never determined whether the Judicial Council of the Tenth Circuit had exceeded its authority.<sup>445</sup> The Eleventh Circuit also opined that Justice Douglas and Justice Black had viewed United States District Courts as “mere collections of individual judges, each of whom is a complete law unto himself or herself.”<sup>446</sup> Neither Justice Douglas nor Justice Black propounded this theory—but it does seem to be the appellate court’s interpretation of their dissents.<sup>447</sup> The *In re Certain Complaints* case arose from United States District Court Judge Alcee Hastings’s challenge to a judicial investigation of his conduct.<sup>448</sup> This investigation was organized pursuant to the 1980 statutory addition to the original act which enabled the councils to investigate the conduct of lower court judges.<sup>449</sup> As a result, *Chandler II* had only indirect applicability to the issue before the Eleventh Circuit, but one might still find the characterization of the dissent troubling. Not only is the “complete law unto himself or herself” absent from Justice Douglas’ dissent, but at no time did Justice Douglas or Justice Black suggest that case assignment schemes from district court chief judges were unconstitutional, or that judicial discipline could only originate with Congress.<sup>450</sup>

In 2015, the Court of Appeals for the Ninth Circuit addressed a United States district court judge’s refusal to permit a Massachusetts-based Assistant United States Attorney to prosecute a trial in Nevada against Bank of America unless the United States Attorney for the District of Nevada certified that no assistant federal prosecutors employed in the Nevada office

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445. *Id.*

446. *Id.*

447. Compare *Chandler II*, 398 U.S. at 129–43 (“Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him.”), with *Certain Complaints*, 783 F.2d at 1505 (“We read *Chandler* as rejecting any fixed notion . . . that courts are mere collections of individual judges, each of whom is a complete law unto himself or herself. Two of the justices who participated in *Chandler*, Justices Douglas and Black, did indeed take this view, but in dissent.”).

448. *Certain Complaints*, 783 F.2d at 1491.

449. *Id.*

450. *Id.* at 1505; see generally *Chandler II*, 398 U.S. at 129–43 (expressing a view different from that extended by the *Certain Complaints* opinion).

were capable of prosecuting the case.<sup>451</sup> Apparently, the district court judge, Robert Clive Jones, had instituted a policy preventing pro hac vice attorneys from appearing in his court.<sup>452</sup> The majority of the appellate court found that, because Jones had reversed his order after the United States filed a writ of mandamus, and that the error of denying pro hac vice appearances would likely not be repeated, they were not required to grant the writ.<sup>453</sup> However, Judge John Clifford Wallace, in his concurrence, cited to *Chandler II* for the proposition that the Judicial Council for the Ninth Circuit possessed the authority to require the district court to permit federal prosecutors to appear in the district court as a matter of ensuring court efficiency, and that formal mandamus writs were a misuse of the Court's time.<sup>454</sup> It would be reasonable to believe that Judge Wallace's interpretation of *Chandler I*'s applicability to a council's administrative authority over a district court judge's rule making is a sound analysis.

Moreover, the influence of the Court's handling of *Chandler II* reached beyond the United States. On July 13, 1965, Lucien Cardin (the Minister of Justice and Attorney General of Canada) asked Ivan Cleveland Rand (a retired Justice of the Supreme Court of Canada) to lead an inquiry into the conduct of Justice Leo Landreville, a judge on the Ontario Supreme Court.<sup>455</sup> Like Judge Chandler, Justice Landreville had been accused of improper fiscal and business relationships.<sup>456</sup> In Justice Landreville's case, he was accused of accepting monies from the Northern Ontario Natural Gas Corporation.<sup>457</sup> Up until this point, no Canadian judge had ever faced impeachment, and retired Justice Rand decided to quietly ascertain methods

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451. *In re* United States, 791 F.3d 945, 949–50 (9th Cir. 2015).

452. *Id.* at 950.

453. *Id.* at 951.

454. *Id.* at 961 (Wallace, J., concurring) (citing *Chandler II*, 398 U.S. at 86 n.7).

455. See S.A. Scott, Editor's Diary, *The Search for an Amending Process 1960–1967*, 12 MCGILL L.J. 337, 361, 367 (1966–1967) (asserting Lucien Cardin became “Minister of Justice and Attorney-General for Canada” on July 7, 1965, and that he retired April 4, 1967); PRIVY COUNCIL, INQUIRY RE: THE HONOURABLE MR. JUSTICE LEO A. LANDREVILLE 1 (1966) [hereinafter PRIVY COUNCIL, INQUIRY RE: LANDREVILLE], available at [http://publications.gc.ca/collections/collection\\_2016/bcp-pco/Z1-1966-2-eng.pdf](http://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1966-2-eng.pdf) [perma.cc/D3C9-YXDK] (“[O]n the recommendation of the Minister of Justice, advise that the Honourable Ivan Cleveland Rand, of Moncton, in the Province of New Brunswick, be appointed Commissioner under Part I of the Inquiries Act to inquire into the dealings of the Honourable Mr. Justice Leo A. Landreville . . .”).

456. See PRIVY COUNCIL, INQUIRY RE: LANDREVILLE, *supra* note 455, at 1, 3 (pointing out Landreville's relationship with Ralph K. Farris).

457. See *id.* (“[C]ircumstances revolving around the acquisition of 7,5000 shares of NONG for which he paid no consideration.”).

of judicial discipline in the United States.<sup>458</sup> He was given the name and address of Warren Olney III (Director of the Administrative Office of the United States Courts) for assistance.<sup>459</sup> The retired Justice Rand's effort to seek out information beyond and outside of the Court's *Chandler II* opinion illustrates a vital concern for the decision's potential to undermine judicial independence extending beyond the United States.

## V. CONCLUSION

It is doubtful that Chief Justice Burger and the Court's majority intended for *Chandler II* to permit an encroachment into the independence of trial judges by appellate judges under the guise of supervision—there is nothing in the decision's text to suggest this was the case. Although this Article has necessarily focused on the federal judiciary, there is more than a minor anecdotal indicium in the state courts that *Chandler II* can be interpreted as permitting such an encroachment. In *Halverson v. Hardcastle*,<sup>460</sup> the Nevada Supreme Court, relying on *Chandler II*, determined that the chief trial judge's administrative oversight of a trial judge could include aspects of judicial punishment in regard to the judge's performance, even though the state legislature had not acted against the judge.<sup>461</sup>

But not all state appellate courts have mirrored the Nevada court. In 1992, the Pennsylvania Supreme Court (describing its functions which are equivalent to the judicial councils in investigating allegations of judicial malfeasance) noted that the burden of proof by clear and convincing evidence rests with the accusation's proponent and not the subject judge—throughout the entirety of the investigatory proceedings—and then quoted

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458. See Letter to Ivan C. Rand, Former Justice, Canadian Supreme Court (Mar. 1, 1966) (on file with the Nat'l Archives of Can.) (suggesting Rand inquired into the names and addresses of U.S. officials who might be in a position to help with the mechanics of reviewing judicial conduct).

459. See *id.* (listing Director Olney as a contact).

460. *Halverson v. Hardcastle*, 163 P.3d 428 (Nev. 2007).

461. *Id.* at 444–45; see also *In re Mussman*, 289 A.2d 403, 404–05 (N.H. 1972) (announcing the authority to investigate a state trial judge and to remove that judge from further hearings when warranted, but dismissing the action because it had not yet ripened). In this decision, the New Hampshire Supreme Court determined that it possessed the authority to investigate the conduct of a state trial judge as well as remove him from hearing further cases, but then decided the issue was not ripe. *Id.* The trial judge in question was facing a disbarment proceeding by the state board of professional responsibility and the state supreme court sensibly, in the author's view, decided to wait to investigate so as not to prejudice a separate investigation, particularly since the trial judge had been removed from pending trials. *Id.*

Justice Black's dissent as a warning against encroachment into judicial independence.<sup>462</sup>

Thus, one state's judiciary has utilized *Chandler II* as a means for senior judges or judicial bodies to discipline a judge without regard to the state legislature, and another state has cautioned against *Chandler II*'s use to this effect. In doing so, the second state impliedly pointed out *Chandler I*'s key deficiency that remains to this day—the lack of a defined burden of proof on the councils and Conference in investigating and assessing judicial misconduct.

As a decision which stands for the proposition that the judiciary should have the administrative rule-making authority or the ability for a council to “referee” disputes between judges, *Chandler II* does present a reasonable citation. On the other hand, Chief Justice Burger's disregard of the recent legal and political history underlying Judge Chandler's appeals led the majority to issuing a rash decision that opened the possibility of encroachments into judicial independence by administrative bodies and higher courts, and, in turn, which could undermine a litigant's confidence in an independent and impartial judiciary. While there may be no need for a complete denunciation of *Chandler II*, the judiciary should recognize a remaining danger to judicial independence created by the flawed decision, and should limit the use of that decision to purely administrative issues, rather than legal issues.

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462. See *In re Larsen*, 616 A.2d 529, 534 (Pa. 1992) (“The hope for an independent judiciary will prove to have been no more than an evanescent dream.” (quoting *Chandler II*, 398 U.S. at 143 (Black, J., dissenting))).