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**\*89 JUDICIAL PRIVILEGE**

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The American legal system, like that of its predecessor in England, has a long history of recognizing the confidentiality of private communication between certain parties having a unique or special relationship. These privileged relationships are carefully defined, [FN<sup>1</sup>] and the assertion of an accepted privilege in a court of law is strictly protected. [FN<sup>2</sup>]

This article discusses the historic rationale for privilege, the general uses of privilege as defined by contemporary authorities and as practiced by federal and state courts, and the current arguments for expansion or reduction of privilege doctrine. Its primary focus is on the concept of judicial privilege. [FN<sup>3</sup>] Although accepted as a common-law practice, judicial privilege has not been included among \*90 the currently recognized areas of privilege. While this omission might simply be a failure to state the obvious, recent attacks on federal judges' right to privacy [FN<sup>4</sup>] have virtually destroyed the common-law understanding of privileged communication between a judge and her law clerks and aides. This article illustrates the need for extending the privilege to the judiciary and considers the consequences for the judicial process absent this protection. The article demonstrates that the judicial branch properly claims a testimonial privilege that prevents chambers staff from giving either compelled or voluntary testimony against their judge. The privilege is grounded both in common-law judicial immunity [FN<sup>5</sup>] and in a desire to promote the separation and independence of the judiciary from the other branches of government. [FN<sup>6</sup>]

**\*91 I. HISTORIC RATIONALE FOR PRIVILEGE**

Framers of the American legal system quite naturally looked to England as a foundation for establishing legal doctrine. English common law adopted the idea of privilege for certain groups of persons. [FN<sup>7</sup>] However, even in England, the concept of privilege was met with some ambivalence; people viewed it as being established primarily for those favored by the Crown. [FN<sup>8</sup>] In America, too, the privilege controversy continued. The Framers wanted an egalitarian system; they emphatically opposed the idea of a monarchy with its tradition of preferred treatment for those of a certain title or class. Many viewed privilege as a type of title/class obstacle to the search for truth and as an impediment to the right to a fair and just trial. [FN<sup>9</sup>]

\*92 Yet, there were occasions when privilege was understood as necessary. A psychotherapist, for example, could better treat a patient if that patient were secure in her belief that her private conversations with her therapist would never be divulged to another. Just how necessary such a privilege is and how far it should extend has been a subject of extensive debate.

### *A. Early Use of Privilege*

When considering the history of testimonial privilege, it is important to note that, prior to the 1400s, the modern witness was practically unknown in jury trials. The presence of a witness at trial and the recognition of her value as an important source of information for the jury was not a common occurrence until the 1500s. [FN10] As Wigmore points out,

[Prior to the 16th century,] the jury had fulfilled the double capacity of triers and of witnesses; their own knowledge of the affair, acquired as neighbors of the parties or by searching about for evidence before the trial, had been a chief source of that information which is nowadays furnished to them by ordinary witnesses. [FN11]

The emerging modern witness of the sixteenth century would appear in court either because a party asked her to come and contribute aid or because of her own volition or interest in the cause. This witness could not be compelled to appear in court, and, in fact, was neither welcomed nor encouraged to attend. [FN12]

There was a radical and strict discouragement of ‘maintenance,’ and the man who comes to labor privately\*93 with his neighbors on the jury by generally urging his influence in favor of one of the parties was not carefully distinguished from the man who comes merely to tell them what he knows of the facts. He is in either case (they thought) trying to make them decide for one of the parties rather than the other; he is a meddler; that was the law's attitude toward him. [FN13]

The doctrine of maintenance gradually became unacceptable and was replaced in 1562 by the Statute of Elizabeth, which imposed a penalty against any person who refused to attend court after service of process and tender of expenses. [FN14] Originally created to protect an individual's ‘right’ to testify at trial, the statute's protection eventually evolved into a ‘duty’ to testify. [FN15] Today, accused persons both in England and in the United States have the right to compulsory process to compel the attendance of their witnesses, and these witnesses are legally bound to appear and offer evidence in court. [FN16] In England, the notion of privilege arose with the imposition of compulsory process. [FN17] Because they evolved together, the right to compulsory process does not override or abolish the exemptions and privileges that are otherwise recognized by common law or statute.

The communication between attorney and client was the first recognized common-law privilege. Courts recognized the privilege as early as 1557, simultaneously with the advent of compulsory \*94 process. [FN18] By the late 1600s, a second broad privilege shielding communications between spouses was well-established. [FN19] During the same period, ‘the obligations of honor among gentlemen . . . were often put forward as a sufficient ground for maintaining silence.’ [FN20] For a while, it seemed as if this notion would prevail. However, the ‘point of honor’ theory of privilege disappeared, while other privileges emerged. ‘By the early 1800s, English courts had begun to develop a common law of evidentiary privileges, and American judges tentatively looked to this emerging law to help them decide privilege questions.’ [FN21]

### *B. The Truth/Privacy Balance*

The English legal system, in its search for truth, began to realize that the original double-duty jury, which served both as witness and trier of fact, was ‘less and less able to do justice to the cause through the means of its own neighborhood knowledge.’ [FN22] Gradually, as both the number and the complexity of cases increased, the courts made room for the testimony of witnesses to aid in the truth-seeking process. At first, courts put trust only in the testimony of witnesses sought by the jury and viewed with suspicion, as if it had a self-serving pur-

pose, any testimony voluntarily given. According to one judge in 1450:

[I]f the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, \*95 and he informs them, it is justifiable; but if *he* comes to the jurors or labors to inform them of the truth, it is maintenance, and he will be punished for it. [FN23]

As the common law developed, it carried on the old principle that ‘the public has a right to every man's evidence.’ [FN24] Yet, keeping in step with the development of a compulsory process doctrine requiring a witness to testify in the interest of society was an equal but opposite privilege doctrine protecting an individual's right to privacy of communication within the context of confidential relationships. [FN25]

Those who advocated the privacy rationale believed that to compel disclosure of a confidential communication is inherently wrong for either of two reasons. First, the disclosure results in ‘the embarrassment of having secrets revealed to the public,’ [FN26] and second, it forces the ‘breach of an entrusted confidence. The first offends the right of people to control the distribution of personal information, and the second offends the right of individuals to form private loyalties. The first harm is shame, the second, treachery.’ [FN27]

However, the need for privacy was not always recognized as a legal interest; it must first meet the threshold test that separates those desires for privacy that the court deems insignificant from those that it deems worthy of special balancing. This determination \*96 varies from privacy interest to privacy interest and from court to court. [FN28] Once a privacy interest is recognized, and before it will be protected by a privilege, the privacy interest must be balanced against society's interest in ascertaining the truth. [FN29]

The most influential rationale for the law of privilege is the utilitarian justification advocated by Dean John H. Wigmore. He believed that a given communication should be privileged only if the benefit derived from the protection outweighed the detrimental effect of the privilege on the search for truth. [FN30] Wigmore recognized four fundamental conditions as necessary to the establishment of a privilege against disclosure of communications. Under the Wigmore test, for a claim of privilege to be recognized, it must meet all four conditions:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. [FN31]

Wigmore strongly believed in the duty to testify. While his treatise on evidence had to be flexible enough to accommodate most existing privileges, he kept it narrow enough to discourage the creation of new ones. [FN32]

\*97 In discussing the duty to testify and the sacrifice of time, labor, and privacy on the part of the witness, Wigmore made this observation:

When the course of justice requires the investigation of truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon. [FN33]

Dean Wigmore further observed that society's right to its citizens' testimony ‘comes, not from any one per-

son or set of persons, but from the community as a whole—from justice as an institution and from law and order as indispensable elements of civilized life.’ [FN34] He emphasized that ‘*all privileges of exemption from this duty are exceptional*, and are therefore to be discountenanced.’ [FN35] In return, society must ‘*make the duty to testify as little onerous as possible*,’ [FN36] so as not to create unnecessary annoyance for innocent persons. [FN37]

Today, most judges and scholars accept truth seeking as the ultimate judicial value. [FN38] Therefore, they place the burden of justifying a privilege on the privilege seeker rather than requiring those seeking to abolish privileges to defend their position. [FN39]

### C. The Power/Image Arguments

Testimonial privilege generally has been justified for its promotion of communication between parties and its protection of privacy \*98 in certain relationships. [FN40] But those who question a justification for the inclusion of privilege in an egalitarian legal system suggest ‘that the real roots of privilege law lie in the power of those benefiting from it.’ [FN41] This power theory asserts that privilege law exists ‘as a special treatment won by the power of those privileged.’ [FN42]

The very word ‘privilege’ suggests the protection of a favored elite. In fact, early English courts explicitly limited privileges to the upper classes. Those enjoying privileges today constitute some of the most politically powerful professions and institutions in America: lawyers, doctors, the Church, the news media, and the government. Indeed, both contemporary and historical circumstances surrounding the making of privilege law suggest a power basis. [FN43]

Still, there has been an evolution in the use of privilege based on social status. The earlier ‘point of honor’ privilege, giving deference to aristocrats who had promised confidentiality, disappeared with the increasing importance of egalitarianism, which challenged the use of status and power as a means of distinguishing the legally privileged from the legally non-privileged. [FN44] The power of individual interest began to lose ground to the power of societal interest.

Today, new privileges are created by statutes, [FN45] which clearly are exercises of political power. Effective lobbying by determined power groups creates the privilege law of tomorrow. Yet, one commentator has stated:

Because . . . the maintenance of power requires the powerful to gain the acquiescence of the less powerful, a compromise equilibrium will be reached that advances the \*99 interests of the powerful while accommodating the interests of the less powerful. In this regard, the nature of privilege law is no different from the nature of most law in a democratic society. [FN46]

Another equally viable explanation for the existence of privilege is that it is a method for protecting the image of the legal system. This image theory suggests that courts and legislatures have established certain privileges to alleviate embarrassment by masking the system’s inability to compel obedience and minimizing the possibility of discovering facts after a trial that would undermine the credibility of judgments reached. [FN47]

Privilege holders generally are members of groups most likely to refuse to testify. Often, they are bound by strong loyalties or professional codes of ethics and the threat of professional sanctions. A refusal to testify creates a dilemma for the court. ‘It could either ignore the witness’s public disobedience, or throw the priest, spouse, lawyer, or doctor in jail. Ignoring disobedience would reduce respect for judicial commands; jailing wit-

nesses would probably generate public sympathy for the resolute witness and hostility toward the court.’ [FN48] Those groups now holding privileges have a strong, ethical commitment to protect confidentiality and, consequently, they are less likely to disclose, after the verdict, information that they claimed as privileged during the trial. ‘Because the legitimacy of the legal system depends on the acceptability of its verdicts as credible determinations of what happened, someone who invoked a privilege and later revealed information that proved the verdict wrong could seriously undermine the system’s legitimacy.’ [FN49]

Also important to the system’s legitimacy is the reliability of testimony. For example, in a spousal relationship it is not difficult to predict the result should one spouse be forced to testify against the other. Rather than participate in a spouse’s conviction or face the trauma of marital breakup, a spouse is likely to lie. Perjury is unacceptable in the courtroom; it is a travesty of justice. Policies \*100 which encourage repeated and predictable perjury should be avoided at all costs. [FN50]

While it is clear that the power and image theories point to a protection of privilege for an elitist minority, arguably, the nonprivileged majority also benefits from the current system. All people gain from ‘a social vision that encompasses a . . . belief in the strength of the marital bond, . . . the sanctity of religious counseling, . . . the necessity of a free press, and . . . the importance of the legal and medical codes of ethics.’ [FN51]

## II. CONTEMPORARY APPROACH TO LAW OF PRIVILEGE

Anti-English sentiment understandably dominated post-revolutionary America; title and class privilege were seen as decidedly un-American. Consequently, there existed a deep-seated popular dissatisfaction with the common law and a growing attempt to abolish the common-law system entirely. [FN52] In spite of this opposition, the common law prevailed as the foundation for the new republic’s legal system. Yet, as the system developed, many states enacted privilege statutes of their own to replace the judicially created common law of privilege. [FN53] ‘The result of this state-by-state statutory revision of evidence law was an erosion of the relative unity of the common law of evidence. By the 1860s, evidence law in general and privilege law in particular varied widely from state to state.’ [FN54]

\*101 In reaction to the confusion, legal scholars called for the unification of state evidentiary law. John Wigmore’s ten volume work, *Evidence in Trials at Common Law*, published in 1904, carried the unification effort forward. [FN55] Subsequent attempts to establish an acceptable code of evidence met with little support. [FN56] Eventually, the Uniform Rules of Evidence, as revised in 1974, [FN57] gained acceptance by a significant number of states and has already produced substantial results in reducing discrepancies between states’ privilege laws. [FN58]

Federal courts were also troubled by the confusion surrounding privilege law. Although the courts followed different procedures for civil and criminal matters, in each instance, the courts debated whether and when to apply state evidentiary law in deciding privilege issues. Enactment of the Federal Rules of Evidence [FN59] in 1975 settled much of the ambiguity governing admission of evidence in the federal system, but it did not resolve the question of privilege. The debate preceding the adoption of the proposed Federal Rules of Evidence became a battle over the privilege rules. Article V of the proposed rules recognized nine discrete privileges, including those protecting state secrets and government informant identities. [FN60] Several\*102 commonly accepted privileges were excluded: the marital communications privilege, the journalist’s privilege, and the general physician-patient privilege. In addition, proposed Rule 501 effectively froze federal common-law development of privilege by specifying that the rules were to be ‘exclusive except as otherwise provided by the Constitution,

acts of Congress, or other Supreme Court rules.’ [FN61]

Opponents attacked the proposed privilege rules on three grounds. [FN62] First, the proposed rules substantially departed from generally prevailing law with respect to testimonial privileges. [FN63] Second, the rules expanded protection for organizational and governmental secrecy, while they restricted the development of privileges protecting individual privacy. [FN64] Third, the rules were internally inconsistent. [FN65]

\*103 In the end, Congress deleted proposed article V [FN66] and substituted in its place a single, general privilege rule—Rule 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. [FN67]

In practice, federal courts hearing federal cases often look to state law for guidance in the area of privilege. Yet, another, Rule 501 does not require this practice and, in fact, ‘leaves privilege law open to common-law development by the federal courts.’ [FN68] Therefore, those communications accorded the status of ‘privilege’ in state law need not be perceived as an exclusive and unchanging list.

#### *A. Recognized Areas of Privilege*

When Congress deleted article V on privileges from the proposed Federal Rules of Evidence and replaced it with Rule 501, it both \*104 alleviated delay of the Federal Rules’ adoption and appeased certain interest groups. Congress did not, however, clarify the law of privilege. As one commentator has described the current state of the law:

Most privileges are not constitutionally based. They exist in some places and not in others. They take different forms in different jurisdictions. Interest groups often seek privileges for information they believe should be held in confidence, and critics of the privilege system seek to limit or repeal existing privileges. In virtually every state you are assured of finding some form of attorney-client privilege, priest-penitent privilege, spousal privilege, and governmental privilege. The privilege against self-incrimination also applies throughout the United States. The incidence of other privileges varies markedly. [FN69]

Understandably, it is unlikely that any two authorities would create the same itemized list of privileges. As a starting point, the privileges described below are those that are generally acceptable, or those that are more likely than not to appear credible, to a majority of scholars:

*Attorney-Client Privilege.* This privilege is the oldest and one of the most widely accepted of the known testimonial privileges. Only eleven jurisdictions have failed to codify the law of attorney-client privilege; one additional state has recently repealed its statute. [FN70] Originally, the privilege was granted in consideration of the oath and honor of the attorney and barrister who were under a solemn pledge of secrecy. The apprehensions of the client were not of primary concern. As the ‘point of honor’ privilege began to lose ground, the attorney’s exemption would have fallen at the same time had not a new theory, providing for the client’s freedom of appre-

hension in consulting with a legal advisor, appeared to sustain the privilege. Gradually, the privilege came to be seen as one possessed\*105 by the client and not by the counsel; thus, it could be waived only by client consent. [FN71]

Wigmore's statement of the rule has continued to be widely quoted:

Where legal advice of any kind is sought . . . from a professional legal advisor in his capacity as such, . . . the communications relating to that purpose, . . . made in confidence . . . by the client, . . . are at his instance permanently protected . . . from disclosure by himself or by the legal advisor, . . . except the protection be waived. [FN72]

*Marital Privilege.* Two types of marital privilege exist. The first, spousal testimonial privilege, depending on jurisdiction, gives a witness the right to refuse to testify against his or her spouse, gives a party the right to prevent testimony by the spouse, or excludes all adverse testimony of spouses on the grounds of incompetence. [FN73] The second, marital communications privilege, protects confidential spousal communications. [FN74] Although often referred to interchangeably, these two types of privilege stem from different common-law principles and have distinct modern applications. The law of spousal privilege is one tht is rapidly changing. [FN75]

*Clergy-Communicant Privilege.* This privilege arose in response to the traditional 'Seal of Confession' required by the Catholic Church. The privilege disappeared during the English Reformation, but later reappeared both in England and in the United States. [FN76] One explanation for its existence is that 'p reserving confidential communications made in the interest of spiritual rehabilitation or \*106 solace is deemed to 'overbalance the possible benefit of permitting litigation to prosper.' [FN77] Today, the privilege is recognized by statute in nearly every state. Generally, the privilege applies to ministers, priests, and rabbis; it is doubtful whether lay officials or self-designated ministers would be protected. [FN78]

*Physician-Patient Privilege.* The physician-patient privilege did not exist at common law. [FN79] Nineteenth century legislatures created the privilege as a publiac health measure to encourage people to seek medical assistance for socially unacceptable diseases. [FN80] Today, the privilege seems to be less necessary; the medical profession has gained legitimacy and the threat of social stigma is not as evident. [FN81] The proposed Federal Rules of Evidence did not suggest a physician-patient privilege, and although they have discretion to do so, federal courts, when applying federal and not state law, are reluctant to recognize the privilege. [FN82]

*Psychotherapist-Patient Privilege.* This privilege, like the physician-patient privilege, did not exist at common law; however, it has met with more consistent approval than the physician-patient privilege. [FN83] The psychotherapist-patient privilege derives from the Freudian model of psychoanalysis which relied on patient confidence and full disclosure for effective treatment. [FN84] Consequently, the privilege protects only confidential communications, that is, those \*107 communications that are necessary for treatment. [FN85] Further, while the broad privilege includes psychologists and psychiatrists, most state statutes limit this privilege's scope by specifying the types of professionals covered. [FN86]

*News Media Privilege.* No common-law privilege existed allowing journalists to refuse to disclose confidential sources. A statutory privilege began to appear in the late 1800s, [FN87] protecting those journalists who refused to disclose such sources. Then, in 1958, the Second Circuit, in *Garland v. Torre*, [FN88] suggested that reporters could rely on the first amendment for protection from evidentiary requests. [FN89] Numerous advances and setbacks followed. [FN90] Today, 'the journalists' first amendment privilege has gained such widespread acceptance that its applicability in many situations is no longer open to question.' [FN91]

*Governmental Privileges.* These privileges are founded upon the public interest in the executive branch's effective performance of **\*108** its constitutional duties. The government can invoke such privileges to protect information the confidentiality of which is essential to national interests. [FN92] Three general areas are protected by governmental privilege: 1) military and state secrets, 2) information obtained for law enforcement purposes, and 3) communications exchanged in the course of governmental decision making. [FN93] The first privilege is absolute and cannot be overridden, the second has been expanded by judicial interpretation of Exemption 7 of the Freedom of Information Act, [FN94] and the third is qualified and may be overcome in appropriate circumstances. [FN95] Additionally, a number of statutory quasi-privileges exist to protect the confidentiality of business and personal information submitted to government agencies. [FN96]

*Executive Privilege.* In *United States v. Nixon*, [FN97] the Supreme Court first acknowledged a constitutional basis for executive privilege. [FN98] The Court determined that this privilege was 'fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.' [FN99] It found a need to **\*109** protect the independence of the executive branch and to encourage candor in the advice given the President by his aides. [FN100] However, the Court rejected President Nixon's argument for absolute privilege:

[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. [FN101]

The privilege is qualified in both criminal and civil cases, [FN102] and only the President or former President may raise it. Consequently, presidential aides may not raise this claim of privilege. [FN103]

*Legislative Privilege.* The speech and debate clause of the United States Constitution [FN104] specifically protects members of the House and Senate from disclosure of matters related to their congressional duties. The privilege shields members of Congress from interference by other branches of government and, thus, from interference by the public at large. Originally, members of Congress were granted absolute immunity. [FN105] Now, however, the privilege is defined more narrowly. It extends only to activities that 'occur in the regular course of the legislative process' [FN106] and not to 'all conduct relating to the legislative process.' [FN107]

**\*110** *Other Privileges.* A number of jurisdictions have accepted several additional privileges. Two which seem to be gaining favor are the accountant-client privilege [FN108] and the parent-child privilege. [FN109] Additional privileges not expressly concerned with communications include the academic research privilege, [FN110] the work product privilege, [FN111] and the constitutionally-mandated fifth amendment privilege against self-incrimination. [FN112]

### *B. Current Arguments for Expansion or Reduction of Privilege*

The law of privilege is one of the least settled areas in the American legal system. While this state of flux exists for a number of reasons, the most important appears to be the proximity of the law of privilege to the core of two very opposing philosophies. [FN113] One school of thought perceives the search for truth as absolutely necessary to achieving the ultimate goal of justice. In contrast, others believe that some rights, the right to privacy in particular, may transcend the quest for truth. As privacy is increasingly protected, evidence tending to penetrate to the truth of the matter is correspondingly restricted.

Further, those who agree that privacy is important differ as to what types of privacy are deserving of protection. Certain power groups [FN114] with privilege are striving to keep it; other emerging power groups are striving to be included.

*1. For Expansion.* There are two ways in which to make an argument in favor of privilege expansion. First, a social or professional\*111 group may argue the necessity of establishing a new privilege for itself. [FN115] Second, individuals who believe their claim falls within, or ought to fall within, an existing privilege may argue to expand the privilege to cover them, [FN116] often relying on claims of entitlement to equal treatment. [FN117]

\*112 Proponents of privilege expansion challenged the proposed federal privilege rules' restriction of personal privileges as an invasion of privacy. [FN118] Privacy, they argued, is a highly valued right in a democratic society that cherishes a fundamental belief in the uniqueness of the individual and seeks to protect that individual's basic dignity from exposure, control, or manipulation by those aiming to reach her innermost secrets. [FN119] Restrictions of personal privileges may cut more harshly against the poor.

A man who can have his tax returns prepared by lawyers, his psyche bolstered by psychotherapists and finance it all by trade secrets can frustrate the judicial inquiry by an assertion of aptly named 'privileges.' No such favor is afforded the litigant who must utilize a supermarket tax accountant, confide only in his wife and support himself by welfare payments which require disclosure of his secrets to a social worker. [FN120]

The compromise of [Federal Rule of Evidence 501](#) has not alleviated the argument for privilege expansion, for it has not settled \*113 the pressing questions of privacy and equity in privilege law. The compromise permits the federal courts to examine the developing law of privilege in the state courts and to follow any expansion or reduction therein. Thus, in many ways, the law of privilege rests in the judges' philosophies of judicial restraint. Due to the unsettled nature of the law, change is inevitable, and that change is likely to result in expansion rather than reduction of privileges.

*2. For Reduction.* Precisely because of the unstable state of the law of privilege, and in reaction to the many claims for inclusion, many authorities suggest a reduction both in the number and the scope of the privileges currently recognized. [FN121]

Exclusionary rules, like the exclusionary rule used in conjunction with the fourth amendment prohibition against unlawful search and seizure, are generally justified on the ground that the rules enhance truth-seeking by excluding evidence that is weak, prejudicial, or disruptive to an orderly inquiry into past events. The exclusionary rule of privilege, however, accomplishes just the opposite; it hampers the search for truth and, all too often, precludes admission of the very facts necessary to prove then case. [FN122]

In rejecting President Nixon's claim of executive privilege in the investigation surrounding the Watergate tapes, Chief Justice Burger discussed the need for admission of evidence:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process

be available for the production of \*114 evidence needed either by the prosecution or by the defense. [FN123]

Professor Charles McCormick, too, has noted an interest in narrowing the field of privilege:

In more recent times the attitude of commentators, whether from the bench, the bar, or the schools, has tended to view privileges from the standpoint of the hindrance to litigation resulting from their recognition. In this regard, the granting of a claim of privilege can serve only to 'shut out the light' so far as the party seeking to bring the privileged matter into the lawsuit is concerned. [FN124]

Yet Professor McCormick is equally clear in his explanation of how privileges have managed to survive in the face of numerous attacks by scholars and judges:

For many people, judges, lawyers and laymen, the protection of confidential communications from enforced disclosure has been thought to represent rights of privacy and security too important to relinquish to the convenience of litigants. Growing concern in recent times with the increase in official prying and snooping into the lives of private individuals has reinforced support for the traditional privileges and no doubt aided in the creation of new ones. [FN125]

In the end, we return to the truth/privacy balance. Are the costs to society of improving the adjudicatory process outweighed by any benefits received? Perhaps protection of personal autonomy is 'an end in itself-an essential condition of political liberty and our very humanity.' [FN126]

### III. A GLARING OMISSION: JUDICIAL PRIVILEGE

A privilege for the judiciary seems so fundamental. Yet very little has been written about the concept of judicial privilege; it appears \*115 neither on lists of recognized privileges nor on those proposed for adoption. In two hundred years, few have discussed the privilege and none have challenged it.

Recent actions against article III federal judges, United States District Judge Alcee L. Hastings [FN127] in particular, have raised the issue of judicial privilege. Decisions related to the actions against Judge Hastings and others have seriously threatened to undermine the function of the judiciary as it is now understood. If, in fact, testimonial privilege is to remain a valid concept in the law of evidence, then recognition of absolute judicial privilege is imperative to the health and maintenance of the American legal system.

#### *A. Policy Argument for Extending Privilege to the Judiciary*

Those who oppose the expansion of privilege law generally argue that exclusion of otherwise admissible evidence inhibits truth-seeking and, therefore, is detrimental to the administration of justice. But even those who believe that a heavy burden of persuasion should be placed on the proponent of any privilege [FN128] will admit that some privileges meet that burden of proof. Judicial privilege is one of these.

Clearly, judicial privilege survives the test of Wigmore's four fundamental conditions. [FN129] Thus, without judicial privilege, relations between judges and their chambers staffs will suffer an injury that is greater than the benefit gained by society.

Three fundamental principles favor adoption of the privilege for the judiciary. First, the functional operation of the judicial process requires that a judge be uninhibited in her communications with members of her staff. Second, judicial privilege finds support in the doctrine of judicial immunity, [FN130] with which it is

closely related. Third, the constitutional guarantee of separation of powers [FN131] mandates that the judiciary be free from interference by the other branches of government.

**\*116** *I. Judicial Process.* Public policy favors a functional, organized legal system and achieving such a system is a legitimate goal of society. Arguably, measures intended to further that legitimate goal ought to be protected in order to protect all other values. The overwhelming case load faced by today's courts is a detriment to the efficiency of the system; judges are overburdened with work, and the time lapse between filing a suit and final adjudication is ever expanding. Unfortunately, the problem promises to get worse, not better.

The problem of a heavy case load is not new to the courts. Toward the end of the nineteenth century, the United States Supreme Court first began to experience the flood of new cases resulting from an expansion of the national borders, an increase in population, and industrial growth. [FN132] To lighten the burden and aid in the judicial administration process, law clerking was instituted: [FN133]

The clerkship represents the judiciary's response, initially fortuitous, to the press of the cases; it is application of the principle of division of labor to the judicial process—an application from which there has been no escape . . . . For better or worse, the clerkship has proved the invariable, now deliberate, response to the growth of appellate case loads throughout the country. [FN134]

Given the unique nature of the relationship, judicial aides have a special view of their judges that requires that confidentiality be preserved:

You provide a second pair of hands and legs for your judge. There are reports to retrieve and lots of bags to tote. Further, I would add that you also tender a second mind, although there is some controversy about this. . . . Law clerking, at least law clerking at its best, requires **\*117** much conversation and hard thinking between judge and clerk. . . . A good judge uses his clerk as sounding board to test the roots of judgment. . . . All of this is meant in the end to assure that the judge's yea or nay is cast as close to the mark as possible. [FN135]

From a judge's point of view, the ability to use and trust clerks as sounding boards is essential:

My relationship with my law clerks is a close and confidential one. If I cannot speak freely to them, they cannot do their job for me. And I could not speak freely to them if I thought that my questions, soul-searching, and opinions would be made matters of public record or private conversation. There is often a good deal of give and take and what finally emerges may not have been anyone's original thought. If my half-formed ideas or preliminary thoughts are not kept confidential by my law clerks—then I will have to keep them confidential myself and that will seriously impair the decision-making process. [FN136]

In addition, chambers staff are privy to their judge's political philosophies and the judge's personal feelings about particular lawyers, litigants, and other judges. Further, a judge's staff is aware of her thoughts concerning the outcome of a case prior to an announced decision. There can be little doubt that conversations of this type are meant to stay within the judge's chambers among a select circle of confidants. To compel the testimony of chambers staff even for in camera proceedings before a judge's other colleagues would create havoc within the judicial system. The element of confidentiality between a judge and those who aid her in chambers is essential, not only to the relationship of the parties, but also to the execution of the judicial office. The relationship between a judge and her staff is one that, until recently, the communities of the bench, the bar, and society at large has regarded **\*118** as nearly sacred. [FN137] The injury that would inure to that relationship if judges knew that their law clerks and other chambers staff could be summoned by judges serving on other courts would outweigh any conceivable benefit.

2. *Judicial Immunity.* Judicial privilege must protect all judges, state and federal, in order to protect confidential communications between themselves and those members of their confidential staff who assist them in performing the duties of the judicial office. That privilege is a necessary corollary to the ancient doctrine, which has been consistently applied for more than 300 years, that judges are immune from civil liability. [FN138]

The doctrine of judicial immunity exists so that judges may exercise discretion in decision-making in adversarial proceedings without fear of future litigation from disappointed parties. The public is best served by permitting the judiciary to conduct the affairs of court free from such concerns, thereby encouraging judgments based on conviction rather than fear of adverse consequences.

Judges enjoy absolute immunity from civil liability for judicial acts even though those acts may be malicious or reckless. [FN139] Additionally, they have qualified immunity from criminal liability for harms done in the good faith exercise of their administrative and ministerial duties. [FN140] That immunity would be rendered largely \*119 meaningless if a judge's clerks could be compelled to reveal what a judge cannot.

3. *Separation Of Powers.* For article III judges, the constitutional character of judicial privilege stems from at least two principles. First, the principle of separation of powers requires the availability of the judicial privilege in order to protect courts from improper interference from other branches. Second, the separation of powers principle combines with the Framers' decision to guarantee the independence and impartiality of the individual judge and thus further requires that the judicial privilege be available to protect the individual judge and her immediate aides from compelled disclosure of confidential communications to judges of their own and of other courts. If the executive or legislative branch can reach even a single judge, the doctrine of separation of powers dissolves.

The Supreme Court has recently reiterated the need to protect the independence of the individual judge as an essential component of article III decisionmaking. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* [FN141] the Court stated that 'the Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature-to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.' [FN142] The prominent features of this impartial judiciary are the provisions barring reduction in the salaries of the federal judiciary and granting tenure during 'good behavior.' 'The 'good Behavior clause' guarantees that article III judges shall enjoy life tenure, subject only to removal by impeachment.' [FN143] The purpose of these two provisions is to provide for an impartial judiciary. 'A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.' [FN144]

The Court in *Northern Pipeline* states emphatically, '[O]ur Constitution unambiguously enunciates a fundamental principle-that \*120 the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.' [FN145]

### *B. Case Law Supporting the Doctrine of Judicial Privilege*

Under a theory of common-law judicial privilege, there would be no power to compel testimony either of a judge or of her law clerks and other chambers staff. But it is not clear whether the privilege actually exists. Some courts have assumed that it does: 'The judicial branch of our government claims a similar

[testimonial] privilege, grounded on an assertion of independence from the other branches. Express authorities sustaining this position are minimal, undoubtedly because its existence and validity has been so universally recognized.' [FN146] Nonetheless, case law on the issue of judicial privilege has been virtually nonexistent. Insofar as is determinable, every court that has considered the question as a matter of dicta has concluded that conversations and records of federal judges and their immediate staff concerning the manner in which a judge conducts the judicial office are protected from compelled disclosure. [FN147] Furthermore, no law clerk of a federal judge has ever been compelled to testify concerning the manner in which her judge formulates judicial decisions, decides cases, or otherwise conducts judicial business in chambers. Although courts may need to define the scope of the privilege and to resolve questions of limited waiver, it is clear that strong policy supports the notion that the judicial privilege exists and that matters in chambers are entitled to be protected against compelled disclosure.

\*121 Prior to the administration of President Richard M. Nixon, there was barely a passing mention of judicial privilege in a court of law. Occasionally, courts seemed to use the term interchangeably with judicial immunity; [FN148] occasionally, it was raised in regard to a \*122 judge's duty in court; [FN149] and, occasionally, it was asserted but held not to apply. [FN150]

Former Alabama Governor George C. Wallace was involved in an interesting case concerning judicial privilege while he was a member of the Alabama judiciary. [FN151] Pursuant to complaints of deprivation of voting rights, the United States Commission on Civil Rights sought to inspect the voting and registration records of several counties, including two in Judge Wallace's jurisdiction. Members of the Board of Registrars and Judge Wallace refused the inspection, claiming illegal invasion of the sovereignty of Alabama. The federal district court answered, 'The sovereignty of the State of Alabama, or of any other of the states, must yield . . . to this expression of the Congress of the United States' [FN152] and 'c oncerning the requirement of Wallace to produce these records, it is sufficient to say, and this Court now says, that there is no \*123 concept of judicial privilege or immunity which relieves him of this requirement.' [FN153]

However, the district court was careful to point out that it was not denying the existence of these concepts:

This does not mean to say or imply that a judge is not immune from investigation or inquiry into his judicial acts; he is. For example, this Commission, nor indeed the Congress of the United States, could not inquire of Judge Wallace as to why he impounded these records or what factors he took into consideration when he impounded these records. However, in the case now presented no judicial act or decision of Judge Wallace need be nor is questioned. It may be, and this Court will for the time being-and I emphasize 'for the time being,'-assume that the order impounding the records of Bullock and Barbour Counties were proper and in good faith. The only question presented is the right of the Commission on Civil Rights to see those records. [FN154]

The court told registrars, who claimed that they were protected because they were also judicial officers, that their contention 'has no merit in this action.' [FN155]

During the Nixon era, questions of executive privilege arose in response to cases concerning release of information on the Watergate incident and the war in VietNam. Discussion of executive privilege occasionally prompted a consideration of legislative and judicial privilege as a comparison to executive privilege.

Judge MacKinnon's dissent in *Nixon v. Sirica* [FN156] traced the existing authorities to support the idea of a judicial privilege. 'Its source is rooted in history and gains added force from the constitutional separation of

powers of the three departments of government.’ [FN157] Further, the brief submitted by counsel for the President \*124 in *Sirica* cited support for a judicial claim of confidentiality:

It has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in ‘absolute secrecy’ for ‘obvious reasons’ . . . Justice Frankfurter has said that the ‘secrecy that envelops the Court’s work’ is ‘essential to the effective functioning of the Court.’ [FN158]

In his dissent in *New York Times v. United States*, [FN159] Chief Justice Burger defended an executive privilege by analogy to the Court’s right to invoke judicial privilege:

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required. [FN160]

In addition, Judge Bazelon in *Senate Select Committee on Presidential Campaign Activities v. Nixon* [FN161] reaffirmed the courts’ role in deciding whether and to what extent a claim of privilege applies, determining that its application ‘depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.’ [FN162]

In considering the public interest in protecting confidential presidential conversations, Judge Bazelon commented on his opinion in *Nixon v. Sirica*:

We recognized this great public interest, analogizing the privilege, on the basis of its purpose, ‘to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and \*125 their law clerks; and . . . to that contained in the fifth exemption to the Freedom of Information Act.’ [FN163]

The District of Columbia Circuit in *Soucie v. David* [FN164] also considered the exemption from disclosure of certain information by the executive branch under the Freedom of Information Act. Judge Wilkey’s concurring opinion suggests two bases for the privilege:

To put this question in perspective, it must be understood that the privilege against disclosure of the decisionmaking process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive. It arises from two sources, one common law and the other constitutional.

Historically, and apart from the Constitution, the privilege against public disclosure or disclosure to other coequal branches of the Government arises from the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires. [FN165]

Clearly, the judiciary has long believed in its privilege to protect the confidentiality of its internal decision-making process, even from the other branches of government. [FN166] In the aftermath of the resignation\*126 of Supreme Court Justice Fortas, it was suggested that the Justices ‘should compose a code of conduct to assure their objectivity and probity.’ [FN167] The Justices’ reaction to the drafting of such a code was reported as follows:

[I]f drawn, they are not likely to diminish the *absolute independence traditionally asserted by the high court for itself and by each of its nine members as individuals.*

In fact, the Justices are said to be determined to resist any effort by Congress or other outside authority to impose ethical standards or enforcement methods upon them. Above all, they remain committed to the principle that *each Justice must be free to work beyond the control or censure even of his colleagues, and they were careful to protect that principle* while concerning themselves with the Fortas case. [FN168]

In the years following the Nixon administration, courts have continued to acknowledge judicial privilege, even if only in passing comment. [FN169] In *McCorquodale v. Balkcom, i*,\*127 [FN170] a habeas corpus proceeding, on a motion for a further evidentiary hearing, the petitioner complained that ‘the Magistrate declined to compel Dennis A. York, Assistant to the Supreme Court of Georgia, to give deposition testimony relative to certain aspects of the Court’s sentence review procedures, which matters were deemed by the Magistrate to be subject to a judicial privilege.’ [FN171] Mr. York was assigned to review transcripts of capital felony cases on appeal to the Georgia Supreme Court and to prepare a card summary on each case containing a factual narrative of the crime and notation of any mitigating circumstances. He maintained a file on these summaries. When requested, he provided written reports on specific subjects. Mr. York, in a companion case, [FN172] declined to say more:

[He] declined to furnish information concerning how the cards are used or interpreted by him when responding to requests from the Justices or how the cards are used by the Justices themselves. Mr. York deemed his activities in this regard to be either akin to those of a law clerk or those of an attorney acting for a client. The Magistrate . . . agreed with Mr. York as to the judicial privilege; the District Court . . . in the same case affirmed the Magistrate. [FN173]

In *McCorquodale*, the court found it ‘unnecessary to rule on whether or not the Magistrate correctly analyzed York’s claim of judicial and/or attorney-client privilege, because . . . the sought-for testimony would not in any way have furthered Petitioner’s claim of inadequate sentence review procedures.’ [FN174]

\*128 The above-discussed cases dealt with the concept of judicial privilege as a peripheral matter and in less than extensive detail. Recently, however, in the aftermath of the prosecution and acquittal of United States District Judge Alcee L. Hastings, a court finally considered the doctrine of judicial privilege at length. [FN175]

### C. Judicial Privilege Under Fire

Until recently, the doctrines of judicial immunity and separation of powers and an assumption of a common-law judicial privilege have protected the judiciary from the other branches of government. In 1980, however, Congress passed the Judicial Council’s Reform and Disability Act. [FN176] Though it was intended to facilitate administrative duties of the judiciary and to offer a grievance procedure for complaints against particular judges, some commentators argue that this Act permits unwarranted interference in the affairs of the judiciary by the executive and legislative branches. [FN177]

1. *Judicial Council Reform and Judicial Conduct and Disability Act of 1970.* Congress passed the Judicial Council Reform and Judicial Conduct and Disability Act of 1970 [FN178] to amend already-existing legislation dealing with the judicial control of court management procedures. [FN179] Its purpose was to promote uniformity and the expeditious conduct of court business. [FN180] The Act subject federal judges to suit brought by any person for improper conduct in the administration of justice. [FN181]

\*129 The judicial council may dismiss improper or frivolous complaints or take corrective action on major

offenses as necessary. Complaints of conduct approaching grounds for impeachment are referred to the Judicial Conference which ultimately determines whether impeachment may be warranted and sends that finding to the House of Representatives. [FN182] The Act is significantly clear on one point: impeachment is viewed as the only proper method of 'removal' of a sitting federal judge. Congress had the opportunity both to examine the exclusivity of the impeachment process and to abrogate it, but chose not to do so. [FN183] Instead, Congress granted to the judicial council the power to supervise, not the power to remove. [FN184]

The Act has been criticized for vesting too much power in the judicial councils. [FN185] It represents one of a number of attempts on \*130 the part of the Congress and the executive branch to exercise a measure of control over the judicial branch. [FN186] Congressional discussion on the issue of the exclusivity of impeachment as a mechanism for removing federal judges focused on judicial independence. [FN187] If the American system of justice is to survive, judges must be free to apply the law without fear of retribution or the influence of favor. Nonetheless, our society cannot tolerate unaccountability. To accommodate the opposing interests of judicial independence and public accountability, the Framers provided for an errant judge's removal from office through impeachment. [FN188] Although the Act does not grant to the Judicial Conference the right to impeach a federal judge, it does grant to the Conference the power to determine—either on its own or upon review of the judicial council's determination—whether consideration of impeachment may be warranted. [FN189]

\*131 In any investigation undertaken pursuant to the Act, the investigating body, be it the special committee, the circuit judicial council, or the Conference, is vested with full subpoena powers. [FN190] The Act also gives each such body the power to prescribe rules for the conduct of its proceedings, provided the rules contain certain minimum procedural safeguards. [FN191]

A significant issue is whether the subpoena power created under the Act includes the power to invade, as part of the council's or Conference's authority to conduct an investigation 'as extensive as it considers necessary,' [FN192] a judge's chambers, her papers, and her work product. Just as significant is the question of whether there is authority to compel the testimony of law clerks and other chambers staff. If judicial privilege exists, it would supersede this authority and bar such transgressions as contrary to the independence of the judicial branch.

An even more recent attack on judicial privilege has been the federal grand jury indictment of four article III federal judges: the Honorable Otto Kerner, Jr., [FN193] the Honorable Alcee L. Hastings, [FN194] the Honorable Harry Eugene Claiborne, [FN195] and the Honorable Walter\*132 L. Nixon. [FN196] Although Judges Hastings, Claiborne, and Nixon are the only federal judges to be criminally prosecuted for arguably impeachable offenses committed while on the bench, other federal judges have resigned during investigation or have been cleared of criminal charges. [FN197]

2. *In The Matter Of Judge Alcee L. Hastings.* Generally, as the Framers intended, the judiciary has remained independent. Judicial privilege, while largely undefined, has been acknowledged. However, the recent indictment of Alcee L. Hastings, U.S. District Judge for the Southern District of Florida, [FN198] for being influenced in the making of a judicial decision by the promise of a bribe, has changed the framework of judicial independence.

\*133 The circumstances leading to Judge Hastings's indictment began with information provided by an undisclosed informant, who told federal authorities in Miami that a Washington, D.C., attorney, William A. Borders, Jr., was acting as a middleman for bribes solicited by Judge Hastings. The subsequent federal investigation fo-

cused on Judge Hasting's conduct with respect to a criminal case, *United States v. Romano*. [FN199] The investigation involved observation, payments of money to Mr. Borders by the investigators, and taped telephone conversations. While Mr. Borders subsequently was arrested by the FBI and found to be in possession of the money in question, no portion of the original or final bribery payments was ever traced to Judge Hastings. [FN200] On December 29, 1981, a federal grand jury indicted Judge Hastings. On February 4, 1983, a jury found Judge Hastings not guilty of the bribery charges. One month later, two district court judges filed a complaint with the Eleventh Circuit Judicial Council against Judge Hastings under the Judicial Council Reform and Judicial Conduct and Disability Act of 1980. [FN201]

\*134 In the course of the investigation, and pursuant to its powers to conduct an investigation 'as extensive as it considers necessary,' [FN202] the Investigating Committee of the Judicial Council of the Eleventh Circuit [FN203] issued subpoenas to Judge Hastings' secretary, Betty Ann Williams, and three law clerks, Alan Ehrlich, Daniel Simons, and Jeffrey Miller. Additionally, the Committee required Ms. Williams to produce appointment diaries, guest sign-in sheets, and the telephone logs that she kept for Judge Hastings. Judge Hastings and all four members of his staff challenged the 'legal and constitutional propriety of the investigation itself, of the Act of Congress which authorizes and directs judicial councils to conduct such investigations, and of many of the procedures involved.' [FN204]

Upon acceptance of employment in the service of an article III judge, an aide takes on a duty of confidentiality, a moral agreement to preserve the privacy of the judge's work. [FN205] Judge Hastings' secretary and law clerks asserted that they were being subpoenaed to breach such a confidence by reporting on private conversations and turning over personal records of their employer. They were being forced to breach a duty of trust or face a prison sentence.

Williams and Ehrlich did not appear before the Committee. Instead, each filed a Notice of Objection to Subpoena and Subpoena Duces Tecum, in which they claimed a privilege against disclosure \*135 of the in-chambers communications among a judge and his staff. They, along with Judge Hastings, filed a complaint seeking 'injunctive relief to restrain enforcement of the subpoenas directed to Williams and Ehrlich, an order requiring return of documents already produced by Williams in response to a previous subpoena . . . and a declaratory judgment that the subpoena power conferred on the Committee by the Act is invalid and that all subpoenas issued and served pursuant thereto are unenforceable.' [FN206]

Simon and Miller appeared before the Committee. Each 'refused to testify, on grounds of privilege, about communications among Judge Hastings and his staff.' [FN207] The Committee moved to dismiss the complaint filed by Williams, Ehrlich and Judge Hastings. It also filed motions for orders directing all subpoenaed chambers staff to testify. The District Court for the Southern District of Florida granted the Investigating Committee's motion to dismiss, and in doing so the district court held that it was 'without jurisdiction to entertain challenges to subpoenas issued pursuant to the Act' [FN208] because the court of appeals was the issuing body and 'it is therefore the only appropriate authority which has jurisdiction to enforce or invalidate its subpoenas.' [FN209] In the alternative, assuming that it did have the authority to rule on the subpoenas, the court held the subpoenas to be 'valid and enforceable.' [FN210] On appeal, appellants challenged the Act's expansion of the limited original jurisdiction of the courts of appeals, and raised several constitutional arguments against the Act:

- (1) The Act impermissibly assigns executive powers, including the subpoena power, to judicial officers.
- (2) The investigatory scheme established by the Act unconstitutionally intrudes upon the independ-

ence of sitting Article III judges to engage in free and uninhibited decision-making.

\*136 (3) The authority given to the judicial branch to certify that grounds for impeachment may exist is inconsistent with the sole power of the House of Representatives to initiate impeachment proceedings.

(4) The Act's standards of judicial misconduct are unconstitutionally vague and overbroad.

(5) The Act violates the due process rights of judges under investigation in that it denies the accused judge the right to confront the evidence against him and impermissibly combines investigatory/prosecutory and adjudicatory functions in the judicial council. [FN211]

The Eleventh Circuit held that 1) it had exclusive original jurisdiction to determine motions to enforce or quash the subpoenas, 2) the Committee's issuance and service of the subpoenas did not violate the Constitution, and 3) subpoenas were enforceable despite the invocation of a privilege protecting communications between judge and chambers staff. [FN212]

In addition, the Eleventh Circuit explained the public policy behind the Act's expeditious investigative procedures:

The Act's goals of maintaining public confidence in the judiciary and promoting the effective administration of justice require that investigations into alleged judicial misconduct be concluded as expeditiously as is reasonably possible, lest a sitting Article III judge be compelled to function under a cloud of doubt and suspicion for any longer than is absolutely necessary. Congress gave effect to the need for speed by directing that each investigating committee file its report 'expeditiously' . . . and by precluding judicial review of orders and determinations made in the course of investigations under the Act. . . . Assigning subpoena enforcement authority to the courts of appeals, similarly, promotes expedition in that it eliminates \*137 an entire layer of potential appeals from original subpoena enforcement determinations. [FN213]

The court further determined that while the members of Judge Hastings' staff had standing to challenge the constitutionality of the 1980 Act with respect to the existence and investigatory authority of the Committee, they did not have standing to claim that the Act's standards of judicial misconduct were constitutionally vague and overbroad. [FN214]

In answer to the argument that the Committee's investigatory and subpoena powers were inherently 'executive,' the court held:

[T]he judicial complaint procedures, being ancillary to the administration of the courts, are duties which the Congress could properly confer upon the *judicial* rather than the *executive* branch. Indeed, we think that far more serious separation of powers objections would have arisen had these same powers been conferred upon a permanent agency in the executive (or legislative) branch. [FN215]

Considering the more difficult question of whether the Act's investigatory scheme unconstitutionally intruded on the independence of a federal judge, the Eleventh Circuit acknowledged the argument adopted by Justices Douglas and Black in the dissent in *Chandler v. Judicial Council*. [FN216] 'A ny kind of procedure which allows a judge's colleagues, for whatever reason, to impose any presssures and sanctions whatsoever on the judge violates the constitutional requirement that a judge can be removed only by impeachment.' [FN217]

However, the Eleventh Circuit preferred the determination by the *Chandler* majority that 'in order for the judicial system to work, some reasonable measures, short of impeachment, tending to require judges to cooperate in respect to administration of their court \*138 are constitutional.' [FN218] Therefore, the Eleventh Circuit decided that this complaint procedure was reasonable and not overly threatening to judicial

[FN219]

Responding to the appellants' assertion that the House's sole power to impeach gave it the sole power to investigate, the Eleventh Circuit stated:

[W]e are aware of no authority . . . that would suggest that the House's sole power to impeach necessarily entails the sole power to investigate. . . . Nothing in the Act effects any change in the impeachment procedures or standards to be followed in the House. Accordingly, formally authorizing the judiciary to assume some initial factgathering responsibility with respect to complaints that may lead to impeachment does not intrude upon the House's sole power of decision whether or not to impeach. [FN220]

\*139 The court determined that the appellants' fifth assertion that the Act unconstitutionally violated the due process rights of judges under investigation was not within the court's original jurisdiction. [FN221] The court added, 'If Judge Heastings' procedural rights are being denied, that does not impair the enforceability of the Committee's subpoenas; Judge Hastings himself must seek relief in the appropriate forum.' [FN222]

The Eleventh Circuit also held that it had no original jurisdiction to hear two additional challenges to the Committee's hearing procedures and confidentiality policies raised by appellants: 1) counsel was not permitted to accompany witnesses in the hearing room during examination, and 2) witnesses were directed not to disclose questions asked and answers given during their appearance before the Committee. The appellants asserted that these policies violated the witnesses' rights under the fifth and first amendments, respectively. [FN223]

The court considered in detail the testimonial privilege claimed by Judge Hastings and honored by his staff. The court repeated Judge MacKinnon's comments on judicial privilege in *Nixon v. Sirica* [FN224] and noted appellants' concerns:

Enforcement of these subpoenas, it is urged, would require that Williams, Ehrlich, Simons, and Miller reveal confidences entrusted to them by Judge Hastings and would thereby threaten the independence and the effective functioning of the judiciary by chilling and obstructing the full and frank exchange of ideas within chambers necessary to a judge's performance of his official duties. [FN225]

With regard to Williams and Ehrlich, the court held that their claim of testimonial privilege was not yet ripe for decision because both parties failed to appear before the Committee and invoke the \*140 privilege. [FN226] However, the court did consider Williams' claim of privilege with respect to the Subpoena Duces Tecum issued to her. The Court also considered the claims of testimonial privilege by Simons and Miller because they had appeared before the Committee and invoked the privilege. [FN227]

After recognizing that 'the probable existence of such a privilege has often been noted,' [FN228] and comparing it with the qualified privilege for the executive as determined in *United States v. Nixon*, [FN229] the court concluded as follows:

[T]here exists a privilege (albeit a qualified one. . .) protecting confidential communications among judges and their staffs in the performance of their judicial duties. But we do not think that this qualified privilege suffices to justify either William's noncompliance with the Committee's subpoena duces tecum, or Simon's and Miller's refusals to answer the questions directed to them by the Committee. [FN230]

The court also held that Williams failed to meet the burden of showing that the documents she was required to produce would reveal communications concerning official judicial business. [FN231]

\*141 Turning to the testimony of Simons and Miller before the Committee, the court found that the privilege

applied. [FN232] ‘That the privilege applies, however, does not end the matter. The judicial privilege is only qualified, not absolute; it can be overcome in an appropriate case.’ [FN233] Finally, pointing to the Committee’s investigation as ‘a matter of surpassing importance,’ the court held that the judicial privilege asserted by Simmons and Miller on Judge Hasting’s behalf was overridden, and ordered all parties to comply with the Committee’s subpoenas. [FN234]

**\*142** In ordering Judge Hastings’ staff to comply with the Investigating Committee’s subpoenas, the Eleventh Circuit became the first court in the United States to rule against the common-law protection of judicial privilege. It did so even though [Rule 501 of the Federal Rules of Evidence](#) dictates continued reliance on the principles of the common law. [FN235] And it did so even though the Judicial Council Reform and Judicial Conduct and Disability Act of 1980 clearly does not abrogate the common law of privilege. [FN236] The court determined that while the privilege exists, it is not absolute and must give way to the need to investigate allegations of misconduct by a federal judge. [FN237] It further stated that the Committee, which itself consists of federal judges, would be ‘uniquely cognizant of the need to safeguard the confidentiality of in-chambers communications among an Article III judge and his staff. In addition, any privileged testimony or documents received by the Committee will remain confidential under the provisions of section 372(c)(14) of the Act.’ [FN238]

The court failed to note that should the Judicial Council eventually recommend impeachment of the judge, all papers, documents, and records related to the investigation may be released for impeachment investigation or trial. Section 372(c)(14) of the 1980 **\*143** Act, noted in the court’s opinion, [FN239] provides for this release of information. [FN240]

Clearly, the confidentiality of a judge’s in-chambers communications is not well protected when the purpose of the Committee’s investigatory proceedings is to promote candid discussion, but the results of those proceedings may be made public should the Committee recommend impeachment. If conduct is thought to constitute an impeachable offense, the investigation proceeds to the House and Senate and subsequently to hundreds of people. Ultimately, the public will be permitted to see the Committee’s report, which includes the article III judge’s confidential materials.

This intrusion into the judge’s chambers is clearly unfair to the judge. Should a judge be exonerated and continue on the bench, that judge’s decisional processes will have been scrutinized by judicial colleagues and others, including those having appellate review of the judge’s former and future decisions. Because the court has qualified the privilege, the Committee may exercise its investigative powers to obtain information that the Committee’s judges could not otherwise permissibly obtain or even consider in proceedings reviewing a judge’s decision on appeal. The possibilities for abuse are legion. [FN241]

#### **\*144 CONCLUSION**

The judiciary is the least powerful branch of the federal government. [FN242] It does not have control over its own purse strings, and its rulings cannot be enforced without the executive. The only power reserved to the judiciary is the power to decide cases and controversies independent of the other two branches. To strengthen the judicial branch, the Framers guaranteed to members of the judiciary life tenure and undiminished compensation. These guarantees ensured an independent judiciary able to render decisions that are constitutionally correct notwithstanding their unpopularity. For two hundred years the American legal system has complied with the Framers’ intent to protect the independence of the judiciary. It has done so by acknowledging the constitutional guarantees of judicial immunity and separation of powers and by accepting the common law of judi-

cial privilege.

Equally strong but opposing values of truth and individual privacy have come to a balance, allowing some claims of privacy to transcend the goal of producing 'every man's evidence' in court. Public policy dictates that we maintain a judiciary free of interference from other branches of government and from the population at large and the judicial privilege is an example of a privilege that easily passes the truth/privacy balancing test. This particularly compelling privilege for the judiciary is absolutely necessary to protect the precarious position of the judicial branch. The image of the \*145 court will diminish considerably if every debate, every hesitation, every change of mind, and every conversation between judge and law clerk is open to public scrutiny.

In his challenge to the Judicial Council's investigation, Judge Hastings never claimed that federal judges should not be accountable. The formal processes of review and the traditional writs, together with informal peer pressures, have functioned effectively to guide and occasionally limit inferior court judges in the manner in which they execute their duties and conduct themselves in office. Since the 1930s, Congress has created additional administrative procedures to clarify and enhance the judiciary's role in administering the business of the courts. [FN243] For example, the provisions of the Ethics in Government Act of 1978 [FN244] and the Speedy Trial Act of 1974, [FN245] have increased both the administrative burdens and the controls on the role of the judiciary.

Judge Hastings did not seek to weaken these structures that had been established before 1980. He questioned only whether the investigative powers added by the 1980 Act exceeded the limitations mandated by the Constitution. Specifically, he asked: What, if any, institutional protections does the Constitution guarantee the individual federal judge from the exercise of investigative powers by his judicial colleagues?

For the past seven years, FBI agents, Justice Department attorneys, a grand jury, and a committee of judges and its agents have investigated the manner in which Judge Hastings formulated his decisions in *United States v. Romano*. [FN246] More recently, the committee of judges and its agents have expanded the investigation to probe all aspects of Judge Hastings conduct as a judge, his financial affairs, his relations with his law clerks and secretary, his lawyers, and his friends. This investigation has continued even though Judge Hastings was tried for his alleged conspiracy to obtain a bribe to influence his decision in *Romano*, and was acquitted by a jury in February, 1983. On March 17, 1987, the Judicial \*146 Conference of the United States certified its determination that Judge Hastings' impeachment may be warranted. [FN247]

The intensive probing exacts a toll on a judge under investigation, severely hampering a schedule already filled with a heavy case load. The added personal stress and the sheer cost of defense creates a coercive affect which can cause even the most idealistic judge to resign. [FN248]

Furthermore, under the 1980 Act, an investigation may be initiated simply by an accusation made by any party. [FN249] If the accusation is deemed to have any merit, the investigation continues. Without the protection of judicial privilege, the investigation continues to the very core of a judge's decisional process; all of this process is bared to the Committee. If eventually the judge is cleared of wrongdoing, irreparable damage still will have been done. Others will have been privy to information they had no right to obtain in any other way.

The compelled testimony of Judge Hastings' chambers staff, however minimal, however secretive, opens the door to unlimited abuse of the judiciary's right to make fair and impartial decisions. Further, it impairs the function of the court by limiting a judge's ability to rely on law clerks for valued debate or discussion on issues critical to a pending case.

Today, it is politically liberal judges who are being investigated. But always it will be the outspoken, perhaps enlightened judge, the one who dares to take a new position, that will be the target of a judiciary committee investigation. Of necessity, federal judges will become less creative and more mainstream, their only alternative to protect their favored position on the bench, or leave the bench \*147 prematurely. It is the judicial process and ultimately the public that will suffer most from the chilling of a judge's free will.

Currently, under the Eleventh Circuit's interpretation of the 1980 Act, there is no protection for an article III judge who has been challenged and subjected to an investigation. Even if later the judge is vindicated, the damage will have been done. There must be some line beyond which investigation cannot go. Judicial privilege provides at least one necessary boundary; it says to the Committee: You may question this much and no more. It protects the time-honored, functional relationship between judge and chambers staff, and it permits the court to tend to the matters of law as effectively as possible in the most efficient legal system yet devised.

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[FN<sub>1</sub>] Privileged relationships that are accepted by most scholars include the attorney-client, husband-wife, priest-penitent, and psychotherapist-patient relationships. *See infra* text accompanying notes 69-112.

[FN<sub>2</sub>] 'The judge is bound to decide the preliminary question whether a communication is privileged or not. It is not a question for the jury. And the decision of the judge may be reviewed if erroneous.' HAGEMAN, PRIVILEGED COMMUNICATIONS 313 (F. B. Rothman rev. ed. 1983).

[FN<sub>3</sub>] Judicial privilege protects a judge who withholds evidence or refrains from testifying in court on matters related to her decision-making process. Necessity mandates that this protection include conversations and correspondence with fellow judges, attorneys, law clerks and other support personnel. The privilege belongs to the judge and would extend to bar testimony by members of the judge's chambers staff.

[FN<sub>4</sub>] The threat to the independence of the judiciary becomes very real when a sitting federal judge is allowed to be indicted and prosecuted for a crime stemming from a judicial act. Recently, four federal judges have been indicted and/or prosecuted: Otto Kerner, Jr., *see infra* note 193; Alcee L. Hastings, *see infra* note 194; Harry Eugene Claiborne, *see infra* note 195; and Walter L. Nixon, *see infra* note 196.

[FN<sub>5</sub>] Judicial immunity is the assurance of justice administered without fear of retaliation. The English system was the basis for the development of absolute judicial immunity as an accepted doctrine in the United States. Prior to the eighteenth century, the English Crown appointed High Court and circuit court judges who served

*durante bene placito regis*, during the king's pleasure. In 1700, to prevent abusive appointment and removal of judges by the monarchs and to promote an independent judiciary, which Parliament viewed as critical to the maintenance and development of a strong and just democratic system of government, Parliament passed the Act of Settlement, 12 & 13 Will, 3 c.2. The Act established the tenure of the High Court judges as *quamdiu se bene gesserit*, life during good behavior. Thereafter, judges were subject to removal from office for egregious offenses only by Address of both Houses of Parliament to the Crown. This procedural safeguard was intended to reduce judicial vulnerability to political interference. See O. PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATION LAW* 380-82 (6th ed. 1975).

Like the Act of Settlement, Article III of the United States Constitution states that '[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . . .' [U.S. CONST., art. III, § 1](#).

[FN6] The Framers of the United States Constitution heeded the experience of their English ancestors and considered the independence of the judiciary as a priority in establishing the doctrine of separation of powers in the Constitution. See generally *THE FEDERALIST NO. 78* (A. Hamilton) (justifying judicial review of legislative acts). The Framers molded the Constitution to provide each branch with both the power to prevent unconstitutional actions on the part of the other branches and the power to remove unsuitable officials from office.

Impeachment, the power to remove an official from office, is the ultimate sanction. Article I of the United States Constitution provides, in pertinent part:

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.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

[U.S. CONST., art. I, § 3, cl. 6-7](#). Further, article II provides: 'The President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.' [U.S. CONST., art. II, § 4](#). These two constitutional provisions enumerate who shall be impeached, who is responsible for impeachment, what circumstances shall justify impeachment, and what the effect of impeachment shall be.

[FN7] The common law developed a privilege for the attorney-client relationship and for the obligations of honor among gentlemen. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, § 2290, at 543 (J. McNaughton rev. ed. 1961).

[FN8] English judges of the seventeenth and early eighteenth centuries were men of influence and ambition whose interests were affected by the will of the Crown. To protect those interests, judges were likely to comply with requests from highly-placed persons to lighten sentences or quash indictments. English citizens saw their judges as agents of the king. J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 143-44 (1979); 94 *PUBLICATIONS OF THE SELDEN SOCIETY: VOLUME 2 OF THE REPORTS OF SIR JOHN SPELMAN* 137-42 (J. Baker ed. 1978).

[FN9] In the trials of the 1600s, the English bench accepted the obligations of honor among the gentry as sufficient ground for maintaining silence. Though this 'point of honor' motive for recognizing privilege eventually disappeared, 'its expiry was undoubtedly viewed with reluctance by many, and traces of its later survival across

the water were to be noticed for some time thereafter.’ WIGMORE, *supra* note 7, § 2286, at 530-31 (footnote omitted).

[FN10] *Id.* § 2190, at 62. *See also* THAYER, PRELIMINARY TREATISE ON EVIDENCE 122-34 (1898); 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 638 (6th ed. 1938) (examines the effect of no independent witnesses on the early law of pleadings), 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 177-78 (3d ed. 1926) (explains that recognition of witnesses and legislative provisions compelling witnesses to testify did not appear until the Tudors restored order to England in the sixteenth century).

[FN11] WIGMORE, *supra* note 7, § 2190, at 62.

[FN12] *Id.* at 63. English law inherited the idea that there is no general testimonial duty from primitive Germanic law. *Id.*

[FN13] *Id.* at 63-64. Further, any person who came forward to testify to the jury who was not a party or counsel to a party ran the risk of being sued for maintenance by the party against whom she had spoken. *Id.* at 64.

[FN14] *See* Statute of Elizabeth, 1562-63, 5 Eliz. I, ch. 9, § 12 (1562) *quoted in* WIGMORE, *supra* note 7, § 2190, at 65 n.17.

[FN15] WIGMORE, *supra* note 7, § 2190, at 66. Apparently, the Statute of Elizabeth was intended only to apply to civil causes of action. Although early English courts did not allow the accused in criminal cases to have witnesses at all, by 1701, the criminally accused statutorily achieved the right to present witnesses. *See* Statutes, 1695-96, 7 & 8 Will. 3, ch. 3, § 7; Statute, 1702, 1 Anne, ch. 9, § 3, *noted in* Wigmore, *supra* note 7 at 67 n.25. *See also* 1 T. STARKIE, EVIDENCE 95-96 (1924) (restating the statutory right of a criminal to present witnesses).

[FN16] In the United States, most of the state constitutions guarantee a criminal defendant the right to compulsory process for witnesses. WIGMORE, *supra* note 7, § 2191, at 68.

[FN17] 9 W. HOLDSWORTH, *supra* note 10, at 178.

[FN18] *See* Dennis v. Codrington, 21 Eng. Rep. 53 (1580) (attorneys not required to testify concerning matters in which the attorney acted as counsel); Berd v. Lovelace, 21 Eng. Rep. 33 (1577). *See also* 9 W. HOLDSWORTH, *supra* note 10, at 201-02 (explaining that the recognition of the attorney-client privilege was almost contemporaneous with the creation of the statutory general rule of compulsion).

[FN19] WIGMORE, *supra* note 7, § 2227, at 213 n. 12.

[FN20] *Id.*, § 2286, at 530-31 (citing Countess of Shrewsbury's Case, 12 Coke 94 (1613)). The court found the Countess in contempt for refusing to tell what she knew of the escape of Lady Arabella Stuart because ‘she had made a rash vow that she would not declare anything in particular touching the said points.’ *Id.* The court determined that ‘rash and illegal vows make not an excuse.’ *Id.*

[FN21] Special Project, *Developments in the Law-Privileged Communications*, 98 HARV. L. REV. 1450, 1457 (1985) [hereinafter *Developments in the Law*]. The English courts of the early 1800s recognized the broad attorney-client and husband-wife privileges, but tended not to recognize privileges for physicians and clergy. *Id.* at 1457-58.

[FN22] WIGMORE, *supra* note 7, § 2190, at 64.

[FN23] *Id.*, (citing Y.B. 28 Hen. VI, 6, 1) (emphasis in original).

[FN24] 12 Parl. Hist. Eng. 693 (1812) (speech of Lord Chancellor Hardwicke on May 25, 1742, in the House of Lords).

[FN25] As noted earlier, the common law, as early as the 1600s, recognized a privilege for communications between attorney and client and between husband and wife. *See supra* notes 18-19 and accompanying text. A primary rationale for establishing such privileges was to protect and foster private communications in these relationships. Chief Baron Gilbert's early treatise on the law of evidence acknowledged the privacy rationale for both privileges: 'And it would be very hard that a Wife should be allowed as Evidence against her own Husband . . .; such a Law would occasion implacable Divisions and Quarrels, and destroy the very legal Policy of Marriage that has so contrived it, that their Interest should be but one . . .'. G. GILBERT, THE LAW OF EVIDENCE 96 (1754). 'A Man retained as Attorney, Counsel, or Solicitor can't give Evidence of anything imparted after the Retainer, for after the Retainer they are confided as the same Person with their clients, and are trusted with their secrets, which without a Breach of Trust cannot be revealed . . .'. *Id.* at 98.

[FN26] *Developments in the Law*, *supra* note 21, at 1481.

[FN27] *Id.* (footnotes omitted).

[FN28] *Id.* at 1482. An example of the uncertain and variable recognition of privacy rights is in the area of family privileges. An individual's right to privacy is limited: no one has a legal right to prevent a family member from disseminating personal information outside of court. *Id.* at 1583. However, the Supreme Court has, in dicta, recognized 'a private realm of family life which the state cannot enter.' *Id.* at 1584 (quoting [Prince v. Massachusetts](#), 321 U.S. 158, 166 (1944)). Advocates of a parent-child privilege use this language to support a privacy right rationale for the privilege. The privilege has met with only limited acceptance. *Id.*

[FN29] *Id.*

[FN30] WIGMORE, *supra* note 7, at 72.

[FN31] *Id.* at 527 (emphasis in original).

[FN32] *Developments in the Law*, *supra* note 21, at 1472-73.

[FN33] WIGMORE, *supra* note 7, at 72 (footnote omitted).

[FN34] *Id.* at 72-73.

[FN35] *Id.* (emphasis in original).

[FN36] *Id.* (emphasis in original).

[FN37] *Id.*

[FN38] *See* 23 C. WRIGHT AND K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: Evidence § 5422, at 676-78 (describing the exaltation of truth seeking).

[FN39] *Development in the Law*, *supra* note 21, at 1479-80. *See also* WRIGHT & GRAHAM, *supra* note 38, at 673 n.37.

[FN40] Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85 (1973).

[FN41] *Developments in the Law*, *supra* note 21, at 1493.

[FN42] *Id.*

[FN43] *Id.* at 1494 (footnotes omitted).

[FN44] *Id.* at 1495.

[FN45] *See* E. CLEARY, *McCORMICK ON EVIDENCE* § 75, at 180 (3d ed. 1984); WIGMORE, *supra* note 7, § 2286, at 532-37. Statutory privileges include communications to journalists, accountants, psychologists, and clerks or stenographers.

[FN46] *Developments in the Law*, *supra* note 21, at 1497 (footnotes omitted).

[FN47] *Id.* at 1498.

[FN48] *Id.* at 1499.

[FN49] *Id.*

[FN50] One commentator notes:

If the marriage is a happy one, some spouses will refuse to testify despite the threat of being held in contempt. Others will perjure themselves or distort their testimony in ways which are likely to mislead the jury. The opposite danger exists where a marriage is unhappy or has been terminated with rancor. Here one spouse may be out to get the other, and testimony may be colored to achieve this end.

R. LEMPert & S. SALTzBURg, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 726 (2d ed. 1984) [hereinafter R. LEMPert].

[FN51] *Developments in the Law*, *supra* note 21, at 1497.

[FN52] *Id.* at 1458. Several states constitutionally abolished the citation of English cases decided after 1776 as precedent, and in the 1810s and 1820s the codification of whole areas of the law was popular. *Id.*

[FN53] For example, New York created a statutory physician-patient privilege in 1828, and Missouri enacted a similar statute in 1835. In the 1850s and 1860s, several states modified the common law rules of evidence, including the rules of witness competency. *Id.* at 1460.

[FN54] *Id.*

[FN55] A. WIGMORE, *supra* note 7, Preface to the First Edition, at xxi-xxii (explaining that the treatise attempts to reduce and remove apparent inconsistencies in the law of evidence).

[FN56] The Model Code of Evidence, completed in 1942, failed due to radical departures from existing law. The

Uniform Rules of Evidence of 1953, although seeking to avoid the Model Code's problems, also failed to gain support and were adopted in only two states.

[FN57] UNIF. R. EVID. (1974).

[FN58] As of December 1986, thirty-one states, plus Puerto Rico (1979) and the armed services (1980) have adopted a version of the Uniform Rules: Alaska (1979), Arizona (1977), Arkansas (1976), Colorado (1980), Delaware (1980), Florida (1979), Hawaii (1981), Idaho (1985), Iowa (1983), Maine (1976), Michigan (1978), Minnesota (1977), Mississippi (1986), Montana (1977), Nebraska (1975), Nevada (1971), New Hampshire (1985), New Mexico (1973), North Carolina (1984), North Dakota (1977), Ohio (1980), Oklahoma (1978), Oregon (1982), South Dakota (1978), Texas (1983), Utah (1983), Vermont (1983), Washington (1979), West Virginia (1985), Wisconsin (1974) & Wyoming (1978). R. CARLSON, E. IMWINKELNED & E. KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE 23-24 (1986).

[FN59] FED. R. EVID. (1975).

[FN60] RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183, 230-61 (1972). The privileges included in article V were: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer.

[FN61] *Developments in the Law*, *supra* note 21, at 1465-66. See *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 230 (1972).

[FN62] One authority described the proposed privilege rules as 'incomplete, inconsistent, and incoherent.' *Developments in the Law*, *supra* note 21, at 1466.

[FN63] The husband-wife and doctor-patient privileges are to be quietly buried. A new rule for governmental privileges has been invented. Where authorities have divided over the scope of the attorney/corporate-client and clergyman-penitent privileges, the wider alternative has been chosen.

... ..

Furthermore, the judicial evolution of testimonial privileges is shut off. No matter how compelling the argument that in the context of a particular case a privilege should be recognized for communications between, for example, a social worker and a client or a parent and child or a brother and sister, such claims must be rejected.

Krattenmaker, *supra* note 40, at 83.

[FN64] At common law the testimonial privileges that grew up sprang from a desire to protect interpersonal communications. The privilege for military secrets arose relatively recently and that for attorneys and their corporate clients evolved, without close inquiry, from the previously established privilege for attorneys and individual clients. In short, the *Rules'* consistent preference for organizational privacy is fundamentally unprecedented.

*Id.* at 84.

It did not go unnoticed that while personal privileges were being restricted, government privileges were being expanded. See generally, *Hearings on the Rules of Evidence Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. (1973) [hereinafter *Hearings of the House*].

[FN65] Sometimes the rules placed weight on whether the state in which the communication took place itself provided the privilege asserted; sometimes they did not. In some instances there were certain and definite rules, while in other instances the trial judge had discretion to weigh competing interests and to fashion the remedy. Krattenmaker, *supra* note 40, at 84.

[FN66] ‘Congress vetoed the section of the Proposed FEDERAL RULES OF EVIDENCE, that would have constricted or abolished most privileges, mainly because of the intense lobbying of protected groups . . .’ *Developments in the Law*, *supra* note 21, at 1494.

[FN67] FED. R. EVID. 501.

[FN68] *Developments in the Law*, *supra* note 21, at 1470. See *Trammel v. United States*, 445 U.S. 40, 47 (1980) (rule 501 provides for developing privilege law on a case by case basis).

[FN69] R. LEMPert, *supra* note 50, at 646.

[FN70] S. STONE & R. LEIBMAN, TESTIMONIAL PRIVILEGES at 11 (1983) [hereinafter S. STONE]. The eleven jurisdictions that have not codified the attorney-client privilege are Alabama, Connecticut, the District of Columbia, Massachusetts, New Hampshire, North Carolina, Rhode Island, South Carolina, Vermont, Virginia and West Virginia. *Id.* at 11 n.32. Oregon recently repealed its statute on the privilege. *Id.*

[FN71] WIGMORE, *supra* note 7, at 543-45 (explaining the evolution of the privilege from one based on the ‘point of honor’ theory to one based upon the client’s privilege not to divulge communications made to his attorney).

[FN72] WIGMORE, *supra* note 7, at 554.

[FN73] S. STONE, *supra* note 70, at 334. About two-thirds of the states recognize spousal testimonial privilege in one of the three forms. *Id.*

[FN74] *Id.* at 341. The policy underlying the privilege is that husband and wife should be able to communicate freely. See *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

[FN75] S. STONE, *supra* note 70, at 341.

[FN76] *Id.* at 360. The privilege emerged in England in the mid-nineteenth century. *Id.* at 361. In the United States, two-thirds of the jurisdictions sanctioned the privilege either by statute or by judicial decision. WIGMORE, *supra* note 7, at 873.

[FN77] *Id.* (citing *Mullen v. United States*, 263 F.2d 275, 280 (D.C. Cir. 1958)).

[FN78] *Id.* at 364.

[FN79] *Wilson v. Rastall*, 4 Term R. 753, 760, 100 Eng. Pep. 1283, 1287 (K.B. 1792) (privilege not extended to medical persons) (*cited in* WIGMORE, *supra* note 7, at 819 n.1).

[FN80] New York, in 1828, was the first state to grant the privilege. See A. CURTIS, NEW YORK LAW OF EVIDENCE § 924 (1926).

[FN81] See P. STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE*, 30-72 (1982) (describing generally the public's lack of trust of hospitals and medical personnel).

[FN82] See, e.g., *United States v. Meagher*, 531 F.2d 752 (5th Cir.), cert. denied, 429 U.S. 853 (1976); *United States v. University Hosp.*, 575 F. Supp. 607, 611 (E.D.N.Y.), aff'd, 729 F.2d 144 (2d Cir. 1983).

[FN83] See *Allred v. State*, 554 F.2d 411 (Alaska 1976) (recognizing psychotherapist privilege); Proposed Federal Rules of Evidence, 56 F.R.D. 183, 230 (1972) (recognizing a psychotherapist-patient privilege); see also Note, *The Psychotherapist-Patient Privilege in Federal Courts*, 59 NOTRE DAME L. REV. 791, 795-98 (1984).

[FN84] See Shuman & Weiner, *The Privilege Study, An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893, 907-08 (1982).

[FN85] Some courts have held that group therapy session communications are privileged because the presence of others is necessary to the treatment. See, e.g., *State v. Andring*, 342 N.W.2d 128, 133-34 (Minn. 1984).

[FN86] For example, the California Evidence Code defines 'physician' as 'a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.' CAL. EVID. CODE § 990 (West (1966)). However, the definition of 'psychotherapist,' for purposes of applying the privilege, is much narrower. To come under the protection of the privilege, the psychotherapist must devote a 'substantial portion of his time to the practice of psychiatry,' *id.* at § 1010(a); be licensed as a psychologist, *id.* at § 1010(b); be licensed as a clinical social worker, *id.* at § 1010(c); serve as a school psychologist, *id.* at § 1010(d); or be licensed as a marriage, family and child counselor, *id.* at § 1010(e).

[FN87] S. STONE, *supra* note 70, at 411.

[FN88] 259 F.2d 545 (2d Cir.), cert. denied, 358 US 910 (1958).

[FN89] Judy Garland, in a suit against CBS, attempted to depose Marine Torre, a columnist who printed some defamatory statements by a CBS executive. Torre refused to name the executive and was held in criminal contempt. While the journalist lost, the *Garland* court, in dicta, recognized the constitutional dimension of the journalist's interest in protecting sources, thus opening the door for a first amendment privilege for the media. S. STONE *supra* note 70, at 413.

[FN90] In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court ruled that a journalist must provide evidence to a grand jury, rejecting the argument that the first amendment allows journalists to refuse to testify absent a showing of compelling need. After *Branzburg*, courts generally recognized a conditional privilege for journalists. See, e.g., *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).

[FN91] S. STONE, *supra* note 70, at 422.

[FN92] *Id.* at 497.

[FN93] *Id.* at 498.

[FN94] 5 U.S.C. § 552(b)(7)(A) (1967) (exempting disclosure of records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings, and also exempting agency plans for current and pending investigations).

[FN95] *Id.* The privilege does not apply to purely factual communications, *In re Franklin Nat'l Bank Sec. Liti.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), or to post-decisional documents *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975).

[FN96] Statutory quasi-privileges are held jointly by the government and by private persons. They are not conventional testimonial privileges; rather, they are governmental duties to preserve the confidentiality of certain information collected by government agencies. The statutory privileges include, among others, the protection of trade secrets, 18 U.S.C. § 1905 (1980); tax return information, 26 U.S.C. § 6103 (1954); patent applications, 35 U.S.C. § 122 (Supp. II 1984); and census reports, 13 U.S.C. §§ 8(b), 9(a) (1956).

[FN97] 418 U.S. 683 (1974). (considering the President's refusal to comply with a subpoena duces tecum ordering him to produce tape recordings of confidential conversations with his close advisers).

[FN98] Governmental privilege protects the executive branch of government as a whole; executive privilege used herein is a protection for the chief executive, the President. Some authorities prefer the terms 'executive privilege' for the broader coverage and 'presidential privilege' for the more specific coverage. *See generally* S. STONE, *supra* note 70, at 502-06.

[FN99] *United States v. Nixon*, 418 U.S. at 708.

[FN100] *Id.* at 705-06.

[FN101] *Id.* at 713.

[FN102] *See Dellums v. Powell*, 561 F.2d 242 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977).

[FN103] *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 208 n.34 (1978).

[FN104] U.S. CONST. art I, § 6, '[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.'

[FN105] 'By its terms, the immunity the speech or debate clause confers is absolute.' L. TRIBE, *supra* note 103, at 292. The first case to construe the clause extended immunity to all things done by members of Congress in relation to Congressional business. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

[FN106] *United States v. Brewster*, 408 U.S. 501, 525 (1972); *Doe v. McMillion*, 412 U.S. 306 (1973).

[FN107] *Brewster*, 408 U.S. at 515 (emphasis in original).

[FN108] *See* S. STONE, *supra* note 70, at 205-42. The accountant-client privilege has been adopted by statute in twenty states. *But see United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (refusing to recognize an accountant-client privilege for federal cases).

[FN109] *See Developments in the Law*, *supra* note 21, at 1575-77. *See also People v. Fitzgerald*, 101 Misc. 2d 712, 422 N.Y.S. 2d 309 (Westchester County Ct. 1979) (recognizing a parent-child privilege grounded on a right of privacy). Two states, Minnesota and Idaho, adopted the privilege by statute. *Developments in the Law*, *supra* note 21, at 1575.

[FN110] See *Developments in the Law*, *supra* note 21, at 1609-11.

[FN111] See S. STONE, *supra* note 70, at 139-204.

[FN112] U.S. CONST. amend. V.

[FN113] See Truth/Privacy Balance discussed *supra* notes 22-39 and accompanying text.

[FN114] See Power/Image Argument discussed *supra* notes 40-51 and accompanying text.

[FN115] Some privileges, like the one protecting communications between an accountant and client, have already been accepted in a number of jurisdictions.

[FN116] For example, marital privilege covers only heterosexual couples legally married. With changing life styles, more and more couples are living together without marrying, including homosexuals. These alternatives to traditional marriage present reasonable possibilities for inclusion in the marital privilege.

[FN117] Professors Lempert and Saltzburg suggest the following possible privileges:

*Accountant-Client Privilege.* Arguably, much of an accountant's work involves a client's private records and financial dealings. Since similar information transmitted to attorneys is privileged, the client should be similarly protected when divulging such information to an accountant. See Note, *Evidence: The Accountant-Client Privilege Under Federal Rules of Evidence-New Statute and New Problems*, 28 OKLA. L. REV. 637, 646 (1975).

*Catholic Sisters and Irregularly Ordained Women-Penitent Privilege.* While members of the Clergy have a privilege, in some religions, certain spiritual advisors providing religious counseling have been denied formal positions in the clergy because they are women. Since these women are not classified as clergy, they are not protected under the clergy-penitent privilege. Arguably, the communications these women have with parishioners are no less deserving of protection. See Sister Simon Campbell, *Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege*, 9 U. CAL. DAVIS L. REV. 523, 540-46 (1976).

*Counselor-Counselee Privilege.* Major cities have established centers to shelter drug addicts, runaways, pregnant teenagers, and victims of battering. Generally, they offer counseling. However, these counselors are not likely to qualify under the psychotherapist-patient privilege.

*Friend-Friend Privilege.* When a party's best friend is called to the stand by the opposing party, problems are bound to arise. Honest testimony may strain a valued friendship. The temptation to perjury is obvious. While this theory has some resemblance to the no longer existent, English 'point of honor' privilege, it is arguably more democratic in that it would protect all friendships rather than only those of the social elite.

*Parent-Child Privilege.* The traditional American family is changing rapidly. If the family relationship should be protected, the parent-child and sister-brother relationships, which are often as strong, or stronger than the husband-wife relationships, must be considered as candidates for privilege. See Note, *Recognition of a Parent-Child Testimonial Privilege*, 23 ST. LOUIS U.L.J. 676, 685-95 (1979).

*Peer-Review or Business Judgment Privilege.* If academics, professionals, and business persons are

free to review in confidence work done by their peers, perhaps the public will benefit from the candid exchange of criticisms. *See, e.g.,* [FTC v. TRW, Inc.](#), 628 F.2d 207 (D.C. Cir. 1980); [Bredice v. Doctor's Hospital](#), 50 F.R.D. 249 (D.D.C. 1970) (first case to recognize a self-evaluative privilege).

*Social Science Research Privilege.* Social scientists and researchers, who depend on voluntary participation, often promise that the information gathered will be held confidential and published in a way precluding identification of individual responses. They are not currently protected by a privilege.

*Social Worker-Client Privilege.* Psychiatric facilities and family service and social welfare agencies employ social workers, many of them with advanced degrees. They assist in the therapeutic process and claim a privilege for their communications similar to that claimed by psychotherapists. *See Testimony of Sherman Ragland, Hearings on the Rules of Evidence Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93rd Cong., 1st Sess. 475-81 (1973).

The above list of possible privileges is not all inclusive; there could be other equally valid claims. What the list does suggest is the size and complexity of the issue of what should be included. R. LEMPert, *supra* note 50, at 788-90.

[FN118] Krattenmaker, *supra* note 40, at 86.

[FN119] *Id.* at 87 (citing A. WESTIN, *PRIVACY AND FREEDOM* 32-39 (1967)).

[FN120] *Id.* at 83, n.99, (quoting *Hearings of the House*, *supra* note 64, at 196 (letter of Professor Kenneth W. Graham, Jr.)).

[FN121] CLEARY, *McCORMICK ON EVIDENCE*, § 7 at 156 (1976).

[FN122] R. LEMPert, *supra* note 50, at 645.

[FN123] *United States v. Nixon*, 418 U.S. 683, 709 (1974).

[FN124] CLEARY, *McCORMICK ON EVIDENCE*, § 77, at 156 (2nd ed. 1972).

[FN125] *Id.*

[FN126] Krattenmaker, *supra* note 40, at 88.

[FN127] *In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986).

[FN128] R. LEMPert, *supra* note 50, at 646.

[FN129] WIGMORE, *supra* note 7, at 527. *See also* Truth/Privacy Balance discussed *supra* notes 22-39 and accompanying text.

[FN130] *See supra* note 5.

[FN131] *See supra* note 6.

[FN132] Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1132 (1973).

[FN133] *Id.* at 1133. Law clerks were introduced to the Supreme Court in the late 1800s as a protective response to its burgeoning docket. Justice Gray used the first clerks around 1882. At first each Justice was allotted one clerk. In 1947 that number was doubled, and by 1972 each Justice had three clerks.

[FN134] *Id.* at 1132.

[FN135] *Id.* at 1144-45 (footnotes omitted).

[FN136] Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1237 (1981) (one judge's comment, articulated in a nationwide survey of the practices and opinions of federal and state judges).

[FN137] *Id.* The confidentiality of the relationship was breached by the publication of *The Brethren: Inside the Supreme Court*. See B. WOODWORD & S. ARMSTRONG, *THE BRETHERN* (1979), and by the testimony of clerks in a televised investigation of misconduct on the part of California Supreme Court justices. See Comment, *supra* note 136, at 1230-31.

[FN138] See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978) (judge not deprived of immunity unless he acted clearly in the absence of jurisdiction); *Bradley v. Fisher*, 80 U.S. (13 Wall) 335 (1871) (exemption of judges from civil liability not affected by the motives with which their judicial acts are performed); *Taffee v. Downes*, 13 Eng. Rep. 15 (C.P. 1813) (the classic English articulation); *Floyd v. Barker*, 77 Eng. Rep. 1305 (S.C. 1608) (Coke) (a judge may not, for anything done by him as judge, be questioned before another judge).

[FN139] The Supreme Court, in *Pierson v. Ray*, 386 U.S. 547, 554 (1967) stated that absolute judicial immunity from suit for judicial acts was provided 'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' *Id.* (citing *Scott v. Stansfield*, L.R.Ex. 220, 223 (1968)). See also *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978), and *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1871).

[FN140] See *Braatenlien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945).

[FN141] 458 U.S. 50 (1982).

[FN142] *Id.* at 58.

[FN143] *Id.* at 59. The good behavior clause states that 'Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior . . . .' U.S. CONST. art. III, § 1.

[FN144] *Id.* at 58 (citing *United States v. Will*, 449 U.S. 200, 217-18 (1980)).

[FN145] *Id.* at 60.

[FN146] *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973).

[FN147] See, e.g., *New York Times v. United States*, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting) (expressing views on power of Court); *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 729 (D.C. Cir. 1974) (quoting with approval *Nixon v. Sirica*, 487 F.2d at 717); *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973) (analogizing the President's executive privilege 'to that among judges and

their law clerks'), 740-42 (MacKinnon, J. dissenting) (tracing judicial privilege), [Soucie v. David](#), 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J. concurring) (concluding that privilege exists to protect communications between constitutional decision-makers and their immediate aides in all three branches); [Statement of Judges](#), 14 F.R.D. 335 (N.D. Cal. 1953) (letter in response to subpoena issued by House sub-committee appointed to investigate Justice Department).

[FN148] *See, e.g.,* [Mauch v. Commissioner of Internal Revenue](#), 113 F.2d 555 (3rd Cir. 1940). In *Mauch*, an attorney charged with income tax fraud claimed on appeal that the attorney-client privilege may not only be used to protect a client but also may be used to 'shield the source of such advice.' *Id.* at 555. The court responded, 'One surely can analogize in reverse from the judicial privilege in the law of libel. It is absolute because vital to the administration of justice. Here, that same administration requires disclosure.' *Id.* at 556-57. In [Barr v. Matteo](#), 360 U.S. 564 (1959), respondents, former employees of the Office of Rent Stabilization, brought a libel suit against the then Acting Director for issuing a press release announcing his intention to suspend them. In discussing the law of privilege as a defense by officers of government to civil damage suits, the Court noted:

This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed . . . and that a like immunity extends to other officers of government whose duties are related to the judicial process.

*Id.* at 569 (citing [Bradley v. Fisher](#), 80 U.S. (13 Wall.) 335, (1871)). In [McGovern v. Martz](#), 182 F. Supp. 343 (D.D.C. 1960), a libel suit by a congressman against publishers of a weekly newsletter, the defendants counterclaimed and were barred by absolute privilege. The Court analogized to judicial privilege: When analogy to the judicial privilege is made, it further appears reasonable to hold that Congressmen have only a qualified privilege, and thus are liable for malicious defamation, for the unofficial dissemination of the Congressional Record. While a judge has an absolute privilege for the official publication of a judicial statement (as by reading an opinion in open court or filing it in the clerk's office), there is only a qualified privilege for the unofficial circulation of copies of a defamatory opinion.

*Id.* at 348. In [Owen v. Kronheim](#), 304 F.2d 957 (D.C. Cir. 1962), the district court dismissed attorney Owen's complaint against Judge Kronheim in an action for damages for slander. Judge Kronheim had filed a motion to dismiss alleging

that the words said to be slanderous were spoken by him in his capacity and within his jurisdiction as a judge of the Municipal Court for the District of Columbia during the trial of a case in which Owen appeared as counsel; and therefore he claimed '*an unqualified and complete judicial immunity.*'

*Id.* at 958 (emphasis added). On appeal, the D.C. Circuit affirmed, stating that '[t]he language attributed to Judge Kronheim is somewhat intemperate and rather unbecoming, but we think it was uttered in his official capacity while he was acting within the limits of his jurisdiction. It is therefore *absolutely privileged*, regardless of the motives which actuated it.' *Id.* at 959 (emphasis added).

[FN149] *See* [Quercia v. United States](#), 289 U.S. 446, 467-70 (1933) (establishing that a trial judge has a 'privilege' to 'assist the jury in arriving at a just conclusion by explaining and commenting upon evidence, by drawing their attention to the parts of it he thinks important; and he may express his opinion upon the facts . . .'); [Lyles v. United States](#), 254 F.2d 725, 736 (D.C. Cir. 1957) (Bastian, J., dissenting) (determining that the judges instructions to the jury were 'a distortion of the evidence and beyond the judicial privilege of summary or comment.');

[Blunt v. United States](#), 244 F.2d 355, 365 (D.C. Cir. 1957) (determining that the judge's question-

ing of a witness and assertions in front of the jury ‘were not within the judicial privilege to analyze and comment upon evidence’).

[FN150] *See, e.g., Chapman v. United States*, 314 F. Supp. 549 (C.D. Cal. 1970). In *Chapman*, the Chairman of the Board at the Federal Home Loan Bank asserted judicial privilege in a suit for refund of income taxes. The taxes were paid in connection with the discharge of a federal savings and loan association's liability to an attorney who was involved in litigation arising out of the bank's seizures of the association. The court responded:

Notwithstanding that privilege is a highly personal and nondelegable matter, Board Chairman Robertson was unacquainted with the legal basis of his claim and was unable to amplify or illumine in any particular a prepared statement which he read to the subcommittee in asserting the claim of judicial privilege. Upon examination of the legal and other citations in the statement, the subcommittee found no grounds whatever for the claim.

*Id.* at 558 n.8.

[FN151] *See In re George C. Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959).

[FN152] *Id.* at 67.

[FN153] *Id.* at 68.

[FN154] *Id.* at 69.

[FN155] *Id.* at 70.

[FN156] 487 F.2d 700, 740 (D.C. Cir. 1974) (MacKinnon, J., dissenting) (concerning special prosecutor's order to show cause why President Nixon should not produce certain tape recordings concerning the Watergate incident.)

[FN157] ‘I [Judge MacKinnon] would recognize an absolute privilege for confidential Presidential communications.’ *Id.* at 730.

[FN158] *Id.* at 740, (citing Brennan, *Working at Justice*, in AN AUTOBIOGRAPHY OF THE SUPREME COURT 300 (Westin ed. 1963) and Frankfurter, *Mr. Justice Roberts*, 105 U. PA. L. REV. 311, 313 (1955)).

[FN159] 403 U.S. 713 (1971).

[FN160] *Id.* at 752 n.3.

[FN161] 498 F.2d 725, 729 (D.C. Cir. 1974).

[FN162] *Id.* at 729 (quoting *Nixon v. Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973)).

[FN163] *Id.* (quoting *Nixon v. Sirica*, 487 F.2d 717 (D.C. Cir. 1973)).

[FN164] 448 F.2d 1067 (D.C. Cir. 1971).

[FN165] *Id.* at 1080 (Wilkey, J., concurring).

[FN166] Judge MacKinnon described an example of the exercise of that privilege, arising in a 1973 case in-

volving the validity of the right of way granted for the Alaska Pipeline. After oral argument, while the case was under advisement, a United States Senator wired Chief Judge Bazelon as follows:

I have been told one or more judges have disqualified themselves in the trans-Alaska pipeline case currently under advisement. Kindly advise me of their identities and reasons if this is the case. I would appreciate a reply in writing as soon as possible. Thank you very much.

[Nixon v. Sirica, 487 F.2d at 742.](#) The reply by Chief Judge Bazelon was unmistakable in its assertion of the privilege.

In re your telegram of February 5, 1973 inquiring as to whether 1 or more judges have disqualified themselves in the trans Atlantic [sic] pipeline cases currently under advisement and in which you request their identities and reasons if this is the case. The opinion, when issued, will reveal the names of the judges who have participated therein. With great respect, we believe that further reply to your inquiry would not be appropriate with cordial wishes.

*Id.*

[FN167] *Id.* at 741.

[FN168] *Id.* (emphasis in original).

[FN169] *See, e.g., Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982)* (recognizing absolute presidential immunity from damages and noting that judicial privilege applies even to acts occurring outside ‘the normal attributes of a judicial proceeding’); *Dennis v. Sparks, 449 U.S. 24, 29-30 (1980)* (suggesting, but not deciding, that common law doctrine of judicial immunity confers even on state court judges a privilege analogous to that afforded members of Congress and their legislative aides, as recognized and applied in *Gravel v. United States, 408 U.S. 606, 616-18 (1972)*); *Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), rev’d 441 U.S. 153 (1979)*, (Judge Meskill’s dissent argued against a privilege for a journalist regarding the disclosure of confidential sources on the grounds that it would establish a fourth branch of government given a ‘special privilege presumably for the same reasons that the three official branches are given executive, congressional and judicial privileges.’ *Id.* at 996.

[FN170] 525 F. Supp. 431 (N.D. Ga. 1981).

[FN171] *Id.* at 432.

[FN172] *Id.* (citing *House v. Balkcom, C78-1471A (Feb. 24, 1979)*).

[FN173] *McCorquodale, 525 F. Supp. at 433.*

[FN174] *Id.*

[FN175] *See infra* text accompanying notes 224-34.

[FN176] 28 U.S.C. § 372(c) (1980).

[FN177] *See, e.g., Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 YALE L.J. 1117 (1985).*

[FN178] Pub. L. No. 96-458, 94 Stat. 2036 (1980) (amending certain sections of 28 U.S.C. §§ 332-76 (1982)). For a comprehensive discussion of the Act, *see* Burbank, *Procedural Rulemaking Under the Judicial Councils*

*Reform and Judicial Conduct and Disability act of 1980*, 131 U. PA. L. REV. 283 (1982).

[FN179] Burbank, *supra* note 178, at 291-300 (giving a summary of the background and purpose of the 1980 Act).

[FN180] 28 U.S.C. § 331 (Supp. IV 1986).

[FN181] The complaint need only contain ‘a brief statement of the facts constituting such conduct.’ *Id.* § 372(c)(1). Both the judge identified in the complaint and the chief judge of the circuit receive copies of the complaint. *Id.* § 372(c)(2). If the chief judge does not summarily dismiss the complaint, a special committee is formed consisting of equal numbers of district and circuit court judges, in addition to the chief judge. *Id.* § 372(c)(4)(A). The committee is charged with investigating the complaint. The investigation it conducts may be ‘as extensive as it considers necessary.’ *Id.* § 372(c)(5). The committee's written recommendations are submitted to the judicial council of the circuit. The judicial council is empowered to take any action ‘as is appropriate to assure the effective and expeditious administration of the business of the courts.’ *Id.* § 372(c)(6)(B). The actions taken by the council may include, but are not limited to, the following: certifying disability, requesting voluntary retirement, ordering that no further cases be assigned for a time, censuring or reprimanding, or ‘ordering such other action as it considers appropriate under the circumstances, except that . . . in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior . . .’ *Id.*

[FN182] *Id.* § 372(c)(7)(B). If the judicial council determines that a judge who holds her office during good behavior has been involved in activity which could constitute an impeachable offense, the council ‘shall promptly’ certify the record to the Judicial Conference of the United States. *Id.* If the Judicial Conference determines that the judge's acts may ‘warrant impeachment,’ it is mandated to ‘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.’ *Id.* § 372(c)(8).

[FN183] Congress not only chose not to examine the alternatives to impeachment, but also it did not address the possibilities for making impeachment a less cumbersome process. For a proposal to ‘modernize’ the impeachment process *see* Stotz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659, 666-70 (1969); *see also* Shartel, *Federal Judges-Appointment, Supervision and Removal-Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1930) (proposal for removal of judges by judges).

[FN184] However, according to Professor Shartel, ‘Power to remove is a logical and necessary extension of the power to supervise.’ Shartel, *supra* note 183, at 884. Apparently, Congress does not agree.

[FN185] *See* Fishburn, *Constitutional Judicial Tenure Legislation?-The Words May Be New But the Song Sounds The Same*, 8 HASTINGS CON. L.Q. 843 (1981).

[FN186] Opponents argue that the law is

an unconstitutional restriction on judges and a tool for political vindictiveness within the judiciary. ‘This act has done more to weaken and undermine the independence of the federal judiciary than anything that has occurred since the enactment of our Constitution,’ says Miles Lord, a former federal judge in Minnesota. Through the act, he was accused of odious behavior. Later he resigned. ‘The basic thrust of it is that it will tame liberal judges.’

Hedges, *Hastings Makes His Final Stand, Embattled Judge Fights Obscure Law, Fellow Jurists*, Miami Herald,

Sept. 15, 1986, at 1B. Congress and the executive have proposed, over the years, various methods of removing judges as alternatives to impeachment. The two most common forms of alternative removal are abolishing the judgeship, first used by Thomas Jefferson, and challenging a judge's competency before a judicial tribunal, first threatened by Franklin Roosevelt. *See* FISHBURN *supra* note 185, at 844-51.

[FN187] *See*, H. REP. NO. 1313, 96th Cong., 2d Sess. 17 (1980); S. REP. NO. 96-362, 96th Cong., 2d Sess. 6, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4315, 4320.

[FN188] The United States Constitution specifies that removal of civil officers shall be by impeachment. U.S. CONST. art. III, § 4. It grants to the House of Representatives the power of impeachment, *id.* art. I, § 2, cl. 5, and to the Senate the power to try all impeachments, *id.*, art. I, § 3, cl. 6. Admittedly, the impeachment process is a difficult one to negotiate:

[It] is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundredton gun which needs complex machinery to bring it into position, an enormous charge of power to fire it, and a large mark to aim at.

Shartel, *supra* note 183, at 871-72 (quoting 1 J. BRYCE, AMERICAN COMMONWEALTH 208 (1920)).

[FN189] It shall transmit its determination to the United States House of Representatives 'for whatever action the House of Representatives considers to be necessary.' 28 U.S.C. § 372(c)(8) (1980).

[FN190] *Id.* §§ 372(c)(9)(A); 372(c)(9)(B).

[FN191] *Id.* § 372(c)(11).

[FN192] *Id.* § 372(c)(5).

[FN193] *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.) (per curiam), *cert. denied*, 417 U.S. 976 (1974). In 1971, Otto Kerner, Jr., a judge on the Seventh Circuit Court of Appeals was indicted for allegedly accepting bribes while Governor of Illinois in return for financial interest in certain horse racing businesses. He was accused of committing perjury during the investigation. Judge Kerner's case is unique in that it concerns crimes committed before he was appointed to the federal bench, and it is unclear if a judge may be impeached for offenses committed prior to appointment. *See, e.g.*, Note, *Indictment of Federal Judges: Chilling Judicial Independence*, 35 U. FLA. L. REV. 296, 296 n.2 (1983).

[FN194] *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983). The *Hastings* controversy centers on the indictment of Alcee L. Hastings, United States District Judge for the Southern District of Florida, for being influenced in making a judicial decision by the promise of a bribe. Judge Hastings was acquitted in February, 1983, but is currently under investigation by the Judicial Council. *See* Catz, *The Constitution and The Federal Judiciary: The Need For 'Transitory' Immunity*, 66 OREGON L. REV. 303 (1987).

[FN195] *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984). In 1983, Harry Eugene Claiborne, United States District Judge for the District of Nevada, was convicted of willfully reporting less taxable income than he made on his 1979 and 1980 tax returns. The district court sentenced Judge Claiborne to a term of two years imprisonment plus a \$5,000 fine on each tax count. Claiborne contested his indictment, trial, and conviction as a violation of the doctrine of separation of powers, which he claimed prohibited the prosecution of a federal judge without prior impeachment by Congress. His pretrial motion asserting this contention was denied and that denial was upheld on appeal. He is the first federal judge to be convicted and sentenced to a

term of imprisonment. Because Judge Claiborne refused to resign his position on the bench, the United States Senate voted to convict him in an impeachment trial on October 9, 1986. 132 CONG. RECORD 15759-67 (Oct. 9, 1986). See Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103 (1986). See also, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 454-62 (1987).

[FN196] In 1986, Judge Walter L. Nixon, Chief Judge for the Southern District of Mississippi was convicted of perjury before a grand jury and sentenced to five years in prison. On April 30, 1987 the Fifth Circuit affirmed his conviction. *United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987), cert. denied, 108 S. Ct. 749 (1988).

[FN197] See Note, *Indictment of Federal Judges*, supra note 193, at n.3-4 (citing J. BORKIN, THE CORRUPT JUDGE 198-204 (1962)). Also, Congress has impeached eight United States Article III judges. Four were convicted: Halsted L. Ritter (S.D. Fla., 1936), S. Doc. No. 185, 190, 74th Cong., 2d Sess. (1936); Robert W. Archibald (Comm. Ct., 1913) S. Doc. No. 874, 62d Cong., 2d Sess. (1913); West H. Humphreys (D. Tenn., 1862), SENATE JOURNAL, 37th Cong., 3d Sess. 885-904 (1804); John Pickering (D.N.H., 1804), SENATE JOURNAL, 6th-8th Congs. 284-86 (7th Cong.) 303, 310, 331-33 (8th Cong.), 493-507 (appendix). The other judges include: Harold Louderback (N.D. Fla., 1932) (acquitted) 82 CONG. REC. 74th Cong., 1st Sess. 3425 (1932); Charles H. Swaine (N.D. Fla., 1905) (acquitted) 39 CONG. REC. 58th Cong., 3rd Sess. (1905); James H. Peck (D. Mo., 1830) (acquitted) SENATE JOURNAL, 21st Cong., 2d Sess. 77, 80, 238-341 (1830); Samuel Chase (U.S. Sup. Ct., 1805) (acquitted) 14 ANNALS OF CONGRESS, 8th Cong., 2d Sess. 80-675, 726-62 (1805)).

[FN198] *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983).

[FN199] 523 F. Supp. 1209 (S.D. Fla. 1981).

[FN200] For a version of the circumstances surrounding the controversy, see Pike, *Was This Judge's Courtroom for Sale?*, NAT'L L.J., Oct. 26, 1981, at 1, col. 2.

[FN201] For a history of the investigation, see *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984) and *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984), vacated and remanded, 770 F.2d 1093 (D.C. Cir. 1985).

[T]he complaint alleges that Judge Hastings has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and has violated several Canons of the Code of Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States. Its most serious allegations are that Judge Hastings has conspired to obtain a bribe in return for an official judicial act. Other allegations are as follows: 1) that Judge Hastings made 'public and unfounded statements' that the United States was prosecuting him on racial/political grounds; 2) that Judge Hastings has exploited his judicial position by accepting financial donations from lawyers and others to defray the costs of his criminal defense; 3) that in particular cases Judge Hastings has 'completely abdicated and delegated' his decision-making authority to his law clerk; 4) that Judge Hastings has told counsel in a judicial proceeding that he had read an important precedent when he knew he had not; and 5) that Judge Hastings has exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

*Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1492 (11th Cir. 1986) (citing *Hastings v. Judicial Conference of the United States*, 593 F. Supp. at 1376-77).

[FN202] See 28 U.S.C. § 372(c)(5) (1980).

[FN203] This panel was specially designated to sit on these matters upon recusal of all the active judges of the United States Court of Appeals for the Eleventh Circuit. *Matter of Certain Complaints Under Investigation*, 783 F.2d at 1491 n.1.

[FN204] *Id.* at 1491.

[FN205] The United States Code provides for law clerks for the Supreme Court, for courts of appeals, and for district courts. 28 U.S.C. § 675 (1948); 28 U.S.C. § 712 (1948); 28 U.S.C. § 752 (1948). Clerks are not subject to a code of conduct other than that defined by their individual judges. However, it is well known that judges do expect the confidentiality of their clerks in matters regarding the court and the cases involved. Some rules of court specifically provide that '[a]ll court-house personnel, including . . . Law Clerks . . . are prohibited from disclosing to any person, without authorization from the Court, information relating to any pending civil or criminal case that is not part of the public records of the Court.' Comment, *supra* note 136, at 1236 n.36. Not surprisingly, Chief Justice Burger was reported to be so concerned with confidentiality that his clerks were forbidden from discussing confidential matters or mentioning the opinions they were working on even with other justices' law clerks in the law clerks' own dining room. See WOODWARD & ARMSTRONG, *THE BRETHERN, INSIDE THE SUPREME COURT* 34-36 (Simon and Schuster 1979).

[FN206] *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1493 (11th Cir. 1986).

[FN207] *Id.*

[FN208] *Id.* at 1494.

[FN209] *Id.*

[FN210] *Id.*

[FN211] *Id.* at 1502.

[FN212] *Id.* at 1525.

[FN213] *Id.* at 1498 (footnotes omitted).

[FN214] *Id.* at 1500-01. 'Judge Hastings himself must present these claims in the proper forum.' *Id.* at 1512.

[FN215] *Id.* at 1505-06 (emphasis in original). See also *id.* at 1506 n.13 (explaining that Congress chose to vest these powers within the judiciary itself as 'least disruptive of our constitutional concept of an independent judiciary.')

[FN216] 398 U.S. 74, 129, 141 (1970) (Black, J., and Douglas, J., dissenting).

[FN217] *Matter of Certain Complaints Under Investigation*, 783 F.2d at 1506 (emphasis in original).

[FN218] *Id.*

[FN219] The Eleventh Circuit further explained its agreement with the *Chandler* majority:

Absent any form of judicial complaint procedure, courts would be virtually alone among public and professional occupations in lacking a means to clean house. The increase in the number of judges coupled

with the increase in the complexity of judicial work and of courts, all suggest that some mechanism for looking into complaints is necessary and reasonable, if only to enable the courts themselves to sort out their own shortcomings and make the necessary administrative adjustments. In fact, a credible internal complaint procedure can be viewed as essential to maintaining the institutional independence of the courts. If judges cannot or will not keep their own house in order, pressures from the public and legislature might result in withdrawal of needed financial support or in the creation of investigatory mechanisms outside the judicial branch which, to a greater degree than the Act, would threaten judicial independence. . . .

Second, while the Act may impose some pressures upon judges' independence, the fact that it places the investigation, and the determination of what actions to take, entirely within the hands of judicial colleagues makes it likely that the rightful independence of the complained-against judge, especially in the area of decision-making, will be accorded maximum respect. . . .

Third, many of the actions which a judicial council is authorized to take under the Act, *see* 28 U.S.C. § 372(c)(6) (1980), depend upon the *voluntary* compliance of the judge. They are, therefore, not of a type which can powerfully interfere with a judge's independence.

*Id.* at 1507-08 (emphasis in original).

[FN220] *Id.* at 1511.

[FN221] *Id.* at 1514.

[FN222] *Id.*

[FN223] *Id.*

[FN224] *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973) (MacKinnon, J., dissenting).

[FN225] *Id.* at 1518.

[FN226] *Id.* See *supra* text accompanying note 206.

[FN227] *Id.*

[FN228] *Id.*

[FN229] 418 U.S. 683 (1974).

[FN230] *Matter of Certain Complaints Under Investigation*, 783 F.2d at 1520.

[FN231] *Id.*

A party raising a claim of judicial privilege has the burden of demonstrating that the matters under inquiry fall within the confines of the privilege. The judicial privilege is grounded in the need for confidentiality in the effective discharge of the federal judge's duties. In the main, the privilege can extend only to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings. Accordingly, Williams had the burden of showing that the Committee's subpoena duces tecum called for the production of documents that would reveal

communications concerning official judicial business. We conclude that she has failed to meet that burden. . . .

. . . .

Moreover, even if the subpoenaed materials were to include some substantive matters that fell within the privilege, we conclude . . . that the privilege would not support Williams' refusal to comply. The seriousness of the Committee's investigation, and the apparent relevance of the subpoenaed documents to that investigation, would justify enforcement of the subpoena in these circumstances regardless of the assertion of privilege, the privilege being qualified, not absolute. . . . We accordingly reject Williams' assertion of privilege to justify non-compliance with the Committee's subpoena duces tecum.

*Id.*

[FN232] *Id.* at 1521.

[FN233] *Id.*

Once the party asserting the privilege has met the burden of showing that the matters under inquiry implicate communications among a judge and his staff concerning performance of judicial business-as Simons and Miller have shown here-those matters are presumptively privileged and need not be disclosed unless the investigating party can demonstrate that its need for the materials is sufficiently great to overcome the privilege. To meet this burden, the investigating party can attempt to show the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means. The court then must weigh the investigating party's demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need.

*Id.* at 1521-22.

[FN234] *Id.* at 1522. 'We hold that the judicial privilege asserted by Simons and Miller on Judge Hastings' behalf is overridden, under the circumstances present here, by the Committee's need for Simons' and Miller's testimony to further its investigation.'

There can be no question that the Committee's investigation is a matter of surpassing importance. While criminal remedies may no longer be in issue, a proceeding which could result in recommending the exoneration of a sitting Article III judge, or in certifying to the House of Representatives that consideration of impeachment may be warranted, obviously implicates concerns of fairness and thoroughness of a high order. And the charges being investigated-particularly the allegation of bribery-are grave. As we said in our previous opinion arising out of the Hastings investigation,

Moreover, the question under investigation-whether an Article III judge should be recommended for impeachment by the Congress, otherwise disciplined, or granted a clean bill of health-is a matter of great societal importance. Given the character of an investigating committee and what is at stake-the public confidence in the judiciary, the independence and reputation of the accused judge-paragraph (c)(5) [of the Act] must in our view be read, with very few strings, as conferring authority to look into whatever is material to a determination of the truth or falsity of the charges.

*Id.* at 1522 (quoting *In re Petition to Inspect and Copy Grant Jury Materials*, 735 F.2d at 1269-70).

[FN235] '[T]he privilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' *FED. R. EVID.* 501.

[FN236] 28 U.S.C. 372(16) (1980). ‘Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title [28 U.S.C.S. section 1-175], the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.’ *Id.*

[FN237] *Matter of Certain Complaints Under Investigation*, 783 F.2d at 1521.

[FN238] *Id.* at 1524-25 (footnote omitted).

[FN239] *See id.* at 1525 & n.35.

[FN240] Section 372(c)(14) provides:

All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless-

(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

28 U.S.C. § 372(c)(14) (1980).

[FN241] No panel has ever before recommended impeachment of a judge acquitted of a crime. Most supporters of the Act say it was drafted to discipline troublesome judges, not remove them.

‘They’re drinking cases, that sort of thing,’ [Griffin B.] Bell, [attorney general during the Carter administration and a former federal judge] said. ‘Most of the cases are behavioral problems. Before a judge gets senile, you have to go and tell him ‘Well, they could hold a hearing.’ He gets the idea.’

Hedges, *supra* note 186, at 2B.

But no matter how well-intentioned the Act may be, it invites disaster for an unpopular or boldly independent judge. According to former United States Judge Miles Lord, the Act forces trial judges to toe the line: ‘They’re walking through an uncharted mine field. They would do as anyone would do walking through that field-stick to the beaten path and hunker down. Don’t experiment, don’t innovate,’ Judge Lord says.

*Id.* Certainly the Act has been used to scrutinize liberal judges. Judge Miles Lord eventually retired as a result of attacks brought under the Act, instigated by A. H. Robins Company manufacturer of the Dalkon Shield and a defendant in Judge Lord’s court. Likewise, Judge Hastings, though exonerated of any crime, is fighting for his right to stay on the bench. He, too, believes his liberal stance is the real reason for the investigation.

[FN242] A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1965).

[FN243] *See, e.g., Chandler*, 398 U.S. at 96-105, 109-10 (Harlan, J., concurring) (describing legislative history and developments through 1970).

[FN244] 28 U.S.C. App. §§ 301-309 (Supp. IV 1986).

[FN245] 18 U.S.C. §§ 3161-3174 (1982).

[FN246] 523 F. Supp. 1209 (S.D. Fla. 1981).

[FN247] 133 CONG. REC. 1517 (daily ed. March 20, 1987). On October 7, 1987, the Subcommittee on Criminal Justice of the House Judiciary in the course of conducting an impeachment inquiry of Judge Hastings, released to the public the confidential judicial certification record. E. Strasser, *Congress Releases Hastings Report*, Nat'l L.J., Oct. 19, 1987, at 3.

[FN248] United States Judge Miles Lord retired rather than continue defending his right to remain on the bench. His defense prior to retirement had cost him the equivalent of an entire year's salary. L. Baker, *Unnecessary and Improper: The Judicial Council Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1142 (1985). See also *Hastings v. Judicial Conference of United States*, 770 F.2d 1093, 1111 n.16 (1985) (Edwards, J., concurring).

[FN249] See 28 U.S.C. § 372(c)(1) (Supp. IV 1986).  
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