U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530
(202) 514-3365

September 23, 2024

By Email

[redacted]
CREW
[redacted]

Re: OPR FOIA No. F22-00034 Fourth and Final Response (1st Referral)

Dear [redacted]

This letter is in response to your January 30, 2022 Freedom of Information Act (FOIA)/Privacy Act (PA) request to the Department of Justice (DOJ) Office of Professional Responsibility (OPR) seeking the following records from January 1, 2010, to the date we began to process your request:

1. All complaints or other submissions to DOJ's Office of Professional Responsibility ("OPR") regarding possible professional misconduct by any federal court of appeals judge, district court judge, magistrate judge, or bankruptcy judge.
2. All referrals made by OPR to any judicial disciplinary authority, state bar, or any other external entity regarding possible professional misconduct by any federal court of appeals judge, district court judge, magistrate judge, or bankruptcy judge.
3. All OPR reports, conclusions, or findings relating to items 1 or 2 above.

OPR received your request on January 20, 2022, and has assigned to it tracking number **F22-00034**. Please refer to this number in any correspondence pertaining to this matter.*

For this fourth and final interim response to your request for records related to the first judicial misconduct referral, OPR processed a total of 561 pages responsive to your request. Of the 561 pages, 19 pages (Bates-numbered F22-00034 00608 to 00626) were withheld in full pursuant to Exemptions 5, 6, and 7(C) of the FOIA, 5 U.S.C. § 522(b)(5), (b)(6) and (b)(7)(C). Exemption 5 pertains to certain inter- and intra-agency communications protected by the

* *For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.*

deliberative process privilege. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Exemption 7(C) pertains to information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties. Two hundred fourteen pages were non-responsive to your request and 212 pages were duplicate pages containing information already processed and provided, as appropriate, to you.

Enclosed please find 84 pages of responsive records. Of these 84 pages, 50 pages (Bates-numbered F22-00034 00492 to 00541) are appropriate for release without excisions and 34 pages (Bates-numbered F22-00034 00542 to 00575) are appropriate for release with excisions made pursuant to Exemptions 5, 6, and 7(C) of the FOIA, 5 U.S.C. § 522(b)(5), (b)(6) and (b)(7)(C). Please be advised that we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

Of the 32 pages of responsive records remaining, OPR determined that 15 pages (Bates-numbered F22-00034 00576 to 00590) contained information of interest to the Criminal Division (CRM) and 17 pages (Bates-numbered F22-00034 00591 to 00607) contained information of interest to CRM and the Professional Responsibility Advisory Office (PRAO); we will send these pages for consult to CRM and PRAO pursuant to 28 C.F.R. § 16.4(d). Upon receipt of the consultation responses, OPR will finalize and provide these pages, as appropriate, to you.

Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal with the Office of Information Policy.

Sincerely,

Carmen Smith Carter

Carmen Smith Carter
Assistant Counsel for the
Freedom of Information and Privacy Acts

Attachment: F22-00034 Processed and Produced Page Counts Chart

cc: Taylor Pitz
Trial Attorney
Federal Programs Branch
Civil Division

Attachment F22-00034 Processed and Produced Page Counts Chart						
Interim/ Monthly Interim	**Bates Nos.**	**No. of Pages Processed**	**Blank, Duplicate, Non-responsive Pages**	**Produced to Sus=S Consult=C Referral=R Withheld in Full=WIF**	**No. of Pages Produced**	**Pages Produced and Processed**
FEB 2023	1-66	66	62	S=4	66	66[†]
MAR 2023	67-283	217	0	S=1 R=137 (EOUSA) R=73(FBI) WIF=6	217	217
3rd Interim (Jan 29, 2024)	284-491	614	406	C=1 (EOUSA, CRM, FBI) R=182 (EOUSA) R=11 (CRM) R=14 (FBI)	208	614
4th Interim (Sept. 23, 2024)	492-626	561	426	S=84 C=15 (CRM) C=17 (CRM,PRAO) WIF=19	135	561
				Total Produced	**626**	
				Total Produced and Processed		**1,458**

[†] For the February 2023 interim response, 62 of the 66 pages produced were discovered to be nonresponsive post-production, but are counted here as part of the total number of pages actually produced (and processed).

Grand Jury Law and Practice § 5:11 (2d ed.)

Grand Jury Law and Practice | December 2018 Update
Sara Sun Beale

William C. Bryson

Taylor H. Crabtree

James E. Felman

Michael J. Elston

Katherine Earle Yanes

Chapter 5. Secrecy of Grand Jury Proceedings

§ 5:11. Disclosure in connection with another proceeding—"Judicial proceeding"

References
The portion of federal Rule 6(e) that has provoked the most litigation is Rule 6(e)(3)(E)(i), which permits a court to order the disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding."[1] Like Rule 6(e)(3)(A)(i), this Rule has also been the subject of Supreme Court attention.[2]

Rule 6(e)(3)(E)(i) is the principal vehicle by which grand jury materials are disclosed for use in other proceedings. Although district courts are accorded substantial leeway in balancing the need for disclosure against the interests of grand jury secrecy, that discretion must be exercised within fairly well-defined standards.

First, the proposed disclosure must relate to a "judicial proceeding." That term clearly permits disclosures in connection with federal, state, and local court proceedings.[3] Moreover, because grand jury proceedings are generally "preliminary to" criminal court proceedings, disclosure has been permitted when requested for use by federal and local grand juries.[4] The courts have also permitted the disclosure of grand jury materials preliminary to impeachment proceedings in the United States House of Representatives.[5] Likewise, the courts have permitted disclosure to state law enforcement officers and defendants in connection with other kinds of state criminal proceedings or investigations aimed at seeking other forms of judicial relief.[6] Prior to 1985, the disclosure of federal grand jury materials to state law enforcement officials was of limited practical value, however, because of the requirement that the state law enforcement proceedings be pending or at least be contemplated in order for the disclosure of the grand jury materials to be permissible. When the state law enforcement authorities are not already aware of the facts developed in the federal investigation, it is unlikely that the grand jury materials will relate to a state proceeding, or that the state authorities will be able to show a "particularized need" for the products of the federal investigation.[7]

The Advisory Committee on the Federal Criminal Rules proposed an amendment to what was then Rule 6(e)(3)(C) to solve that problem, and the amendment took effect in August 1985. Under the 1985 Amendment, a court could order disclosure of grand jury materials to state law enforcement authorities simply on a showing that the materials "may disclose a violation of state criminal law."[8] More recent amendments have expanded the scope of this provision such that grand jury materials disclosing a violation of state, Indian tribal, or foreign laws may be disclosed to state, local, Indian tribal, or foreign law enforcement authorities.[9]

Other kinds of uses, which are farther removed from court proceedings, present more difficulties. In the case of Baggot v. United States,[10] the Supreme Court addressed this issue by stating that the Rule "contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated."[11] As the Court noted, it is "not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge." Rather, the Court said, "[t]he focus is on the actual use to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under [Rule 6(e)(3)(E)(i)] is not permitted."[12]

The Court in Baggot clearly signaled that agency proceedings would often not qualify for disclosure under the Rule. Where an agency's action "does not require resort to litigation to accomplish the agency's present goal," the Court concluded, the action is not preliminary to a judicial proceeding for purposes of Rule 6(e)(3)(E)(i).[13]

Applying that test, the Court held that disclosure of grand jury materials could not be ordered for use in connection with an IRS audit of civil tax liability, because "the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels."[14] Even if the audit should disclose a deficiency on the part of the taxpayer, the Court wrote, there was no particular reason why the deficiency must lead to litigation, since it was by no means clear that the IRS would ever have to go into court to collect the amount owed. Because the IRS's proposed use of the materials was "to perform the non-litigative function of assessing taxes rather than to prepare for or to conduct litigation," the Court held that the disclosure would not be preliminary to a judicial proceeding.[15]

Of course, while holding that a tax levy is not a "judicial proceeding," the Court in the Baggot case did not suggest that the same rule would apply to a proceeding in the tax court brought by the taxpayer to obtain a ruling on a contested issue of tax liability. In fact, the Baggot case hinted that such a proceeding would be a "judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i),[16] and other courts have explicitly so held.[17]

The Court in the Baggot case declined to rule on the validity of a line of cases that have held that attorney disbarment and police disciplinary proceedings are sufficiently akin to judicial proceedings to bring them within the reach of Rule 6(e)(3)(E)(i).[18] Moreover, the court declined to decide whether its ruling would be different in the case of an agency proceeding that required resort to the courts. However, the Court's narrow construction of Rule 6(e)(3)(E)(i) would appear to provide general support for those cases that have held that administrative investigations, nonjudicial hearings, and congressional inquiries are neither "judicial proceedings" nor "preliminary to" judicial proceedings, even if judicial review of the proceedings is possible at some point in the future.[19]

Because the Supreme Court's companion decisions in United States v. Baggot,[20] and United States v. Sells,[21] substantially altered the way the federal government handled certain kinds of grand jury materials, the question has arisen in several cases whether Baggot and Sells should be given retroactive application; that is, whether the courts should grant relief in proceedings in which the government obtained grand jury materials under automatic disclosure practices employed before Sells or under court orders issued before Baggot. The courts have used several different approaches in analyzing the problem and have reached widely differing resolutions.

The Ninth Circuit has found Sells and Baggot to be fully retroactive.[22] The Fourth Circuit, by contrast, has concluded that Sells and Baggot should not be applied retroactively, and that disclosure and continued access to grand jury materials under a court order predating those decisions would not be invalidated.[23] Another court has agreed that Sells and Baggot are not to be applied retroactively, and that no sanctions would be imposed because of the initial disclosure, but that further access to grand jury materials would not be permitted.[24]

Two other circuits have held that retroactivity is not the proper mode of analysis. Instead, those courts have held that, at least where a Rule 6(e) order was previously entered and the order was not challenged on appeal following its entry, the validity of the order should be governed not by principles of retroactivity, but by the principles of finality that usually attach to civil judgments. Thus, where the disclosure order has become final, those courts hold that the disclosure order should not be invalidated absent strong reasons to do so. While noting that the courts retain equitable authority to modify even final orders, that authority should not be exercised in the absence of compelling reasons.[25]

That reasoning led the Seventh Circuit to conclude that it would not upset a district court's decision not to modify a pre-Baggot disclosure order, even though the order would not have been valid if it had been entered after Baggot.[26] The effect of

the Seventh Circuit's decision was to permit the Internal Revenue Service to continue to use materials obtained pursuant to the pre-Baggot disclosure order in its civil audit proceedings.[27]

The Second Circuit, using similar analysis, also upheld the district court, but since the district court in that case had decided to modify the disclosure order as to its prospective effect, the impact of the Second Circuit's decision was to condition the further disclosure of the grand jury materials on the government's making a showing of particularized need for the disclosure in question.[28] Besides emphasizing the need to defer to the judgment of the district court on such matters, the Second Circuit appeared to be moved in part by the fact that the original disclosure order in that case was issued only three months before the Supreme Court's decisions in Sells and Baggot, and that the government could not have reasonably placed heavy reliance on the validity of the disclosure order during the ensuing three years that the government made use of the grand jury materials disclosed under the authority of that order.[29]

Finally, other courts have held that even if Sells and Baggot are retroactive in application, sanctions would not be imposed against the governmental entity to which disclosure was made as long as the violation was not egregious and did not substantially affect the later proceeding,[30] or as long as the government agents acted in good faith in obtaining the pre-Baggot order of disclosure.[31]

Many of the states have adopted the same principles as are found in federal Rule 6(e)(3)(E)(i), permitting disclosure of grand jury materials in connection with other judicial proceedings. Like the federal courts, the courts in those states have allowed limited disclosure, on a case-by-case basis, in connection with other proceedings when disclosure appears to be required in the interest of justice.[32]

Footnotes

1 Fed R Crim P 6(e)(3)(E)(i).

2 **United States.** U.S. v. Baggot, 463 U.S. 476, 103 S. Ct. 3164, 77 L. Ed. 2d 785, 52 A.F.T.R.2d 83-5248 (1983).

3 **United States.** U.S. v. Grasso, 173 F. Supp. 2d 353, 365 (E.D. Pa. 2001). In re Grand Jury Proceedings, 654 F.2d 268, 271–72 (3d Cir. 1981); In re Grand Jury Matter, 516 F. Supp. 27 (E.D. Pa. 1981); In re Grand Jury Proceedings, 483 F. Supp. 422 (E.D. Pa. 1979). See also Goldstein v. City of Long Beach, 603 F. Supp. 2d 1242 (C.D. Cal. 2009) (federal court had authority to order disclosure of state grand jury materials in connection with federal civil rights action).

4 U.S. v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982); In re Disclosure of Evidence Taken Before Special Grand Jury Convened on May 8, 1978, 650 F.2d 599 (5th Cir. 1981), opinion amended, 662 F.2d 362 (5th Cir. 1981); U.S. v. Stanford, 589 F.2d 285, 50 A.L.R. Fed. 656 (7th Cir. 1978); In re 1979 Grand Jury Proceedings, 479 F. Supp. 93, 54 A.L.R. Fed. 797 (E.D. N.Y. 1979); In re Petition for Disclosure of Evidence Before Oct., 1959 Grand Jury of This Court, 184 F. Supp. 38 (E.D. Va. 1960). The court in U.S. v. Tager, 638 F.2d 167, 169 (10th Cir. 1980), missed the point when it held that the disclosure in that case was not proper because the ongoing grand jury proceeding did not constitute a "judicial proceeding." See also In re November 1992 Special Grand Jury For Northern Dist. of Indiana, 836 F. Supp. 615, 618 (N.D. Ind. 1993).
That principle has been extended to permit disclosure to persons who are designated to assist the grand jury in its work. See U.S. v. Mayes, 670 F.2d 126, 129 (9th Cir. 1982); U.S. v. Stanford, 589 F.2d 285, 292, 50 A.L.R. Fed. 656 (7th Cir. 1978). Even if a grand jury proceeding is not a "judicial proceeding" in itself, the criminal trial that follows is clearly a judicial proceeding. The disclosure to the grand jury is thus preliminary to that judicial proceeding, and is permissible as a disclosure made "preliminarily to" a judicial proceeding. See Mayes, supra, 670 F.2d at 129.

5 **United States.** See In re Grand Jury Proceedings, 841 F.2d 1048 (11th Cir. 1988); In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438 (11th Cir. 1987).
Similarly, grand jury materials may be released in connection with the report an independent counsel is required to file pursuant to 28 U.S.C. § 594(h). In re Espy, 259 F.3d 725, 728–29 (D.C. Cir. 2001). The D.C. Circuit has adopted the

following test to determine whether independent counsel reports, "and specifically the grand jury materials contained therein," should be disclosed:

> [1] whether the subjects of the investigation have already been disclosed to the public;
>
> [2] whether the subjects do not object to the filings being released to the public;
>
> [3] whether the filings contain information which is already publicly known;
>
> [4] whether the court filings consist of legal or factual rulings in a case which should be publicly available to understand the court's rules and precedents or to follow the developments in a particular matter.

In re Espy, 259 F.3d at 729 (quoting In re North, 16 F.3d 1234, 1237, 22 Media L. Rep. (BNA) 1161 (D.C. Cir. 1994). See also In re Cisneros, 426 F.3d 409, 412–15 (D.C. Cir. 2005) (ordering release of independent counsel report).

6 **United States.** See In re Grand Jury Proceedings, 654 F.2d 268 (3d Cir. 1981); U.S. v. Colonial Chevrolet Corp., 629 F.2d 943, 1980-2 Trade Cas. (CCH) ¶ 63473 (4th Cir. 1980); U.S. v. B. F. Goodrich Co., 619 F.2d 798, 1980-2 Trade Cas. (CCH) ¶ 63353 (9th Cir. 1980); U.S. v. Cotroneo, 37 F. Supp. 2d 1130, 1132, 99-1 U.S. Tax Cas. (CCH) P 50301 (D. Minn. 1999); In re Grand Jury Matter, 516 F. Supp. 27 (E.D. Pa. 1981).

7 See generally § 5:10.

8 See Fed R Crim P 6(e)(3)(C)(iv) (1985).

9 See Fed R Crim P 6(e)(3)(E)(iv).

10 U.S. v. Baggot, 463 U.S. 476, 103 S. Ct. 3164, 77 L. Ed. 2d 785, 52 A.F.T.R.2d 83-5248 (1983).

11 *U.S. v. Baggot*, 463 U.S. at 480.

12 *U.S. v. Baggot*, 463 U.S. at 480.

13 *U.S. v. Baggot*, 463 U.S. at 482.

14 *U.S. v. Baggot*, 463 U.S. at 480.

15 *U.S. v. Baggot*, 463 U.S. at 483.

16 *U.S. v. Baggot*, 463 U.S. at 481.

17 **United States.** In re Grand Jury Subpoenas Duces Tecum, 904 F.2d 466, 468, 90-2 U.S. Tax Cas. (CCH) P 50483, 66 A.F.T.R.2d 90-5132 (8th Cir. 1990); Patton v. C.I.R., 799 F.2d 166, 172, 86-2 U.S. Tax Cas. (CCH) P 9670, 58 A.F.T.R.2d 86-5709 (5th Cir. 1986).

18 See U.S. v. Baggot, 463 U.S. 476, 479 n.2, 103 S. Ct. 3164, 77 L. Ed. 2d 785, 52 A.F.T.R.2d 83-5248 (1983). The cases in which courts have permitted disclosure for these purposes include U.S. v. Sobotka, 623 F.2d 764 (2d Cir. 1980) (attorney disciplinary proceedings); Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) (police board of inquiry); In re Holovachka, 317 F.2d 834 (7th Cir. 1963) (police board of inquiry); Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958) (attorney disciplinary proceedings); In re Petition to Inspect and Copy

Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), order aff'd, 735 F.2d 1261 (11th Cir. 1984) (judicial disciplinary panel); and In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970) (police board of inquiry). See also Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) (impeachment proceedings). Even after Baggot, these cases could qualify for disclosure under Rule 6(e)(3)(C)(i) on one of two theories: they could be regarded either as constituting quasi-judicial proceedings in themselves, or they could be regarded as proceedings that are "preliminary to" judicial proceedings because they are designed to lead to judicial proceedings or because judicial proceedings are "clearly contemplated" at the conclusion of the administrative hearings. See In re April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1179, 81-2 U.S. Tax Cas. (CCH) P 9632, 48 A.F.T.R.2d 81-5715 (E.D. Mich. 1981).

In spite of the Baggot Court's strict construction of the phrase "in connection with or preliminarily to a judicial proceeding," the courts have adhered to the view that bar disciplinary proceedings and judicial disciplinary proceedings are sufficiently within the reach of the phrase to be eligible for disclosure of grand jury materials under Rule 6(e)(3)(E)(i). See Matter of Federal Grand Jury Proceedings, 760 F.2d 436 (2d Cir. 1985) (bar disciplinary proceeding); In re Barker, 741 F.2d 250 (9th Cir. 1984) (bar association disciplinary proceeding); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984) (judicial disciplinary proceeding).

The Sixth Circuit has reached a contrary result. Analyzing the Michigan attorney disciplinary system, the court held that grand jury materials could not be disclosed under the "preliminary to or in connection with a judicial proceeding" exception, because the attorney disciplinary system in Michigan was neither administered by a judicial body nor subject to sufficient judicial controlto fall within the terms of that exception. See In re Grand Jury 89-4-72, 932 F.2d 481 (6th Cir. 1991).

Ohio. Petition of Grievance Committee of Toledo Bar Ass'n, 47 Ohio St. 3d 611, 548 N.E.2d 916 (1989) (permissible under Ohio grand jury secrecy rule to disclose matters occurring before the grand jury to bar disciplinary committee).

19 **United States.** See Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980) (parole revocation hearing); In re J. Ray McDermott & Co., Inc., 622 F.2d 166, 1980-2 Trade Cas. (CCH) ¶ 63451 (5th Cir. 1980) (Federal Energy Regulatory Commission administrative proceeding); U.S. v. Bates, 627 F.2d 349, 1980-2 Trade Cas. (CCH) ¶ 63297 (D.C. Cir. 1980) (Federal Maritime Commission administrative proceeding); In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962) (Federal Trade Commission administrative proceeding); In re December 1988 Term Grand Jury Investigation, 714 F. Supp. 782 (W.D. N.C. 1989) (deportation proceeding is not a "judicial proceeding" within the meaning of Rule 6(e)); In re Grand Jury Impanelled October 2, 1978 (79-2), 510 F. Supp. 112, 114 (D.D.C. 1981) (congressional committee oversight hearings); In re April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 81-2 U.S. Tax Cas. (CCH) P 9632, 48 A.F.T.R.2d 81-5715 (E.D. Mich. 1981); In re Grand Jury Matter, 495 F. Supp. 127 (E.D. Pa. 1980) (administrative proceeding by Mine Safety and Health Administration); U.S. v. Young, 494 F. Supp. 57 (E.D. Tex. 1980) (Texas State Board of Medical Examiners license revocation proceeding); In re Proceedings Before Federal Grand Jury for Dist. of Nevada, 487 F. Supp. 1098 (D. Nev. 1980) (Nevada state gaming commission licensing proceeding); In re Grand Jury Investgation of Uranium Industry, 1979-2 Trade Cas. (CCH) ¶ 62798, 1979 WL 1661 (D.D.C. 1979) (congressional committee hearings).

20 **United States.** U.S. v. Baggot, 463 U.S. 476, 103 S. Ct. 3164, 77 L. Ed. 2d 785, 52 A.F.T.R.2d 83-5248 (1983).

21 **United States.** U.S. v. Sells Engineering, Inc., 463 U.S. 418, 103 S. Ct. 3133, 77 L. Ed. 2d 743, 83-2 U.S. Tax Cas. (CCH) P 9439, 52 A.F.T.R.2d 83-5361 (1983).

22 **United States.** In re Sells, 719 F.2d 985, 990–92, 83-2 U.S. Tax Cas. (CCH) P 9662, 52 A.F.T.R.2d 83-6311 (9th Cir. 1983).

23 **United States.** U.S. v. (Under Seal), 783 F.2d 450, 86-2 U.S. Tax Cas. (CCH) P 9751, 58 A.F.T.R.2d 86-5779 (4th Cir. 1986).

24 **United States.** DiVivo v. Egger, 601 F. Supp. 1259 (D. Md. 1984).

25 **United States.** In re Disclosure of Grand Jury Material, 821 F.2d 1290, 87-2 U.S. Tax Cas. (CCH) P 9417, 60 A.F.T.R.2d 87-5156 (7th Cir. 1987); In re Grand Jury Proceedings (Kluger), 827 F.2d 868, 88-1 U.S. Tax Cas. (CCH) P 9375, 71A A.F.T.R.2d 93-3011 (2d Cir. 1987).

26 **United States.** In re Disclosure of Grand Jury Material, 821 F.2d 1290, 87-2 U.S. Tax Cas. (CCH) P 9417, 60

A.F.T.R.2d 87-5156 (7th Cir. 1987).

27 **United States.** In re Disclosure of Grand Jury Material, 821 F.2d 1290, 1293–94, 87-2 U.S. Tax Cas. (CCH) P 9417, 60 A.F.T.R.2d 87-5156 (7th Cir. 1987); Matter of Grand Jury Proceedings Operation Gateway, 877 F.2d 632, 89-2 U.S. Tax Cas. (CCH) P 9397, 64 A.F.T.R.2d 89-5091 (7th Cir. 1989); Matter of Grand Jury Proceedings “”Operation Gateway’’, 839 F.2d 390, 88-1 U.S. Tax Cas. (CCH) P 9239 (7th Cir. 1988).
The Fifth Circuit endorsed the Seventh Circuit’s position on this issue. See Matter of December 3, 1979 Houston Div. Federal Grand Jury, 889 F.2d 1466, 90-1 U.S. Tax Cas. (CCH) P 50165, 65 A.F.T.R.2d 90-441 (5th Cir. 1989).

28 **United States.** In re Grand Jury Proceedings (Kluger), 827 F.2d 868, 88-1 U.S. Tax Cas. (CCH) P 9375, 71A A.F.T.R.2d 93-3011 (2d Cir. 1987).

29 **United States.** In re Grand Jury Proceedings (Kluger), 827 F.2d 868, 88-1 U.S. Tax Cas. (CCH) P 9375, 71A A.F.T.R.2d 93-3011 (2d Cir. 1987).

30 **United States.** U.S. v. Sutton, 795 F.2d 1040, 1047, 21 Fed. R. Evid. Serv. 30 (Temp. Emer. Ct. App. 1986).

31 **United States.** LTV Educ. Systems, Inc. v. Bell, 862 F.2d 1168, 50 Ed. Law Rep. 944 (5th Cir. 1989); Gluck v. U.S., 771 F.2d 750, 85-2 U.S. Tax Cas. (CCH) P 9658, 56 A.F.T.R.2d 85-5979 (3d Cir. 1985); Graham v. C.I.R., 770 F.2d 381, 85-2 U.S. Tax Cas. (CCH) P 9657, 56 A.F.T.R.2d 85-6002 (3d Cir. 1985).

32 The states that have permitted limited disclosure in connection with other judicial proceedings, either by statute or court decision are the following:
Alaska. Ala R Crim P 6.
Arizona. Wales v. Tax Commission, 100 Ariz. 181, 412 P.2d 472 (1966) (disclosure by prosecutor to district attorney of grand jury testimony indicating possible state tax law violations was not improper, because done in furtherance of justice).
Colorado. Granbery v. District Court in and for City and Denver County, 187 Colo. 316, 531 P.2d 390 (1975).
Connecticut. In re Final Grand Jury Report Concerning Torrington Police Dept., 197 Conn. 698, 501 A.2d 377 (1985); In re Investigation of Grand Juror into Cove Manor Convalescent Center, Inc., 4 Conn. App. 544, 495 A.2d 1098 (1985); State v. Canady, 187 Conn. 281, 445 A.2d 895 (1982).
District of Columbia. Davis v. U.S., 641 A.2d 484 (D.C. 1994) (discussing particularized need standard for disclosure of grand jury information).
Delaware. Petition of Jessup, 50 Del. 530, 136 A.2d 207, 217–18 (Super. Ct. 1957) (in allowing disclosure to state Senate Committee investigating gambling, court holds that superior court has discretion to order disclosure, even in nonjudicial proceedings, upon a showing of overriding public interest or upon a showing that the reasons for secrecy are not applicable).
District of Columbia. DC Super Ct Crim R 6(e).
Florida. Fla Stat Ann § 905.27 (providing for disclosure by court in other civil and criminal proceedings for the purpose of furthering justice).
Georgia. Ga Code Ann § 15-12-72.
Hawaii. Haw R Crim P 6(e).
Illinois. Ill Code Crim Proc § 112-6; In re Extended March 1975 Grand Jury No. 655, 84 Ill. App. 3d 847, 40 Ill. Dec. 84, 405 N.E.2d 1176 (1st Dist. 1980) (in affirming trial court’s denial of petition for release of grand jury transcripts for use in class action, court follows reasoning of U.S. Supreme Court cases construing federal Rule 6(e)(3)(E)(i)).
Indiana. Ind Code Ann § 35-34-2-3(d) (“When ordered by the court, a transcript … shall be prepared and supplied to the requesting party”). Hinojosa v. State, 781 N.E.2d 677, 681-82 (Ind. 2003) (party seeking access to grand jury transcripts is required to show particularized need).
Iowa. Iowa R Crim P 2.14(6)(d) (permitting disclosure when “necessary in the administration of justice”).
Kansas. Kan Stat Ann § 22-3012.
Kentucky. Ky R Crim P 5.24(1) (grand jury secrecy subject “to the authority of the court at any time to direct otherwise”).
Louisiana. State v. Ross, 144 So. 3d 932 (La. 2014); State v. Lacaze, 117 So. 3d 915 (La. 2013); State v. Higgins, 898 So. 2d 1219 (La. 2005). See also State v. Grubbs, 644 So. 2d 1105 (La. Ct. App. 4th Cir. 1994), writ denied, 654 So. 2d 323 (La. 1995) (trial judge may conduct in camera inspection of grand jury materials where there exists a specific basis for concluding they may contain exculpatory information); State v. Bush, 634 So. 2d 79 (La. Ct. App. 4th Cir. 1994) (grand jury testimony may not be disclosed to impeach witness’ trial testimony; error harmless in this

case). Cf. Grace v. Cain, 2015 WL 160369 (E.D. La. 2015), appeal dismissed, mandamus denied, 826 F.3d 813 (5th Cir. 2016) (federal district court in habeas proceeding, relying on caselaw of Louisiana Supreme Court, finding compelling necessity and ordering disclosure of portions of grand jury transcript where "new evidence contained in the transcript reveals new habeas claims with potential merit"). But see In re Grand Jury, 737 So. 2d 1 (La. 1999) (disclosure of state grand jury materials by district attorney directly to federal prosecutor in the absence of a subpoena and without a hearing improper).

Maine. Me R Crim P 6(e).

Maryland. Md Crim Law Code Ann § 8-213.

Massachusetts. Mass Crim R 5(d); Globe Newspaper Co. v. Police Com'r of Boston, 419 Mass. 852, 648 N.E.2d 419, 23 Media L. Rep. (BNA) 1822 (1995) (permitting limited disclosure of grand jury materials after expiration of investigation); Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 407 (1922) (upholding use of grand jurors' testimony in proceedings for removal of district attorney).

Minnesota. Minn R Crim P 18.07.

Missouri. State ex inf. Dalton v. Moody, 325 S.W.2d 21 (Mo. 1959) (upholding use of transcript of grand jury proceedings in proceeding to oust district attorney).

Montana. Mont Code Ann § 46-11-317.

Nebraska. In re Grand Jury of Douglas County, 263 Neb. 981, 644 N.W.2d 858 (2002) (affirming denial of request for grand jury materials applying reasoning of U.S. Supreme Court cases construing Fed R Crim P 6(e)).

Nevada. Nev Rev Stat § 172.245.

New Jersey. Stewart v. Dexter, 218 N.J. Super. 417, 527 A.2d 958 (Law Div. 1986); Application of Jascalevich, 169 N.J. Super. 392, 404 A.2d 1239 (App. Div. 1979); River Edge Sav. and Loan Ass'n v. Hyland, 165 N.J. Super. 540, 398 A.2d 912 (App. Div. 1979); Doe v. Klein, 143 N.J. Super. 134, 362 A.2d 1204 (App. Div. 1976).

New Mexico. State v. Tackett, 1967-NMSC-207, 78 N.M. 450, 432 P.2d 415, 20 A.L.R.3d 1 (1967).

New York. NY Crim Proc Law § 190.25; People v. Cipolla, 184 Misc. 2d 880, 711 N.Y.S.2d 303 (County Ct. 2000) (ordering unsealing of grand jury record where acquitted defendants filed federal lawsuit alleging grand jury proceeding was tainted because prosecutors caused to creation of false and forged documents to be used as evidence in grand jury and at trial); Matter of District Attorney of Suffolk County, 58 N.Y.2d 436, 461 N.Y.S.2d 773, 448 N.E.2d 440 (1983) (upholding denial of disclosure of grand jury proceedings for use in federal civil action, since showing inadequate to establish compelling and particularized need for disclosure).

Ohio. Ohio R Crim P 6(E); State v. Mack, 73 Ohio St. 3d 502, 1995-Ohio-273, 653 N.E.2d 329 (1995) (grand jury materials may be disclosed only upon showing of particularized need); In re Petition for Disclosure of Evidence Presented to Franklin County Grand Juries in 1970, 63 Ohio St. 2d 212, 17 Ohio Op. 3d 131, 407 N.E.2d 513 (1980) (reversing trial court's denial of petition for disclosure of grand jury material in civil action by state).

Oregon. State v. Hartfield, 290 Or. 583, 624 P.2d 588 (1981) (disclosure of grand jury material "in furtherance of justice" not overridden by statute excluding grand jury testimony from criminal discovery); Gowin v. Heider, 237 Or. 266, 386 P.2d 1 (1963), adhered to, 237 Or. 266, 391 P.2d 630 (1964) (court has discretion to allow disclosure when demand for promoting justice outweighs need for secrecy, or when reasons for secrecy have passed).

Pennsylvania. Pa Stat Ann tit 42 § 4549(b); In re Investigating Grand Jury of Philadelphia County, 496 Pa. 452, 437 A.2d 1128 (1981) (holding that court of common pleas improperly approved full disclosure of grand jury proceedings to Philadelphia Law Department, a civil enforcement agency).

Rhode Island. RI Super Ct R Crim P 6(e); In re Young, 755 A.2d 842 (R.I. 2000) (where targets of grand jury investigation had waived any claims to secrecy and grand jury materials and grand jury materials were needed for purposes of related civil case, limited disclosure of grand jury minutes was permitted); State v. Carillo, 112 R.I. 6, 307 A.2d 773 (1973) (disclosure requires showing of particularized need, but the showing is easier to make after the grand jury witness in question has been identified and has testified).

South Dakota. SD Codified Laws §§ 23A-5-16, 23A-5-17.

Utah. Utah Code Ann § 77-10a-13(7).

Vermont. Vt R Crim P 6(e)(3).

Washington. Wash Rev Code Ann § 10.27.090(5) (permitting court to order disclosure to other prosecutors upon showing of good cause).

West Virginia. W Va R Crim P 6(e).

Wyoming. Wyo Stat § 7-5-308(c).

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Note
Alexa J. Smith[a]

FEDERAL JUDICIAL IMPEACHMENT: DEFINING PROCESS DUE

The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.[1]

Considerate [people], of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no [person] can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every [person] must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.[2]

Introduction

The impeachment process was instituted to remove 'fallen' federal civil officers.[3] Although the Constitution limits removal by impeachment to actions of 'Treason, Bribery, or other high Crimes and Misdemeanors,'[4] scholars have noted that impeachment proceedings may be instituted for offenses outside the criminal realm.[5] Such offenses ***640** include acts that undermine public confidence in the judiciary or compromise the integrity of the judicial branch.[6] Thus, one aim of impeachment proceedings is to shield the judiciary from any appearance of impropriety.

All federal judges take an oath to uphold the American legal system.[7] A judge who has abdicated the immense responsibility that the position dictates must, by necessity, be disciplined. However, any judge charged with wrongdoing must be entitled to the same benefits of impartiality, justice, and fairness that have been the hallmarks of our legal system. A truly successful legal system consistently operates with fairness and impartiality toward all before it, and the American legal system depends on public trust. When any aspect of such a justice system is fatally flawed in its treatment of one category of accused persons, the rights of all accused are threatened and the public confidence is diminished.

This Note argues that the current impeachment process, as applied to federal judges, violates the due process rights of accused judges.[8] This Note also exposes the flaws in the current impeachment ***641** process, and proposes the adequate process due. Part I considers the framing and ratification of the Constitution's impeachment clauses. Part II discusses the current impeachment process itself, beginning with actions taken pursuant to the Judicial Councils Act[9] and finishing with the Senate impeachment trial. Part III describes the most recent federal judicial impeachments of Judges Harry Claiborne, Alcee Hastings, and Walter Nixon. Part IV analyzes the imprudence inherent in the current impeachment process. Section A of Part IV presents a due process analysis, arguing that the Judicial Councils Act denies the accused procedural due process by failing to guarantee public scrutiny or to provide for resolution of judicial conflicts of interest. Further, Section A explains that recusal as implemented in the impeachment process is an inadequate remedy because recusal is largely discretionary and does not provide a random selection process for the replacement of recused judges. Section B of Part IV argues that the Supreme Court's reliance on the political question doctrine as a basis to decline review of congressional impeachment

decisions directly contradicts the reality of the substantial role judges play in impeachment under the Judicial Councils Act. Moreover, Section B of Part IV explains that due process protections are even more important because judicial review of Senate impeachment proceedings is denied. Part V discusses remedies to these problems, presenting procedural safeguards to guarantee the fairness of the process and maintain the appearance of propriety. This Section argues that providing for judicial review of judicial council decisions, opening investigation reports to public scrutiny, and creating a random selection process to address conflicts of interest of adjudicatory judges will ensure that justice is done. Part V also argues that consistency in the application of the political question doctrine to federal judicial impeachment proceedings is necessary to return the spirit of justice to the justice system.

***642 I. The History of the Framing and Ratification of the Impeachment Clauses**

To fully explore the impeachment process, it is necessary to understand the purpose of impeachment and the role that the Framers of the Constitution intended impeachment to play in American society. The issue of judicial impeachment was discussed extensively during the Constitutional Convention.[10] The Framers grappled with the competing interests of judicial independence on the one hand and the need for judicial accountability in cases of abuse or incapacity on the other.[11] In deciding who should exercise the substantial power of impeachment, the Framers intended to distribute the power over the several branches of government to prevent the consolidation of power in any one branch.[12] The Framers envisioned impeachment to be a fair process -- a process not subject to the whim of any one political faction that might use it to achieve its own political ends.[13] In balancing these interests, the Framers considered a number of proposals, including one proposal to place the impeachment trial function in the judicial branch.[14] This proposal called for trials of impeachment to be held in the national judiciary pursuant to the 'Virginia Plan.'[15] However, the proposal was subsequently abandoned.

After consideration of several factors, the Framers rejected the Supreme Court as the court to ultimately decide impeachments. The Framers believed that the Supreme Court Justices, like the judges of the lower courts, would not possess the 'degree of credit and authority' necessary to persuade the public because they perceived the group to be too small in number to adequately treat impeachment inquisitions.[16] Such a small group, it was thought, would be unable to assure both justice and public tranquility.[17] More importantly, the ***643** Framers were concerned that the same tribunal not try the accused twice.[18] The Framers recognized that the accused, if convicted of impeachment, might also be subject to criminal charges, and the Framers did not want the same court to try both offenses.[19] In effect, the Framers found that the same tribunal holding the ability to try both offenses would deny the accused an impartial process.[20] Furthermore, the Framers expressed interest in obtaining fairness for the accused. The Framers did not want to subject the accused, through the criminal process, to the judgment of those who may have already determined the accused's guilt in the impeachment inquiry.[21]

The Framers were also concerned that the House of Representatives might abuse the power of impeachment. This was manifested in the Framers' rejection of the traditional English practice of removal by address.[22] That practice made judges subject to the sway of the political winds by allowing for their speedy removal upon the insistence of politicians. The Framers believed this would severely undermine the constitutional structure of the government because it would reduce the power of the court to review acts of Congress.[23]

However, the Framers believed the Senate possessed the ability to remain unswayed by the 'passions of the whole community' and to make decisions based on the 'real demonstrations of innocence or guilt.'[24] Thus, the Framers chose the Senate as 'the court for the trial of impeachments. '[25] The Senate was considered the most likely to 'allow due weight to the arguments' for and against the accused.[26] ***644** Also, the Framers apparently believed that the 'power of originating the inquiry . . . ought to be lodged in the hands of one branch of the legislative body. '[27]

The independence of the judiciary from the other branches is of utmost importance. In addition to careful selection of the forum to try judicial impeachments, the Framers placed protection of judicial independence in several articles of the Constitution.[28] Article III gives judges life tenure and a promise of undiminished compensation.[29] Article II provides only a limited number of reasons to justify removal of a judge from office by impeachment.[30] Furthermore, the Framers expressly designed the impeachment process to protect judges by requiring a two-thirds super-majority vote to convict.[31] However, in addition to their considerations of fairness to the accused, the Framers also realized that the authority of the judiciary depends both on the courage and integrity of individual judges and on the public perception of the institution as fair, impartial, and efficient.[32]

II. The Impeachment Process

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

The structure of the federal court system created by the Constitution focused on judicial independence, making judges autonomous in most actions. Because the sphere of the judiciary was considered sacred, developing regulation of federal judicial action was a slow process. Modern regulation of the federal judiciary is codified in the Judicial Councils Act and is the result of nearly fifty years of consideration by Congress and the federal judiciary of the best means by which to assure responsible judicial conduct, while remaining consistent with the constitutionally protected independence of the judicial branch.[33]

***645** Prior to the Judicial Councils Act, the first grant of authority for judicial self-policing was found in the Administrative Office Act of 1939.[34] The Act stated that a judicial council for each circuit would 'make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit courts.'[35] The Act separated the management of the federal judiciary from the executive branch and specifically authorized the judicial councils to control judicial assignments and set standards for judicial ethics.[36] The revision of the Judicial Code in 1948 further expanded the role of judges in judicial policing. In the 1948 revision, the judicial councils were authorized to issue direct orders and actually discipline fellow judges based on case backlog and physical or mental disability.[37] However, even under the Act, the judicial councils ran their affairs in an ad hoc manner.

In 1970 the Supreme Court, in Chandler v. Judicial Council of the Tenth Circuit,[38] expressed concern about the lack of specificity in the scope of the judicial council's powers.[39] In that case, Judge Stephen Chandler, U.S. District Judge for the Western District of Oklahoma, challenged the judicial council's order relieving him of all of his judicial duties.[40] Judge Chandler argued that the council order infringed ***646** on his constitutional powers as a judge and encroached on Congress's constitutional impeachment power.[41] However, the Supreme Court refused to decide the question of the constitutionality of the broad powers afforded the judiciary, instead resting its opinion on the insufficiency of Judge Chandler's case.[42]

Against this abstract backdrop, and despite the lack of previously condoned judiciary engagement in lengthy investigations, the Judicial Councils Act of 1980 was born. Congress noted that '[t]he goals of the . . . legislation are to improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's system of justice, and, at the same time, to maintain the independence and autonomy of the judicial branch of Government.'[43]

To this aim, the Act allows for the formation of a judicial council for each circuit in accordance with the prior system. Additionally, the Judicial Councils Act creates a tribunal parallel to the court system for the adjudication of complaints against judges. The Judicial Councils Act permits any person to file a complaint against a judge for 'conduct prejudicial to the effective and expeditious administration of the business of the courts. '[44] A copy of the complaint is filed with the appropriate circuit court and is first reviewed by the chief judge of the circuit or by the senior circuit judge if the chief judge is the object of the complaint.[45] A copy of the complaint is also sent to the accused judge.[46] The chief judge must expedite the review of the complaint if the complaint relates directly to the merits of a specific decision or, if 'frivolous,' the complaint must be immediately dismissed.[47] A complaint will also be dismissed if appropriate corrective action has been taken.[48] However, if the complaint is so complex that the chief judge of a circuit cannot address it easily, the complaint is referred to a special committee of district and circuit judges (the investigating committee) whom the chief judge appoints.[49] The committee of judges conducts an investigation into the complaint, reports its findings, and ***647** recommends remedial measures to the judicial council of the circuit. The judicial council is then charged with the task of conducting additional investigations, if necessary, and implementing remedial measures such as certifying the judge's disability, directing the judge to retire voluntarily, suspending the judge's calendar, issuing a private or public censure or reprimand, or taking any other action deemed appropriate.[50] Should the judicial council determine that the complaint against the judge rises to a level possibly warranting impeachment, the council must transfer the complaint along with the record of proceedings to the Judicial Conference of the United States.[51] The Judicial Conference is chaired by the Chief Justice of the United States Supreme Court and includes the chief judge of each circuit court.[52] The Judicial Conference is empowered to review the record and institute its own independent investigation.[53] To aid their investigatory functions, both the judicial council and the Judicial Conference are endowed with 'full subpoena powers.'[54]

The results of the judicial investigations are kept confidential; papers, documents, and records of proceedings may not be disclosed by any person.[55] However, the Judicial Councils Act allows for a judicial council, in its discretion, to release a copy of a report of an investigatory committee to the complainant whose complaint initiated the investigation.[56] Additionally, the various branches involved in the impeachment proceeding may act to release material necessary to further an ongoing impeachment investigation, or documents may be released at the discretion of the judicial council if such disclosure is ***648** authorized in writing by the accused judge.[57] A judge who is the object of a complaint may appeal decisions of the chief judge of the circuit to the Judicial Conference. However, there is no formal judicial review of decisions rendered in disciplinary investigations.[58]

Should a judicial council determine that the alleged conduct rises to the level requiring impeachment, and the Conference concurs, the Conference must communicate that determination to the House of Representatives.[59] The House may then proceed in whatever manner it deems appropriate.[60]

B. The Congressional Role

Should the House agree with the determination of the Judicial Conference that impeachment of a federal judge is warranted, the House drafts articles of impeachment and votes to determine whether the impeachment proceeding should be initiated.[61] In drafting the articles, the House reviews the record of investigations compiled by the judicial council or the Judicial Conference.[62] Should a majority of the members of the House determine that the accused judge's conduct warrants impeachment, the articles are approved. As becomes evident from the modern impeachment cases, presented in Part III of this Note, the vote generally results in a perfunctory 'rubber stamp' of the determination of the Judicial Conference.[63]

***649** After articles of impeachment have been approved by the House, they are transferred to the Senate, where a committee of Senators conducts a trial of the accused judge.[64] The House of Representatives acts as prosecutor of the accused before the Senate committee.[65] The Senate committee compiles a record of the proceedings and presents that record to the full Senate. The full Senate votes on whether to impeach the judge based on the evidence in the record compiled by ***650** the committee.[66] If two-thirds of the Senate votes to convict the judge on any of the articles of impeachment, the judge is impeached.[67]

III. The Modern Impeachment Cases

Since 1986 there have been three impeachments. Because judges are ideally men and women of unusually high integrity, it is not surprising that prior to those three impeachments there had not been one in fifty years.[68] The modern impeachment cases provide a framework for a discussion of the problems associated with the current impeachment process.

A. Judge Harry E. Claiborne

The first of the recent impeachments was the case of Judge Harry E. Claiborne of the U.S. District Court for the District of Nevada.[69] In 1983 a federal grand jury indicted Judge Claiborne for bribery, tax-fraud, and false statements.[70] His first trial ended in a mistrial.[71] The prosecutors then dropped the charges relating to bribery and retried the judge on the unrelated tax fraud and false filing counts.[72] Throughout the proceedings, the Judge asserted that he was the victim of a prosecutorial vendetta due to his rulings adverse to the Department of Justice in criminal cases.[73] In the second trial, Judge Claiborne ***651** was acquitted of false filing, but was convicted on the charge of tax fraud.[74] A specially selected panel of three judges from other circuits affirmed his conviction.[75] Judge Claiborne requested that his post-conviction appeal be heard en banc,[76] but his request was denied.[77] After the Judicial Conference recommended that impeachment might be warranted, the House of Representatives drew up articles of impeachment for Judge Claiborne, based largely on his earlier criminal conviction,[78] and referred the articles to the Senate. The Senate tried Judge Claiborne by committee and convicted him of three of the articles of impeachment against him.[79]

B. Judge Alcee Hastings

The case of Alcee Hastings,[80] former U.S. District Judge for the Southern District of Florida, presents a unique situation. In 1979 Judge Alcee Hastings became the first African-American judge to be appointed to the federal bench in Florida.[81] In

1981 Judge Hastings was indicted for conspiring to receive a bribe.[82] Judge Hastings was acquitted of all criminal charges,[83] while his alleged coconspirator was ***652** convicted in a separate trial.[84] Judge Hastings alleged that racial discrimination within the Justice Department was the motivation behind the case.[85] Following his acquittal, two of Judge Hastings's colleagues[86] ***653** filed a complaint alleging, among other things, that Judge Hastings had committed the crime for which he was charged.[87] Pursuant to the Judicial Councils Act, the Chief Judge of the Eleventh Circuit appointed a committee to investigate the complaint.[88] Judge Hastings filed four lawsuits to enjoin the investigation, yet was denied relief.[89] The judicial investigating committee hired an investigative team charged with the task of compiling a record of the events surrounding Hastings's case.[90] The investigating committee hearings were not limited by the rules of evidence.[91] The committee concluded that Hastings was guilty of the bribery charge and unanimously recommended that impeachment of Hastings might be warranted.[92] The committee certified its findings to the Judicial Conference.[93] The Conference reviewed the documents and voted to recommend Hastings's ***654** impeachment to the House of Representatives.[94] The House then held additional hearings, found that there was sufficient evidence to impeach,[95] and sent the articles to the Senate. The Senate committee took testimony and prepared a report for the full Senate,[96] which voted to impeach Hastings. Hastings vociferously contested the impeachment proceedings at every stage, from the judicial investigating committee hearings under the Judicial Councils Act to the Senate trial by committee pursuant to Senate Rule XI. Through federal court litigation, he vigorously challenged the Senate's use of a committee to hear the evidence against him instead of allowing him to present his case before the full Senate. Judge Sporkin, District Judge for the District of Columbia, held that a life-tenured, Article III judge who has been acquitted of felony charges cannot thereafter be impeached and tried on essentially the same charge by a committee of Senators consisting of less than the full Senate.[97] Ironically, once acquitted of the impeachment, Judge Hastings was elected to the United States House of Representatives, where he currently serves the Twenty-third District of Florida as a member of the body that impeached him.

C. Judge Walter L. Nixon, Jr.

The case against Walter L. Nixon, Jr.,[98] adds another dimension to the criticism of the impeachment process. In 1984 Judge Nixon, ***655** formerly the Chief Judge of the United States District Court for the Southern District of Mississippi, was indicted on one count of bribery and three counts of perjury before a grand jury.[99] He was acquitted of the bribery charge and one count of the perjury charge, but was convicted on the other two counts of perjury.[100] Judge Nixon noted the irony of the perjury convictions -- he was convicted of perjury based on statements he made to the grand jury supporting his innocence of the bribery charge.[101] Judge Nixon's convictions were upheld on appeal.[102] Even in the face of a criminal conviction, Judge Nixon refused to resign his judicial position. He, like Judge Claiborne, contended that he was being unjustifiably prosecuted based upon controversial rulings against the government.[103] Despite that claim, the House of Representatives approved three articles of impeachment against Judge Nixon.[104] The Senate, pursuant to Senate Procedural Rule XI, appointed a twelve-member committee to receive and report evidence. The committee conducted four days of hearings, received testimony from ten witnesses including Nixon, and then submitted a transcript and summary of its proceedings to the full Senate. The Senate convicted him of two of the three articles[105] and removed him from office.[106]

Nixon brought an action in the United States District Court for the District of Columbia challenging Senate Rule XI, which authorized the use of a committee to hear impeachment trials.[107] Nixon argued that the Constitution required the full Senate to try his impeachment, instead of the twelve-member committee of Senators.[108] ***656** He also claimed that because the full Senate had failed to perform the fact-finding inherent in a trial, the Senate had failed to 'try' him pursuant to the constitutional mandate.[109] The District Court dismissed his claim as a nonjusticiable political question.[110] Nixon appealed to the Court of Appeals for the District of Columbia Circuit.[111] The Court of Appeals unanimously affirmed the decision of the district court, with each judge of the three-judge panel writing separately.[112] In the opinion for the court, Judge Williams based his finding of nonjusticiability on his reading of the text and history of the Impeachment Trial Clause.[113] Judge Randolph concurred, finding review of the Senate impeachment rules to be nonjusticiable based on prudential separation of powers concerns.[114] Judge Edwards concurred in part and dissented in part, finding the question justiciable, but determining on the merits that the Senate had indeed tried Nixon.[115] Nixon further appealed his case to the U.S. Supreme Court,[116] which affirmed his conviction, relying on the elusive political question doctrine.[117]

*657 IV. Toward Due Process Guarantees in the Impeachment Process

Because the Constitution does not define the words within it precisely, it is within the province of the judiciary to define

those terms.[118] The Nixon Court's decision to abdicate this duty through the use of the political question doctrine leaves a process with no check on the rules of Congress, thus upsetting the delicate system of checks and balances established in the United States Constitution.[119] The political nature of the initiation of impeachments[120] and the magnitude of the consequences of impeachment[121] justifies a thorough probing into the necessity of impeachment in each case. Honesty, consistency, and fairness should be guarantees of our impeachment process; instead, they are left to happenstance.

A. Due Process

Both the Fifth and Fourteenth Amendments to the Constitution prohibit governmental actions that would deprive any person of certain entitlements.[122] The employment of the Judicial Councils Act does not override the protection afforded accused judges by the Fifth ***658** Amendment. However, the Act's procedures deny accused judges the procedural protections of a neutral decision maker, judicial review of the process, and public access to investigation findings, in contravention of due process.

To ascertain an individual's entitlement to due process, the U.S. Supreme Court applies a two-pronged analysis. The Court first asks whether life, liberty, or property are implicated, and if so, then asks what process is due.[123] Article III judges are granted constitutionally protected life tenure and salary protection, both of which are property interests under the Constitution, and are therefore entitled to due process before their removal.[124]

In determining whether procedural protection is due, courts look to the extent to which the individual will be 'condemned to [suffer] grievous loss.'[125] This examination includes consideration of the precise nature of the government function involved, and the private interest that has been affected by the government action.[126] When due process is implicated, the individual has a right to 'a fair procedure' to determine the basis for and legality of the government's action.[127] Because determinations of what and how much process is due are flexible, the specific dictates of due process requirements have been condensed to consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[128]

When these factors are applied to the impeachment process, the only conclusion is that the Judicial Councils Act fails to accord an accused judge the full panoply of due process protections.

First, because Article III judges are constitutionally guaranteed salary protection and life tenure, such judges have a strong private interest. Judges risk losing their reputations as a result of a finding of misconduct, and their futures as jurists are threatened. Sanctions a judge may face range from a suspension of duties to a recommendation ***659** of impeachment -- each of which jeopardizes the jurist's future ability to conduct the business of the courts by diminishing the public confidence in the judge's integrity. Impeachment will likely also hamper the jurist's ability to gain future employment, as it carries with it the stigma of having betrayed the public trust.

Other factors affecting the amount of process due arise differently at two distinct points in the impeachment process -- first, during the judicial council investigation of an accused judge, and second, when an accused judge challenges any part of the process through the federal courts.

(1) The Judicial Council Investigation Under the Judicial Councils Act

The second factor in determining the requirements of due process is the risk of erroneous deprivation. The risk of such deprivation in impeachment proceedings is substantial. Three particular aspects of the impeachment process increase this risk: the lack of meaningful judicial review of the impeachment process; the relative sophistication and secrecy with which judicial impeachment investigations are conducted; and the lack of an effective mechanism to deal with conflicts of interest between the accused judges and the investigating judges.

Although the investigating committee is composed of federal judges who are often more sophisticated than lay people, the decision-making process can become strained. Judicial review on appeal is acknowledged as a necessary component of American jurisprudence because a multi-layered approach to adjudications is often appropriate and helpful in guaranteeing fairness to litigants. Nevertheless, in Judicial Council proceedings, judicial review is explicitly precluded.[129] Although the statute notes that a judge may appeal a decision of a judicial council to the Judicial Conference, it is still within the discretion of the Judicial Conference to accept or reject the appeal, leaving an accused judge with no recourse.[130] This is exacerbated by the geographic ***660** proximity of the judges selected to serve on the investigating committee. Because the judges are all selected from the accused judge's circuit, disparate treatment of like cases based on personal associations is possible. Without judicial review, these biases are unlikely to be effectively countered.

The risk of erroneous deprivation is further enhanced by the nature of the impeachment investigation of an accused judge. The issues of judicial competence or misconduct are highly fact-specific. Nevertheless, because misconduct is often private and therefore not obvious, the alleged misconduct may be difficult to establish. Thus, in impeachment proceedings, it may be necessary to engage the assistance of investigators, in addition to commanding information through the subpoena power granted investigating committees. This is particularly true when the investigation does not follow a criminal conviction.

Additionally, the Judicial Councils Act allows judicial investigations to be conducted under a shroud of secrecy.[131] Public scrutiny is a significant deterrent to misconduct of any sort. Public knowledge of the actions of investigating committees, in addition to Judicial Council recommendations as the scheme currently requires, would bolster public confidence in the judiciary by mitigating the appearance of either partiality toward or persecution of judges under investigation.

The risk of erroneous deprivation of the judge's property interest is likewise increased because the Act fails to provide a procedure for resolving conflicts of interest among investigating committee members and the accused.[132] 'The government always has the obligation of providing a neutral decision-maker -- one who is not inherently biased against the individual or who has personal interest in the outcome.'[133] However, within a judicial council's disciplinary hearings, once judges have been selected to sit on an investigating committee there is no formal mechanism for those judges to recuse themselves, nor are there any standards set for such recusal. Although judges are ideally men and women of great integrity, it is likewise clear that conflicts of interest do occur. Judges of the same circuit may find it inappropriate to ***661** pass on questions of misconduct regarding one of their colleagues. The risk that judges may protect their colleagues, or may be unjustifiably harsh on their colleagues, is substantial. One judge may find that the accused judge has been the victim of an erroneous complaint, while another judge may find the embarrassment of judicial misconduct for all of the judiciary so great that the judge may approach the investigation with contempt. In any misconduct investigation, the search for truth must be the underlying motivating force. If any other factor may potentially become an issue, risk of disparate procedures is heightened. In order to ensure that erroneous deprivations do not occur, the Judicial Councils Act must make provisions for the conflicts of interest that are inevitable.

In addition to conflicts of interest based on personal affiliations, under the current system, an accused judge may face impeachment investigation proceedings in which a judge with prior exposure to the case is participating -- the likelihood of which is increased by an imperfect recusal mechanism -- with no possibility of judicial review or public scrutiny. Under these procedures, 'the risk of unfairness is intolerably high.'[134]

Third, the considerations of due process require an appraisal of the government's interest, including the function involved and the fiscal and administrative burdens that additional procedural requirements would entail.[135] In the impeachment investigation context, the government's interest is in eradicating misconduct from the judiciary and satisfying the public's interest in limiting the administrative and fiscal burdens imposed as a result of providing due process protections of judicial review, public availability of decisions, and conflict of interest mechanisms. The cost to the government includes the generally small cost of allowing judicial review of the relatively few impeachment investigation cases. Additionally, making the public aware of the impeachment process should entail virtually no cost, other than basic costs of reproduction and distribution of committee investigation reports. The conflict of interest mechanism may be more costly. In order to provide for alternative judges to take the place of recused judges on investigating committees, the provision of resources will be increased somewhat. However, the relative infrequency of impeachment investigations mitigates against an unmanageable cost to the government.

Balanced against those costs are the benefits to be derived from the preservation of the sanctity of the federal judiciary, the

independence of federal judges, and the maintenance of the confidence of the public. The fair and just adjudication of judicial misconduct is itself a ***662** benefit to the government and to society. Moreover, judges are entrusted with the very lives of the litigants who come before them. Therefore, the public confidence in the federal judiciary as a whole will be further diminished by the presence of judges whose honor has been called into question. Finally, in the American common law system, the decisions of federal judges must be inherently reliable in order to maintain the sanctity of a system that relies heavily on precedent. It is necessary for federal judges to trust the decisions of their colleagues in order to preserve the sanctity of the process as a whole.

The case of Judge Hastings is illustrative of the current due process problems with judicial council investigations.[136] Upon receipt of the initial complaint filed against Judge Hastings, the Chief Judge appointed a committee to investigate.[137] Pursuant to the Judicial Councils Act, the Chief Judge has complete discretion to select the investigating judges.[138] In choosing an investigating committee, the Chief Judge of the Eleventh Circuit appointed the circuit judge who had written the decision in the appeal of Hastings's alleged coconspirator.[139] The opinion in the coconspirator's appellate case 'recited in detail the evidence against Hastings'; yet this judge stayed on the committee and heard Hastings's case.[140] The impartiality of the assigned judge could reasonably be questioned because of the substantial likelihood that he may have already determined the guilt of the accused. Because the disciplinary investigation is essentially unguarded by such standard protections as judicial review and public scrutiny, the appointment of the judge who will decide the case is of paramount significance. In this case, a judge intricately involved in the alleged coconspirator's original case was chosen to participate in the subsequent impeachment investigation, in direct contravention of the Framers' mandate that the accused should not be subjected to the scrutiny of one who may have predetermined a judge's guilt through involvement in a criminal proceeding.

The Framers of the Constitution explicitly considered the rights of accused judges and included due process protections at the forefront of their debates. This constitutional mandate has been circumvented in the impeachment process by allowing judges involved in the determination of the guilt of an individual in a criminal proceeding to preside in a subsequent impeachment proceeding based on the same ***663** alleged misconduct.[141] Incorporating due process safeguards into the impeachment process will facilitate fact finding and secure the judge's perceived due process. Failure to subject evidence to the most rigorous examination possible is not only harmful to the accused judge, but also injures the justice system by exposing it to claims of impropriety.

(2) Court Challenges to the Constitutionality and Parameters of the Judicial Councils Act Itself

The federal judiciary's role in the impeachment process is twofold. Not only do Article III judges participate intimately in the internal investigation of complaints against judges, but Article III judges also have repeatedly been called upon to determine the constitutionality and parameters of the Judicial Councils Act itself. Both Judges Claiborne and Hastings challenged the legitimacy and scope of the Judicial Councils Act.[142] Conversely, Judge Nixon rested his legal contests on the validity of the Senate's trial by committee.[143] A recurring question in the Claiborne and Hastings cases was the extent to which recusal of judges from the accused judge's circuit would have been appropriate.[144] The propriety of circuit recusal in each case has ***664** been approached in an ad hoc manner, resulting in unpredictable decisions.

Inherent in the American judicial system are mechanisms for judges to recuse themselves from a case.[145] A judge must preside over a proceeding in an unbiased manner[146] and with the appearance of impartiality. If there is an appearance of bias or partiality, judges may recuse themselves from a particular case or be disqualified.[147] Two broad types of situations warrant compulsory judicial disqualification: personal bias or prejudice, either in fact or appearance, and personal involvement by the judge in the matter or controversy.[148]

Lawyers and litigants expect that judges will recuse themselves voluntarily when their impartiality may legitimately be questioned. Judges are generally in a better position to determine whether to recuse themselves from a case. If such potential exists, the judge will ***665** not only recognize it, but ideally will act to ensure the integrity of the legal process.

Nevertheless, inherent problems in the impeachment process are not relieved by the mere fact that the mechanism of recusal exists.[149] The discretionary nature of recusal leaves open the possibility that judges with intimate familiarity with a case may still decide questions of procedural validity relating to subsequent impeachment proceedings. This practice contravenes constitutional due process requirements and the prudential goal of maintaining the appearance of propriety in judicial action. Discretion inherently leads to divergent decisions; when one judge may find that knowledge of a case or communication with

an accused warrants her recusal, another judge faced with the same prior exposure may decide to continue presiding over the case.

Judge Claiborne faced the problems stemming from discretionary recusal several times. In his initial criminal trial, an out-of-circuit senior district judge was specially assigned to hear the case.[150] The district judge denied a series of pretrial motions filed by Judge Claiborne.[151] In Judge Claiborne's appeal of the pretrial rulings, the Ninth Circuit judges agreed to recuse themselves.[152] The Chief Justice then specially selected a panel of three judges from other circuits to hear the case.[153] The panel affirmed the pretrial rulings of the district judge.[154] Upon Judge Claiborne's subsequent conviction, he appealed again to the Ninth Circuit for en banc review.[155] Only six of the twenty-five circuit judges recused themselves from the vote.[156] The en banc vote represents the first time Ninth Circuit judges participated in Claiborne's criminal case.[157] Those judges who voted against the en banc hearing did so because of a perceived appearance of impropriety ***666** in having circuit judges from the same geographic location as the judge on trial presiding over the case.[158] This is notable because although many circuit judges recused themselves from hearing Claiborne's pretrial motion, the majority of them subsequently concluded that it was proper for them to vote on the en banc question. Judge Reinhardt, Circuit Judge for the Ninth Circuit Court of Appeals, aptly recognized that 'there can be no distinction drawn between the propriety of a judge's voting on a call for a hearing en banc and the propriety of a judge's hearing the appeal itself.'[159] Further, Judge Reinhardt notes the immense discretion afforded the Chief Justice of the United States in designating judges to preside in another circuit.[160] Judge Reinhardt suggests a 'random selection system' to be established through procedures that are a matter of public record to remedy this problem;[161] however, this has not been implemented. Noting the significance of Judge Claiborne's documented assertion of selective prosecution and the hand-picked manner in which the judges for his case may have been selected, the threat to the integrity of federal judges is great. The lack of consistency coupled with the absence of an unbiased standard for selecting judges to preside over cases compel the conclusion that subjective justice is at work; such a conclusion undermines the public confidence that justice has been done.

Judge Hastings's legal challenges to the Judicial Council's authority also present a curious situation. Most of Hastings's cases resulted in the recusal of other Eleventh Circuit judges.[162] At first glance this seems adequate; however, upon closer examination it is apparent that this was insufficient. As noted above, the Chief Justice is authorized to choose the judges who will sit by designation. In the Hastings ***667** cases, this was improper because the Chief Justice, in his capacity as Chair of the Judicial Conference, was a named defendant.[163] Although the name on the pleading is often of little significance to the merits of a case, in impeachment related proceedings, naming the Chief Justice as a defendant is more than a formality. The Chief Justice, as chair of the Judicial Conference, reviews and considers the entire record from the judicial council in impeachment cases. Moreover, the Chief Justice, as chair of the Judicial Conference, is authorized to conduct additional investigations into the conduct of the accused judge. Therefore, the Chief Justice is intimately involved in the litigation. In its quest to guarantee a healthy, viable judiciary, this system instead leads the public to question the fairness of the judicial process as a whole. In such a climate as impeachment, the judicial involvement should appear to be as nonpartisan as possible. Instead, the current system taints the stature of the judiciary. The current process could be initiated by a judge with a conflict of interest, the decision may be denied judicial review, and the public will be denied access to the determinations of the judicial councils. Moreover, the judicial council has no established mechanism for addressing challenges to judicial impeachment investigations. While the costs of remedying these problems are low, the benefits are great. Public confidence in the federal judiciary should not be undervalued.

B. The Political Question Doctrine: Cognitive Selection as Jurisprudential Method

The judicial branch of government finds itself in a precarious position when placed in the midst of political disputes based on highly charged controversies. In many cases, the court has invoked the justiciability doctrines to avoid involvement in politics. One justiciability doctrine, the political question doctrine, embodies the concept that certain matters are inherently political in nature and are best resolved by the political branch of government and not by judicial review.[164] ***668** The difficulty with the political question doctrine lies in its absolute finality -- a holding of nonjusticiability is absolute in its foreclosure of judicial scrutiny. Thus, reliance of a court on the political question doctrine to resolve a dispute renders the conduct at issue immune from scrutiny.[165]

Traditionally, the process of impeachment has been acknowledged as a political process.[166] However, the application of the political question doctrine to federal judicial impeachment procedures is curious given the vast involvement of the judiciary in earlier aspects of the impeachment process.

This issue was explored more broadly in the Supreme Court's treatment of the Nixon case.[167] In finding Senate impeachment procedures a nonjusticiable political question in the Nixon opinion, Chief Justice Rehnquist reasoned that the Constitution grants the sole authority to try impeachments to the Senate.[168] The Court explained that the word 'sole' constituted a textually demonstrable commitment of trial procedures to a coordinate branch of government, the first element in finding a political question in Baker v. Carr.[169] Searching for the meaning of the term 'sole' in the impeachment trial clause, Justice Rehnquist resorted to dictionary definitions.[170] However he ultimately relied on the 'common sense meaning' of the word sole, finding that the Senate alone should determine an individual's impeachment fate.[171] Based on that definition, the Court found that ***669** the Framer's use of the word sole in the impeachment trial clause was sufficient to foreclose judicial review of Senate procedures.[172]

Likewise, the Court found a lack of a judicially manageable standard of review, the second element required to find a political question. In defining the word 'try,' the Court again resorted to dictionary definitions, but concluded that the insufficient precision of the word 'try' failed to provide the necessary manageable standards of review.[173]

The Court further based its finding of nonjusticiability on constitutional history, citing for support the statement that 'the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. '[174] Lending credence to this historical approach, the Court noted that the Framers intended separate criminal and impeachment trials for accused officials.[175] The Court also based its decision on prudential considerations and the observation that '[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers.'[176]

Finally, the majority distinguished Powell v. McCormack.[177] In Powell the Court found justiciable Adam Clayton Powell's request for review of the House of Representative's refusal to seat him. The Powell court separated Congress's nonjusticiable authority to determine a member's constitutional qualifications of age, residency, and length of citizenship, from its justiciable act to deny a member his seat on other grounds.[178] The Nixon Court distinguished Powell based on a separate constitutional clause controlling the qualifications Congress could consider and the lack of such a clause to shape impeachment procedures.[179] Justice Stevens concurred in the Court's judgment, based on ***670** his perception that the Framers' intent to assign impeachment to the legislature was sufficient evidence of nonjusticiability.[180] Justice Stevens found that the danger of deciding the impeachment by a completely arbitrary method was slight because the Senate recognized the importance of its duty under the Constitution's impeachment trial clause.[181]

Justice White, joined by Justice Blackmun, found the case to be justiciable and therefore concurred only in the judgment.[182] Justice White was extremely dissatisfied with the way the majority addressed the separation of powers issue.[183] For Justice White, judicial review was essential to ensure the fairness of the process.[184] Justice White found that the word 'sole' was intended merely to distinguish between the House and the Senate, each of which has a singular power over the impeachment process. Justice White also found the term 'try' sufficiently definable and concluded that the judiciary has the duty and province to determine the sufficiency of the Senate impeachment procedure.[185]

Although Justice Souter found the case nonjusticiable in his concurring opinion,[186] he left open the possibility of judicial review of Senate impeachment procedures when justified by egregious circumstances.[187] Souter reasoned that trial by committee in the Senate was not an occasion that demands an answer from the courts because the committee trial is sufficient to satisfy the mandate of the impeachment clause.[188]

***671** The independence of the federal judiciary is a value that both historic and modern social architects have endeavored to protect through the impeachment clauses of the Constitution and the Judicial Councils Act. The Nixon Court posed the questions of the validity of the impeachment procedures as if the Justices had had no role in the impeachment proceedings prior to the case being heard by the Supreme Court. Chief Justice Rehnquist recited history and tradition in the Nixon case to assert that the judiciary should not have any role in impeachments because that could eviscerate what is effectively the only check on the judiciary.[189] Chief Justice Rehnquist relied on the political question doctrine as a means of avoiding the more complex issue of judicial involvement at all stages of an inherently political process.[190] His failure to acknowledge the reality that judges are involved in the impeachment process damages the public's perception of the integrity of the judiciary.

The judiciary's ability to continue to shape public discourse lies firmly in its ability to maintain public trust. The judiciary has

been described as the 'least dangerous branch'[191] because its power is derived from public confidence in the judicial branch's integrity and in the maintenance of the sanctity of the judicial process. It is disingenuous to include judicial involvement in the initiation of impeachment proceedings, while disallowing judicial involvement or review of subsequent congressional proceedings, based on the theory that the judiciary was not intended to participate in impeachments. This inconsistency in the impeachment process, underscored by Chief Justice Rehnquist's opinion in Nixon, mandates that action be taken to protect the sanctity of the judicial branch.

***672 V. Incorporating Procedural Safeguards into the Judicial Councils Act**

Considering the manifest need to attack corruption at every level of government, the interest in judicial policing is great. However, the Judicial Councils Act sustains a procedure that fails to provide federal judges with the protections of due process. Because judicial self-policing is necessary to the administration of a growing court system, at the very least, procedural safeguards must be implemented to ensure due process for accused judges. This Note argues for the adoption of formal judicial review of the application of the Judicial Councils Act to an accused judge, the public availability of investigatory actions, and a formal procedure for addressing judicial conflicts of interest within the judicial policing mechanism.

Formal judicial review of the proceedings of the investigating committee and the judicial council as applied to a particular judge will protect the sanctity of the process. To ensure that the fact finding inherent in investigating committee actions is accurate and that judges are afforded the due process protections guaranteed to them under the Constitution, the safeguard of judicial review should be implemented. Finally, judicial review of the proceedings at this early stage in an impeachment inquiry is necessary precisely because the Supreme Court, speaking through Chief Justice Rehnquist, has stated it will not review the procedures of Congress.[192]

Public access to investigating committee actions will provide the public with the confidence so necessary to ensure that justice is being done. The inevitable tendency for the public to perceive that the judiciary is either protecting its own, or conversely is unfairly condemning a judge perceived to have brought the judiciary into disrepute, will be lessened through the dissemination of this information. The public will then understand the nature of the proceedings and will therefore have greater confidence in the sanctity of the process.

The Congress finally should directly address the judicial conflicts of interest problems that have plagued the impeachment cases. Because the Judicial Councils Act requires judges to investigate and discipline their colleagues, the provision of express procedures will likely increase the consistency with which judicial misconduct is addressed. This Note argues for the adoption of a random selection process for the replacement of judges recused or otherwise disqualified from a proceeding. Contrary to the perception that some judges may have more expertise in some cases than in others and should therefore be selected using that criterion, the federal judiciary is teeming with talented jurists, all of whom may adequately apply the precepts of law to ***673** the problems of a misconduct hearing. A random selection process will exploit this pool, in addition to shielding the judiciary from the public suspicion associated with the disjointed manner by which judges are currently selected to serve in the face of recusal.

All of these reforms will protect the judiciary from the threat to its character caused by the implementation of the current scheme of judicial self-policing. Judges should be afforded this protection so that the underlying goals of the Judicial Councils Act -- maintaining the public confidence in the judiciary and promoting the effective administration of justice -- will be achieved. This will prevent an accused judge -- and the public -- from operating within a sea of doubt and suspicion.

Conclusion

The impeachment process was initially a constitutional process designed to remove corrupt judges. With the implementation of the Judicial Councils Act, it has since become largely a statutory process. From the framing of the constitutional impeachment clauses to the statutory attempt to streamline the impeachment process through the Judicial Councils Act, it is clear that independence and accountability are the two issues central to the maintenance of judicial independence. In our haste for an expedient method of judicial discipline, we have instead created a method by which judges are denied due process, and the public is left to question whether justice is being done.

The modern impeachments of Judges Claiborne, Hastings, and Nixon illustrate the limitations of the current system. Under the Judicial Councils Act, accused judges are denied the essential check of judicial review of the Act as applied to them. Further, as the Supreme Court announced in the Nixon decision, the procedures of the Congress in performing its role in impeachment is likewise immune from judicial scrutiny, under the political question doctrine. It is precisely because of this denial of judicial review of the end of the process that resort to the courts should be allowed in the early stages of the process. Additionally, the investigating committees created by the circuit judicial councils under the Judicial Councils Act operate without informing the public of their fact-finding process and investigatory actions. The public, susceptible to the perception that the judiciary is either protecting its own or unfairly persecuting one who has allegedly brought the judiciary into disrepute, is left to question whether, in fact, justice is being done. An additional problem under the Act is that it does not provide a mechanism for the consistent resolution of judicial conflicts of interest. Because the judiciary is called upon not only to investigate accused judges, but also to rule on the constitutionality of the Act itself, conflicts necessarily arise. Judges from the accused ***674** judge's circuit, conscious of the need to preserve the sanctity of the process, recuse themselves from impeachment related cases. Nonetheless, the Act provides no method for their replacement.

This Note argues for judicial review of the Judicial Councils Act as applied to accused judges, in addition to increasing public scrutiny of investigatory committee actions and implementation of a random selection process to improve the ad hoc method of replacement currently in place. All of these changes will create a process upon which the judiciary -- and the public -- can depend.

Footnotes

[a] LL.M. Candidate Harvard Law School, 1995; J.D. Hastings College of the Law, 1994; A.B. University of California, Berkeley, 1989. I would like to express my appreciation to Professors C. Keith Wingate and Joseph Grodin for their insightful comments on earlier drafts. Additionally, I would like to thank Professors W. Ray Forrester and Richard Marcus and the Hastings Law Journal editors. I would also like to thank my parents, Elthello and Beverly Smith, for their overwhelming support.

[1] Benjamin Cardozo , Nature of the Judicial Process 168 (1921).

[2] The Federalist No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[3] Raoul Berger, Impeachment: The Constitutional Problems 1 (1973).

[4] U.S. Const. art. II, s 4. Additional constitutional provisions regarding impeachment are: 'The House of Representatives shall have the sole power of impeachment,' U.S. Const. art. 1, s 2; and U.S. Const. art. 1, s 3, cl. 6, which states:
The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[5] See Berger , supra note 3, at 58 (stating that criminality is not a requirement for impeachment); see also Charles K. Burdick, The Law of the American Constitution 87 (1922) (stating that grounds for impeachment may include misconduct in office); Alex Simpson, Jr., A Treatise on Federal Impeachments (1973) (concluding that the commission of a crime is not necessary to impeach); Arthur Bestor, Impeachment: The Constitutional Problems, 49 Wash. L. Rev. 255 (1973) (book review) (noting that the Framers of the Constitution intended impeachment to reach political conduct injurious to the commonwealth, whether criminal or not). But see Irving Brant, Impeachment: Trials & Errors 180-81 (1972) (arguing that impeachment should be limited to criminal offenses).

[6] See House Comm. on the Judiciary, Constitutional Grounds for Presidential Impeachment , 93d Cong., 2d Sess. 21 (1974) [hereinafter Constitutional Presidential Impeachment], which states
[T]he House has placed little emphasis on criminal conduct .... Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Recitals that a judge has brought his court or the judicial system into disrepute are commonplace.

See also Peter Charles Hoffer & N.E.H. Hull, Impeachment in America, 1635-1805, at 99 ('Insofar as impeachment had concerned misconduct and misuse of power rather than common law crimes, the danger of its misapplication was heightened.').

7 28 U.S.C. s 453 (1993) requires each justice or judge to take the following oath or affirmation before performing the duties of the office:
I, [state your name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [state your position] according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

8 Although much has been written regarding impeachment, surprisingly little appears in the academic literature regarding the constitutional or prudential issues inherent in the impeachment process. See generally Philip B. Kurland & Ralph Lerner, The Founders' Constitution 148-81 (1987); James D. St. Clair et al., An Analysis of the Constitutional Standard for Presidential Impeachment (1974) [hereinafter Presidential Impeachment]; Department of Justice, Legal Aspects of Impeachment: An Overview (1974); Paul S. Fenton, The Scope of the Impeachment Power, 65 Nw. U. L. Rev. 719 (1970); Ronald D. Rotunda, Symposium on Judicial Discipline and Impeachment: An Essay on the Constitutional Parameters of Federal Impeachment, 76 Ky. L.J. 707 (1988); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 8 (1959); Note, The Exclusiveness of the Impeachment Power Under the Constitution, 51 Harv. L. Rev. 330 (1937); Note, Vagueness in the Constitution: The Impeachment Power, 25 Stan. L. Rev. 908 (1973).

9 Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified as amended at 28 U.S.C. ss 331, 332, 372 (1993)) [hereinafter Judicial Councils Act].

10 2 The Records of the Federal Constitutional Convention of 1787 , at 159, 500, 551 (Max Farrand ed., rev. ed. 1937) [hereinafter Farrand]; Notes of the Debates in the Federal Convention of 1787 Reported by James Madison 49, 61, 319, 539, 577 (Adrienne Koch ed., 1966) [hereinafter Madison's Notes].

11 See The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In contemplating regulation, the Framers recognized that some accountability should be instituted in case life-tenured, unelected judges abused their positions through acts of treason or sheer neglect of office. Id.

12 The Federalist No. 81 , at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13 Madison's Notes , supra note 10, at 606.

14 Id. at 605-07.

15 Farrand, supra note 10, at 21-22.

16 The Federalist No. 65 , at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17 Alexander Hamilton expanded on this view in The Federalist No. 65:
The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding .... The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.
The Federalist No. 65 , at 492 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18 Id. at 399.

[19] Id. ('Would it be proper that the persons, who had disposed of his fame, and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? '). See also Madison's Notes, supra note 10, at 577, 605-06.

[20] Alexander Hamilton notes in The Federalist No. 65 that 'by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate, would often be virtually included in a sentence ....' The Federalist No. 65 , at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[21] Id. ('Who would be willing to stake his life and his estate upon the verdict of a jury, acting under the auspices of judges, who had predetermined his guilt.').

[22] 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives s 2013, at 334-35 (1907).

[23] The Federalist No. 78, at 470-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Madison's Notes , supra note 10, at 337.

[24] Madison's Notes , supra note 10, at 337.

[25] The Federalist No. 65 , at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[26] Id. at 397.

[27] Id.

[28] The Federalist No. 78 (Alexander Hamilton).

[29] 'The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.' U.S. Const. art. III, s 1.

[30] '[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.' U.S. Const. art. II, s 4; see supra notes 5-6 and accompanying text.

[31] U.S. Const. art. I, s 3, cl. 6.

[32] The Federalist No. 78, at 470-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[33] For a complete history of the purpose of the Judicial Councils Act, see Stephen B. Burbank, Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283 (1982), and Michael J. Remington, Circuit Council Reform: A Boat Hook for Judges and Court Administrators, 1981 B.Y.U. L. Rev. 695. The National Commission on Judicial Discipline and Removal, chaired by Robert Kastenmeier, was commissioned to study the problems associated with the Judicial Councils Act. Howard Mintz, It's Not Over Yet for Aguilar, The Recorder (San Francisco), May 6, 1994, at A1. The report, released in August 1994, endorses the current federal discipline system. Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265 (Aug. 1994) [hereinafter National Commission Report]. The commission rejected a proposal to rely on a central enforcement authority that is characteristic of state systems because of the perceived interference with judicial independence. Id. at 351.
For a collection of working papers prepared for the Commission, see Stephen B. Burbank & S. Jay Plager, Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science, 142 U. Pa. L. Rev. 1 (1993); Jeffrey N. Barr & Thomas E. Willing,

Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 U. Pa. L. Rev. 25 (1993); Peter M. Shane, Who May Discipline or Remove Federal Judges? A Constitutional Analysis, 142 U. Pa. L. Rev. 209 (1993); Charles Gardner Geyh, Informal Methods of Judicial Discipline, 142 U. Pa. L. Rev 243 (1993); Emily Field Van Tassel, Resignations and Removals: A History of Federal Judicial Service -- and Disservice -- 1789-1992, 142 U. Pa. L. Rev. 333 (1993).

34 Administrative Office Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223, 28 U.S.C. s 332 (1993).

35 Id. s 332(d)(1).

36 Mary L. Volcansek, Judicial Impeachment: None Called For Justice 9-10 (1993).

37 Id. at 10.

38 398 U.S. 74, 86 (1970).

39 Id. at 85 n.6.

40 Id. at 82.

41 Id.

42 Id.

43 H.R. Rep. No. 1313, 96th Cong., 2d Sess. 1 (1980); 126 Cong. Rec. S13, 858 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini).

44 28 U.S.C. s 372(c)(1) (1993).

45 Id. s 372(c)(2).

46 Id.

47 Id. s 372(c)(3)(A).

48 Id. s 372(c)(3)(B).

49 Id. s 372(c)(4)(A)-(C). If, after receiving a complaint regarding the conduct of a judge, the Chief Judge does not dismiss that complaint, the Chief Judge ‘shall promptly appoint himself 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.‘ Id. s 372(c)(4)(A).

50 Id. s 372(c)(6).

[51] 28 U.S.C. s 372(c)(7)(B) (1993) states:
In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct -- (i) which might constitute one or more grounds for impeachment under Article I of the Constitution; ... the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

[52] The Judicial Conference is formed as follows:
The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate .... If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee.
28 U.S.C. s 331 (1993).

[53] 28 U.S.C. s 372(c)(8)(A) (1993).

[54] Id. s 372(c)(9)(A)-(B).

[55] Id. s 373(c)(14).

[56] Id. s 373(c)(14)(A).

[57] Id. s 373(c)(14)(A)-(C).

[58] 28 U.S.C. s 372(c)(10) (1993).

[59] 28 U.S.C. s 372(c)(8)(A) (1993) states:
If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.
Curiously, section 372(c) of the Judicial Councils Act relating to investigation and impeachment recommendations does not apply to Justices of the United States Supreme Court.

[60] Id.

[61] See Charles A. Black, Jr., Impeachment: A Handbook 6-9 (1974).

[62] Id.

[63] The congressional delegation of the authority to investigate judicial conduct warranting impeachment to the judicial branch is constitutionally suspect. It has been noted that although the final decision to impeach remains in the House, substantial weight must be given to a recommendation of impeachment from the Chief Justice of the United States Supreme Court and the chief judges of all of the federal circuit courts. Hastings v. Judicial Conference of the United States, 829 F.2d 91, 110 (D.C. Cir. 1987) (Buckley, J., concurring in part and dissenting in part), cert. denied, 485 U.S. 1014 (1988). In that case, Judge D.H. Ginsberg, Circuit Judge for the District of Columbia Circuit, speaking for the majority found that the certification from the Judicial Conference to the House of Representatives that impeachment of a judge may be warranted was harmless because Congress might 'equally ... regard a private informant's suggestion that a judge may have committed an impeachable offense as a matter of utmost gravity.' Id. at 102-03. Judge Buckley dissented from the court's treatment of the question of whether the Judicial Councils Act violates separation of powers. Id. at 110. Arguing for a more thorough analysis of the question, Judge Buckley noted that although

any private citizen has the authority to submit a complaint against a judge, the judicial councils and the Judicial Conference are the only complainants with the power to support their complaint through investigations, subpoenaed witnesses, and extensive testimony. The judge reasoned that the recommendation of impeachment reflecting the judgment of such an impressive collection of jurists makes it difficult for the House to exercise its role in the impeachment process independently. Id.

This is illustrated by the Hastings case. See supra Part III.B. The judicial council's hired attorney, John Doar, worked for 6,000 hours investigating Judge Hastings. Jack Bass, Why the Alcee Hastings Case Is Still Not Settled, Wash. Post , Jan. 10, 1993, at C4. The council also took testimony from more than 112 witnesses before it recommended impeachment proceedings. Id.

It has been argued that judicial participation in the process 'exploits the Framers' blending of governmental powers' by 'allow[ing] the judicial branch to serve as an expert witness for or against one of its members.' Elbert P. Tuttle & Dean W. Russell, Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the 'Blending' of Powers , 37 Emory L.J. 587, 610 (1988). The recommendation by the Judicial Conference is characterized as 'testimony,' which the House is free to give any weight it wishes. Id. However, this view ignores the prosecutorial nature of an impeachment investigation and the explicit intent of the Framers that the legislature should initiate impeachments. Alexander Hamilton states in The Federalist No. 65:

Is [impeachment] not designed as a method of National Inquest into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body ....

The Federalist No. 65 , at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

64 The Senate trial procedure was adopted by the Senate in 1935 to streamline the Senate impeachment trial system. The Rule XI evidence committee was not used until the impeachment of Harry Claiborne in 1986. See infra Part III(A) (discussing the impeachment of Harry Claiborne) and infra Part IV(B) (discussing the Supreme Court's treatment of Senate trial by committee).

65 Black , supra note 61, at 9. One scholar has used the 'prosecutor' analogy to describe the actions of the House in investigating alleged judicial misconduct. Id. at 5-9. See also Congressional Quarterly, Impeachment and the U.S. Congress 17 (Mar. 1974) (noting the 'prosecutorial' role of the House in investigating impeachments and presenting the articles of impeachment to the Senate for trial); Black , supra note 61, at 7-8 (noting the prior procedure of the House to use one of its own committees to investigate possible impeachable conduct; such committee investigations were generally conducted with testimony and documents available through subpoena). This investigative power given to committees, as described by Black, is remarkably similar to the authority granted the judiciary through the Judicial Councils Act.

66 For a discussion of the use of the Senate Committee to facilitate an impeachment trial, see Volcansek , supra note 36, at 54 (presenting the Senate impeachment trial by committee in the context of the impeachment of Judge Harry E. Claiborne). See also infra section III(A) (discussing the impeachment of Judge Harry E. Claiborne).

67 Black , supra note 61, at 9-14.

68 The impeachment of Judge Halstead Ritter occurred in 1936. Constitutional Presidential Impeachment , supra note 6, at 48-51. In the period from 1799 to 1936, the House of Representatives impeached just 13 federal officers. Of these, 10 were jurists. Interestingly, all of the impeached officials have been male; no female officer has ever been impeached. Eleanore Bushnell, Crimes, Follies and Misfortunes: The Federal Impeachment Trials 9-10 (1992).

69 Proceedings of the U.S. Senate in the Impeachment Trial of Harry E. Claiborne, S. Doc. No. 48, 99th Cong., 2d Sess. 11-12 (1986) [hereinafter Claiborne Senate Impeachment].

70 United States v. Claiborne, 870 F.2d 1463, 1464 (9th Cir. 1989).

71 United States v. Claiborne, 781 F.2d 1327, 1327 (9th Cir. 1986) (Reinhardt, C.J., dissenting from order denying rehearing en banc), cert. denied, 475 U.S. 1120 (1986).

72 Id.

73 Id. at 1328. During the impeachment debate, Senator Levin stated that 'evidence clearly suggests that the Government engaged in a pattern of selective prosecution, prosecutorial overreaching, and perhaps intimidation of witnesses and other improprieties.' 132 Cong. Rec. S16,823 (daily ed. Oct. 16, 1986). It has been argued that the Judicial Councils Act, as it stands, encourages the political targeting of controversial and outspoken judges. Drew E. Edwards, Comment, Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act, 75 Calif. L. Rev. 1071 (1987).
Judge Claiborne argued that this vendetta would result in 'chilling' judicial independence if the prosecutors were successful. Claiborne, 870 F.2d at 1465. For a detailed discussion of the adverse affect of stifling judicial decision making, see Irving R. Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681 (1979).

74 Claiborne, 870 F.2d at 1464.

75 United States v. Claiborne, 765 F.2d 784, 784 (9th Cir. 1985).

76 Claiborne, 781 F.2d at 1329 (Reinhardt C.J., dissenting).

77 Id. at 1325 (Ferguson, J., dissenting).

78 Claiborne Senate Impeachment , supra note 69, at 14-15.

79 Id.

80 Hastings v. Judicial Conference of the United States, 829 F.2d 91 (D.C. Cir. 1987), cert. denied, 485 U.S. 1014 (1988) [hereinafter Hastings III]; Hastings v. Judicial Conference of the United States, 657 F. Supp. 672 (D.D.C. 1986), aff'd in part and rev'd in part on other grounds sub. nom. In re Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir. 1986), cert. denied sub nom. Hastings v. Godbold, 477 U.S. 904 (1986) [[[hereinafter Hastings II]; Hastings v. Judicial Conference, 593 F. Supp. 1371 (D.D.C. 1984), aff'd in part and vacated in part, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 447 U.S. 904 (1986) [hereinafter Hastings I]; In re Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd, 735 F.2d 1261 (11th Cir. 1984), cert. denied sub nom. Hastings v. Investigating Committee for the Judicial Council of the Eleventh Circuit, 469 U.S. 884 (1984) [hereinafter Hastings Petition].

81 Hastings I, 593 F. Supp. at 1375 (1984); see also Alcee Hastings Impeachment Inquiry: Hearings on H. Res. 128 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 2 (1988) [hereinafter Hastings House Impeachment].

82 Hastings I, 593 F.Supp. at 1375.

83 Id. at 1376.

84 United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983).
It has been noted that impeachment is an independent inquiry, and an impeachable offense may include a noncriminal act. However, the incidence of independent judicial investigation has been diminished when impeachment follows a criminal conviction. See Volcansek , supra note 36, at 140. This trend was codified in the Judicial Councils Act:
If a judge ... has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction ... the Judicial Conference may, by majority vote and without referral or certification [from the judicial council,] ... transmit to the House of Representatives a determination that consideration of impeachment may be warranted ....

Judicial Councils Act of 1990, Pub. L. No. 101-650, s 402(d) (codified at 28 U.S.C. s 372(c)(8) (1993)). This approach was first advocated by Robert N. Kastenmeier (Member of Congress and Chairman of the House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice) and Michael J. Remington (Chief Counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice) in Symposium on Judicial Discipline and Impeachment, Judicial Discipline: A Legislative Perspective, 76 Ky. L.J. 763, 784 (1988). See also Michael J. Broyde, Expediting Impeachment: Removing Article III Federal Judges After Criminal Conviction, 17 Harv. J.L. & Pub. Pol'y 157, 158 (1994) (arguing that the House of Representatives should establish an objective standard for 'automatic' impeachment of federal judges who have been convicted of certain crimes in federal court); Maria Simon, Bribery and Other Not So 'Good Behavior': Criminal Prosecution as a Supplement to Impeachment of Federal Judges, 94 Colum. L. Rev. 1617, 1619 (1994) (arguing that the removal and disqualification of an Article III judge convicted under a federal criminal statute supports the removal of that judge from office without resorting to the impeachment mechanism at all).

85 See The Perplexing Case of Judge Alcee Hastings, Wash. Post , July 7, 1988, at C1. This allegation presents an interesting issue. It is significant that of the five criminal judicial convictions since 1980, three of the judges are minorities. This is a disparate ratio considering the minuscule number of minorities within the federal judiciary. The other two cases not addressed in this Note either have not yet or will not reach impeachment. One concerns Judge Robert P. Collins of the Eastern District of Louisiana, who was convicted of accepting a bribe. The other case involves Judge Robert P. Aguilar of the Northern District of California, convicted of an unlawful wiretap disclosure. See Robert S. Peck, Jurist Before the Bench, Challenging Impeachment Procedures for Federal Judges, A.B.A. J. , Feb. 1993, at 60. Judge Collins is currently in prison, having exhausted all appeals. See United States v. Collins, 972 F.2d 1385 (5th Cir. 1993), cert. denied, Collins v. United States, 113 S. Ct. 1812 (1993). On June 22, 1993, the Judicial Conference certified to the House of Representatives that impeachment of Collins may be warranted. However, Judge Collins resigned his office upon exhaustion of his appeals. National Commission Report, supra note 33, at 74.
Judge Aguilar's case presents a different matter. On April 19, 1994, an en banc panel of the United States Court of Appeals for the Ninth Circuit overturned Judge Aguilar's convictions on all counts. United States v. Aguilar, 21 F.3d 1475, 1487 (9th Cir. 1994), cert. granted 115 S. Ct. 571 (1994). Nevertheless, Judge Aguilar may still face the judicial council, which must decide whether and to what extent the Judge should be disciplined. Howard Mintz, It's Not Over Yet for Aguilar, The Recorder (San Francisco), May 6, 1994, at A1.

86 The complaining judges were Judge William Terrell Hodges of the U.S. District Court for the Middle District of Florida and Chief Judge Anthony A. Alaimo of the U.S. District Court for the Southern District of Georgia. Both are members of the Eleventh Circuit Judicial Council. Hastings I, 593 F. Supp. at 1376 n.11.

87 Id. at 1376 ('Confronted with the fact that Judge Hastings was the only alleged co-conspirator, the Court determined in affirming the jury's conviction of Borders on the conspiracy count that the jury must have on all the evidence properly concluded that Judge Hastings had conspired with Borders. '). The complaining judges also alleged that Judge Hastings:
(2) ... made 'public and unfounded statements' that the United States was prosecuting him on racial/political grounds; (3) ... knowingly and publicly exploited his judicial position ... by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense; (4) ... had allowed ex parte contacts between his law clerk and counsel ... and had 'completely abdicated and delegated' his judicial decision-making authority to his law clerk; (5) ... told counsel in a judicial proceeding that he had read an important precedent when he knew he had not ... (6) ... exploited his judicial position by soliciting funds for ... a convicted federal offender.
Id. at 1376-77.

88 Id. at 1377. The investigating committee of the Judicial Council of the Eleventh Circuit consisted of John C. Godbold, Chief Judge of the Eleventh Circuit, U.S. Circuit Judges Gerald Bard Tjoflat and Frank M. Johnson, and U.S. District Judges Sam C. Pointer and William C. O'Kelley. The committee named John Doar, a private attorney, as its counsel. Id. at 1377.

89 See In re Grand Jury Proceedings, 841 F.2d 1048 (11th Cir. 1988) (before Judges Gilbert S. Merritt, Nathaniel R. Jones, and Ralph B. Guy of the Sixth Circuit); In re Request for Access to Grand Jury Materials, 833 F.2d 1438, 1439 (11th cir. 1987) (before the same panel); In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1491 & n.1 (11th Cir. 1986) (before Chief Judge Levin H. Campbell of the First Circuit, Judge Amalya Lyle Kearse of the Second Circuit, and Wilbur F. Pell of the Seventh Circuit), cert. denied, 477 U.S. 904 (1986); In re

Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1262, 1263 (11th Cir. 1984).

90 See Hastings I, 593 F. Supp. at 1377; see also Volcansek , supra note 36, at 87.

91 Volcansek , supra note 36, at 87.

92 Hastings III, 829 F.2d at 96.

93 Id.

94 Id.; Congress Reluctantly Takes up Hastings' Ouster, Legal Times , Mar. 30, 1987, at 2; H.R. Res. 128, 100th Cong., 1st Sess. (1987), 133 Cong. Rec. H1506, H1514 (daily ed. Mar. 23, 1987) ('[O]n March 17, 1987, Chief Justice Rehnquist, acting on behalf of the Judicial Conference, transmitted to the Speaker of the House of Representatives a determination that the impeachment of United States District Judge Al Hastings may be warranted.').

95 H. Res 499, 100th Cong., 2d Sess. (1988).

96 Report of the Impeachment Trial Comm. on the Articles Against Judge Alcee L. Hastings , S. Rep. No. 156, 101st Cong., 1st Sess. 1 (1989) [[[hereinafter Hastings Senate Impeachment]. Hastings also sought injunctive relief from the District of Columbia District Court during the Senate trial. Hastings v. United States Senate, 716 F. Supp. 38, 39 (D.D.C. 1989), aff'd, 887 F.2d 332 (D.C. Cir. 1989). District Judge Gerhard Gesell dismissed the claim, finding that Hastings failed to establish a clear constitutional violation. Id. at 43. The Court of Appeals for the District of Columbia Circuit affirmed, stating that Hastings's challenges were not ripe. Hastings v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989).

97 Hastings v. United States, 802 F. Supp. 490, 505 (D.D.C. 1992). In that case, Judge Sporkin found that Hastings's objection to the Senate committee was not precluded by the grant of certiorari in Nixon v. United States (see infra Part III.C), which presented an identical issue. Id. at 493. Nevertheless, on March 2, 1993, the District of Columbia Court of Appeals vacated Judge Sporkin's decision without opinion. Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993). In light of the Supreme Court's decision in Nixon, Judge Sporkin dismissed the action on October 21, 1993 in a brief opinion. Hastings v. United States, 837 F. Supp. 3 (D.D.C. 1993).

98 See Nixon v. United States, 744 F. Supp. 9, 10 (D.D.C. 1990), aff'd, 938 F.2d 239 (D.C. Cir. 1991), aff'd, 113 S. Ct. 732 (1993).

99 Nixon, 744 F. Supp. at 10.

100 Id.

101 Brief for Petitioner at 17-18, Nixon v. United States, 113 S. Ct. 732 (1993); Walter L. Nixon Impeachment Inquiry: Hearings on H. Res. 407 Before Subcomm. on Civil and Constitutional Rights, 100th Cong., 2d Sess. 979-80 (1988) (app. 1, no. 96) [hereinafter Nixon House Impeachment].

102 United States v. Nixon, 816 F.2d 1022 (5th Cir. 1987); see also United States v. Nixon, 881 F.2d 1305 (5th Cir. 1989) (affirming lower court's denial of judge's motion to vacate conviction); United States v. Nixon, 827 F.2d 1019 (5th Cir. 1987) (denying petition for rehearing en banc); Nixon v. United States, 703 F. Supp. 538 (S.D. Miss. 1988) (denying motion to vacate

conviction).

103 One relevant case is the land condemnation case of Petit Bois Island in the Gulf of Mexico, in which Nixon ruled that the government was liable for more than six million dollars in damages. United States v. 717.42 Acres of Land, C.A. No. S80-0450(N) (S.D. Miss), cited in Nixon House Impeachment, supra note 101, at 1156-57.

104 Nixon, 744 F. Supp. at 10.

105 Id. at 10.

106 Id.

107 Id. at 9. Senate Rule XI allows the appointment of 'a committee of Senators to receive evidence and take testimony,' which then compiles a transcript of the proceedings, testimony, and all evidence upon which the full Senate votes. Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials XI, XXII , reprinted in Senate Manual, S. Doc. No. 1, 101st Cong., 1st Sess. 186-87, 188 (1989).

108 Nixon, 744 F. Supp. at 10. The constitutionality of Senate impeachment by committee is beyond the scope of this Note. However, this issue is discussed in depth by several commentators. See Rose Auslander, Note, Impeaching the Senate's Use of Trial Committees, 67 N.Y.U. L. Rev. 68 (1992) (observing that the text of the Constitution and the history of the Framers' intent suggest that the full Senate is required to hear impeachments); Daniel Luchsinger, Note, Committee Impeachment Trials: The Best Solution?, 80 Geo. L.J. 163 (1991) (arguing that the current committee procedure is unconstitutional and proposing a revision allowing the committee to make the initial determination as to the guilt or innocence of the accused). But see Mitch McConnell, Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change, 76 Ky. L.J. 739 (1988) (arguing that significant economies are achieved in the Senate through the committee procedure without abdicating any of its responsibilities to hear, consider, and judge before convicting).

109 Nixon, 744 F. Supp. at 10.

110 Id. at 14. When a political question is found, the case will involve
a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
Baker v. Carr, 369 U.S. 186, 217 (1962).

111 Nixon v. United States, 938 F.2d 239 (D.C. Cir. 1991) (Williams, J., with Randolph, J., concurring, and Edwards, J., dissenting in part and concurring in the judgment).

112 Id. at 246.

113 Id.

114 Id. at 246-48 (Randolph, J., concurring).

115 Id. at 248-65 (Edwards, J. dissenting in part and concurring in the judgment).

116 Nixon v. United States, 113 S. Ct. 732 (1993).

117 Id. at 734.

118 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

119 The justiciability of legislative impeachment rules has been discussed extensively in the academic literature. See generally Thomas D. Amrine, Comment, Judicial Review of Impeachment Proceedings, 19 Harv. J.L. & Pub. Pol'y 809 (1993); Auslander, supra note 108, at 107 (noting that the political question doctrine should not bar judicial review of Senate impeachment rules); Brendan C. Fox, Note, Impeachment: The Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials, 60 Geo. Wash. L. Rev. 1275, 1310 (1992) ('The political question doctrine should not act as a bar to the justiciability of impeachment procedure claims under the classic Baker v. Carr standards ....'); Lisa A. Kainec, Note, Judicial Review of Senate Impeachment Proceedings: Is a Hands Off Approach Appropriate?, 43 Case W. Res. L. Rev. 1499 (1993) (arguing that the Supreme Court should review Senate Impeachment rules); Michael Miller, Comment, The Justiciability of Legislative Rules and the 'Political' Political Question Doctrine, 78 Calif. L. Rev. 1341 (1990) (arguing courts should intervene when private litigants are involved); Nicole H. Schneider, Comment, Senate Impeachment Trials -- To Review or Not To Review, What Would Marshall Do?, 4 Seton Hall Const. L.J. 237 (1993) (arguing in favor of the justiciability of Senate impeachment trial rules); David Todd Smith, Note, Constitutional Law -- Impeachment Trial Clause, 25 St. Mary's L.J. 855 (1994) (arguing that the Supreme Court should review legislative rules in extreme circumstances).

120 See The Federalist No. 65 (Alexander Hamilton).

121 An impeachment conviction results in expulsion from the judiciary and the subsequent loss of salary, pensions, and other benefits ordinarily due. See The Federalist No. 65 , at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (acknowledging the grave loss of livelihood and estate in an impeachment trial).

122 The Fifth Amendment to the United States Constitution provides the guarantee that '[n]o person shall be deprived of life, liberty, or property, without due process of law.' '[N]or shall any State deprive any person of life, liberty, or property, without due process of law.' U.S. Const. amend. XIV.

123 John E. Nowak & Ronald D. Rotunda, Constitutional Law s 13.1 [[[hereinafter Nowak & Rotunda].

124 A property interest has been found when an employee has tenure in her position. Perry v. Sinderman, 408 U.S. 593, 602 (1972).

125 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

126 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

127 Nowak & Rotunda , supra note 123, s 13.1, at 487.

128 Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Zinermon v. Burch, 494 U.S. 113, 127 (1990).

129 28 U.S.C. s 372(c)(10) (1993) states:
A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may

petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The judicial conference, or the standing committee ... , may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

130 Judge Edwards, Circuit Judge for the District of Columbia Circuit, noted the problematic nature of the language of section 373(c)(10), stating that because this language could be construed as precluding review of challenges to the legality of the decision-making processes of judicial councils, due process could be denied an accused judge. Hastings I, 770 F.2d at 1109 (Edwards, J., concurring). Despite the lack of a definitive statement from the Supreme Court on the constitutionality of the Judicial Councils Act, courts have allowed facial challenges to the Act. At least one court has disallowed an individual judge's challenge to the Act as applied to him. Hastings I, 593 F. Supp. at 1378. Circuit Judge D.H. Ginsberg of the Court of Appeals for the District of Columbia stated in a footnote that 'sensitive and unsettled questions of constitutional law would arise if [Judge Hastings's] challenges are covered by the prohibition on judicial review. ' Hastings III, 829 F.2d at 107-08 n.69 (citing Weinberger v. Salfi, 422 U.S. 749, 762 (1975)). The court remanded the case to the district court, but prior to that adjudication, Hastings was impeached in Congress. See supra Part III.B.

131 28 U.S.C. s 372(c)(14)(A)-(C) (1993); see supra Part II (discussing confidentiality of committee disciplinary investigations).

132 See supra Part I.

133 Nowak & Rotunda , supra note 123, s 13.1, at 488; Morrissey, 408 U.S. at 489.

134 Withrow v. Larkin, 421 U.S. 35, 58 (1975).

135 See supra note 128 and accompanying text.

136 See supra Part III (discussing the most recent federal impeachment cases).

137 Id.

138 28 U.S.C. s 372(c)(4)-(5) (1993).

139 Hastings Petition, 735 F.2d at 1263-64.

140 Hastings I, 593 F. Supp. at 1376. See Borders, 693 F.2d at 1318. Interestingly, when Hastings challenged the judge's participation as a violation of due process, the court repeatedly failed to reach the issue.

141 Scholars have questioned the propriety of any discipline of federal judges other than impeachment. Compare Harry T. Edwards, Regulating Judicial Misconduct and Divining 'Good Behavior' for Federal Judges, 87 Mich. L. Rev. 765 (1989) (arguing that any regulation short of impeachment should be through judicial self-regulation that does not include congressional interference); C. Randolph Fishburn, Constitutional Judicial Tenure Legislation? The Words May be New, But the Song Sounds the Same, 8 Hastings Const. L.Q. 843, 851 (1981) (arguing that impeachment is the sole constitutional means for removal); Warren S. Grimes, Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges, 38 UCLA L. Rev. 1209 (1991) (arguing that the integrity of the impeachment process is undermined if criminal prosecution of a judge precedes impeachment); Lynn A. Baker, Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and

Disability Act of 1980, 94 Yale L.J. 1117 (1985) (arguing that impeachment should be the sole method for investigating, trying, and punishing Article III judges for noncriminal misbehavior); and Melissa H. Maxman, Note, In Defense of the Constitution's Judicial Impeachment Standard, 86 Mich. L. Rev. 420 (1987) (arguing that prosecuting a federal judge prior to impeachment undermines judicial independence) with Anthony D'Amato, Self-Regulation of Judicial Misconduct Could Be Mis-Regulation, 89 Mich. L. Rev. 609 (1990) (rejecting Judge Edwards's plea for judicial self-regulation as unworkable due to a perceived tendency in the judicial culture to cover up judicial misbehavior) and Patrick Donald McCalla, Note, Judicial Disciplining of Federal Judges Is Constitutional, 62 S. Cal. L. Rev. 1263 (1989) (arguing that disciplining federal judges does not violate the Constitution).

142 See supra Parts III(A) and (B) (discussing the challenges of Claiborne and Hastings).

143 See supra Part III(C) (discussing Nixon's challenge to the Senate's impeachment procedures).

144 Claiborne, 870 F.2d at 1464-67; Hastings cases, supra note 80. Judges are selected to replace recused judges pursuant to 28 U.S.C. s 291(a) (1993), which provides:
The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the Chief Judge of Circuit Justice of the circuit wherein the need arises.
The Rule of Necessity requires that a forum be made available for litigants, thus preventing recusal of all Article III judges from participating in judicial council proceedings. Hastings Petition, 576 F. Supp at 1280 (citing United States v. Will, 449 U.S. 200, 217 (1980)).

145 The procedures for recusal of a federal judge are outlined in 28 U.S.C. ss 144, 455 (1988) and Canon 3 of the ABA Code of Judicial Conduct. 28 U.S.C. s 144 (any judge shall be disqualified if a party to any proceeding makes and files a timely and sufficient affidavit showing personal judicial bias or prejudice); 28 U.S.C. s 455(a) (any justice, judge, or magistrate shall disqualify him or herself in any proceeding if his or her impartiality might reasonably be questioned). If a judge provides full disclosure on the record of the basis why his or her impartiality may reasonably be questioned, the parties may consent to the judge remaining on the case except in several circumstances specified in s 455(b). In determining whether a judge should recuse him or herself, courts apply a reasonable person standard. Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438 (1st Cir. 1992) (whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning judge's impartiality, not in the mind of the judge him or herself or even necessarily in the mind of the litigant filing the motion, but rather in the mind of the reasonable person); Yagman v. Republic Ins., 987 F.2d 622 (9th Cir. 1993) (whether a reasonable person with knowledge of all the facts would conclude that judge's impartiality might reasonably be questioned).

146 Personal bias usually refers to bias in favor of or against a specific party as opposed to judicial bias, which refers to prejudgment of the legal issues or merits. Seth E. Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 Case W. Res. L. Rev. 662, 668 (1985). See generally Leslie Abramson, Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct 1-3 (describing the circumstances for judicial disqualification).

147 A party seeking to disqualify a judge must make and file a timely affidavit alleging the nature of the bias alleged. 28 U.S.C. s 144 (1988). The party may file only one affidavit in a judicial disqualification case and must include in the affidavit a statement of the facts and reasons for the belief that bias or prejudice exists. See generally Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435 (1966).

148 Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975) (en banc) (quoting United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973)), cert. denied, 425 U.S. 944 (1976).

149 But cf. Tuttle & Russell, supra note 63, at 609-10 (arguing that recusal is the appropriate remedy).

150 Claiborne, 781 F.2d at 1329-30 (Reinhardt, J., dissenting). Senior United States District Judge Walter E. Hoffman of the Eastern District of Virginia was designated by the Chief Justice to preside at trial.

151 Id. at 1330. The issue of one such pretrial motion was whether a federal judge could be subjected to criminal proceedings prior to impeachment. United States v. Claiborne, 727 F.2d 842, 843 (9th Cir. 1984). Judge Claiborne argued that because impeachment is the sole method of removing federal judges from the bench, criminal prosecution before impeachment resulted in an unconstitutional de facto removal. Id. at 846. For a comprehensive discussion of this issue, see Steven W. Gold, Note, Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement, 53 Brook. L. Rev. 699 (1987).

152 Claiborne, 781 F.2d at 1330.

153 Id.

154 Id.

155 Id.

156 Id.

157 Claiborne, 870 F.2d at 1464.

158 Claiborne, 781 F.2d at 1331.

159 Id. at 1330.

160 Under 28 U.S.C. ss 291, 292, the Chief Justice of the Supreme Court ... may select any judge he wishes; there are no published guidelines or standards. Thus, when a certificate of necessity is issued in a specific case or proceeding, there will always be an appearance that the judges designated are being hand-picked to decide the controversy.
Id. at 1333.

161 Id. Judge Claiborne's challenge to the absence of a random selection process was rejected on appeal by Judge William A. Norris. Claiborne, 870 F.2d at 1465-67. Judge Norris declined to pass on the prudence or fairness of such a process. Id. at 1467.

162 See In re Grand Jury Proceedings, 841 F.2d 1048 (11th Cir. 1988) (before Merritt, Jones, and Guy, JJ., of the Sixth Circuit); In re Request for Access to Grand Jury Materials, 833 F.2d 1438, 1439 (11th Cir. 1987) (same panel); In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1491 & n.1 (11th Cir.) (before Campbell, C.J., of the First Circuit, Kearse, J., of the Second Circuit, and Pell, J., of the Seventh Circuit), cert. denied, 477 U.S. 904 (1986); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1262, 1263 (11th Cir. 1984) (same panel).

163 See supra notes 85-87 and accompanying text; see also Hastings I, 593 F. Supp. at 1376.

164 Nowak & Rotunda , supra note 123, s 2.15; See also supra notes 107-117 and accompanying text. A rational basis for the political question doctrine has eluded scholars:
[T]he definition of a political question can be expanded or contracted in accordion-like fashion to meet the exigencies of the times. A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions.
John P. Roche, Judicial Self-Restraint, 49 Am. Pol. Sci. Rev. 762, 768 (1955).

For additional commentary regarding the political question doctrine, see Robert Lowry Clinton, Marbury v. Madison and Judicial Review 76 (1989) (noting that the Federalists and the Republicans agreed that the judicial function involved deciding questions of a 'nonpolitical' nature); Charles Gordon Post, Jr., The Supreme Court and Political Questions 11-14 (1936) (noting the unsatisfactory explanations offered by the Supreme Court for the political question doctrine); Philippa Strum, The Supreme Court and 'Political Questions': A Study in Judicial Evasion 1 (1974) ('Justices of the Supreme Court and of lower courts ... have floundered in the quagmire of definition [of political questions].'); Miller, supra note 119 (arguing that judicial recognition of the political nature of legislative rules should limit court interference unless a private litigant is involved); Gregory Frederick Van Tatenhove, Comment, A Question of Power: Judicial Review of Congressional Rules of Procedure, 76 Ky. L.J. 597 (1987-88) (contending that judicial review of rules of Congress should be exercised in only the most limited circumstances because of the 'political tension' inherent in such involvement).

165 Nowak & Rotunda , supra note 123, s 2.15.

166 See The Federalist No. 78 (Alexander Hamilton).

167 Nixon, 113 S. Ct. at 735. The Supreme Court has consistently denied certiorari in cases involving the constitutional parameters of judicial discipline and impeachment. The grant of certiorari in this case represents the first authoritative pronouncement regarding judicial discipline by the Supreme Court.

168 Id.

169 Id. at 735-36. See also supra note 110 (citing the standard for the political question doctrine announced in the seminal case Baker v. Carr, 369 U.S. 186, 217 (1962)).

170 The Supreme Court's use of static dictionary definitions to resolve disputes in interpretation is increasing. For a discussion of the Court's use of the dictionary in the Nixon case, see The Supreme Court, 1992 Term, Leading Cases, Justiciability, 107 Harv. L. Rev. 144, 298-303 (1993).

171 Nixon, 113 S. Ct. at 735.

172 Id.

173 Id. at 736.

174 Id. at 738.

175 See supra Part I.
Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision?
Nixon, 113 S. Ct. at 739 (quoting The Federalist No. 65 (Alexander Hamilton)).

176 Id. The Court also noted that petitioner's argument would 'place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.' Id.

177 395 U.S. 486 (1969).

178 Id. at 549-50.

179 Nixon, 113 S. Ct. at 740. See also Victor Williams, Unconstitutional Bills of Attainder or Valid Impeachment Convictions?: The Walter Nixon and Alcee Hastings Impeachment Cases, 22 Sw. U. L. Rev. 1077, 1097-98 (1993). Williams argues that contrary to the Chief Justice's assertion that no parallel provision exists to circumscribe the Senate impeachment proceedings, the Bill of Attainder clause is such a provision. Id. Williams explains that the Constitution's Bill of Attainder clause (U.S. Const. art. I, s 9, cl. 3) was designed to prevent legislative punishment without judicial trial. Id. at 1100. Therefore, Williams argues, the Senate use of a committee to take testimony in impeachment hearings and the ultimate removal vote by the full Senate are the equivalent of legislative punishment without judicial trial in violation of the restrictions of the Bill of Attainder Clause. Id. at 1101.

180 Nixon, 113 S. Ct. at 740 (Stevens, J., concurring).

181 Id. But see Buckner F. Melton, Jr., Federal Impeachment and Criminal Procedure: The Framers' Intent, 52 Md. L. Rev. 437, 456 (1993) (arguing that the Senate possibly could use constitutionally suspicious methods for impeachment trials with no repercussions).

182 Nixon, 113 S. Ct. at 742 (White, J., concurring in the judgment).

183 Id.

184 Id. See also Napoleon B. Williams, Jr., The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U. L. Rev. 512, 513 (1975) (describing the separation of powers problems inherent in the grant of the impeachment power).

185 Nixon, 113 S. Ct. at 747 (Souter, J., concurring in the judgment).

186 Id.

187 Id. at 748.

188 Id.

189 Id.

190 See also James G. Wilson, American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior, 40 Buff. L. Rev. 645, 655-56 (1992) (noting the political question doctrine is expressed in ambiguous and conclusory terms).

191 The Federalist No. 78 (Alexander Hamilton); Alexander Bickel , The Least Dangerous Branch (1986). As the Supreme Court has stated, 'The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action.' Mistretta v. United States, 488 U.S. 361, 407 (1989). The Federalist further supports this view with the notation that '[t]he Judiciary ... has not influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgement ....' The Federalist No. 78

, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

192 Nixon, 113 S. Ct. at 735.

46 HSTLJ 639

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1 Fed. Prac. & Proc. Crim. § 109 (4th ed.)

Federal Practice and Procedure (Wright & Miller) | August 2019 Update

Federal Rules of Criminal Procedure

Chapter 4. Indictment and Information
Andrew D. Leipold[a0]

Rule 6. The Grand Jury

§ 109 Disclosure for Use in Other Proceedings

Rule 3(e)(3)(E) states: "The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter: … (i) preliminarily to or in connection with a judicial proceeding." This is the most expansive and probably most frequently litigated provision of Rule 6, because it permits the disclosure of grand jury material in proceedings other than a criminal trial.

Grand jury material may be requested under this provision by either a private party or the government. Note that an attorney for the government (as defined by the rules[1]) who is enforcing the federal criminal law need not seek court authorization; disclosure here is automatic, as discussed in a prior section.[2] But for government attorneys who seek disclosure for enforcement of the civil law and for other purposes, and for private parties, disclosure requires court approval, and then only on a showing of "particularized need."

The Supreme Court has spoken frequently on the contours of the particularized need standard. In United States v. Procter & Gamble Co.,[3] a grand-jury investigation of possible antitrust violations ended with no indictment. Later the government brought a civil suit against Procter & Gamble and others seeking to enjoin violation of the Sherman Act. The government attorneys used the grand-jury transcript to prepare the civil case for trial, and defendants, desiring the same privilege, moved under the Rules of Civil Procedure for discovery of the transcript. The trial court ruled that "good cause" for the production of the transcript had been shown, ordered it produced, and dismissed the suit when the government refused to comply. A divided Supreme Court reversed.

Justice Douglas for the majority first restated the historic policy of secrecy of grand-jury proceedings. He then said that that policy "must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."[4] The Court held that no such showing had been made on the facts before it, and that, even though the relevancy and usefulness of the testimony sought was sufficiently established, defendants had failed to show "that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done."[5]

Proctor & Gamble thus set a high threshold for parties seeking disclosure of grand jury information for use in other proceedings. Almost 20 years later, the Court in Douglas Oil Co. of California v. Petrol Stops Northwest,[6] articulated the standard in more detail:

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations …. [D]isclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure.[7]

The Court went on to note that while the need for secrecy continued after the grand jury had completed its work, it was "equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification."[8]

Whether "particularized need" means the same thing when a private party seeks disclosure as when the government seeks the material was unsettled for a number of years. Douglas Oil did not except government agencies from the requirement that a particularized need be shown, but the Court was writing in the context of a request by private parties. This led some lower courts to suppose that whenever the government sought the information it had a particular need for it, and that any showing required of the government should be minimal.[9] That expansive view was rejected in 1983 by the Supreme Court in United States v. Sells Engineering.[10]

The Court in Sells Engineering held that attorneys from the Civil Division of the Justice Department who sought grand-jury materials for use in a civil case must obtain a court order before gaining access,[11] and that the particularized need standard applies to disclosure to public parties as well as private ones. On the other hand, the Court was explicit that the moving party's burden could change when the party seeking disclosure is the government:

> Nothing in Douglas Oil, however, requires a district court to pretend that there are no differences between governmental bodies and private parties. The Douglas Oil standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. … [T]he standard itself accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case.[12]

The Court observed, for example, that a district court might find that the risk of leaks was lower when the party seeking disclosure was a government entity, or that the government might have greater ability than private parties to obtain the information by other means, or that there was a greater public interest being served by a governmental party than by a private one.[13]

The concept of "particularized need" is thus a fact-intensive and flexible inquiry, making it difficult to draw generalizations about what a party must show to obtain disclosure.[14] The Supreme Court said that the "typical showing" of particularized need arises if a litigant wishes to use the grand-jury transcript at trial to impeach a witness, to refresh his recollection, or to test his credibility,[15] but the cases are not limited to these settings. The fact that the witnesses might be subject to adverse consequences if their testimony is revealed also is a consideration,[16] although its force is diminished if the moving party already has access to the damaging information.[17]

For the modest value they have, set forth in the footnotes are examples where a particularized need was shown[18] and not shown[19] for government litigants, as well as cases where the required showing was made[20] and not made[21] by private parties. A district court's decision on whether a showing of particularized need has been made will only be overturned for an abuse of discretion.[21.50]

The phrase "in connection with a judicial proceeding" is not defined in the rule, but "there is some flexibility evident in what may be viewed as qualifying for the exception."[22] Judge Learned Hand offered a definition of "judicial proceeding" as "any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest."[23] The precise "connection" required between the proceeding and the disclosure of the grand jury material is less obvious, although the Supreme Court has emphasized that, while the concepts of "particularized need" and "in connection with a judicial proceeding:"

> [are] related in some ways, [they] are independent prerequisites to (C)(i) disclosure. The particularized need test is a criterion of *degree;* the "judicial proceeding" language of (C)(i) imposes an additional criterion governing the *kind* of need that must be shown. It reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. … If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted.[24]

Using these standards, the exception of Rule 6(e)(3)(E)(i) does not apply to an administrative proceeding or investigation if the possibility that that investigation will ripen into a judicial proceeding is speculative and uncertain.[25] The Supreme Court has said that the phrase does not include disclosure of grand-jury material to the Internal Revenue Service for its use in conducting a civil tax investigation to determine liability and to assess any tax deficiency.[26] Some courts also have said that the exception in Rule 6(e)(3)(E)(i) does not include the very proceeding instituted for the purpose of obtaining disclosure.[27]

On the other hand, a petition to the Tax Court for a redetermination of a deficiency is a "judicial proceeding."[28] Courts have also said a Senate impeachment trial qualifies as a "judicial proceeding" within the meaning of 6(e)(3)(E)(1), and an impeachment inquiry by the House Judiciary Committee is "preliminary to" the Senate trial.[29] If state authorities seek disclosure for use in a attorney disbarment proceeding, disclosure typically will be granted[30] or denied[31] by balancing the need for disclosure against the reasons for maintaining secrecy, rather than by a mechanical limitation based on whether these are judicial proceedings.[32] Other situations have also met the standard for judicial proceedings.[33] And while for a time there was disagreement among courts on whether grand jury proceedings were "judicial proceedings," Rule 6 is now explicit that disclosure of grand jury material can be made by an attorney for the government to a different grand jury without leave of court.[34]

Footnotes

a0 Edwin M. Adams Professor of Law, University of Illinois.

1 **Attorney for the government**
Rule 1(b)(1). See § 23 of this volume.

2 **Criminal proceedings**
See § 107.

3 **Proctor & Gamble case**
1958, 78 S.Ct. 983, 356 U.S. 677, 2 L.Ed.2d 1077. Justice Douglas wrote the opinion of the Court. Justice Whittaker wrote a concurring opinion, while Justice Harlan dissented, in an opinion joined by Justices Frankfurter and Burton.
The case is criticized in Mark Kadish, Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process, 1996, 24 Fla.St.U.L.Rev. 1, 34 to 40.

4 **Shown with particularity**
78 S.Ct. at 986, 356 U.S. at 682.

5 **No showing of injustice**
The court agreed that if the government had deliberately used the grand jury as a means of obtaining evidence for a civil action, it would have flouted the policy of the law, and that such a showing that criminal procedure had been subverted would constitute good cause for the production of the grand-jury transcript, but said that the mere fact that no indictment had been returned did not reflect on the integrity of the prosecution. 78 S.Ct. at 987, 356 U.S. at 683–684.
See also
Petition of U.S. for Disclosure of Grand Jury Matters (Miller Brewing Co.), E.D.Wis.1981, 518 F.Supp. 163, 166–167, judgment affirmed in part, reversed in part C.A.7th, 1982, 687 F.2d 1079.

6 **Douglas Oil case**
1979, 99 S.Ct. 1667, 441 U.S. 211, 60 L.Ed.2d 156. Justice Powell wrote the opinion of the Court. Justice Rehnquist wrote a concurring opinion. Justice Stevens dissented, in an opinion joined by Chief Justice Burger and Justice Stewart.
The Douglas Oil case was the aftermath of a grand-jury investigation that resulted in an antitrust indictment and pleas of nolo contendere. Civil antitrust actions were also pending against the defendants and the plaintiffs in those actions

sought release of the grand-jury transcripts. The holding in the case was that the court in the district in which the grand jury had sat should not itself have granted the motion for disclosure of the transcripts; if it thought disclosure might be appropriate, it should have sent the requested materials to the court in which the civil action was pending, which could have evaluated the need for the transcripts in the civil action before deciding on disclosure. 99 S.Ct. at 1675–1679, 411 U.S. at 223–232.
See also § 110.

7 **Standard for disclosure**
99 S.Ct. at 1674–1675, 411 U.S. at 221–223 (footnote omitted).
"To prove a particularized need, parties seeking disclosure must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." United States v. Ulbricht, 858 F.3d 71, 107 (2d Cir. 2017) (internal quotation marks and citation omitted).
"In order to demonstrate a 'particularized need,' a party must show that the request for disclosure is: (1) required to avoid possible injustice in a different judicial proceeding, (2) greater than the need for continued secrecy, and (3) specifically directed at the material required." U.S. v. McDougal, 559 F.3d 837, 841 (8th Cir. 2009).
On remand the court in the district in which the grand jury sat determined that the need for continued grand-jury secrecy should be "lightly weighted," the court in which the civil action was pending found that the plaintiff had shown a compelling and particularized need to use the transcripts and documents to impeach, refresh recollection, and test credibility, and the appellate court held that it was not an abuse of discretion to grant access to the grand-jury material. Petrol Stops Northwest v. Continental Oil Co., C.A.9th, 1981, 647 F.2d 1005, certiorari denied 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.
See also
Party seeking disclosure of grand-jury materials generated independently of grand-jury investigation must show particularized need for documents but is not required to demonstrate large compelling need. In re Grand Jury Proceedings Relative to Perl, C.A.8th, 1988, 838 F.2d 304.
One seeking disclosure of grand-jury proceedings must demonstrate more than relevance; he must show necessity to prevent injustice. Hernly v. U.S., C.A.7th, 1987, 832 F.2d 980.
A particularized need for grand-jury testimony must be demonstrated by more than a mere showing that such material is relevant; party seeking the testimony must focus on a specific area of inquiry, and must show that the grand-jury testimony will contain needed information not otherwise available. Grumman Aerospace Corp. v. Titanium Metals Corp. of America, E.D.N.Y.1982, 554 F.Supp. 771.
Parties seeking disclosure of federal grand-jury material pursuant to direction by court preliminary to or in connection with judicial proceeding must show particularized need for material by showing that material sought is needed to avoid possible injustice in another judicial proceeding, that need for disclosure is greater than need for continued secrecy and that request is structured to cover only material so needed. In re Doe, D.R.I.1982, 537 F.Supp. 1038.

8 **Lesser burden of justification**
99 S.Ct. at 1674–1675, 411 U.S. at 222–223, **citing Wright.**

9 **Requirement minimal**
See, e.g.
In re Grand Jury, C.A.5th, 1978, 583 F.2d 128, 131.
"Disclosure to the IRS for civil enforcement purposes requires a court order predicated on a demonstration of good faith." In re Grand Jury Subpoenas, April, 1978, at Baltimore, C.A.4th, 1978, 581 F.2d 1103, 1110, certiorari denied 99 S.Ct. 1533, 440 U.S. 971, 59 L.Ed.2d 787.
In re December 1974 Term Grand Jury Investigation, D.Md.1978, 449 F.Supp. 743, 750.

10 **Sells Engineering case**
1983, 103 S.Ct. 3133, 463 U.S. 418, 77 L.Ed.2d 743. Justice Brennan wrote the opinion of the Court. Chief Justice Burger dissented, in an opinion joined by Justices Powell, Rehnquist, and O'Connor.
In Sells the United States had obtained a criminal conviction, and then moved for disclosure of all grand-jury materials to attorneys in the Civil Division of the Justice Department to prepare a possible civil suit against the defendants. Among other things the Court ruled that Rule 6(e)(3)(A(i), which permits disclosure of grand jury material without leave of court to "an attorney for the government," was limited to those attorneys who conducted the criminal matters to which the materials pertain. 103 S.Ct. at 3140, 463 U.S. at 427.
See also § 107 of this volume.

11 **Must obtain court order**

103 S.Ct. at 3147, 463 U.S. at 442.

12 **Highly flexible standard**

103 S.Ct. at 3149, 463 U.S. at 445.

See also

Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.7th, 1983, 717 F.2d 1136, 1139–1140.

In re Grocery Products Grand Jury Proceedings of 1983, D.Conn.1986, 637 F.Supp. 1171.

Cf.

"Need" of civil division of Justice Department for grand-jury transcripts and materials in a separate judicial proceeding must be more than a legal conclusion that division is entitled to disclosure because it has a legitimate interest in the disclosure and has a "need" for the disclosure; there must be an additional showing that the disclosure would serve the interests of fairness and justice. In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4th, 1986, 800 F.2d 1293.

13 **Public interest being served**

103 S.Ct. at 3149, 463 U.S. at 445, quoting Illinois v. Abbott & Associates, 1983, 103 S.Ct. 1356, 1361–1362, n.15, 460 U.S. 557, 567–568, n.15, 75 L.Ed.2d 281.

14 **Fact-intensive inquiry**

For a further discussion of cases where the accused must show a particularized need to gain access to grand jury information, see § 108 of this volume.

15 **Typical showing**

Douglas Oil Co. of Cal. v. Petrol Stops Northwest, 1979, 99 S.Ct. 1667, 1674 n.12, 441 U.S. 211, 222 n.12, 60 L.Ed.2d 156.

United States v. Procter & Gamble Co., 1958, 78 S.Ct. 983, 987, 356 U.S. 677, 683, 2 L.Ed.2d 1077.

But see

"[T]he use of grand jury testimony to impeach or to refresh recollection must be real; bald assertions of such need are not sufficient." In re Grand Jury Testimony, C.A.5th, 1987, 832 F.2d 60, 63.

Even where this is the purpose for which disclosure is sought, it will be denied if the need can be satisfied by materials other than the grand-jury transcript. In re Grand Jury Investigation, S.D.N.Y.1976, 414 F.Supp. 74.

16 **Adverse consequences**

Thus in the Proctor & Gamble case, discussed above, it appeared to be significant to the Supreme Court that witnesses in the antitrust case may be employees of potential defendants, or their customers, competitors, or suppliers, and that such witnesses would be subject to retaliation if their testimony were disclosed. United States v. Procter & Gamble Co., 1958, 78 S.Ct. 983, 986, 356 U.S. 677, 682, 2 L.Ed.2d 1077.

See also

Company whose tax affairs were investigated by grand jury was not entitled to inspect grand-jury material that government petitioned to disclose to Internal Revenue Service civil investigators, in that company did not make an argument of potential abuse by government of grand-jury process that was sufficient to outweigh the policy of secrecy where four current or former employees of company who testified before grand jury objected to disclosure to company, and some of the material sought was subpoenaed from company's largest competitor. Petition of U.S. for Disclosure of Grand Jury Matters (Miller Brewing Co.), E.D.Wis.1981, 510 F.Supp. 585.

Where disclosure of grand-jury materials would cause strain in and adversity to objecting parties' careers, and where disclosure would have chilling effect on future grand-jury testimony because of reliance of parties on secrecy of grand-jury proceedings, disclosure of grand-jury materials would not be ordered. U.S. v. Atlantic Container Line, Ltd., D.D.C.1980, 511 F.Supp. 115.

17 **Force diminished**

Douglas Oil Co. of California v. Petrol Stops Northwest, 1979, 99 S.Ct. 1667, 1675 n.13, 441 U.S. 211, 222 n.13, 60 L.Ed.2d 156.

Petrol Stops Northwest v. Continental Oil Co., C.A.9th, 1981, 647 F.2d 1005, 1009 n.2, certiorari denied 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

Illinois v. Sarbaugh, C.A.7th, 1977, 552 F.2d 768, 775, certiorari denied 98 S.Ct. 262, 434 U.S. 889, 54 L.Ed.2d

174.

Cf.

Even when all corporate defendants in a criminal action have obtained transcripts of the grand-jury testimony of their own employees, automatic discoverability in related civil proceedings does not necessarily follow. Matter of Grand Jury Criminal Indictments 76-149 and 77-72 In Middle Dist. of Pennsylvania, M.D.Pa.1978, 469 F.Supp. 666.

18 **Showing made by government**

Attorneys for the Antitrust Division, who had conducted a criminal investigation of two corporations that did not result in an indictment, made a sufficient showing of particularized need for disclosure of grand-jury materials to government attorneys in the Civil Division and to the local United States attorney, when these were being consulted in order to make a decision whether to proceed with a civil action against the corporations under the False Claims Act. U.S. v. John Doe, Inc. I, 1987, 107 S.Ct. 1656, 1662–1665, 481 U.S. 102, 111–117, 95 L.Ed.2d 94.

District court did not abuse its discretion in releasing grand-jury materials to the Internal Revenue Service (IRS) for use in defense of a Tax Court proceeding, where the government made a sufficiently particularized showing that the information was pertinent to the litigation, and the district court properly limited exposure of the grand-jury material by sealing the government's petition and denying the taxpayers access to the material. In re Grand Jury Subpoenas Duces Tecum, C.A.8th, 1990, 904 F.2d 466.

Government's belief that grand-jury testimony would prove that defendant's son had committed perjury before grand jury and that father had suborned that testimony, thus affecting proper sentence for father under sentencing guidelines, demonstrated particularized need for disclosure of grand-jury testimony. U.S. v. McDowell, C.A.3d, 1989, 888 F.2d 285.

Ex parte disclosure to Civil Division of Justice Department, in civil proceeding by government contractor to recover extra charges, of grand-jury transcripts and exhibits made in connection with federal criminal investigation of government contractor was not an abuse of discretion, in that issues in both civil and criminal proceedings were identical, whole matter had already been thoroughly "aired" publicly in criminal proceeding that resulted in acquittal of government contractor, grand-jury proceedings had terminated about four years earlier, government contractor had had grand-jury materials for about eight years, and district judge who ordered disclosure had been intimately involved in both the civil and criminal proceedings from their inceptions. In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4th, 1986, 800 F.2d 1293.

Federal district court acted within its discretion in ordering disclosure of grand-jury documents to Internal Revenue Service district council and agents, notwithstanding that at time of order Service had completed its investigation and issued statutory notice of deficiency, where documents relevant to examination were also relevant to pending Tax Court litigation. Matter of Grand Jury Proceedings, Miller Brewing Co., C.A.7th, 1982, 687 F.2d 1079, adhered to on rehearing C.A.7th, 1983, 717 F.2d 1136.

Where district judge found that government had acted in good faith in its use of grand jury for purpose of conducting criminal investigation, which resulted in two of three taxpayers being convicted of filing false income-tax returns, material sought by Internal Revenue Service was relevant to, and particularized need was shown for its disclosure to government in connection with, civil tax-enforcement proceedings, and, accordingly, disclosure was sought "preliminarily to a judicial proceeding" within the terms of the rule. In re Judge Elmo B. Hunter's Special Grand Jury Empaneled Sept. 28, 1978, C.A.8th, 1981, 667 F.2d 724.

Government was entitled to disclosure of grand-jury matters consisting of documentary evidence that had been subpoenaed from company that had been target of the grand jury and various third parties, in that the interest in grand-jury secrecy was lower for such documentary evidence since disclosure was not so likely to reveal matters before the grand jury, and duplication of the grand-jury investigation would have produced significant costs not only to government but to company and the third parties, and thus government made out a showing of particularized need sufficient to outweigh the interest in grand-jury secrecy. Petition of U.S. for Disclosure of Grand Jury Matters (Miller Brewing Co.), E.D.Wis.1981, 518 F.Supp. 163, judgment affirmed in part, reversed in part C.A.7th, 1982, 687 F.2d 1079.

19 **Need not shown by government**

Internal Revenue Service did not demonstrate particularized need for grand-jury material against taxpayer for use in investigating whether taxpayer owed back taxes. IRS did not claim that it would be unable to assemble documents it needed but argued only that it would be inconvenient and time-consuming to do so given fact that IRS already had material in its possession for eight years. Matter of Grand Jury Proceedings Operation Gateway, C.A.7th, 1989, 877 F.2d 632, certiorari denied 110 S.Ct. 839, 493 U.S. 1044, 107 L.Ed.2d 834.

Government's attempt to show particularized need for grand-jury material by comparing potential savings in terms of time and expense in Internal Revenue Service investigation of taxpayers' civil tax liability against need for secrecy was not sufficient to justify disclosure of documents, exhibits and testimony acquired by grand jury during

investigation of charges that taxpayers had criminally defrauded United States and evaded federal income tax. In re Sells, C.A.9th, 1983, 719 F.2d 985.

Government had not made required showing of particularized need necessary to obtain disclosure of reports that constituted matters occurring before the grand jury where government did not specify which report or a part thereof it requested; matter would be reconsidered if government made a more specific showing of particularized need for the portions relating to the grand jury or excised the portions relating to the grand jury and submitted the remainder for in-camera inspection. In re Grand Jury Proceedings (Daewoo), D.Or.1985, 613 F.Supp. 672.

Government was not entitled to disclosure of certain grand-jury matters consisting of transcripts of the testimony of four individuals where such individuals objected to disclosure and stated that they were willing to give testimony pursuant to a summons, in that since the transcripts were verbatim records of the workings of the grand jury the interest in preserving grand-jury secrecy was high, and government did not make a sufficient showing of particularized need to outweigh the interest in secrecy that was present. Petition of U.S. for Disclosure of Grand Jury Matters (Miller Brewing Co.), E.D.Wis.1981, 518 F.Supp. 163, judgment affirmed in part, reversed in part C.A.7th, 1982, 687 F.2d 1079.

Showing by Internal Revenue Service that grand jury records contained evidence relevant to IRS audit was merely minimal first step toward showing that ends of justice required disclosure or that particularized need existed that outweighed policy of grand jury secrecy and, without more, was insufficient to justify order authorizing disclosure. Application of United States For an Order Pursuant to Provisions of Rule 6(e), Federal Rules of Criminal Procedure, W.D.Pa.1980, 505 F.Supp. 25.

Wholesale discovery of grand-jury transcripts would be denied without prejudice in case in which the Securities Exchange Commission sought to use grand-jury testimony given by persons who were defendants in action brought by the Commission to cross-examine them and refresh their recollections during depositions, where there had been no particularized showing of need such that secrecy of the grand-jury proceedings could be lifted discretely and limitedly, and where deposition testimony had not yet been given and thus the need for grand jury transcripts was, in part, speculative. S.E.C. v. Everest Management Corp., S.D.N.Y.1980, 87 F.R.D. 100.

Even if grand-jury transcripts that to some extent furnished basis for civil penalties imposed upon corporation were released properly, propriety of breaching secrecy of grand-jury by publishing all or part of the transcripts under any circumstances was difficult to justify, and it would be unfair to allow defendant agency to assimilate and act upon information contained in transcripts and at same time refuse access to plaintiffs, and thus there was strong likelihood that plaintiffs would succeed on merits on their action to enjoin and for declaratory judgment. Kocher Coal Co. v. Marshall, E.D.Pa.1980, 497 F.Supp. 73.

The Securities and Exchange Commission failed to carry its burden of showing the requisite particularized need for grand-jury testimony of a certain witness, despite its contention that the transcript of that testimony was required to refresh the recollection of the witness for pending civil litigation brought by the Commission and by private litigants, in view of the fact that other transcripts were available to the Commission to refresh the recollection of the witness on certain topics and in view of the fact that the grand jury testimony would not have been helpful for other topics. In re Grand Jury Investigation, S.D.N.Y.1976, 414 F.Supp. 74.

20

Showing made by private party

House Judiciary Committee made showing of particularized need sufficient to warrant disclosure of confidential materials considered by grand jury which charged federal judge with conspiracy for use in connection with Committee's impeachment inquiry; Committee's interest in conducting full-and-fair impeachment inquiry outweighed need for grand-jury secrecy. In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, C.A.11th, 1987, 833 F.2d 1438.

Where there has been prior unlimited release of grand-jury transcript and materials to one party in a separate judicial proceeding, disclosure of those materials to the other party is in order, not merely to assure accuracy of testimony but also to equalize access to relevant facts and to eliminate obvious unfair advantage arising from affording only one side exclusive access to the relevant facts. In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, C.A.4th, 1986, 800 F.2d 1293.

It was not abuse of discretion to conclude that need for disclosure of grand-jury transcripts outweighed interest in continued grand-jury secrecy and that disclosure was necessary to prevent injustice where witnesses, when deposed in civil antitrust actions, experienced considerable and frequent difficulty in recalling events or invoked privilege against self-incrimination, grand jury had been disbanded, and plaintiffs had unsuccessfully sought to compel deposition testimony of the witnesses who had claimed privilege. In re Corrugated Container Antitrust Litigation (Anchor Hocking Corp.) v. St. Joe Container Corp., C.A.5th, 1982, 687 F.2d 52.

On remand from the Supreme Court in Douglas Oil Co. of Cal. v. Petrol Stops Northwest, 1979, 99 S.Ct. 1667, 1674, 441 U.S. 211, 221, 60 L.Ed.2d 156, the court in the district in which the grand jury sat determined that the need for continued grand-jury secrecy should be "lightly weighted," the court in which the civil action was pending found that the plaintiff had shown a compelling and particularized need to use the transcripts and documents to impeach,

refresh recollection, and test credibility, and the appellate court held that it was not an abuse of discretion to grant access to the grand-jury material. Petrol Stops Northwest v. Continental Oil Co., C.A.9th, 1981, 647 F.2d 1005, certiorari denied 102 S.Ct. 672, 454 U.S. 1098, 70 L.Ed.2d 639.

Particularized need is sufficiently shown if the corporate employer of the grand-jury witness whose transcript is sought has obtained a copy of that transcript and the witness is scheduled to give testimony either at trial or by deposition on the matters about which he testified before the grand jury. Illinois v. Sarbaugh, C.A.7th, 1977, 552 F.2d 768, certiorari denied 98 S.Ct. 262, 434 U.S. 889, 54 L.Ed.2d 174.

Where one party had already had access to a memorandum based on grand-jury testimony, it would be inequitable not to allow access to the other party. U.S. Industries, Inc. v. United States District Court, C.A.9th, 1965, 345 F.2d 18, certiorari denied 86 S.Ct. 32, 382 U.S. 814, 15 L.Ed.2d 62.

"Courts have consistently held that use of a grand jury transcript to refresh the memory of witnesses or to impeach witnesses is a valid use of the transcripts." Callahan v. A.E.V., Inc., W.D.Pa.1996, 947 F.Supp. 175, 178.

Plaintiffs in antitrust litigation seeking release of grand-jury transcripts from antitrust prosecution against same defendants were entitled to receive copies of requested transcripts; parties demonstrated particular instances of need for transcript due to nature of ongoing antitrust litigation with relevant events lasting for years, defendants in litigation were already in possession of transcripts, plaintiffs only sought transcripts of three witnesses to grand-jury proceeding and release of transcripts would be narrow and designed to limit dissemination such that remaining interests of secrecy were adequately protected. In re Catfish Antitrust Litigation, N.D.Miss.1995, 164 F.R.D. 191.

Even if tape recordings of alleged bribe or bribes offered to chief of airport security were "matters occurring before the grand jury," and thereby covered by secrecy rule for grand-jury proceedings, tape recordings would be subject to disclosure in civil antitrust action against city, commissioner of aviation, and suburban limousine-service companies; tape recordings were sought to learn information contained therein, not to discover what occurred before the grand jury, and particularized need existed for tapes to refresh the chief's memory. Pontarelli Limousine, Inc. v. City of Chicago, N.D.Ill.1987, 652 F.Supp. 1428.

Allegedly false testimony that was given by federal agents to grand jury prior to indictment against physician, which was nolle prossed and which subsequently became basis for physician's civil-rights action against agents, was subject to being produced at behest of physician, although production would be stayed pending an appeal by the government, where any contention that release to physician of the grand-jury minutes, after some nine years had passed, would compromise any ongoing investigation or invite escape of those whose indictment might be contemplated was specifically eschewed by the government, and no attempt was made to show that release would cause targets of grand-jury inquiry to suborn perjury or importune the grand jurors. Dale v. Bartels, S.D.N.Y.1981, 532 F.Supp. 973.

Disclosure of grand-jury documents of third party consisting of certain statistical compilations from which no individual manufacturer's data was ascertainable, was appropriate in civil proceedings arising out of conspiracy, in that members of third-party institute were not entitled to grand-jury secrecy merely because they paid for creation of statistical information, and figures themselves were not probative of actions of any one defendant in any alleged conspiracy, but may be needed by the plaintiffs on class certification or other discovery issues. In re Screws Antitrust Litigation, D.Mass.1981, 91 F.R.D. 47.

A particularized need was shown by defendants for production of documents, including copies of grand-jury transcripts, in possession, custody, or control of another defendant and his counsel where several grand-jury witnesses were unable to recall significant events at their depositions and defendants sought to use grand-jury transcripts at trial to refresh recollection of such witnesses; moreover, since transcripts had already been disclosed to a party to action, it would be exceedingly inequitable, discriminatory, and contrary to principles of federal discovery to allow one party access to grand-jury transcripts but not remaining parties. Securities and Exchange Commission v. National Student Marketing Corp., D.D.C.1977, 430 F.Supp. 639.

Grand-jury witnesses, who were executives of airlines being investigated regarding violations of federal antitrust laws, and who had been subpoenaed to testify for third time many months after their last appearances before grand jury, met burden of showing that "a particularized need," which outweighed policy of secrecy, existed for allowing them access to their prior testimony. In re Braniff Airways, Inc., W.D.Tex.1975, 390 F.Supp. 344.

Grand-jury testimony of witnesses was made available to plaintiffs in civil antitrust suits where, on taking of their depositions, witnesses showed recalcitrance and unexplained failures to remember. Illinois v. Harper & Row Publishers, Inc., N.D.Ill.1969, 50 F.R.D. 37.

Cf.

Where petitioner was seeking World War II era grand jury material concerning a newspaper account of how the U.S. had broken the Japanese military code and whether the Espionage Act had been violated as a result, the government conceded that there was no interest in continued secrecy and great public interest in disclosure. The issue presented was whether the district court had the authority to unseal the grand jury material in the absence of authority for disclosure granted by Rule 6(e). A divided Seventh Circuit found that the district court had the inherent authority to release the material. Carlson v. United States, 837 F.3d 753 (7th Cir. 2016).

21

Showing not made by private parties

Defendant sought disclosure of grand jury material related to the corruption investigation of the federal agents who had investigated defendant's criminal case. The court of appeals affirmed the order concluding that defendant failed to show particularized need. Disclosing the information could have compromised the investigation of the agents, some of the requested information was available to the defense through other means, and the government had represented that it would not use any of the information gathered by the agents against the defendant at his trial. United States v. Ulbricht, 858 F.3d 71, 107 (2d Cir. 2017).

Defendant filed a civil action for malicious prosecution, claiming that the prosecutor had withheld exculpatory information from the state grand jury that indicted him. Because the state proceedings were not transcribed, defendant sought to depose the grand jurors. Relying on federal grand jury law, the court of appeals upheld the order to quash the deposition subpoena, finding that defendant failed to make a showing of particularized need. Shields v. Twiss, C.A.5th, 2004, 389 F.3d 142, 147–148.

Determination that special circumstances did not exist to justify disclosure of 1948 grand-jury testimony of former government official accused of being spy was not abuse of discretion, notwithstanding claim of doctoral candidate seeking disclosure that public, historical interest in testimony provided sufficient basis; case was not one in which extensive prior disclosure of grand-jury proceedings had occurred, and current disclosure would involve some witnesses who were still alive. In re Petition of Craig, C.A.2d, 1997, 131 F.3d 99.

Obligors under note, being sued in state court by successor to original obligee, were not entitled to release of grand-jury testimony given by original obligee before he died on basis that testimony was necessary to overcome evidentiary problem encountered by operation of state dead man's statute. In re Lynde, C.A.10th, 1991, 922 F.2d 1448.

Mandamus issued to set aside an order allowing a private party access to grand-jury materials. "The fact that the grand jury documents are relevant or that production of them by the Bureau would expedite civil discovery or reduce expenses for the parties is insufficient to show particularized need then the evidence can be obtained through ordinary discovery, i.e., subpoenaing documents from other sources, or pursuing other routine avenues of investigation." Federal Deposit Ins. Corp. v. Ernst & Whinney, C.A.6th, 1990, 921 F.2d 83, 86.

Defendants in civil fraud action failed to make particularized showing that disclosure of grand-jury materials was necessary in order to prevent injustice, even though whatever information the Internal Revenue Service agent relied on in forming his conclusion during income-tax investigation was relevant to defense. Hernly v. U.S., C.A.7th, 1987, 832 F.2d 980.

In re Grand Jury Testimony, C.A.5th, 1987, 832 F.2d 60.

It was not abuse of discretion to deny request for disclosure of grand-jury material consisting of interview reports prepared by FBI agents and testimony of witnesses, where witnesses had been promised by FBI and grand jury that their identities would be kept secret unless they testified in civil action, where civil plaintiffs' requests were broad scale and unparticularized, and where plaintiffs were provided with other material through which they could identify persons whom they would wish to interview. Cullen v. Margiotta, C.A.2d, 1987, 811 F.2d 698, certiorari denied 107 S.Ct. 3266, 483 U.S. 1021, 97 L.Ed.2d 764.

Order requiring disclosure of six grand-jury transcripts to public utilities bringing civil action against former defendants in criminal antitrust action could not stand, where need for continued secrecy was demonstrated by acquittal of two defendants and outstanding indictment against third defendant, with limited possibility of another criminal trial, and finding of need for disclosure of grand-jury testimony of each of six witnesses, who were employees of corporate defendants, was not demonstrated by specific findings. U.S. v. Fischbach and Moore, Inc., C.A.9th, 1985, 776 F.2d 839.

Plaintiffs in antitrust action who sought order for disclosure of testimony of two settling defendants before grand jury that indicted corporate defendant for criminally violating antitrust laws failed to make required showing of particularized need, notwithstanding that settlement agreements contained provisions requiring settling defendants to testify in the action, since they had not yet been deposed, and it was too early to tell whether grand-jury testimony was needed to impeach or refresh their recollection. Illinois v. F.E. Moran, Inc., C.A.7th, 1984, 740 F.2d 533.

The general circumstances that another party has his own or his employees' transcript in his possession does not, standing alone, establish sufficient need to overcome the need for grand-jury secrecy. Texas v. United States Steel Corp., C.A.5th, 1977, 546 F.2d 626, certiorari denied 98 S.Ct. 262, 434 U.S. 889, 54 L.Ed.2d 174.

Petitioner did not make a showing of particularized need sufficient to justify disclosure of an unredacted special agent's report in related tax litigation, requested in connection with a motion to disqualify petitioner's attorney in that litigation, where the unredacted report was being provided to the judge in other litigation for in-camera review and in redacted form to petition, and the government provided reasons for its redactions. U.S. v. Randell, S.D.N.Y.1996, 924 F.Supp. 557.

Antitrust plaintiff was not entitled to disclosure of grand-jury testimony given by certain of defendants' employees where plaintiff had either not attempted to depose witnesses, sought grand-jury testimony only to cross-examine deposed witnesses, failed to show that deceased witnesses' information was not available from other witnesses, or had

not moved to compel testimony of witnesses who had invoked Fifth Amendment. Sun Dun Inc. of Washington v. U.S., E.D.Va.1991, 766 F.Supp. 463.
U.S. v. Stanton, S.D.Fla.1988, 689 F.Supp. 1103.
Plaintiff who sought grand-jury materials under Freedom of Information Act merely to obtain information about wrongful government conduct for potential civil action for damages failed to show sufficient particularized need that could entitle him to access to such grand-jury information. Fiumara v. Higgins, D.N.H.1983, 572 F.Supp. 1093.
No sufficient showing had been made for the production of grand-jury testimony except for the testimony of a witness who had consented to the production. Illinois v. Borg, Inc., N.D.Ill.1983, 564 F.Supp. 96.
Plaintiffs in a civil antitrust action were not entitled to grand-jury testimony of two witnesses on the basis of an assertion of Fifth Amendment privilege by such witnesses, since only after plaintiffs showed that they sought to question the witnesses and were blocked by an assertion of privilege would they be able to argue that unavailability due to privilege resulted in a particularized need. Grumman Aerospace Corp. v. Titanium Metals Corp. of America, E.D.N.Y.1982, 554 F.Supp. 771.
Plaintiff in a securities fraud case could not rely on the public interest to support its request for grand-jury documents, particularly when some defendants had already been subject to criminal proceedings and to proceedings before the Securities and Exchange Commission. Index Fund v. Hagopian, S.D.N.Y.1981, 512 F.Supp. 1122.
Civil antitrust plaintiffs were not entitled to obtain subpoenas issued by grand jury that returned antitrust indictment against the same defendants so that civil plaintiffs might ascertain names of participants in alleged price-fixing conspiracy, where petitioners had not pursued civil discovery to obtain such information or demonstrate how release of names of those who testified was tailored to avoid chilling effect that disclosure of a grand-jury investigation may bring. U.S. v. White Ready-Mix Concrete Co., N.D.Ohio 1981, 509 F.Supp. 747.
Disclosure of grand-jury testimony of one individual, who was exonerated of antitrust conspiracy, for use in subsequent civil proceedings arising out of conspiracy would be inappropriate, in that secrecy concerns of individual were high because he did not testify at criminal trial and because he was an unindicted coconspirator, and plaintiffs did not show any particular and compelling need for individual's grand-jury testimony. In re Screws Antitrust Litigation, D.Mass.1981, 91 F.R.D. 47.
When defendants sought to compel executive for plaintiff to testify in deposition to matters he had previously testified to before grand jury, statements by defendants that evidence had been obtained through depositions that could indicate that plaintiff may be attempting to use criminal proceeding to collect civil debt and that defendants were entitled to determine whether grand jury evidence was consistent with that being revealed through discovery in civil action, were not sufficient to show particularized need for compelling executive's testimony. William Iselin & Co., Inc. v. Ideal Carpets, Inc., N.D.Ga.1980, 510 F.Supp. 343.
Plaintiff, who failed to show any particularized need for transcript of his grand-jury testimony and who failed to demonstrate that he needed the material in connection with another judicial proceeding, was not entitled to disclosure of transcript under these rules. Valenti v. U.S. Dept. of Justice, E.D.La.1980, 503 F.Supp. 230.
Where, of the eight potential witnesses in civil antitrust action who had invoked their privilege against self-incrimination, five had already testified publicly in related criminal proceeding, so that transcripts of their trial testimony were available to plaintiff in the civil action, and where there was no showing that the plaintiff in the civil action had made any efforts to compel the testimony of any deposition witnesses who had invoked the Fifth Amendment, the fact that witnesses had invoked the privilege did not show a particularized need by the civil antitrust plaintiff for grand-jury materials from the criminal prosecution. Matter of Grand Jury Criminal Indictments 76-149 and 77-72 In Middle Dist. of Pennsylvania, M.D.Pa.1978, 469 F.Supp. 666.
The traditional rule of grand-jury secrecy did not have to yield to any claimed interest of the public in a 30-year old case, whatever its historical significance and notwithstanding the government's lack of opposition to disclosure. Hiss v. Department of Justice, S.D.N.Y.1977, 441 F.Supp. 69.
Where the only showing of need in a civil treble-damage action for sentencing memoranda, which had been submitted to court in connection with criminal antitrust proceedings and which contained excerpts and summaries of grand-jury testimony, was that disclosure would expedite discovery, memoranda were not discoverable. ABC Great Stores, Inc. v. Globe Ticket Co., E.D.Pa.1970, 309 F.Supp. 181.
Plaintiffs in civil antitrust action would not be granted right to inspect subpoenas and lists of names of witnesses who appeared before federal grand jury that indicted instant defendants in criminal antitrust case, in absence of showing of particularized need and where defendants represented that they did not have access to information sought. State of Minn. v. U.S. Steel Corp., D.Minn.1968, 44 F.R.D. 559.

21.50 **Abuse of discretion**

United States v. Ulbricht, 858 F.3d 71, 107 (2d Cir. 2017).

22 **Some flexibility**

In re Special February 1975 Grand Jury, C.A.7th, 1981, 662 F.2d 1232, 1239.

See also

Although nothing in Rule 6(e) covered the situation, the court could order the grand-jury testimony of a candidate for mayor of New York City made public, where the witness himself requested disclosure and the United States attorney joined in the request. In re Biaggi, C.A.2d, 1973, 478 F.2d 489. In a supplemental opinion the court said, at 494: "Our decision should therefore not be taken as demanding, or even authorizing, public disclosure of a witness' grand jury testimony in every case where he seeks this and the Government consents. It rests on the exercise of a sound discretion under the special circumstances of this case."

Records and evidence before a grand jury that had returned an indictment against an Article III judge who was subsequently acquitted of the charges would be disclosed to the Special Investigating Committee appointed under the Judicial Councils Reform and Judicial Conduct and Disability Act, because disclosure to the Committee impinged only slightly upon traditional interests that remained in preserving grand-jury secrecy, while simultaneously allowing the Committee expeditiously to comply with its congressional directive, judge's acquittal did not obviate the need for further inquiry under the Act, and disclosure to the Committee presented little risk of chilling the truthful testimony of prospective witnesses before future grand juries. In re Petition to Inspect and Copy Grand Jury Materials, S.D.Fla.1983, 576 F.Supp. 1275, affirmed C.A.11th, 1984, 735 F.2d 1261, certiorari denied 105 S.Ct. 254, 469 U.S. 884, 83 L.Ed.2d 191. This case is also noted in § 106 of this volume.

23 **Term defined**

Doe v. Rosenberry, C.A.2d, 1958, 255 F.2d 118, 120. Judge Hand went on to say: "An interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be imputed to the Rule."

The Hand definition was quoted with approval in In re Grand Jury 89-4-72, C.A.6th, 1991, 932 F.2d 481, 484, certiorari denied 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438, but disclosure was denied there since the Michigan Attorney Grievance Commission is an administrative rather than a judicial body so that disclosure to it would not he preliminary to a judicial proceeding.

Judge Hand's definition also was applied in In re Barker, C.A.9th, 1984, 741 F.2d 250, 253.

24 **Independent prerequisites**

United States v. Baggot, 1983, 103 S.Ct. 3164, 3167, 463 U.S. 476, 480, 77 L.Ed.2d 785 (emphasis in original).

See also

"Wolf argues that after Baggot and In re Sells [C.A.9th, 1983, 719 F.2d 985], a mere possibility of a judicial proceeding is not enough to justify disclosure of grand jury materials. He claims that if the Multnomah County Professional Responsibility Committee investigation does not uncover evidence of misconduct, no judicial proceedings will occur. These arguments are misplaced. Neither the possibility that no judicial proceeding will result nor the likelihood that litigation will occur is controlling. Under Baggot, the proper inquiry is whether the primary purpose of the disclosure is to assist in the preparation or conduct of judicial proceedings." In re Barker, C.A.9th, 1984, 741 F.2d 250, 253–254.

See generally

Rebecca Swenson, The Implications of United States v. Sells Engineering Inc. and United States v. Baggot, 1984, 12 Am.J.Crim.L. 327.

Charles S. Lyon, Disclosure of Grand Jury Materials: Why the Supreme Court Was Wrong in Baggot, 1984, 39 Tax L. Rev. 215.

25 **Speculative and uncertain**

By regulating practice of law through an administrative body, Michigan limited its access to grand-jury materials involving disciplinary proceedings; as administrative body with only discretionary review by state Supreme Court, Michigan's Attorney Grievance Commission fell within same category as all administrative agencies denied access to federal grand-jury material. In re Grand Jury 89-4-72, C.A.6th, 1991, 932 F.2d 481, certiorari denied 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

Grand-jury materials sought by the IRS in connection with its civil investigation of taxpayer were items "occurring before the grand jury," with the possible exception of limited portions of an agent's report, and did not qualify for any exception to general rule of secrecy of grand-jury proceedings at present stage of IRS administrative proceedings, where no judicial proceeding was pending and it was possible none might result in investigation, and taxpayer's tax deficiency was not of such consequence as to justify fashioning a special judicial exception to grand-jury secrecy.

In re Special February, 1975 Grand Jury, C.A.7th, 1981, 662 F.2d 1232.

Parole revocation hearing was not a judicial proceeding or preliminary to a judicial proceeding such that United States attorney's disclosure of grand-jury materials to the parole commission hearing officer was proper. Bradley v. Fairfax, C.A.8th, 1980, 634 F.2d 1126.

Federal Maritime Commission's inquiry into possible antitrust activities was not a "judicial proceeding," and thus the Commission was not entitled to disclosure of grand jury material under this rule. U.S. v. Bates, C.A.D.C.1980, 627 F.2d 349.

Federal Energy Regulatory Commission, which was conducting preliminary investigation under Natural Gas Act of possibility that interstate pipelines had been overcharged for construction by corporations indicted for conspiring to defraud purchasers of marine construction services, was not entitled to disclosure of grand-jury matter under the "judicial proceeding" exception of this rule as agency had not yet brought any action, issued any order, or begun its own investigation that would cause it to appear that the Act or agency order was or was about to be violated. In re J. Ray McDermott & Co., Inc., C.A.5th, 1980, 622 F.2d 166.

Investigation by Federal Trade Commission of possible violation of its cease and desist order is not a "judicial proceeding," within meaning of Rule 6(e), and disclosure of grand-jury minutes to that commission was properly refused. In re Grand Jury Proceedings, C.A.3d, 1962, 309 F.2d 440.

A member of the Puerto Rico House of Representatives requested information that was contained in a grand jury file to use in a legislative investigation. The United States objected, and the request was denied. The district court had previously authorized the disclosure of grand jury materials under Rule 6(e)(3)(E), but had limited the use of those materials "exclusively to criminal proceedings." U.S. v. Velez, D.Puerto Rico 2004, 344 F.Supp.2d 329, 332.

Deportation proceeding was not a "judicial proceeding" for purposes of criminal procedure rule authorizing the release of grand-jury information. In re December 1988 Term Grand Jury Investigation, W.D.N.C.1989, 714 F.Supp. 782.

Utility was not entitled to disclosure of record of grand jury that returned indictment under which utility was charged, since utility was seeking disclosure of record for use in administrative proceeding rather than a judicial proceeding as required by Rule 6(e)(3)(C)(i), and utility failed to establish particularized need due to unavailability of witnesses. U.S. v. Metropolitan Edison Co., M.D.Pa.1984, 585 F.Supp. 231.

Administrative investigation into possible violations of orders, regulations, or statutes does not satisfy requirement that disclosure of grand-jury records would be preliminary to a judicial proceeding, as it is always possible that investigation will not uncover evidence of any wrongdoing; judicial proceeding is even more remote where agency requesting grand-jury material has not attempted to subpoena witnesses or compel production of any documents to carry out the investigation, preferring instead to rely on disclosed grand-jury materials to save time and money. In re April 1977 Grand Jury Proceedings, E.D.Mich.1981, 506 F.Supp. 1174.

In this rule authorizing disclosure of grand-jury material, phrase "preliminarily to or in connection with a judicial proceeding" should, at least, mean that requested grand-jury material will be used in preparation for judicial proceeding that is more than remote potentiality, and thus plans to hold administrative hearing would not alone justify production of requested transcripts. U.S. v. Young, E.D.Tex.1980, 494 F.Supp. 57.

Nevada Gaming Control Board's investigation into a gambling license application was not a judicial proceeding and therefore federal grand-jury testimony could not be disclosed pursuant to this rule permitting such disclosure when directed by a court preliminarily to or in connection with a judicial proceeding. In re Proceedings Before Federal Grand Jury for Dist. of Nevada, D.Nev.1980, 487 F.Supp. 1098.

26 **Civil tax investigation**

"[D]isclosure is not appropriate for use in an IRS audit of civil tax liability, because the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels." United States v. Baggot, 1983, 103 S.Ct. 3164, 3167, 463 U.S. 476, 480, 77 L.Ed.2d 785.

Court order authorizing release of grand-jury material to Internal Revenue Service in connection with investigation of money laundering scheme engaged in by taxpayer's spouse, which did not mention investigation of taxpayer as purpose of disclosure, did not authorize use of materials by Service in establishing tax deficiency of taxpayer. Altman v. U.S., E.D.N.Y.1990, 738 F.Supp. 83.

27 **Very proceeding**

Rule 6(e)(3)(C)(i) applies only to requests in aid of a claim or defense in another proceeding and does not include a claim in which uncovering confidential grand-jury materials is part of the ultimate relief sought in the action. American Friends Service Committee v. Webster, C.A.D.C.1983, 720 F.2d 29, 71–72.

Fund for Constitutional Government v. National Archives and Records Service, C.A.D.C.1981, 656 F.2d 856, 868.

Provision of federal criminal rules authorizing disclosure of grand-jury materials when so directed by court in connection with judicial proceeding when needed to avoid possible injustice in another judicial proceeding authorizes district courts to disclose grand-jury materials only where those materials are necessary to altogether different

proceeding; grand-jury proceedings themselves from which information is sought to be revealed are not "other judicial proceedings" contemplated by rule. In re Nov. 1992 Special Grand Jury for Northern Dist. of Indiana, N.D.Ind.1993, 836 F.Supp. 615.

Hiss v. Department of Justice, S.D.N.Y.1977, 441 F.Supp. 69, 70.

28 **Tax court**

In re Grand Jury Subpoenas Duces Tecum, C.A.8th, 1990, 904 F.2d 466, 468.

Patton v. C.I.R., C.A.5th, 1986, 799 F.2d 166.

29 **Impeachment**

The House Judiciary Committee made a sufficient showing of particularized need to warrant disclosure of grand-jury materials. In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, C.A.11th, 1987, 833 F.2d 1438.

Grand-jury material ordered disclosed to a committee of the House of Representatives considering articles of impeachment. In re Report and Recommendation of June 5, 1972, Grand Jury Concerning Transmission of Evidence to House of Representatives, D.D.C.1974, 370 F.Supp. 1219, mandamus refused C.A.D.C.1974, 501 F.2d 714.

30 **Disbarment—disclosure granted**

The Oregon State Bar Association was entitled to grand-jury materials to allow its professional responsibility committee to conduct an investigation into the activities of several members of the Oregon Bar, where the disclosure was sought to assist in preparation of proceedings before the Oregon Supreme Court, and, absent disclosure of the requested documents, it was clear that no disciplinary proceedings were likely to occur. In addition, the Oregon State Bar demonstrated that the materials requested were all within its subpoena power had the federal grand jury not already subpoenaed them and the Bar properly structured its disclosure motion to request only those materials dealing with the attorney and his law firm. In re Barker, C.A.9th, 1984, 741 F.2d 250.

In action by the city, the Council for Discipline of Nebraska State Bar Association, and the Nebraska Commission on Judicial Qualifications seeking release of specified pages of witness's testimony given before federal grand jury which had been investigating gambling activities, district court did not abuse its discretion in authorizing release of limited portion of testimony in that by the time the disclosure was authorized, grand jury had ceased its investigation and in that applicants' investigation sought to protect the public's welfare and in that district court maintained detailed control over release of testimony. Matter of Disclosure of Testimony before Grand Jury, C.A.8th, 1978, 580 F.2d 281.

Matter of Electronic Surveillance, E.D.Mich.1984, 596 F.Supp. 991.

Doe v. Rosenberry, S.D.N.Y.1957, 152 F.Supp. 403, affirmed C.A.2d 1958, 255 F.2d 1 18.

31 **Disbarment—disclosure denied**

Administrator of Illinois Attorney Registration and Disciplinary Commission failed to demonstrate particularized need for grand-jury testimony of person who was allegedly conduit through which attorney passed money to former client in effort to convince former client not to pursue complaint with disciplinary body; district court virtually admitted that grand-jury testimony did not fulfill compelling necessity or particularized need and administrator failed to address and district court neglected to consider impact that release of testimony would have upon person who gave testimony. Matter of Grand Jury Proceedings, Special Sept., 1986, C.A.7th, 1991, 942 F.2d 1195.

In re Grand Jury 89-4-72, C.A.6th, 1991, 932 F.2d 481, 484, certiorari denied 112 S.Ct. 418, 502 U.S. 958, 116 L.Ed.2d 438.

No compelling necessity for disclosure of grand-jury testimony for a bar-association grievance-committee inquiry is shown where it is merely easier or less expensive for the party seeking disclosure to have the full grand-jury transcript at its disposal. U.S. v. Sobotka, C.A.2d 1980, 623 F.2d 764.

Showing of compelling necessity to reveal witness's testimony before federal grand jury was not made as to state disbarment proceeding, where attorney had been convicted of willfully attempting to evade his income taxes, petition of state Attorney General alleged only that witness had reportedly testified concerning bribe made to attorney, and witness had testified under oath that, in his testimony before grand jury, name of attorney had not been mentioned. In re Holovachka, C.A.7th, 1963, 317 F.2d 834.

Cf.

Ability of Texas State Board of Medical Examiners to obtain information it sought by means other than violating grand-jury secrecy militated against ordering disclosure of requested grand-jury transcripts. U.S. v. Young, E.D.Tex.1980, 494 F.Supp. 57.

32 **Mechanical limit**

But cf.

Evidentiary hearings in attorney disciplinary proceedings are a "judicial proceeding" within meaning of [Rule 6(e)(3)(E)(i)]. Matter of Federal Grand Jury Proceedings, C.A.2d, 1985, 760 F.2d 436.

33 **Other situations**

A request by a grand jury witness to review a copy of her own transcript is one made "preliminary to or in connection with a judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i). In re Grand Jury, C.A.D.C.2007, 490 F.3d 978, 986 (per curiam).

Witness's request for release of his grand-jury testimony in proceeding under Ethics in Government Act so that he could submit comments to independent counsel's report was in connection with a "judicial proceeding," as required by rule authorizing release of grand-jury materials. In re Sealed Motion, C.A.D.C.1989, 880 F.2d 1367.

Judicial review of Chicago police board disciplinary hearing, which extended to all questions of law and fact presented in record, was a "judicial proceeding" within meaning of this rule permitting disclosure of matters occurring before grand jury when directed by court in connection with a judicial proceeding. Special February 1971 Grand Jury v. Conlisk, C.A.7th, 1973, 490 F.2d 894.

Where Customs Service had assessed a penalty in connection with importation of foreign steel and such penalty could only be enforced through a judicial proceeding, request for disclosure of transcripts from grand jury which indicted defendants in connection with the same importation was "preliminary to or in connection with a judicial proceeding," within meaning of grand-jury-disclosure rule. In re Grand Jury Proceedings (Daewoo), D.Or.1985, 613 F.Supp. 672.

34 **Another grand jury**

Rule 6(e)(3)(C). The Advisory Committee Note to the 1983 amendment that added this provision said in part: "In this kind of situation, "[s]ecrecy of grand jury materials should be protected almost as well by the safeguards at the second grand jury proceeding, including the oath of the jurors, as by judicial supervision of the disclosure of such materials." The full text of the Advisory Committee Notes is set forth in Volume 3C, App. C.

End of Document

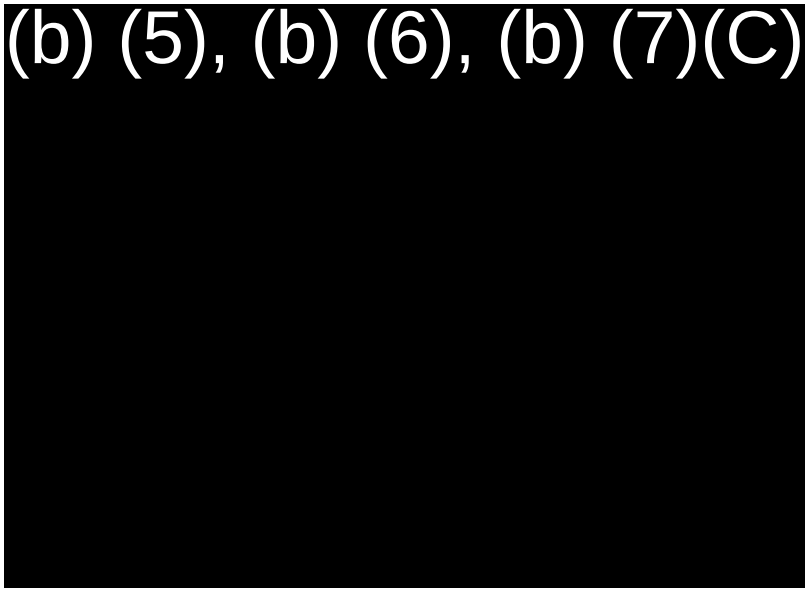
From: Gonzalez, Gregory (OPR)
To: Sciortino, John (OPR)
Subject: Re: [redacted] epilogue
Date: Monday, April 6, 2020 11:55:00 AM

Nope

Sent from my iPhone

> On Apr 6, 2020, at 11:49 AM, Sciortino, John (OPR) [redacted] wrote:
>
> So I don't need to send a form to Shamelle or Jacqueline?
>
> ---
>
> **From:** Gonzalez, Gregory (OPR) [redacted]
> **Sent:** Monday, April 6, 2020 11:33 AM
> **To:** Sciortino, John (OPR) [redacted]
> **Subject:** Re: [redacted] epilogue
>
> I already closed it in DM
> As far as I'm concerned the case is closed when the [redacted]
>
> Sent from my iPhone
>
> > On Apr 6, 2020, at 11:26 AM, Sciortino, John (OPR) [redacted] wrote:
> >
> > I'm really sorry it took me so long to get it done. Should I fill out a closing form for it now, or do we wait to see what happens first?
> >
> > ---
> >
> > **From:** Gonzalez, Gregory (OPR) [redacted]
> > **Sent:** Monday, April 6, 2020 11:15 AM
> > **To:** Sciortino, John (OPR) [redacted]
> > **Subject:** Re: [redacted] epilogue
> >
> > Thanks for getting this difficult one resolved!
> >
> > Sent from my iPhone

On Apr 6, 2020, at 11:08 AM, Sciortino, John (OPR) (b) (6) wrote:



From: Sciortino, John (OPR)
To: Drouet, Suzanne (OPR); Gonzalez, Gregory (OPR)
Subject: RE: [redacted] epilogue
Date: Monday, April 6, 2020 11:24:00 AM

I was wondering the same thing. (b) (5)

[redacted]

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Monday, April 6, 2020 11:11 AM
To: Sciortino, John (OPR) (b) (6); Ragsdale, Jeffrey (OPR) (b) (6); Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: [redacted] epilogue

Good. (b) (5).

Duplicate

From: Priscilla Owen
To: Sciortino, John (OPR)
Subject: RE: (b) (6), (b) (7)(C) referral
Date: Monday, April 6, 2020 10:57:38 AM

Dear Mr. Sciortino,

Yes, I received the letter and all attachments.

Thank you.

Priscilla Owen

From: Sciortino, John (OPR) (b) (6)
Sent: Monday, April 6, 2020 9:37 AM
To: Priscilla Owen <Priscilla_Owen@ca5.uscourts.gov>
Subject: (b) (6), (b) (7)(C) referral

Dear Chief Judge Owen,

On Friday afternoon, I e-mailed you the referral we discussed, which consisted of two PDF files. One PDF was the 6-page referral letter itself, and the other contained 200+ pages of attachments to the letter. Would you confirm that the e-mail and attachments made it through to you? I am worried that the second PDF file was too large to send via e-mail, and I have my IT colleague standing by in case some other means of electronic delivery is necessary.

Thanks very much,

John Sciortino

John J. Sciortino
US Department of Justice
Office of Professional Responsibility
RFK Main Bldg., Rm. 3535
950 Pennsylvania Ave. NW
(b) (6)

From: Sciortino, John (OPR)
To: Drouet, Suzanne (OPR)
Subject: RE: [redacted] letter is sent
Date: Saturday, April 4, 2020 11:16:00 AM

You are checking email at 6:39 am on a Saturday!

From: Drouet, Suzanne (OPR) [redacted]
Sent: Saturday, April 4, 2020 6:39 AM
To: Sciortino, John (OPR) [redacted]
Subject: RE: [redacted] letter is sent

Great. Thanks very much for your efforts on a tricky referral.

From: Sciortino, John (OPR) [redacted]
Sent: Friday, April 03, 2020 6:13 PM
To: Drouet, Suzanne (OPR) [redacted]; Gonzalez, Gregory (OPR) [redacted]; Ragsdale, Jeffrey (OPR) [redacted]
Subject: [redacted] letter is sent

[redacted]

From: Boykin, Evonne (OPR)
To: Sciortino, John (OPR)
Subject: RE: OPR Judicial Referral
Date: Friday, April 3, 2020 3:28:19 PM
Attachments: OPR Judicial Referral to 5th Cir. Chief Judge Owens.pdf

---

Oh geez, sorry I attached the wrong one. Here you go.

Evonne M. Boykin
Legal Administrative Specialist
Office of Professional Responsibility
Department of Justice
950 Pennsylvania Ave., NW
Room 3266
Washington, DC 20530

From: Sciortino, John (OPR) (b) (6)
Sent: Friday, April 03, 2020 3:26 PM
To: Boykin, Evonne (OPR) (b) (6)
Subject: RE: OPR Judicial Referral

The letter you just sent me is unsigned, Evonne

Duplicate

From: Sciortino, John (OPR)
To: Boykin, Evonne (OPR)
Subject: [redacted] referral letter attachments
Date: Thursday, April 2, 2020 4:13:00 PM
Attachments: 01 --
02 --
03 --
04 --
05 --
06 --
07 --
08 --
09 --
10 --
11 --
12 --
13 --
14 --
[redacted]

Hi Evonne,

I tried to attach all 14 attachments to this email. I also saved them all separately to DM. (A table listing all the attachments and their DM numbers is saved at DM 450923).

Let me know if you get them!

John

From: Drouet, Suzanne (OPR)
To: Sciortino, John (OPR)
Subject: RE: PIN comments on draft (b) (6), (b) (7)(C) referral letter
Date: Thursday, April 2, 2020 12:11:22 PM

Okay. It is ready for you to add in the attachment info.

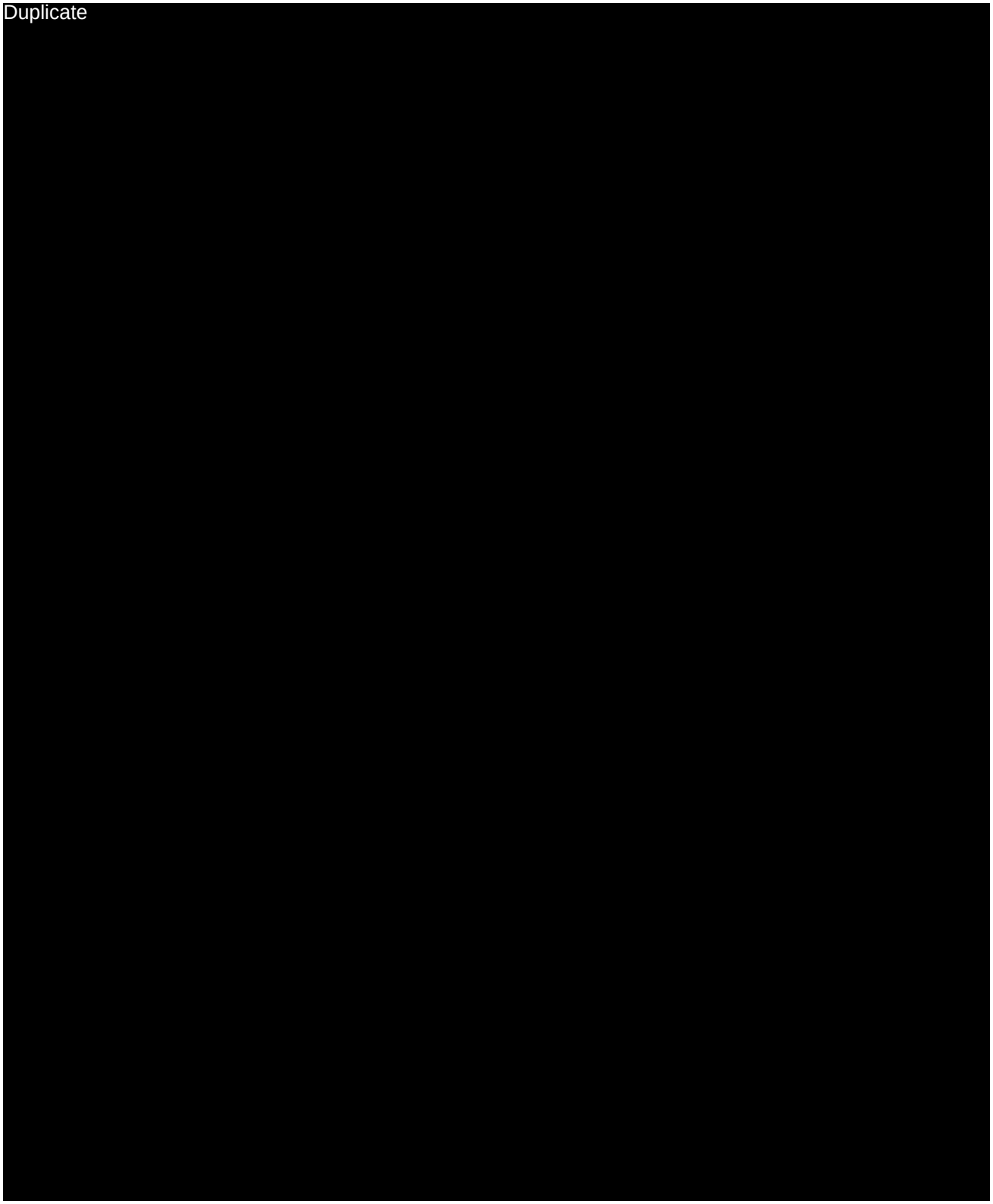
The margins look screwy, and page numbers need to be added, but Evonne can get that fixed when she puts it into final.

(b) (5), (b) (6), (b) (7)(C)

From: Ragsdale, Jeffrey (OPR)
To: Sciortino, John (OPR); Drouet, Suzanne (OPR)
Cc: Gonzalez, Gregory (OPR)
Subject: RE: PIN comments on draft (b) (6), (b) (7)(C) referral letter
Date: Thursday, April 2, 2020 11:48:43 AM

Excellent. Sounds like you were on your best behavior. It will be interesting to see what happens.

Duplicate



From: Drouet, Suzanne (OPR)
To: Sciortino, John (OPR); Ragsdale, Jeffrey (OPR)
Cc: Gonzalez, Gregory (OPR)
Subject: RE: PIN comments on draft (b) (6), (b) (7)(C) referral letter
Date: Wednesday, April 1, 2020 3:55:03 PM

(b) (5)

From: Sciortino, John (OPR) (b) (6)
Sent: Wednesday, April 01, 2020 3:43 PM
To: Ragsdale, Jeffrey (OPR) (b) (6); Drouet, Suzanne (OPR) (b) (6)
Cc: Gonzalez, Gregory (OPR) <Gregory.Gonzalez@opr.usdoj.gov>
Subject: RE: PIN comments on draft (b) (6), (b) (7)(C) referral letter

Will do.

Duplicate

From: Sciortino, John (OPR)
To: Drouet, Suzanne (OPR); Ragsdale, Jeffrey (OPR); Gonzalez, Gregory (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Thursday, March 26, 2020 12:04:00 PM

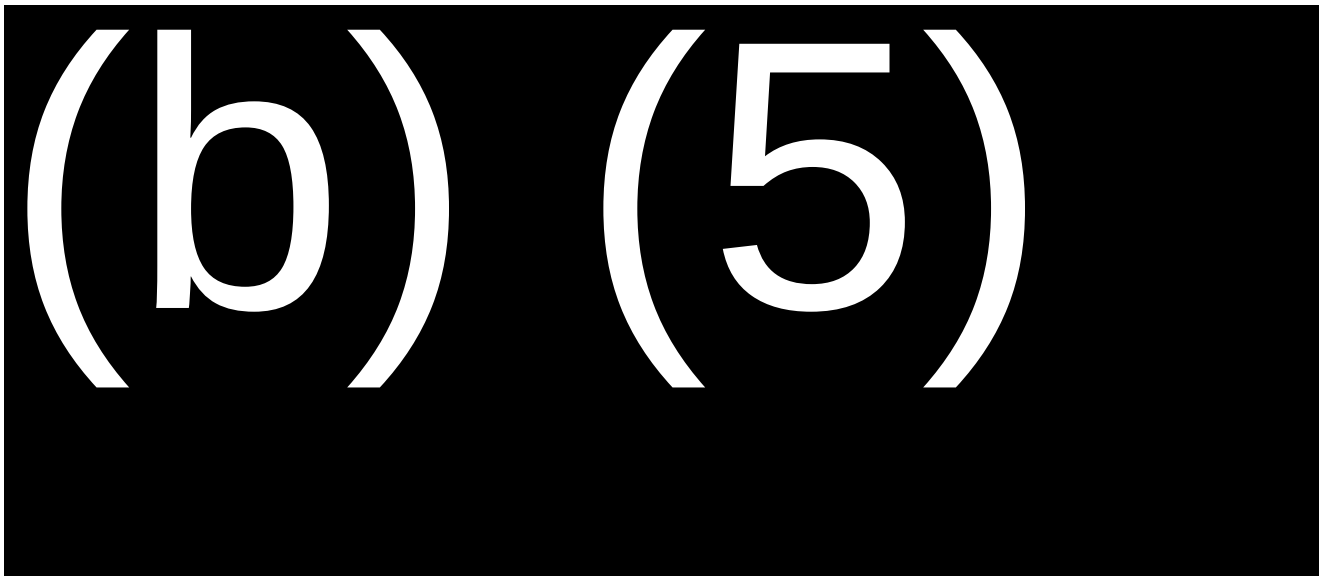
I had a good talk with Mitch, who was very gracious and helpful, and offered to be available for any follow-up we perceive necessary.

He pointed out that the 5th Circuit has its own Judicial Conduct rules, which can be found here: http://www.ca5.uscourts.gov/docs/default-source/default-document-library/localjudicialmisconductrules
However, the appear to me to be substantively identical, in relevant part at least. (Sorry for missing that.)

(b) (5)

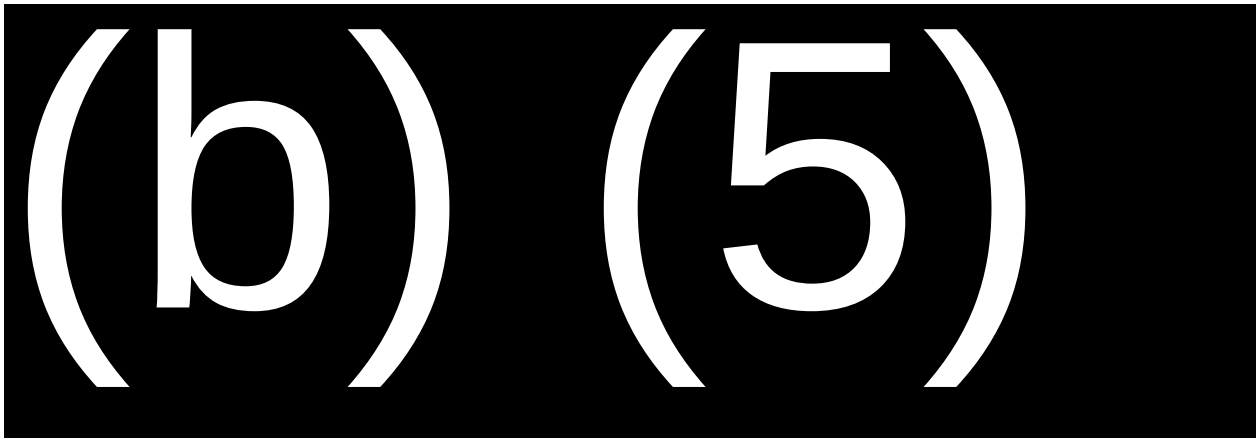
From: Drouet, Suzanne (OPR) (b) (6)
Sent: Thursday, March 26, 2020 10:14 AM
To: Sciortino, John (OPR) (b) (6); Ragsdale, Jeffrey (OPR) (b) (6); Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

(b) (5)



From: Sciortino, John (OPR) (b) (6)
Sent: Thursday, March 26, 2020 9:15 AM
To: Drouet, Suzanne (OPR) (b) (6) ; Ragsdale, Jeffrey (OPR) (b) (6) ; Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

May I weigh in?



From: Drouet, Suzanne (OPR) (b) (6)
Sent: Thursday, March 26, 2020 8:45 AM
To: Sciortino, John (OPR) (b) (6) ; Ragsdale, Jeffrey (OPR) (b) (6) ; Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

John,

(b) (5)

SKD

From: Sciortino, John (OPR) (b) (6)
Sent: Thursday, March 26, 2020 8:14 AM
To: Drouet, Suzanne (OPR) (b) (6); Ragsdale, Jeffrey (OPR) (b) (6); Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

(b) (5)

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Wednesday, March 25, 2020 7:04 PM
To: Sciortino, John (OPR) (b) (6); Ragsdale, Jeffrey (OPR) (b) (6) Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

(b) (5)

From: Sciortino, John (OPR) (b) (6)
Sent: Wednesday, March 25, 2020 1:21 PM
To: Drouet, Suzanne (OPR) (b) (6); Ragsdale, Jeffrey (OPR) (b) (6); Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

Evonne successfully tracked down the final, executed referral letter in the Judge Hughes matter, which is attached. It was indeed under Corey's signature and under oath. No non-OPR point of contact was identified, just Corey and Lyn.

(b) (5) [redacted] The latest version is DM 448937 v.8.

John

From: Sciortino, John (OPR)
Sent: Monday, March 23, 2020 4:18 PM
To: Drouet, Suzanne (OPR) (b) (6) [redacted]; Ragsdale, Jeffrey (OPR) (b) (6) [redacted]; Gonzalez, Gregory (OPR) (b) (6) [redacted]
Subject: draft (b) (6), (b) (7)(C) [redacted] referral letter status

(b) (5), (b) (6), (b) (7)(C) [redacted]

From: Gonzalez, Gregory (OPR)
To: Drouet, Suzanne (OPR); Sciortino, John (OPR)
Subject: RE: PIN comments on draft (b) (6), (b) (7)(C) referral letter
Date: Wednesday, April 1, 2020 12:35:12 PM

Nope! Looks good to me!

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

(b) (5), (b) (6), (b) (7)(C)

From: Sciortino, John (OPR)
To: Drouet, Suzanne (OPR); Ragsdale, Jeffrey (OPR); Gonzalez, Gregory (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Thursday, March 26, 2020 10:51:00 AM

(b) (5)

Duplicate

From: Sciortino, John (OPR)
To: Drouet, Suzanne (OPR); Ragsdale, Jeffrey (OPR); Gonzalez, Gregory (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Thursday, March 26, 2020 9:23:00 AM

(b) (5)

Duplicate

From: Gonzalez, Gregory (OPR)
To: Sciortino, John (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Thursday, March 26, 2020 8:14:34 AM

I saw that she that. I just figured that rather than take a chance on it, a phone call could probably clear it up

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

From: Sciortino, John (OPR) (b) (6)
Sent: Thursday, March 26, 2020 8:13 AM
To: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

(b) (5), (b) (6), (b) (7)(C)

From: Gonzalez, Gregory (OPR) (b) (6)
Sent: Thursday, March 26, 2020 8:10 AM
To: Sciortino, John (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

(b) (5)

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

From: Sciortino, John (OPR) <(b) (6)
Sent: Thursday, March 26, 2020 8:07 AM
To: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

What's the clarification on the transcript issue we need?

From: Gonzalez, Gregory (OPR) <(b) (6)
Sent: Thursday, March 26, 2020 7:46 AM
To: Drouet, Suzanne (OPR) <(b) (6) ; Sciortino, John (OPR) (b) (6) ; Ragsdale, Jeffrey (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

Should we reach out to the chief judge for clarification on the transcript issue before we send it?

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

Duplicate

[redacted]

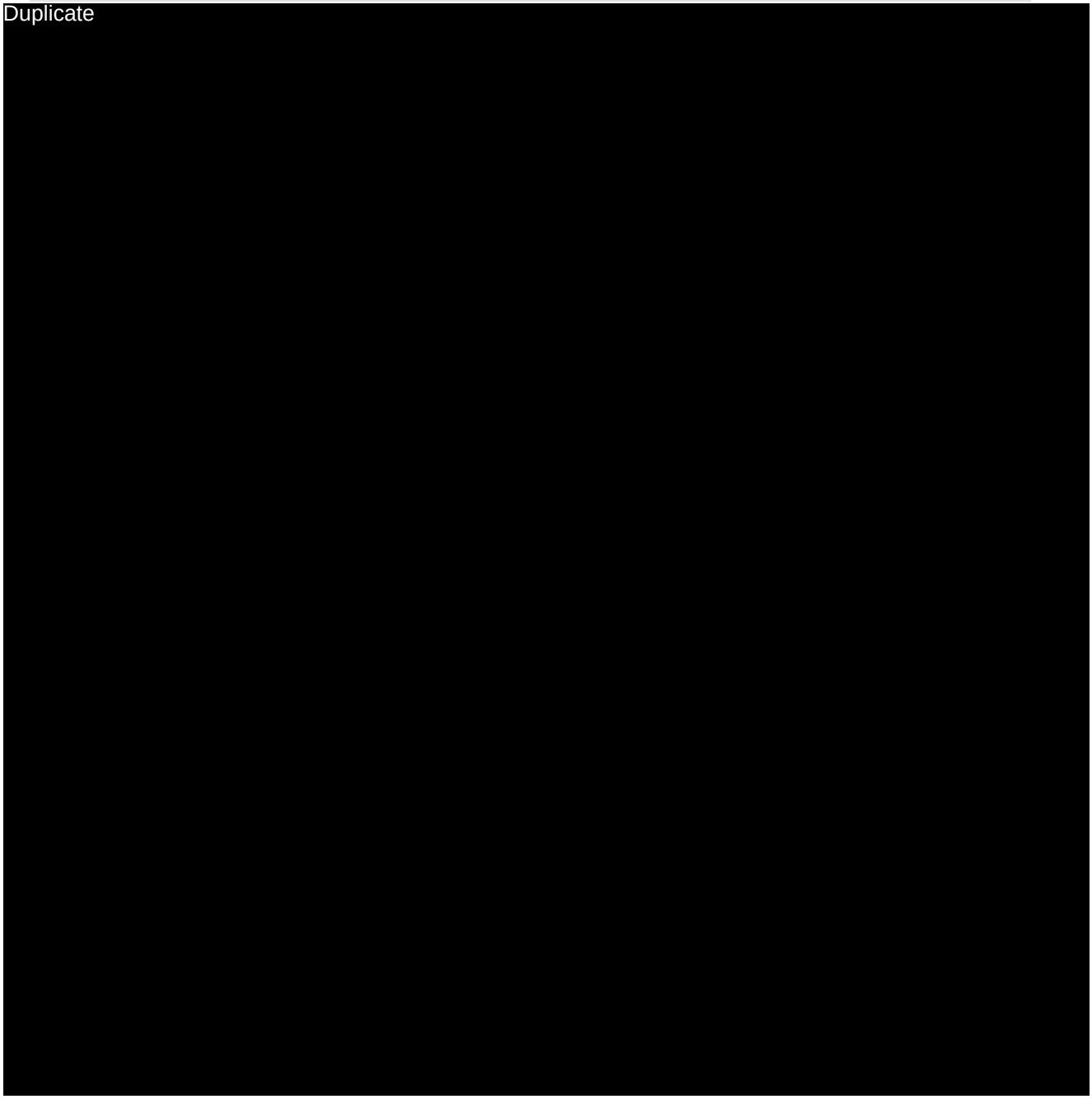
From: Drouet, Suzanne (OPR)
To: Sciortino, John (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Thursday, March 26, 2020 6:23:02 AM

Ugh, sorry. Out now.

From: Sciortino, John (OPR) (b) (6)
Sent: Wednesday, March 25, 2020 7:36 PM
To: Drouet, Suzanne (OPR) (b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

Are you still in it? I was going to accept your edits.

Duplicate



From: Sciortino, John (OPR)
To: Drouet, Suzanne (OPR)
Cc: Gonzalez, Gregory (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Wednesday, March 25, 2020 3:55:00 PM

(b) (5)

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Wednesday, March 25, 2020 2:44 PM
To: Sciortino, John (OPR) (b) (6)
Cc: Ragsdale, Jeffrey (OPR) (b) (6) ; Gonzalez, Gregory (OPR)
(b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

(b) (5)

From: Sciortino, John (OPR) (b) (6)
Sent: Wednesday, March 25, 2020 2:26 PM
To: Drouet, Suzanne (OPR) (b) (6)
Cc: Ragsdale, Jeffrey (OPR) (b) (6) Gonzalez, Gregory (OPR)
(b) (6)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

(b) (5)

https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Wednesday, March 25, 2020 1:52 PM
To: Sciortino, John (OPR) (b) (6)
Cc: Ragsdale, Jeffrey (OPR) (b) (6) ; Gonzalez, Gregory (OPR)
(b) (6) >
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status

John,

(b) (5)

SKD

Duplicate

From: Drouet, Suzanne (OPR)
To: Sciortino, John (OPR)
Cc: Ragsdale, Jeffrey (OPR); Gonzalez, Gregory (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Wednesday, March 25, 2020 2:38:22 PM

(b) (5)

Duplicate

From: Drouet, Suzanne (OPR)
To: Sciortino, John (OPR); Gonzalez, Gregory (OPR)
Subject: RE: (b) (6), (b) epilogue
Date: Monday, April 6, 2020 11:29:23 AM

I would suspect we would not unless there is some provision in the rules stating that they will provide some information to the complainant.

Duplicate

[redacted]

From: Ragsdale, Jeffrey (OPR)
To: Sciortino, John (OPR); Drouet, Suzanne (OPR); Gonzalez, Gregory (OPR)
Subject: RE: draft (b) (6), (b) (7)(C) referral letter status
Date: Thursday, March 26, 2020 8:35:55 AM

(b) (5)

Jeff

Duplicate

From: Sciortino, John (OPR)
To: Gonzalez, Gregory (OPR)
Subject: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)
Date: Wednesday, March 18, 2020 4:43:00 PM

Hey Greg,

Hope you and your family are weathering the pandemic okay! Strange days.

I am not proud of how long it took me, (b) (5), (b) (6), (b) (7)(C) [redacted] OPR matter number 201900204. It is saved at DM 448937 v2. Please take a look at it when you have a chance. You will notice that there are a handful of issues to be resolved, which are indicated in brackets, usually in footnotes.

Looking forward to your input.

John

From: Gonzalez, Gregory (OPR)
To: Sciortino, John (OPR)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)
Date: Monday, March 23, 2020 9:28:00 AM

(b) (5)

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

From: Sciortino, John (OPR) (b) (6)
Sent: Monday, March 23, 2020 9:19 AM
To: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5), (b) (6), (b) (7)(C)

From: Gonzalez, Gregory (OPR) (b) (6)
Sent: Monday, March 23, 2020 8:00 AM
To: Sciortino, John (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

No problems there! Let's just get it done right.
I am glad you are taking the lead on this one!

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)

(b) (6)
202-514-5050 fax

From: Sciortino, John (OPR) (b) (6)
Sent: Friday, March 20, 2020 7:04 PM
To: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

And sorry that this one has gotten more complicated with all the layers of review.

From: Gonzalez, Gregory (OPR) (b) (6)
Sent: Friday, March 20, 2020 4:13 PM
To: Ragsdale, Jeffrey (OPR) (b) (6); Drouet, Suzanne (OPR) (b) (6); Sciortino, John (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5)
I am having trouble finding the final letter we sent out. But, it must have gone under Corey's signature because we received a reply letter addressed to him.
(b) (5)
(DM#439497)

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

From: Ragsdale, Jeffrey (OPR) (b) (6)
Sent: Friday, March 20, 2020 4:00 PM
To: Drouet, Suzanne (OPR) (b) (6); Sciortino, John (OPR) (b) (6)
Cc: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5)

Thanks.

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Friday, March 20, 2020 2:37 PM
To: Ragsdale, Jeffrey (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5)

From: Ragsdale, Jeffrey (OPR) (b) (6)
Sent: Friday, March 20, 2020 1:57 PM
To: Drouet, Suzanne (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5)

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Friday, March 20, 2020 10:06 AM
To: Ragsdale, Jeffrey (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

I'm out of the document.

From: Drouet, Suzanne (OPR)
Sent: Friday, March 20, 2020 10:01 AM
To: Ragsdale, Jeffrey (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

I remembered something that I needed to add as a comment, so I will be out of the document shortly, in case you see that it is checked out.

From: Ragsdale, Jeffrey (OPR) (b) (6)
Sent: Friday, March 20, 2020 9:40 AM
To: Drouet, Suzanne (OPR) (b) (6) ; Sciortino, John (OPR) (b) (6)
Cc: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

I just read the transcript and agree. I will look DM.

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Friday, March 20, 2020 9:34 AM
To: Sciortino, John (OPR) (b) (6) ; Ragsdale, Jeffrey (OPR) (b) (6)
Cc: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5), (b) (6), (b) (7)(C)

Duplicate

From: Gonzalez, Gregory (OPR)
To: Sciortino, John (OPR)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)
Date: Monday, March 23, 2020 8:01:27 AM

I also could not find it.
We will need to have one of the admins pull it from the closed file and scan it.

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

From: Sciortino, John (OPR) (b) (6)
Sent: Friday, March 20, 2020 7:03 PM
To: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

I couldn't find the final signed letter either, just the "final" Word version.

Duplicate

From: Gonzalez, Gregory (OPR)
To: Sciortino, John (OPR); Drouet, Suzanne (OPR); Ragsdale, Jeffrey (OPR)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)
Date: Thursday, March 19, 2020 3:16:32 PM

On the letters I have been sending out, we have paragraph pointing the bar authority back to the jurisdiction.
Here is an example:

Should you need any additional information regarding this matter, you may wish to contact Executive U.S. Attorney Mitchel Neurock, at the United States Attorney's Office for the Southern District of Texas, 1000 Louisiana, Ste. 2300, Houston, TX 77002, or at (b) (6), (b) (7)(C)

[redacted]

Greg Gonzalez
Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave. NW,
Washington, D.C. 20530
(b) (6)
202-514-5050 fax

Duplicate

[redacted]

From: Drouet, Suzanne (OPR)
To: Sciortino, John (OPR); Ragsdale, Jeffrey (OPR)
Cc: Gonzalez, Gregory (OPR)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)
Date: Thursday, March 19, 2020 2:30:34 PM

https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint

(b) (5)

From: Sciortino, John (OPR) (b) (6)
Sent: Thursday, March 19, 2020 2:25 PM
To: Ragsdale, Jeffrey (OPR) (b) (6) Drouet, Suzanne (OPR) (b) (6)
Cc: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5)

From: Ragsdale, Jeffrey (OPR) (b) (6)
Sent: Thursday, March 19, 2020 2:23 PM
To: Drouet, Suzanne (OPR) (b) (6) ; Sciortino, John (OPR) (b) (6)
Cc: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

(b) (5)

Duplicate

From: Sciortino, John (OPR)
To: Gonzalez, Gregory (OPR)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)
Date: Thursday, March 19, 2020 9:38:00 AM

Are you available to talk this morning?

(b) (5), (b) (6), (b) (7)(C)

Duplicate

From: Drouet, Suzanne (OPR)
To: Sciortino, John (OPR)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)
Date: Thursday, March 19, 2020 2:44:03 PM

I'm not in it, so I assume that Jeff might have turned to it. Doesn't matter to me who goes next, but if Jeff is working in it, then you can just deal with everything at once.

From: Sciortino, John (OPR) (b) (6)
Sent: Thursday, March 19, 2020 2:41 PM
To: Drouet, Suzanne (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

Are you still editing the document? I was at least going to accept all your stylistic changes. Or did you want Jeff to have a crack at it before I do that?

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Thursday, March 19, 2020 2:17 PM
To: Sciortino, John (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

No problem. My "usual responsibilities" cover a vast territory, as it turns out.

From: Sciortino, John (OPR) (b) (6)
Sent: Thursday, March 19, 2020 11:33 AM
To: Drouet, Suzanne (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

Thanks, Suzanne. I realize this is not part of your usual responsibilities.

From: Drouet, Suzanne (OPR) (b) (6)
Sent: Thursday, March 19, 2020 11:31 AM
To: Sciortino, John (OPR) (b) (6) Ragsdale, Jeffrey (OPR) (b) (6)
Cc: Gonzalez, Gregory (OPR) (b) (6)
Subject: RE: Matter 201900204 -- judicial referral of (b) (6), (b) (7)(C)

Okay. I'm reviewing it and will get back to you with comments.

Duplicate