IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:	*	
	*	
TRACIE TODD	*	CASE NO. 58
CIRCUIT COURT JUDGE	*	
BIRMINGHAM DIVISION	*	
CRIMINAL DIVISION	*	
JEFFERSON COUNTY, AL	*	

ORDER ON PETITION TO DISMISS

Judge Tracie A. Todd has filed a petition to dismiss the complaint filed against her by the Judicial Inquiry Commission ("the Commission"). See Rule 19, R. P. Ala. Jud. Inquiry Comm'n; see also Rule 12(b), Ala. R. Civ. P.; Rule 10, R. P. Ala. Ct. Judiciary (addressing the applicability of the rules of civil procedure, "[e]xcept where inappropriate").[1]

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[1]Judge Todd's petition and brief include some arguments that relate to the Commission's alleged violations of the Rules of Procedure for the Judicial Inquiry Commission, see Rule 19 of those rules, and others that merely reflect standard defenses pursuant to Rule 12(b), Ala. R. Civ. P.

Also, in her petition, Judge Todd argues that the complaint was due to be dismissed because the Commission purportedly had violated an alleged "settlement agreement." That argument was addressed in this court's order entered on April 21, 2021.

Judge Todd argues that the complaint filed with this court is due to be dismissed because the Commission purportedly did not comply with Rule 6.A., R. P. Ala. Jud. Inquiry Comm'n, when it accepted and acted on the pre-investigation complaint it received in December 2017. The purported errors under Rule 6.A. are, according to Judge Todd, that the verification form used in the pre-investigation complaint was defectively worded and that the pre-investigation complaint was filed by T. Michael Anderton, the district attorney in the Tenth Judicial Circuit at that time, rather than "a member of the public or ... member of the commission or the commission's staff." Rule 6.A.

Section 156(b), Ala. Const. 1901, states that "[t]he commission shall be convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state." Section 156 (c) provides that "[t]he Supreme Court shall adopt rules governing the procedures of the commission." Rule 6.A. is a procedural rule adopted pursuant to § 156(c). Judge Todd reads the provisions of Rule 6.A. as a jurisdictional restriction on the authority of the Commission to proceed with an investigation based upon

a complaint it has received. As to that issue, however, in addition to the provisions of Rule 6.A., under Rule 6.B., R. P. Ala. Jud. Inquiry Comm'n, the Commission is authorized to conduct "a preliminary review ... [of] the complaint and ... public records available on the Internet" to determine whether "the complaint is ... worthy of further action." Also, Rule 6.C., R. P. Ala. Jud. Inquiry Comm'n, states that:

> "If a complaint is not dismissed on preliminary review pursuant to Rule 6.B., the commission, within 14 days of its decision to conduct some investigation of the complaint, and in no event more than 84 days after a complaint is filed, shall serve upon the judge who is the subject of the complaint copies of the complaint and all other documents or other materials of any nature whatsoever constituting, supporting, or accompanying the complaint, or accumulated by the commission before such service upon the judge. Further, the commission shall advise the judge of those aspects of the complaint that it then considers worthy of some investigation."

Likewise, Rule 6.D., R. P. Ala. Jud. Inquiry Comm'n, requires that,

> "[e]very six weeks after serving the judge pursuant to Rule 6.C., the commission shall serve on the judge being investigated copies of all materials of any nature whatsoever not already served upon him or her tending to establish that the conduct either did or did not occur or that the investigation is or is not still appropriate, and shall serve upon the judge a full statement of whether the commission intends to continue the investigation and any modification of the previous advice as to aspects of the complaint that it then deems worthy of some investigation."

There is no indication that, after the Commission accepted the allegedly defective complaint in 2017, it failed to provide Judge Todd with a copy of the pre-investigation complaint or with a copy of any required materials regarding its ongoing investigation, which extended over several years. Likewise, there is no indication that Judge Todd filed any objection with the Commission regarding the initiation or continuation of the investigation based on the allegedly defective pre-investigation complaint. Further, it is not entirely clear whether Judge Todd is challenging the subject-matter jurisdiction of this court based on alleged defects in the pre-investigation complaint filed with the Commission or whether she is merely asserting that the Commission's acceptance of the pre-investigation complaint was a legal error that somehow precluded the Commission's investigation that followed and that would mandate that this court dismiss the Commission's complaint. Neither challenge, however, has merit, and a prolonged discussion of this issue is not warranted. See, e.g., Ex parte Seymour, 946 So.2d 536, 538 (Ala. 2006), ("Subject-matter jurisdiction concerns a court's power to decide certain types of cases."); see also, e.g., State Dep't of Revenue v. Decatur RSA LP,

247 So. 3d 378, 386 (Ala. Civ. App. 2016) (noting that technical signature or verification defects do not affect the power of the court). Under the circumstances, this court is not required to dismiss the Commission's complaint based on the alleged defects in the pre-investigation complaint.

Judge Todd's remaining arguments concern whether the Commission's complaint is due to be dismissed on the merits. A complaint filed with this court must "specify in plain and concise language the charges against the judge and the allegations of fact upon which such charges are based ...." Rule 3, R. P. Ala. Ct. Judiciary.[2] In addressing Judge Todd's merits based arguments, the allegations of the complaint must be viewed in favor of the Commission, specifically assuming that Judge Todd committed each act of unethical conduct alleged in the 109-page complaint and its attachments. See, e.g., Lyons v. River Rd. Constr., Inc., 858 So. 2d 257, 260 (Ala. 2003).

Judge Todd argues that the Commission's complaint is due to be dismissed because, according to her, (1) the Commission impermissibly seeks to punish her judicial rulings as ethical violations, (2) the

[2]Judge Todd does not argue that the complaint was insufficient to notify her of the charges against her.

Commission is guilty of laches, and (3) the Commission has violated her rights to substantive due process and procedural due process because of alleged delays in the investigation and prosecution. Considering the allegations in the Commission's complaint, deciding the foregoing issues will require the resolution of factual matters, which must be addressed at trial; dismissal as a matter of law would be improper. See, e.g., Trabits v. First Nat'l Bank of Mobile, 295 Ala. 85, 90, 323 So. 2d 353, 358 (1975).[3] Thus, the foregoing arguments for dismissal are rejected.

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[3]Regarding the issue of considering judicial rulings, see, e.g., Moore v. Alabama Judical Inquiry Commission, 234 So. 3d 458, 469-70 (Ala. 2017) ("[T]he Court of the Judiciary is tasked with reviewing judicial conduct. The Court of the Judiciary may consider the content of a judicial order as it speaks to the conduct or motivations leading to the entry of the order or to whether that conduct or motivation constituted a violation of a Canon [of Judicial Ethics] ....").

Regarding the issue of laches, see, e.g., Horton v. Kimbrell, 819 So. 2d 601, 606 (Ala. 2001) (noting the fact-dependent nature of laches and the discretion as to its application), and Unzicker v. State, 346 So. 2d 931, 932 (Ala. 1977) (stating that when the pleadings raise "issues of material fact" as to laches, such "can be resolved only by trial of those issues and cannot be disposed of on motions to dismiss").

Regarding the issue whether the alleged delay violated Judge Todd's right to substantive due process or procedural due process, see, e.g., Hall v. State, 150 So. 3d 771, 774 (Ala. Civ. App. 2014) (holding that whether a delay violates due process "should be decided based on the facts and circumstances of th[e] case"), and United States v. Lovasco, 431 U.S. 783, 790-96 (1977) (discussing numerous concerns implicated in applying the due-process clause in the context of prosecutorial discretion).

Judge Todd's final merits based argument is that the Commission's complaint must be dismissed based on the defense of condonation. Judge Todd bases her argument solely on the undisputed facts that she was re-elected to office in November 2018 and that the charges against her are for alleged violations of the Alabama Canons of Judicial Ethics that occurred during her previous term of office. The evidence as to the alleged violations, which includes a purported pattern of unethical conduct, spans from November 2014 through October 2018, with the bulk of that evidence relating to events occurring between 2016 and 2018. Judge Todd grounds her argument on precedents that discuss the theory of condonation as a defense in cases involving impeachment proceedings under Article VII, § 173 et seq. ("the Impeachment Article"), Ala. Const. 1901. See, e.g., Parker v. State, 333 So. 2d 806, 808 (Ala. 1976); State ex rel. Attorney General v. Hasty, 184 Ala. 121, 63 So. 559 (1913). As the Commission notes, however, the case against Judge Todd is a disciplinary proceeding governed by § 156 and § 157, Ala. Const. 1901, which are part of Article VI ("the Judicial Article"). According to the Commission, the theory of

condonation does not apply as a defense in a proceeding under § 156 and § 157.

In addition to precedents construing the Impeachment Article, Judge Todd also relies on Steensland v. Alabama Judicial Inquiry Commission, 87 So. 3d 535 (Ala. 2012), as standing for the proposition that condonation applies to a disciplinary proceeding under § 156 and § 157. Steensland did involve a proceeding under § 156 and § 157. However, at issue in Steensland was whether the misconduct of Judge M. John Steensland, Jr., during a previous term could be used as evidence to prove pattern and practice as to charges of misconduct by Steensland that had occurred during a subsequent term. In addressing that issue, the Steensland court did not speak unfavorably of condonation, and, in part, " '[s]imply stated [that] the "condonation theory" is that re-election to an office operates as a condonation of the officer's conduct during the prior term.' Parker v. State, 333 So. 2d 806, 808 (Ala. 1976)"; Parker involved the impeachment of a Jefferson County Treasurer pursuant to the Impeachment Article. Nevertheless, the charges that were the subject of Steensland's appeal were not for alleged misconduct that had occurred during his previous

term.[4] In reviewing whether this court "ran afoul of this doctrine [of condonation]" by considering evidence of misconduct that had occurred during a previous term of office in support of a conviction on charges relating to misconduct in a subsequent term of office, 87 So. 3d at 542, the supreme court stated:

> "[O]ne examines the [Court of the Judiciary's] order in vain for proof that [it] used pre-2009 conduct as anything but pattern-and-practice evidence. On the contrary, the order is expressly based on the conduct charged in the four complaints ... -- all of which occurred within Judge Steensland's last term of office. ...
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> "....
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> "In his argument before the [Court of the Judiciary], Judge Steensland's counsel condoned the use of pre-2009 conduct to show a pattern and practice. For all that appears, that is precisely the purpose for which that evidence was used. Thus, to the extent the [Court of the Judiciary] considered the conduct at all, the error -- if any -- was invited error. Consequently, reversal of the [Court of the Judiciary's] judgment cannot be predicated on evidence of Judge Steensland's alleged pre-2009 conduct."

87 So. 3d at 543.

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[4]Charges based on misconduct in a previous term were discussed during Steensland's trial, but those charges were not the subject of his conviction or the appeal. See Steensland, 87 So. 3d at 539, 543.

Based on the foregoing, the Steensland court did not decide the issue whether the theory of condonation applies in a disciplinary proceeding under § 156 and § 157, even under the limited circumstances of that case. Also, the supreme court made no attempt in Steensland to discern and decide whether any distinctions might exist regarding the application of the theory of condonation in impeachment proceedings, such as Parker, and disciplinary proceedings under § 156 and § 157. Instead, whether the theory of condonation applies in a disciplinary proceeding under § 156 and § 157, and if so, how it might apply, are matters of first impression.

In their briefs regarding this issue, the parties generally have talked past one another. Judge Todd has assumed that the precedents construing the Impeachment Article translate directly to the context of disciplinary proceedings under § 156 and § 157 of the Judicial Article, all the while ignoring the fact that § 176 of the Impeachment Article, which was a basis for the seminal precedent on the application of the theory of condonation to impeachment proceedings, i.e., Hasty, is expressly limited in application to the Impeachment Article:

> "The penalties in cases arising under [the Impeachment Article] [do] not extend beyond removal from office, and

> disqualifications from holding office, under the authority of this state, for the term for which the officer was elected or appointed ...."

The Commission, in turn, has argued that the plain language of § 156(b) and § 157(a) do not include any reference to the term of office for purposes of prosecuting or disciplining unethical conduct. Thus, the Commission concludes, the theory of condonation is not applicable as a defense in disciplinary proceedings under the Judicial Article. In pertinent part, § 156(b) states:

> "The [C]ommission shall be convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state. The commission shall file a complaint with the Court of the Judiciary in the event that a majority of the members of the commission decide that a reasonable basis exists, (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties. ..."

Similarly, § 157(a) states that this court

> "shall be convened to hear complaints filed by the ... Commission. The court shall have authority, after notice and public hearing (1) to remove from office, suspend without pay, or censure a judge, or apply such other sanction as may prescribed by law, for violation of a Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to suspend with or without pay, or to retire a judge who is physically or mentally unable to perform his or her duties.

The Commission's argument is straightforward, but it does not attempt to address condonation, per se, or why one would expect to find a list of available affirmative defenses in sections describing the authority of the Commission or this court. The sections of the Impeachment Article make no reference to the theory of condonation, yet it has been applied in the cases under that Article. Nevertheless, the condonation issue, as presented, is a matter of law and must be resolved at least to the extent necessary to address whether Judge Todd's petition is due to be granted.

To appreciate Judge Todd's argument, it is necessary to note the purpose of impeachment proceedings and why condonation is a defense in such proceedings. In England, impeachment "was regarded and treated as the highest form of criminal prosecution" and, "on conviction, the severest penalties of the law could be inflicted." State v. Buckley, 54 Ala. 599, 617 (1875); see also 2 Joseph Story, Commentaries on the Constitution of the United States § 782 (1833) (noting that the penalties in England included "capital punishment; or perpetual banishment; or forfeiture of goods and lands; or fine and ransom; or imprisonment; as well as removal from office, and incapacity to hold office, according to the

nature and aggravation of the offence"). In contrast, Story notes that, under the United States Constitution, "judgment upon impeachments shall not extend further than to removal from office, and disqualification to hold office (which, however afflictive to an ambitious and elevated mind, would be scarcely felt, as a punishment, by the profligate and the base) ...." Story, at § 781; see also U.S. Const. art. 1, § 3, cl. 7; § 176, supra.[5] "[R]emoval from office" was, according to Story, "the most important object, for which the remedy [of impeachment] was given" and that "it would seem to follow, that the senate, on the conviction, were bound, in all cases, to enter a judgment of removal from office, though it has a discretion, as to inflicting the punishment of disqualification." Story, at § 801.

> "There is also much force in the remark, that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity."

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[5]See, e.g., 1819 Ala. Const., art. Impeachments, § 3 ("[J]udgment in such cases shall not extend further than removal from office, and to disqualification to hold any office of honor, trust, or profit under the State ...."

Id.; see also id. at § 785. "[T]he final judgment is confined to a removal from, and disqualification for, office; thus limiting the punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries." Id. at § 810; see also State v. Hill, 37 Neb. 80, 55 N.W. 794, 797 (1893) ("The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired, and he is no longer in office, that object is attained, and the reason for his impeachment no longer exists; but, if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office."). See generally Black's Law Dictionary 901 (11th ed. 2019) (defining "impeachment" as "[t]he act (by a legislature) of calling for the removal from office of a public official, accomplished by presenting a written charge of the official's alleged misconduct ....").

Turning now to the precedents construing the Impeachment Article, Hasty involved an impeachment proceeding against a probate judge under former § 174, Ala. Const. 1901. The supreme court stated:

> "Section 174 makes [§] 173 apply to probate judges and other officers therein named but who are omitted from said [§] 173,

and [§] 176 provides that the penalty shall not extend beyond the removal from office and disqualification from holding office, under the authority of this state, for the term for which the officer was elected or appointed ....

"It must be observed that, while the law affords ample means for the indictment and punishment of unfaithful officers and for the removal of same for certain causes, the maximum penalty, under an impeachment proceeding, is the removal and disqualification to hold office under the state for the term only for which he was elected. If an officer is impeached and removed, there is nothing to prevent his being elected to the identical office from which he was removed for a subsequent term, and, this being true, a re-election to the office would operate as a condonation under the Constitution of the officer's conduct during the previous term, to the extent of cutting off the right to remove him from the subsequent term for said conduct during the previous term. It seems to be the policy of our Constitution to make each term independent of the other and to disassociate the conduct under one term from the qualification or right to fill another term, at least so far as the same may apply to impeachment proceedings, and as distinguished from the right to indict and convict an offending official. In other words, if this respondent had been impeached and removed from his first term, that fact could not affect his right to hold the subsequent term to which he was elected in 1910, and, as he was re-elected in 1910, this fact alone forecloses the state from impeaching and removing him from the second term for acts done during the previous term. We therefore sustain the motion of respondent to strike from the information all grounds of impeachment based upon his conduct during the previous term of office.

"We are not unmindful of the fact that there have been rulings by other tribunals, federal and state, wherein the conduct of the officer during the previous term of office, and in a few instances before taking office, has been the basis of

> impeachment and removal; but the Constitutions there, as to the extent of the punishment and the period of removal, are not like ours, and these holdings can probably be differentiated from ours, and we need not therefore commit ourselves to the soundness or unsoundness of these adjudications.
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> "While we have eliminated the acts of the previous term, as grounds of impeachment, we have considered some of them as evidential facts, in so far as they are connected with or bear upon the respondent's general course of conduct during the second term, for the limited purpose of inquiring into the motive and intent of the respondent as to the acts and omissions charged to him during the second term. "

184 Ala. at 124-26, 63 So. at 561 (emphasis added).

The remaining precedents cited by Judge Todd construing the Impeachment Article, and others she has not cited, add nothing essential to the pertinent part of the foregoing discussion.[6] See Parker v. State, 333

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[6]The prior and subsequent history of the constitutional provisions for impeachment of judges is convoluted, but not without import. Before 1875, Alabama's various constitutions provided for the impeachment of public officials and provided separate, additional provisions for the removal of judges from office "for wilful neglect of duty, or other reasonable cause, which shall not be sufficient ground for impeachment ...." 1819 Ala. Const., art. V, § 13; see also, e.g., 1868 Ala. Const., art. VI, § 12; 1865 Ala. Const., art. VI, § 12. The 1875 Alabama Constitution omitted the additional removal provisions for judicial misconduct that did not rise to the level of impeachable conduct and expressly listed "the judges of the supreme court," 1875 Ala. Const., art. VII, § 1, and the "chancellors, judges of the circuit courts, judges of the probate courts, solicitors of the circuits, and judges of inferior courts from which an appeal may be taken directly to the supreme court," 1875 Ala. Const., art. VII, § 2, among those public officers who could be impeached "for willful

So. 2d 806, 808 (Ala.1976) (discussing Hasty as to both condonation and § 176 and stating: "Thus, while it is clear that an officer cannot be

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neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith ...." 1875 Ala. Const., art. VII, § 1. Those provisions as to judges were carried forward into the Alabama Constitution of 1901 as § 173 and § 174 of the Impeachment Article, but important history followed as to those sections.

As the Code Commissioner's Notes to § 173 and § 174 discuss, Amendment 317, Ala. Const. 1901, which created the predecessor to the Commission, repealed "[t]he provisions of [the Impeachment Article], Sections 173 and 174 ... in so far as they relate to a judge as defined herein," which included appellate court judges and circuit court judges, among others. Act no. 1187, § 1(4), Ala. Acts 1971. Amendment 317 was repealed in 1973 by Amendment 328, Ala. Const. 1901, see Act no. 1051, Ala. Acts 1973. Amendment 328 established the Commission and this court, including the substantive provisions found in § 156(b) and § 157(a). See Act no. 1051, § 6.17 and § 6.18. The Judicial Article was subsequently amended in 1996 by Amendment 580, adding § 158. See Act no. 95-646, Ala. Acts 1995. Section 158 established impeachment, pursuant to § 173 of the Impeachment Article, as an additional remedy to the disciplinary procedures in the Judicial Article, only as "to Justices of the Supreme Court and Judges of the Courts of Appeals." See Act no. 95-646, Ala. Acts 1995.

Current § 173 and § 174 of the Impeachment Article, which include language as to the impeachment of "justices of the supreme court" and "judges of the district and circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court," respectively, were ratified in 2016. See Act no. 2015-199, Ala. Acts 2015. Nevertheless, the present case is a disciplinary proceeding under § 156 and §157 of the Judicial Article, not an impeachment proceeding under § 174 of the Impeachment Article, as ratified in 2016.

removed from office for conduct which occurred during a prior term, the question for consideration here is whether a public officer may be impeached for acts which occurred prior to the actual commencement of his term and prior to the actual assumption of his duties. We do not think the law provides for impeachment for such acts."); see also, e.g., State ex rel. Mullis v. Mathews, 259 Ala. 125, 140, 66 So. 2d 105, 118 (1953)(stating, in regard to the impeachment of a sheriff pursuant to § 174, that "an official cannot be removed because of his conduct during a previous term" and citing Hasty). What is clear, however, is that reading Hasty and the impeachment precedents in context reveals that the rationale for applying the theory of condonation to impeachment proceedings is based on the penalty-limitation language of § 176 and on political concerns about removal from office, which thwarts the electorate's choice of the officer who serves them.[7] Section 176 has no

[7]As the Hasty court noted, the states have not taken a uniform approach to the application of the theory of condonation to acts committed in a previous term, and distinctions are often made based on the particular constitutional or statutory language at issue. A collection of such cases is found in Thomas J. Goger, J.D., Annotation, Removal of Public Officers for Misconduct During Previous Term, 42 A.L.R. 3d 691 (1972), and the cases reflect many factual variations and a mass of conflicting rationales, even among courts with similar positive-law provisions.

application in the present case. Thus, an examination of § 156(b) and § 157(a) is warranted before addressing whether or how the political concerns described in Hasty might be pertinent to disciplinary proceedings.

The plain language of § 156(b) and § 157(a) reflect a clear focus on matters unique to the judicial office, e.g., the "violation of a Canon of Judicial Ethics," and § 157 specifically provides a range of disciplinary measures designed to be meted out as the facts and circumstances warrant -- "to remove from office, suspend without pay, or censure a judge, or apply such other sanction as may prescribed by law." In other words, unlike impeachment proceedings under the Impeachment Article, the main purpose of § 156 and § 157 clearly is not removal from office, although that remedy may be justified under appropriate circumstances. Instead, those sections concern the discipline of judges, with removal from office being the most extreme and, hopefully, rarely needed measure of discipline. See generally Black's Law Dictionary 582 (11th ed. 2019) (defining "discipline" as "1. Punishment intended to correct or instruct; esp., a sanction or penalty imposed after an official finding of misconduct,

such as punishment or penalties (often termed 'sanctions') imposed by a disciplining agency on an attorney who has breached a rule of professional ethics. • Three types of discipline are common: disbarment, suspension, and reprimand (public or private). 2. A method of training people to control their behavior and obey rules. 3. Control gained by enforcing compliance or order."). Compare Story, at § 783 ("[I]t was deemed most advisable by the convention, that the power of the senate to inflict punishment [for impeachment] should merely reach the right and qualifications to office ....").[8] One need look no further than the range of disciplinary measures described in § 157(a) and the rules promulgated in furtherance of § 156(b) to appreciate the distinction between disciplinary proceedings and impeachment proceedings. See, e.g., Rule 16, R. P. Ala. Jud. Inquiry Comm'n (providing a diversionary procedure for certain treatable causes of misconduct (substance abuse, mental disorder, etc.)); Rule 10, R. P. Ala. Jud. Inquiry Comm'n (encouraging the joint resolution of disciplinary matters).

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[8]Lesser penalties than removal are sometimes said to be available in impeachment proceedings, but, as the discussion above reflects, the primary purpose of impeachment is removal from office. That is not true of disciplinary proceedings under § 157(a).

Further, application of the theory of condonation is based on a presumption that the electorate has or could obtain knowledge of the alleged unethical conduct at issue before re-election. That presumption presents at least some tension with the confidential nature of the Commission's proceedings, particularly absent some indication that the unethical conduct was otherwise known to the public before the election at issue. "All proceedings of the commission shall be confidential except the filing of a complaint with the Court of the Judiciary." § 156(b); see also Rule 5, R. P. Ala. Jud. Inquiry Comm'n; cf. Cunningham v. Cunningham, 278 Ala. 90, 94, 176 So. 2d 22, 26 (1965) (noting, in the context of a divorce proceeding, that condonation necessarily implies knowledge of the offensive conduct at issue). See generally 1 Wharton's Criminal Law §§ 45-46 (15th ed. 1993) (noting respectively that condonation generally is not a defense to a crime and that, where consent is a defense, the victim's consent must be "voluntary and intelligent," as a factual matter, in order to be effective).[9]

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[9]Some courts that have applied the theory of condonation also have recognized that the application of that defense is fact dependent and requires more than proof of the mere fact of re-election. For example, in State ex rel. Londerholm v. Schroeder, 199 Kan. 403, 413-14, 430 P.2d 304, 313-14 (1967), the Kansas supreme court stated:

Contrary to the necessary implications of Judge Todd's argument, the differences between disciplinary proceedings and impeachment

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> "Statutory provisions aside, the principal rationale of the [present term] rule is that reelection or reappointment of the officer amounts to condonation of his prior misconduct. Condonation of an offense implies knowledge of the offense, and, if the officer's misconduct in the prior term was concealed or not known to the electorate or the appointing official at the time of reelection or reappointment, several courts have refused to apply the rule ....
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> "We would have difficulty supposing any electorate would knowingly reelect as guardian of the public funds one guilty of the deceitful dealings revealed here. Be that as it may, we are not confronted with deciding whether the present term rule should be applied here because of condonation by the electorate. The defendant throughout has stoutly denied any acts of wrongdoing, more specifically, in his reelection campaign he is shown to have categorically denied the factual basis upon which any wrong must rest (finding 27). The wrongdoing has been concealed from public view and there is nothing before us which may fairly be interpreted as condonation by the electorate."

See also, e.g., Newman v. Strobel, 236 A.D. 371, 373, 259 N.Y.S. 402, 404 (1932) ("[T]he interests of the public are none the less injuriously affected because the misdeeds which portray [an officer's] unfitness occurred on the last day of one term rather than on the first of the next succeeding term. ... Much might be said as to the right, or at least the advisability, of a court overriding the will of the majority of the electorate, when the people have elected a man to office with their eyes wide open, and with full knowledge of his shortcomings and derelictions. But that question is not here, and we need not pass upon it. It does not appear that the alleged misdeeds of respondent had come to light or were known to the people of his town when they elected him to his present term.").

proceedings cannot simply be ignored in considering whether the theory of condonation applies as a defense in a proceeding under § 156 and § 157. The rationale that made that defense applicable in the context of impeachment proceedings does not translate on an easy, blanket, one-on-one basis to disciplinary proceedings. Also, as the Commission has argued, the plain language of §156(b) and § 157(a) does not support Judge Todd's argument. The pertinent part of those sections naturally references conduct that has already occurred as the basis for a charge of unethical conduct. Yet, § 156(b) contains no limitation providing or requiring that the unethical conduct at issue must have occurred in the present term of office for the Commission to exercise its "authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state." Nor does § 156(b) contain such a limitation as to the Commission's complaint "charg[ing] a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties." And, under § 157(b), this court is authorized to impose appropriate discipline against a judge " for violation of a Canon of Judicial Ethics, misconduct in office, [or] failure to perform

his or her duties." In short, unlike § 176, § 156(b) and § 157(a) make no reference to a "term" of office in relation to the treatment of unethical conduct in office. See, e.g., Clay Cnty. Comm'n v. Clay Cnty. Animal Shelter, Inc., 283 So. 3d 1218, 1230 (Ala. 2019) (quoting Magee v. Boyd, 175 So. 3d 79, 121 (Ala. 2015)("'"'"In construing a constitutional provision, the courts have no right to broaden the meaning of words used and, likewise, have no right to restrict the meaning of those words."' This Court is '"not at liberty to disregard or restrict the plain meaning of the provisions of the Constitution."'" City of Bessemer v. McClain, 957 So. 2d 1061, 1092 (Ala. 2006)(quoting City of Birmingham v. City of Vestavia Hills, 654 So. 2d 532, 538 (Ala. 1995), quoting in turn McGee v. Borom, 341 So. 2d 141, 143 (Ala. 1976)).'").

Judge Todd has been a circuit judge in the Tenth Judicial Circuit, an office that does not cease to exist simply because it may not be occupied at a given time because of vacancy, since she took office in January 2013. She was reelected to a successive term of office in November 2018, but she has had no successor in office. See Ala. Code 1975, § 17-14-6 (The judges of the circuit and district courts ... shall hold their respective offices for

the term of six years from the first Monday after the second Tuesday in January next after their election and until their successors are elected and qualified."). Instead, she has held her office uninterrupted over successive terms, and the Commission's investigation and the charges against her arise out of her purported unethical conduct in that office. Indeed, adopting Judge Todd's argument would create the paradoxical position that judges could be disciplined by the "Disciplinary Commission and the Disciplinary Board of the Alabama State Bar during their terms of office for misconduct occurring before they became judges," Rule 1(a)(2), Ala. R. Disc. P., but could not be disciplined by this court, in any manner whatsoever, for judicial misconduct that had occurred while they were judges, but in a previous term. In addition to being unsupported by the language of § 156(b) and § 157(a), such an approach is inconsistent with instilling public confidence in the courts. In re Emmet, 293 Ala. 143, 145, 300 So. 2d 435, 438 (1974); see also Hayes v. Alabama Ct. of Judiciary, 437 So. 2d 1276, 1278 (Ala. 1983) ("From one to whom much is given, much is expected.").

In light of the foregoing, the rationale for applying the theory of condonation in impeachment proceedings lacks force in the context of

disciplinary proceedings under § 156 and § 157 and cannot justify the application of that theory so as to preclude the discipline of a judge for unethical conduct in office.[10] Thus, the Commission's complaint is not due to be dismissed.

PETITION DENIED.

C O Edwards

CHRISTY O. EDWARDS
CHIEF JUDGE
COURT OF THE JUDICIARY

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[10]Arguably, the political concerns that justify the application of the theory of condonation in impeachment proceedings might apply as to one of the disciplinary measures available to this court under § 157(a), namely, removal from office. However, in making her argument as to the theory of condonation, Judge Todd has not attempted to distinguish between the types of disciplinary measures available under § 157(a), and, even if she had made such an argument, the question would remain whether those concerns alone would justify the application of the theory of condonation in light of the various factual inquiries generally required in deciding whether the defense of condonation is applicable. Further, assuming those questions were answered in favor of applying the theory of condonation as to removal from office, the political concerns supporting such a conclusion would not justify the application of the theory of condonation to the lesser disciplinary measures provided in § 157(a), specifically, suspension without pay (provided the suspension does not substantially equate to removal from office) or censure, as the circumstances may warrant.