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IMPEACHING FEDERAL JUDGES: A STUDY OF THE CONSTITUTIONAL PROVISIONS

*JOHN D. FEERICK**

I. INTRODUCTION

ON April 15, 1970, Republican Leader Gerald R. Ford of Michigan reported to the House of Representatives on a study he had made concerning the law of impeachment and the behavior of Associate Justice William O. Douglas of the United States Supreme Court.[1] His report contained, in substance, five charges against Justice Douglas which, he said, would justify his removal from office. In the first charge, he stated that Justice Douglas voted in favor of Ralph Ginzburg, the editor and publisher of *Fact* magazine, in a libel suit brought against him and the publication by Senator Barry Goldwater.[2] While the case was pending in the lower federal courts, Justice Douglas wrote an article in *Avant Garde*, a Ginzburg publication and the alleged successor to *Fact*, entitled "Appeal of Folk Singing: A Landmark Opinion," for which he was paid three hundred and fifty dollars. The second specification was that Justice Douglas wrote an inflammatory book, *Points of Rebellion*, setting forth the thesis that "violence may be justified and perhaps only revolutionary overthrow of 'the establishment' can save the country."[3] The third allegation was that Justice Douglas allowed excerpts from *Points of Rebellion* to appear in *Evergreen* magazine near nude photographs and a caricature of President Nixon as King George III. As the fourth charge, he cited Justice Douglas' association with Albert Parvin and the Albert Parvin Foundation, in connection with which he allegedly assisted in organizing the Foundation in violation of federal law,[4] gave legal advice to the Foundation on dealing with the Internal Revenue Service, accepted from it an annual salary of twelve thousand dollars, and came in contact with alleged international gamblers. The fifth charge involved Justice Douglas' allegedly close association "with the leftish Center for the Study of

* Member of the New York Bar. The author wishes to express his deep appreciation to Associate Editor Robert Quinn of the Fordham Law Review and to Edward Yodowitz, Esq. of his firm for their excellent research and drafting assistance, without which this article would not have been possible.

1. 116 Cong. Rec. H3112 (daily ed. Sept. 23, 1970).

2. Ginzburg v. Goldwater, 396 U.S. 1049 (1970), denying cert. to 414 F.2d 324 (1969).

3. Professor Leonard F. Manning's review of this book is contained in this issue of the Fordham Law Review.

4. This statute provides: "Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor." 28 U.S.C. § 454 (1964).

Democratic Institutions," a "focal point for organization of militant student unrest."

Concerning the law of impeachment, Representative Ford expressed his conclusion that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."[5]

On the same day that this report was delivered, Representative Andrew Jacobs, Jr. of Indiana introduced an impeachment resolution which incorporated all of the foregoing charges.[6] This resolution was referred to the Committee on the Judiciary, which appointed a Special Subcommittee to investigate the charges.[7] At this writing, the Subcommittee's investigation is in progress.[8]

The initiation of impeachment proceedings against Justice Douglas has once again brought into sharp focus the constitutional provisions relating to impeachment, reviving controversies of long standing regarding the meaning of those provisions.[9] Article I of the Constitution provides that

5. 116 Cong. Rec. H3113 (daily ed. April 15, 1970). A legal memorandum subsequently submitted by Representative Ford from the distinguished Michigan law firm of Dykema, Gossett, Spencer, Goodnow & Trigg, concluded that "it is the conscience of Congress—acting in accordance with the constitutional limitations—which determines whether conduct of a judge constitutes misbehavior requiring impeachment and removal from office." Special Subcomm. on H.R. 920 of the House Comm. on the Judiciary, 91st Cong., 2d Sess., Legal Materials on Impeachment 23 (1970).

6. H.R. Res. 920, 91st Cong., 2d Sess. (1970). More than one hundred members of the House of Representatives have introduced resolutions calling for the appointment of a Select Committee to investigate the conduct of Justice Douglas. See First Report by the Special Subcomm. on H.R. 920 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 44-50 (1970).

7. The Subcommittee consists of Representatives Emanuel Celler of New York, its chairman; Byron G. Rogers of Colorado; Jack B. Brooks of Texas; William M. McCulloch of Ohio; and Edward Hutchinson of Michigan. On June 20, 1970, the Subcommittee submitted its first report. See note 6 supra. On August 11, 1970, it submitted a collection of legal materials on impeachment. See note 5 supra.

8. The subcommittee was originally scheduled to complete its investigation by June 24. The deadline has been extended at the subcommittee's request, reportedly because of its inability to obtain requested information from various departments of the executive branch. See N.Y. Times, Aug. 24, 1970, at 19, col. 3.

9. An impeachment proceeding may be started by charges made on the floor of the House of Representatives against a public official by a member of the House. It may also be initiated by a presidential message, a state legislature, a petition, or a memorial containing charges under oath. Once charges are preferred, a standing or special committee of the House is designated to investigate and report. The official under investigation may be given an opportunity to appear at the committee hearings to testify, present evidence, and

the House of Representatives shall have the "sole Power of Impeachment" and that the Senate shall have the "sole Power to try all Impeachments."[10] Article I further provides that "no Person shall be convicted without the concurrence of two-thirds of the members present" and that the judgment "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."[11] Article II, Section 2 excludes cases of impeachment from the President's power to grant reprieves and pardons "for offenses against the United States." Article II, Section 4 provides that "[t]he President, Vice 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."[12] Article III states that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by jury," and also provides that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."

These provisions give rise to a number of questions: What is an impeachable offense? Is it limited to something which is indictable, or does it embrace acts of a non-indictable nature? If the latter, does it extend to non-official as well as official conduct? Does the "good Behaviour" judicial tenure provision of Article III furnish an independent ground for impeachment in the case of judges?

The purpose of this article is to examine the impeachment provisions

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cross-examine witnesses. When the committee concludes its investigation, its report is acted upon. If the report recommends impeachment, it will set forth a proposed resolution containing the articles (charges) of impeachment against the official. If the report is adopted by the House, several Representatives will be designated as Managers to prosecute the case. Subsequently, the House notifies the Senate by message of the impeachment; the Senate notifies the House that it is ready to receive the articles of impeachment; the House-appointed Managers present the articles to the Senate; and the Senate organizes for trial. The impeached official is afforded an opportunity to appear, in person or by counsel, and answer the charges. After the pleading stage, the actual trial begins, at which witnesses are sworn and examined by the Managers and may be cross-examined by the impeached official or his counsel. At the conclusion of the Managers' case, the official may present his defense. Thereafter, a vote is taken on each article of impeachment. Special Subcomm. on H.R. 920 of the House Comm. on the Judiciary, supra note 5, at 1-3.

10. U.S. Const. art. 1, §§ 2, 3.

11. Id. § 3.

12. Treason is defined in U.S. Const. art. 3, § 3, which states: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court."

of the Constitution:[13] in particular, to trace their common law and colonial antecedents, to explore their development at the Constitutional Convention of 1787, to examine the twelve cases of impeachment in United States history, and to offer an interpretation of the constitutional provisions.[14]

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13. For an excellent book on the subject, see A. Simpson, A Treatise on Federal Impeachments (1916) [hereinafter cited as Simpson]. See also 6 C. Cannon, Cannon's Precedents of the House of Representatives of the United States §§ 455-66 (1935) [hereinafter cited as Cannon's Precedents]; W. Carpenter, Judicial Tenure in the United States (1918); 3 A. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 2008-23 (1907) [hereinafter cited as Hinds' Precedents]; Brown, The Impeachment of the Federal Judiciary, 26 Harv. L. Rev. 684 (1913); Haley, The Impeachment of Federal Officers in United States History, 10 The Historian 135 (1948); Lawrence, The Law of Impeachment, 15 Am. L. Reg. 641 (1867); Potts, Impeachment as a Remedy, 12 St. Louis L. Rev. 15 (1927); Taylor, The American Law of Impeachment, 180 N. Am. Rev. 508 (1905); Thomas, The Law of Impeachment in the United States, 2 Am. Pol. Sci. Rev. 378 (1908).

14. This article does not deal with the question of whether impeachment is the exclusive method of disciplining federal judges. For authority that Congress has power to establish non-impeachment procedures, such as a special court or commission, see Comment, Removal of Federal Judges—New Alternative to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit, 13 U.C.L.A.L. Rev. 1385 (1966); Comment, Removal of Federal Judges —Alternatives to Impeachment, 20 Vand. L. Rev. 723 (1967); statement of Assistant Attorney General William H. Rehnquist, Hearings on S. 1506 before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm., 115 Cong. Rec. 14,909 (June 5, 1969) (remarks of Senator Joseph Tydings). For authority that impeachment is exclusive, see Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. Chi. L. Rev. 665 (1969); Ziskind, Judicial Tenure in the American Constitution; English and American Precedents, 1969 Sup. Ct. Rev. 135; Comment, Courts—Judicial Responsibility—Statutory and Constitutional Problems Relating to Methods for Removal or Discipline of Judges, 21 Rutgers L. Rev. 153 (1966); Comment, The Chandler Incident and Problems of Judicial Removal, 19 Stan. L. Rev. 448 (1967). See generally Kramer & Barron, The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary; The Meaning of "During Good Behaviour," 35 Geo. Wash. L. Rev. 455 (1967); Otis, A Proposed Tribunal: Is it Constitutional?, 7 U. Kan. City L. Rev. 3 (1938); Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution (pts. 1-3), 28 Mich. L. Rev. 485, 723, 870 (1929-1930); Note, The Exclusiveness of the Impeachment Power Under the Constitution, 51 Harv. L. Rev. 330 (1967). See also the authorities referred to in note 286 infra. In a dissent to the Supreme Court's June 1, 1970 decision in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), Justices Douglas and Black stated their view that impeachment is "the only leverage" under the Constitution against a judge. "If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress." Id. at 140. See their dissent in the earlier decision in Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003, 1004-06 (1966). For an interesting view of how Congress could "modernize" the impeachment process, see Stolz, Disciplining Federal Judges: Is Impeachment Hopeless?, 57 Calif. L. Rev. 659 (1969).

II. Development of Impeachment Provisions

A. *Common Law Antecedents*

While the origin of impeachment remains unsettled,[15] the first English impeachments are believed to have occurred during the reign of Edward III (1327-1377).[16] During the early part of this reign, Parliament formally separated into the two houses of Lords and Commons and acquired some of the legislative powers which it has today.[17] In 1376, the House of Commons instituted impeachment proceedings against Richard Lyons and, later that year, against Lords Latimer and Neville.[18] Upon conviction by the House of Lords, Lyons was forbidden to ever hold office, while Latimer was ousted from all his offices.[19] It was not, however, until the reign of Henry IV (1399-1413) that the procedure was firmly established whereby the House of Commons instituted impeachment proceedings and the House of Lords tried such cases.[20] Both public officials and private individuals were subject to impeachment.[21] Conviction in the

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15. It has been observed that the origins of impeachment can be traced to the Athenian Constitution. Upon leaving office, public officials in Athens were subject to an examination in law courts composed of citizens who acted as judges, in panels, and who were enrolled by lot. The people were given an opportunity to bring charges against the officials in these courts, which were known as the "heliaea." M. Hart, The Origin of the Constitution of the United States of America 19, April 25, 1927 (unpublished thesis in Boston College Library). Some English historians trace the origin of impeachment to the early criminal procedures of conviction by record and conviction by notoriety. See Plucknett, The Origin of Impeachment, 24 Royal Historical Soc'y Transactions 47 (4th ser. 1942).

16. 4 Hatsell's Precedents of Proceedings in the House of Commons 62-63, 73-74 (1796) [hereinafter cited as Hatsell]; 1 H. Taylor, The Origin and Growth of the English Constitution 441 (1889) [hereinafter cited as Taylor].

17. 1 Taylor 517.

18. The Commons impeached Richard Lyons for certain misdemeanors in removing the staple of wool from Calais (see 1 W. Blackstone, Commentaries 233-34 (Chitty ed. 1851)), lending funds to the Crown at exorbitant interest, and purchasing Crown debts from creditors below value. Latimer and Neville were subsequently impeached on similar charges. See Hatsell 50-51; Simpson 85-86; A. Wilshire, Constitutional History 43 (1929).

19. Simpson 85.

20. Prior to the reign of Henry IV, there were instances of charges being brought against public officials by the Crown, other public officials, lords, commoners, and private citizens. There were also variations in the forum which tried the impeachments. Sometimes the Crown was the trier; at other times, the Crown and the House of Lords; and still other times, various officials. Id. at 5-6; see Hatsell 74-76. In 1387 Richard II (1377-1399) sought and obtained an opinion from the judges that no official or judge could be impeached in Parliament without the will of the King. This opinion was nullified by Parliament during the first year of the reign of Henry IV. Simpson 6-7.

21. A. Carter, A History of the English Courts 64-65 (1927) [hereinafter cited as Carter]; Hatsell 75.

House of Lords was by majority vote,[22] and there generally was no limitation on the punishment that could be imposed.[23]

From 1376 to 1450, there were a number of cases in which ministers and judges were impeached.[24] Beginning in 1460 and continuing until 1620, impeachment fell into disuse because of the decline in the influence of Parliament. During that interval, bills of attainder were frequently utilized and the great state trials took place in the Star Chamber.[25] Between 1621 and 1787, more than fifty impeachment trials were held.[26] Many of these involved private individuals.

As early as 1388, Parliament employed the impeachment process against the judiciary. In that year Robert Belknap and five other judges were jointly impeached by the Commons for treason in answering "certain questions submitted to them as judges, wrongfully."[27] In convicting them, the Lords apparently thought themselves not bound by the common or civil law as used in the inferior courts, but only by the discussions and precedents of Parliament.[28] Similarly, in 1641 Sir Robert Berkley and others were impeached for high treason and misdemeanors.[29] Berkley,

22. The House of Commons functioned as prosecutor, appearing by Managers appointed for the trial, who presented the articles of impeachment. Carter 64; G. Cross & G. Hall, The English Legal System 223 (1964) [hereinafter cited as Cross & Hall].

23. 24 Halsbury's Laws of England 216 n.m (2d ed. 1937) [hereinafter cited as Halsbury]. In 1388, after convicting five judges, the House of Lords sentenced them to be "drawn and hanged as traitors, their heirs disinherited, and their lands, tenements, goods, and chattels forfeited to the King." Hatsell 54-55. It appears that the sentence was later commuted to banishment to Ireland. Simpson 88.

24. Hatsell states that during this period the Commons impeached for treason, misdemeanors, maladministration, and extrajudicial conduct of judges. Hatsell 63; see Simpson 85-90.

25. Carter 66; Hatsell 78-88. Taylor states that no impeachments occurred between that of Lord Stanley in 1459 and Sir Giles Mompesson in 1621—a period of one hundred and sixty-two years. 1 Taylor 442. The Star Chamber's criminal jurisdiction covered everything in which the government felt it was interested. Offenses that would have been subject to impeachment were tried there. Offenses of treason and treasonable practices were punished by bills of attainder. Hatsell 66. Attainder enabled Parliament to punish a man without a trial, avoiding the difficulty of proving a crime. See Carter 67; A. Wilshire, supra note 18, at 59. The procedure was successfully employed against Lord Strafford in 1641. Cross & Hall 224. It is said that the Lords would not have been able to convict him because of lack of proof, but they were willing to vote for a bill of attainder because they were convinced in conscience of his guilt. Id.; Taswell-Langmead's English Constitutional History 530-31 (11th ed. T. Plucknett (1960)) [hereinafter cited as Plucknett].

26. Simpson 88. Taylor, The American Law of Impeachment, 180 N. Am. Rev. 502, 504 (1905), refers to impeachments between 1621 and 1805 as the "political impeachments."

27. Simpson 88.

28. Hatsell 64. This stand was later rejected in 1709, when the Lords resolved that they would try cases of impeachment "according to the law of the land, and 'the law and usage of Parliament.'" Id. at 282-83.

29. Dwight, Trial by Impeachment, 15 Am. L. Reg. 257, 274 (1867).

a judge of the King's Bench, was charged with attempting to subvert the laws of the kingdom by traitorous words, opinions, judgments and practices. The articles all concerned on-the-bench conduct.[30] Despite the charges against him, Berkley was tried only for his opinion in the ship money cases,[31] and was convicted by the Lords two years after his impeachment.[32] Twenty-six years later the Commons sought to impeach Lord Chief Justice John Keeling for improperly confining juries which had decided cases against his wishes.[33] After hearing his defense, the House of Commons dismissed the proceedings.[34]

In 1680 there were two instances of futile attempts to remove judges from office. In the first instance Sir Francis North, Chief Justice of the Court of Common Pleas, was charged with assisting in the drafting and passage of "A Proclamation Against Tumultuous Petitions." Although he was impeached, nothing further came of the proceedings.[35] In the second instance, Lord Chief Justice Scroggs and others were impeached by the Commons for discharging a grand jury before it had made its presentments, legislating from the bench, setting improper fines, and other on-the-bench conduct.[36] An answer was filed by Scroggs but the case was never tried, since Parliament was soon afterwards dissolved.

An examination of the principal articles of impeachment in approximately one hundred English impeachment cases, involving both judicial and non-judicial officials, reveals that either "treason" or "high crimes and misdemeanors" was the charge in more than seventy-five percent of

30. Simpson 105-09.

31. Hatsell 397. The ship money incident involved a dispute between the King and Parliament. In 1628 Charles I consented to the Petition of Right, which prohibited the imposition of a tax without the consent of Parliament. Charles, having disbanded Parliament and in need of funds, sought to raise revenue by requiring both port and inland counties to provide an amount to maintain and repair the King's ships. The issue of whether this was a tax or a customs duty came before the courts which upheld the "tax," finding that the King's prerogative was superior to statute. When the Long Parliament came to power, it passed an act declaring the judgment void. Those judges who had supported the King were impeached for their "ship money" opinions. See E. Haynes, Selection and Tenure of Judges 60-67 (1944) [hereinafter cited as Haynes]; F. Maitland, The Constitutional History of England 307-08 (1926).

32. For one whole term subsequent to his impeachment he continued to hold court. Dwight, supra note 29.

33. Hatsell 113.

34. Id. at 114; Simpson 130.

35. See Hatsell 115-16; Simpson 135. "Tumultuous Petitioning" was by statute a misdemeanor. It was committed when more than twenty persons signed a petition to the Crown or Parliament to change the law, without obtaining prior approval from three judges or the grand assizes of the petition's contents. See Black's Law Dictionary 1685 (4th ed. 1951).

36. See Simpson 136-39.

such cases.[37] Those cases charging "high crimes and misdemeanors" which resulted in convictions involved acts of a criminal nature, grave misuse of one's official position, or treasonous-like conduct.[38]

37. Id. at 81-188. Blackstone viewed impeachment as the "trial of great and enormous offenders" (4 W. Blackstone, Commentaries 256 (4th ed. 1770)) who had seriously breached a public trust. Id. at 258. Professor Richard Wooddeson agreed, finding that the Lords should try the case since the influence of the accused official might obstruct the administration of justice in the ordinary courts. 2 R. Wooddeson, A Systematical View of the Laws of England 611 (1792). For other views of this author, see note 284 and accompanying text infra.

38. The convictions are those of the Earl of Suffolk, Chancellor, in 1386 (depriving the Crown of revenue and improper use of tax funds); Sir Henry Yelverton, Attorney General, in 1621 (acting without authority in office and neglect of office); Lord Treasurer Middlesex in 1624 (bribery and corruption in office); Sir Edward Herbert in 1642; George Benyon in 1642 (formulating a seditious petition); Sir Richard Gurney, Mayor of London, in 1642 (circulating illegal proclamations); Nine Lords at York in 1642 (support of the King in his determination to wage war on Parliament); John Goudet and others in 1698 (trading with the enemy in wartime); John Aurioll and John Du Maistre in 1698 (trading with the enemy in wartime); Henry Sacheverell in 1710 (speeches against the government); and Earl of Macclesfield, Lord Chancellor, in 1725 (extortion and sale of judicial offices). Simpson 86-167. Those cases charging "high crimes and misdemeanors" but not listed by Simpson as resulting in a conviction are: Bishop Wren in 1640 (unlawful innovations and restrictions upon religious practices); Richard Spencer in 1642; Sir Edward Dering in 1642 (formulating and circulating a seditious petition); Sir Thomas Gardiner in 1642 (enforcement of the illegal ship money tax and preventing the filing of lawful petitions); Henry Hastings and others in 1642 (inciting an unlawful assembly of three hundred armed persons); Lord Viscount Mordaunt in 1666 (illegally confined and refused to accept bail in Tayleur's case, thereby preventing Tayleur voting in Parliament); Peter Pett, Commissioner of the Navy, in 1668 (violation of orders and negligent command, causing the loss of Crown ships); Sir William Penn, Vice Admiral of His Majesty's fleet, in 1668 (fraud and embezzlement of cargo); Earl of Orrery in 1669; Sir Francis North, Chief Justice of the Common Pleas, in 1680 (drawing and passing an illegal petition); Duke of Leeds in 1695 (sale of his official influence); Earl of Portland in 1701; Earl of Oxford in 1701 (conversion of royal funds and property, and giving false advice to the King); Lord Somers, Lord Chancellor of England, in 1701 (giving false advice to the King and unlawfully affixing the Great Seal to treaties and commissions); Lord Halifax, Chancellor of the Exchequer, in 1701 (corruption in misusing Crown assets); Earl of Strafford in 1715 (acting to the detriment of the nation in wartime by consorting with the enemy); Warren Hastings in 1786 (misgovernment and maladministration in India); Lord Viscount Nelville, Treasurer of the Royal Navy, in 1806 (misappropriation of public funds). Id. at 111-90.

"[I]n applying the term 'high crimes and misdemeanors' to the conduct of English judges, [the Commons] only included in that category such acts as a judge performs while sitting upon the bench, administering the laws of the realm . . . . Excepting bribery, there is no case in the Parliamentary law of England which gives color to the idea that the personal misconduct of a judge, in matters outside of his administration of the law in a court of justice, was ever considered or charged to constitute an impeachable high crime and misdemeanor." Taylor, The American Law of Impeachment, 180 N. Am. Rev. 502, 506 (1905) (emphasis deleted). See Dwight, supra note 29, at 264, concluding that the "weight of authority is, that no impeachment will lie except for a true crime, or, in other words, for a breach of the common or statute law . . . ."

The most famous English impeachment proceeding was initiated three days before the Constitutional Convention convened in Philadelphia. On May 11, 1787, the House of Commons impeached Warren Hastings at the bar of the House of Lords for "high crimes and misdemeanors." Hastings had served as Governor-General of India for a period of thirteen years. He "had ruled an extensive and populous country, had made laws and treaties, had sent forth armies, had set up and pulled down princes"[39] —all in his official capacity. The articles of impeachment charged him with mismanagement and misgovernment in India, including acts of extortion, bribery, corruption, confiscation of property, and mistreatment of various provinces.[40] Some of the articles were poorly drafted and were criticized for not charging criminal conduct.[41] Notwithstanding this defect, the House of Commons instructed Edmund Burke, who had vowed in 1783 to bring Hastings "to justice,"[42] to impeach him "at the bar of the House of Lords."[43] The trial began in 1788[44] and resulted in an acquittal on all charges in 1795.[45]

Impeachment, however, was only one of several procedures which were available at the common law for removing judges.[46] From the earliest

39. Macaulay's Essay on Warren Hastings 175 (M. Frick ed. 1900) [hereinafter cited as Macaulay].

40. See 3 G. Gleig, Memoirs of Warren Hastings 283-85 (1841) [hereinafter cited as Gleig]; P. Marshall, The Impeachment of Warren Hastings (1965) [hereinafter cited as Marshall].

41. Marshall 56-58.

42. Id. at 19-20.

43. Id. at 58.

44. Gleig 332-33; Macaulay 171-78; L. Trotter, Warren Hastings 234-37 (1910). After two days of reading the charges and answers, Burke then consumed four days with his opening speech. He concluded by stating: "I impeach Warren Hastings of high crimes and misdemeanors. I impeach him in the name of the Commons' . . . . the English nation . . . . the people of India . . . . in the name of human nature itself . . . . I impeach the common enemy and oppressor of all!" Macaulay 179-80.

45. Marshall 85. Early in the trial a dispute between the Managers and the defense arose as to whether, in deciding the case, the Lords were bound either by the laws of Parliament or by the laws as observed in other courts. They resolved that they "intended to follow contemporary legal practice rather than seventeenth century precedents." Id. at 64, 69.

46. When judges were appointed during good behavior, the means available for their removal were: "In cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by scire facias to repeal his patent, 'good behaviour' being the condition precedent of the judges' tenure; secondly, when the conduct amounts to what a court might consider a misdemeanour, then by information; thirdly, if it amounts to actual crime, then by impeachment; fourthly, and in all cases, at the discretion of Parliament, 'by the joint exercise of the inquisitorial and judicial jurisdiction' conferred upon both Houses by statute, when they proceed to consider of the expediency of addressing the crown for the removal of a judge." 2 A. Todd, On Parliamentary Government in England

days, judges were appointed by the Crown and given "patents" which fixed their terms.[47] The usual term was *durante bene placito, i.e.*, at the pleasure of the Crown.[48] This term expired on the death of the king.[49] Because of their method of appointment and uncertain tenure, their loyalty was to the Crown. Henry VII (1485-1509) is said to have boasted to the effect that he ruled England with his laws, and his laws with his judges.[50]

Since a judge's tenure was dependent upon the pleasure of the Crown, his removal was quite simple:[51] The king had merely to revoke his patent.[52] This was done on a number of occasions when a judge's actions displeased the Crown. Thus, for example, in 1616 Sir Edward Coke was dismissed by James I because of his stand in favor of the independence of the judiciary and the rule of law.[53] In 1628, Charles I sought to remove Sir John Walter, Chief Judge of the Exchequer, for his opinion that no criminal proceeding could be brought against a member of Parliament for an act done in either House. Claiming that his patent was for good behavior and not at the pleasure of the Crown, Judge Walter resisted the king's efforts to remove him and demanded a *scire facias* in court to

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728-29 (1869) (emphasis deleted and footnote omitted) [hereinafter cited as Todd]. See also 6 Halsbury 609.

47. See Haynes 76-77; O. Phillips, A First Book of English Law 23 (5th ed. 1965). A patent has been defined as a "grant by the sovereign to a subject . . . under the great seal, conferring some authority, title, franchise, or property." Black's Law Dictionary 1282 (4th rev. ed. 1968).

48. See Haynes 62-67; Plucknett 465.

49. Haynes 54-55; Plucknett 466. Even after the passage in 1701 of the Act of Settlement, which provided for a term during good behavior, judicial commissions continued to expire upon the King's death. In 1720 the commissions were extended to six months after the King's death. Finally, in 1761 it was provided by statute that commissions survive the death of the King. Haynes 54-55; Todd 726.

50. Haynes 55.

51. See Cross & Hall 224; H. Hanbury, English Courts of Law 127 (1967) [hereinafter cited as Hanbury]; 2 Taylor 239-42.

52. "[M]anipulations of the bench were possible because judges were ordinarily appointed durante bene placito and were thus removable at pleasure without assigning any professional default." Plucknett 465.

53. Id. Coke was responsible for the judges of the exchequer refusing to consult with the King prior to rendering their decision in the "case of Commendams." When chastized by James I for this position, Coke alone defended their refusal. He was then dismissed. When asked "whether in a like case in future he would consult with the king before rendering judgment, in the event his majesty should consider himself interested, nothing more could be drawn from him than the statement that when such a case should arise, he would do what was fitting for a judge to do." 2 Taylor 241; see Plucknett 349-52.

determine his right to continue in office.[54] Charles chose instead to prohibit the judge from sitting in court.[55]

Removal by the Crown continued until the eighteenth century. Finally, in 1701, Parliament passed the Act of Settlement, which provided that "judges' commissions be made *quamdiu se bene gesserint* [during good behavior], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."[56]

After their tenure was changed to "good behavior," judges no longer were removable at the king's will or fancy.[57] "Address" by both Houses of Parliament was established as a means of removal.[58] It could be employed for practically any reason whatsoever, which meant that its use

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54. The writ of "scire facias" was used to revoke a patent after a determination was made that the holder had breached the condition upon which he held office, e.g., good behavior. Blackstone states that "where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of 'scire facias' in chancery." 3 W. Blackstone, Commentaries 256 (Christian & Archbald ed. 1825). In England the writ survived until 1947, when it was abolished by the Crown Proceedings Act. O. Phillips, supra note 47, at 24 n.5. Interestingly, the Federal Rules of Civil Procedure, after abolishing the writ, state: "Relief heretofore available by . . . scire facias may be obtained by appropriate action . . . under the practice prescribed in these rules." Fed. R. Civ. P. 81(b).

55. See Haynes 61-62; McIlwain, The Tenure of English Judges, 7 Am. Pol. Sci. Rev. 217, 221 (1913). In 1672, Sir John Archer, a judge of the common pleas who had been appointed for good behavior, refused to surrender his patent without a "scire facias." Although Charles II directed him to cease exercising his duties, he continued to do so. Id. at 223.

56. 12 & 13 Will. 3, c. 2, § 3 at 360 (1701). For the text of the Act, see Plucknett 460-66; 2 Taylor 422-23. The Act did not take effect until after the death of Queen Anne in 1714. See Haynes 78; Plucknett 464. Section 8 of the Act confirmed Parliament's decision in the impeachment of Earl Thomas Osborne of Danby that the King's pardon was not a defense to an impeachment by the Commons. See Plucknett 464, 532-34.

57. "The grant of an office during good behaviour creates an office for life determinable upon breach of the condition, and behaviour means behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour though not committed in connection with the office.

"Misbehaviour as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance, or neglect of or refusal to perform the duties of the office." 6 Halsbury 609-10 (footnotes omitted). Accord, Todd 727.

58. Address is a formal request by Parliament to the King seeking the dismissal of a judge whose conduct, while wrongful, fails to warrant an impeachment trial. See Black's Law Dictionary 60 (4th ed. 1951). Address afforded the two Houses of Parliament "a right to appeal to the crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of his judicial office." Todd 729.

depended on the conscience of Parliament.[59] However, unlike impeachment, address was not used in the period between 1701 and 1787.[60]

B. *Colonial Antecedents*

1. Pre-1776

During colonial America, executive and judicial officials usually served for an uncertain term. In the royal colonies governors were appointed by the Crown, and in the proprietary colonies by the proprietor (subject to ratification by the Crown after the seventeenth century). Both royal and proprietary governors served at the pleasure of the appointing authority. They received a commission, which was a formal but brief statement of their authority, from the Crown or proprietor. The manner in which they executed that authority was delineated in another document known as the "instructions."[61] There are a number of instances during colonial

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59. See W. Carpenter, Judicial Tenure in the United States 125 (1918). Upon an address by both houses, the Crown was bound by convention to comply with the request. O. Phillips, The Constitutional Law of Great Britain and the Commonwealth 445 (1952). "If there is a failure in the administration of justice, from whatever cause, affecting any judge, both Houses of Parliament may address the crown, to remove that judge from office." 1 Todd 355.

60. This procedure was used in 1830 against Sir Jonah Barrington, judge of the Court of Admiralty in Ireland, for allegedly appropriating funds belonging to the court. 62 Lords Journ. 599 (1830); A. Gibb, Judicial Corruption in the United Kingdom 64, 72 (1957). While address was instituted on other occasions, Barrington's case is the only instance where it was carried to a final conclusion. 6 Halsbury 610-11 nn.d, e & h. Removal by address under the Act of Settlement was first considered in 1805 when Parliament investigated the judicial misconduct of Judge Fox, with a view toward a possible address to the King. Between 1805 and 1867 historian Alpheus Todd records eight instances where a possible address was considered by Parliament. Only in 1830 was it brought to a conclusion when the sovereign, regretting the circumstances giving rise to the address, ordered Barrington removed from office. The only restraints on the employment of address were those Parliament, in exercising its position of trust, chose to impose upon itself. Todd, after reviewing available precedents, found six self-imposed "rules" on the utilization of address: The complaint originated in the House of Commons; the complaint could be initiated in various ways (e.g., by a member, a royal commission or even an individual wronged by the judge); members had to investigate the charges before Parliament decided to investigate; an investigation looking toward an address was only to be taken up if the alleged misconduct justified removal; the accused had to be informed of the charges and given an opportunity to present a defense, and the address to the sovereign had to state the misconduct which in Parliament's opinion rendered the judge unfit for office, so the King might exercise "constitutional discretion" in acting on the request. 2 Todd 729-44.

61. For a description of the various documents of government used during the colonial period, see L. Labaree, Royal Government in America 1-36 (1930) [hereinafter cited as Labaree].

America of governors being recalled for disobedience or inefficiency, or because of politics or patronage in England.[62]

Judges, on the other hand, were in some cases commissioned in England, and in other instances appointed by the governors under authority contained in the instructions.[63] During most of the colonial period these instructions were ambiguous as to the tenure which judges were to enjoy. They directed the governors not to express "any limitation of time" in any judicial commissions, apparently to protect judges from arbitrary removal by the governors.[64] It was not clear, however, whether the expression "no limitation of time" meant during good behavior or during the pleasure of the Crown. Up until the first third of the eighteenth century governors construed the expression, and so issued judicial commissions, as meaning during the Crown's pleasure.[65] A number of cases then occurred in which governors issued commissions to judges during good behavior.[66] As a result, in 1752 the authorities in England revised the instructions to the governors, making it clear that judicial commissions were to be issued during the pleasure of the Crown.[67] What followed was a period of strife in some of the colonies, involving the authorities in England, governors, and the colonial legislative bodies. Some legislatures refused to appropriate funds for the payment of judges' salaries unless they were issued commissions during good behavior. This put governors in a difficult position, because to issue such commissions they had to violate the terms of their instructions.[68] The British position on tenure, however, ultimately prevailed until the American Revolution.

That judges were rendered insecure in their positions was listed in the Declaration of Independence as one of the ways by which the king sought to establish an absolute tyranny over the states: "He has made Judges

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62. Id. at 125-26.

63. O. Dickerson, American Colonial Government 1696-1765, at 197 (1912) [hereinafter cited as Dickerson].

64. A typical instruction provided: "You shall not displace any of the judges, justices, or other officers or ministers within our said province, without good and sufficient cause to be signified unto us, and to our said commissioners for trade and plantations; and to prevent arbitrary removals of judges and justices of the peace, you shall not express any limitation of time in the commissions you are to grant." Id. at 195 & n.445. See also Labaree 381 n.20, 388-89.

65. Dickerson 196; Labaree 389-90.

66. Dickerson 199.

67. Id. at 208.

68. See id. at 200-09. In 1759, Pennsylvania passed a law providing for judges to hold their tenure during good behavior and establishing address by the assembly as a procedure for removal. This act was rejected by the British Government. Similar legislation was passed in Jamaica in 1751 and proposed in New York in 1761. Labaree 390-91.

dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

2. 1776-1787

The first state constitutions which were adopted drew on the common law traditions and the experience of a century and a half of colonial government. Provision was made in each state for a chief executive, a legislature and a judiciary.[69] A bicameral legislature existed in all but two of the states.[70] In eight states the executive was chosen by the legislature,[71] and in most states his term of office was limited to one year. Regarding the judiciary, a number of constitutions contained provisions providing that certain judges held office during good behavior.[72]

Almost all of the early state constitutions contained provisions for impeachment of officials, although the grounds for impeachment varied. Some state constitutions authorized impeachment where the safety of the state was "endangered" by "mal-administration, corruption or other means."[73] Other constitutions authorized impeachment for "misconduct and mal-administration" in office,[74] "mal and corrupt conduct" in office,[75] "misbehaviour,"[76] "mal-administration,"[77] and "misdemeanor or default."[78] In most states the lower house of the legislature was empowered to institute impeachment proceedings.[79]

69. The colonial charters and early state constitutions are reproduced in B. Poore, The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the United States (2d ed. 1878) [hereinafter cited as Poore's Constitutions].

70. Georgia became bicameral in 1789 and Pennsylvania in 1790.

71. He was elected by the people in Connecticut, Massachusetts, New Hampshire, New York and Rhode Island. In all of these states except New York, he was chosen by the legislature if he did not obtain a majority of the popular vote.

72. See, e.g., 1 Poore's Constitutions 275 (Del. Const. (1776)); id. at 826 (Md. Const. (1776)); id. at 968 (Mass. Const. (1780)); 2 id. at 1286 (N.H. Const. (1784)); id. at 1336 (N.Y. Const. (1777)); id. at 1412 (N.C. Const. (1776)); id. at 1625 (S.C. Const. (1778)); and id. at 1911 (Va. Const. (1776)).

73. See 1 id. at 276-77 (Del. Const. (1776)); 2 id. at 1912 (Va. Const. (1776)). The North Carolina Constitution of 1776 provided that officers offending the state through violation of any part of the state constitution, "maladministration," or "corruption" were subject to impeachment. 1 id. at 1413.

74. 1 id. at 963 (Mass. Const. (1780)); 2 id. at 1286 (N.H. Const. (1784)).

75. 2 id. at 1337 (N.Y. Const. (1777)); id. at 1624 (S.C. Const. (1778)).

76. 1 id. at 819 (Md. Const. (1776)); 2 id. at 1312 (N.J. Const. (1776)).

77. 2 id. at 1545 (Pa. Const. (1776)).

78. 1 id. at 254 (Conn. Charter (1662)); 2 id. at 1599 (Providence Plantations Charter (1663)).

79. Delaware, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina and Virginia all provided for impeachment in this manner. 1 id. at 276, 964, 1287, 1312; 2 id. at 1337, 1413, 1624, 1912. In New York and South Carolina, a two-thirds vote was required for impeachment.

The forum for trying impeachment proceedings varied. In some states the trial was by the upper house of the legislature;[80] in others, by the judiciary;[81] and in still others, by a combination of these forums.[82] Some state constitutions specified the punishment on impeachment to be removal from office and disqualification from holding office in the future, with the provision that the officer was also subject to indictment and other penalties imposed by law.[83] Additionally, some constitutions provided that the chief executive could not grant a pardon in cases of impeachment.[84] Aside from impeachment, a number of state constitutions also provided, in the case of judges, for the British system of removal by the address of the legislature.[85]

At the national level, the Articles of Confederation, which had become effective in 1781, constituted the basic charter of government. It provided for a Congress in which each state had one vote, with the assent of nine being required for important decisions. The Articles severely limited the powers of Congress and completely failed to provide for a national judiciary or chief executive.[86] Nowhere did it contain any impeachment provisions.

C. *Constitutional Convention of 1787*

The debates at the Constitutional Convention of 1787 clearly reveal that the delegates were familiar with the colonial charters, early state constitutions, and common law traditions and precedents, and were knowledgeable in the various forms of government. This background particularly influenced them in formulating the impeachment provisions of the Constitution.

On May 29, 1787, four days after the Convention opened, Edmund Randolph of Virginia presented the fifteen resolutions of his state's plan,

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80. E.g., Delaware, New Hampshire and New Jersey. Id. at 276, 1286, 1312.

81. E.g., North Carolina and Virginia. 2 id. at 1413, 1912.

82. In New York and South Carolina, a two-thirds vote was required. Id. at 1337, 1624.

83. This was true in Delaware, Massachusetts, New Hampshire, New York and Virginia 1 id. at 275, 963, 1286; 2 id. at 1337, 1912.

84. This limitation was imposed in Massachusetts, New Hampshire and Pennsylvania. 1 id. at 966, 1285; 2 id. at 1545.

85. E.g., Delaware, Massachusetts, New Hampshire, and South Carolina. 1 id. at 276, 969, 1290; 2 id. at 1625. In Maryland, a two-thirds vote of both houses was required. 1 id. at 819. In Pennsylvania, judges were removable for "misbehavior" at any time. 2 id. at 1545. Delaware also provided for removal of officers on "conviction of misbehavior at common law . . . ." 1 id. at 276.

86. In 1786 it was proposed that the Articles be amended to provide, among other things, for a federal court to try and punish all officers appointed by Congress for "all crimes, offenses and misbehavior in their offices." See H. Hockett, The Constitutional History of the United States 1776-1826, at 186 (1939).

commonly known as the Virginia Plan. This plan, largely the handiwork of James Madison, called for the creation of a strong national government consisting of an executive, a two-house legislature, and a judiciary. The executive, whose term was not specified, was to be elected by the national legislature and was not to be eligible for re-election. The judiciary was to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the national legislature, to hold their offices during "good behaviour."[87] It was to have jurisdiction of, *inter alia*, "impeachments of any National officers . . . ."[88] The Virginia Plan, however, did not specify any grounds for impeachment.

On the same day that the Virginia Plan was introduced, Charles Pinckney of South Carolina proposed his plan of government. Although the original of his plan has never been located, it is believed to have provided for a tripartite system of government. The power of impeachment was lodged in the lower house of the legislature and the trial was assigned to the federal judiciary.[89]

On May 30, the Convention resolved itself into a Committee of the Whole to discuss the Virginia Plan point by point. On the following day a discussion ensued as to the executive article of the Virginia Plan. During this discussion Gunning Bedford, Jr., of Delaware, opposed a long term, stating that a chief executive might prove to be incapable of discharging his duties. "An impeachment . . . would be no cure for this evil, as an impeachment would reach misfeasance only, not incapacity."[90] Randolph felt a plural executive was desirable in part because one "can not [*sic*] be impeached until the expiration of his Office, or he will be dependent on the Legislature . . . ."[91]

On June 2, John Dickinson of Delaware proposed that the executive be made removable by the national legislature on the request of a majority of the legislatures of the individual states.[92] He said that "he did not like the plan of impeaching the Great Officers of State." George Mason of Virginia observed that "[s]ome mode of displacing an unfit magistrate

87. 1 The Records of the Federal Convention of 1787, at 21-22 (Farrand ed. 1911 & 1937) [hereinafter cited as Farrand].

88. Id. at 22.

89. One copy of his plan, which was transmitted to John Quincy Adams in 1818 by Pinckney himself, referred to "Treason, Bribery or Corruption" as the grounds for presidential impeachment. 3 Farrand 600. Upon seeing this copy, Madison questioned its accuracy. Id. at 601-02. A reconstructed copy of the plan (see id. at 604) prepared by certain scholars refers to "all Crimes . . . in their Offices" as the grounds for impeachment of officers of the United States. Id. at 608.

90. 1 id. at 69.

91. Id. at 71.

92. Id. at 85.

is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen."[93] Wilson and Madison objected to Dickinson's proposal, declaring that "it would enable a minority of the people to prevent [the]removal of an officer who had rendered himself justly criminal in the eyes of a majority . . . ."[94] Hugh Williamson of North Carolina then moved to add to the executive article the words "to be removeable [*sic*] on impeachment and conviction of mal-practice or neglect of duty . . . ."[95] This motion, seconded by William R. Davie of North Carolina, carried.

During the next week, the delegates devoted some time to the judicial article. James Wilson of Pennsylvania suggested that judges be appointed by the President. Madison, however, felt that appointment should be by the Senate. On June 13, Randolph and Madison successfully moved the adoption of a resolution which placed "impeachments of any national officers" within the jurisdiction of the judiciary.[96] That same day the Committee reported out the Virginia Plan, as amended. Among other things, it provided that the chief executive was to be elected by the national legislature for a seven year term, and that judges were to be appointed by the upper house and to hold their term during good behavior. The impeachment provisions consisted of those agreed to on June 2, and earlier on June 13.

On June 14, discussion of the Virginia Plan was postponed at the request of William Patterson of New Jersey. On the following day Patterson presented nine resolutions (the New Jersey Plan), under which there was to be a unicameral legislature (in which each state was to have one vote), a supreme court, and a plural executive elected by Congress. The executive was to be removable by Congress on application by a majority of the state executives and was not to be eligible for another term. The Supreme Court was to be appointed by the President, to hold their offices during good behavior, and "to hear & determine in the first instance on all impeachments of federal officers . . . ."[97]

Three days later Alexander Hamilton presented a sketch of his plan of government, which was patterned after the British Government. "[H]e had no scruple in declaring . . . that the British Govt. was the best in the world: and that he doubted much whether any thing short of it would do in America."[98] Under Hamilton's Plan, the chief executive, senators, and

93. Id. at 86.
94. Id.
95. Id. at 88.
96. Id. at 232.
97. Id. at 244.
98. Id. at 288.

judges were to serve during good behavior. The chief executive, senators and "all officers of the United States [were] to be liable to impeachment for mal- and corrupt conduct; and upon conviction to be removed from office, & disqualified for holding any place of trust or profit . . . ."[99] Impeachments were to be tried by a court the composition of which is not clear.[100]

On June 19, after considering the Patterson resolutions, the Committee of the Whole reaffirmed its action on the Virginia Plan. The subject of impeachment did not come up again at the Convention until July 18, during a discussion on the method of appointing judges. During the debate, Mason observed that the method might depend on the mode of trying impeachments of the executive, since if the judges try impeachment, they ought not be appointed by the executive.[101] Gouverneur Morris of Pennsylvania suggested that a trial of a President's impeachment by the judiciary would likely involve intrigue between the legislative branch and the judges, thereby frustrating an impartial trial. At some point during the debate it was unanimously agreed to strike out of the judicial resolution the words "impeachments of national Officers."[102]

On July 20, the delegates engaged in an extensive debate as to whether the President should be subject to impeachment. Pinckney and Morris moved to eliminate from the amended Virginia Plan the clause providing for the President's removal. In opposition, Mason argued that impeachment was necessary. "When great crimes were committed he was for punishing the principal as well as the Coadjutors."[103] Davie, Franklin, Madison, Gerry, Randolph and Wilson were also of the view that impeachment was necessary. Davie considered it "an essential security for the good behaviour of the Executive."[104] In Franklin's opinion, history showed that where there has been no means of removal of an executive, there has been recourse to assassinations.[105] Madison stated that it was "indispensable that some provision should be made for defending the Community [against] the incapacity, negligence or perfidy of the chief Magistrate."[106] Madison remarked that the President "might pervert his administration into a scheme of peculation or oppression. He might

99. Id. at 292.

100. One copy of Hamilton's plan specified the forum as a court consisting of the justices of the Supreme Court plus the chief or senior judge of each state. Another copy confined the court to state judges. See 3 id. at 618-19.

101. 2 id. at 41-42.

102. Id. at 39. The good behavior tenure provision was unanimously agreed to. Id. at 38.

103. Id. at 65.

104. Id. at 64.

105. Id. at 65.

106. Id.

betray his trust to foreign powers."[107] "In the case of the Executive Magistracy," said Madison, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic."[108] Said Randolph: "Guilt wherever found ought to be punished. The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money, will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections."[109] King expressed the opinion that impeachment was not appropriate in the case of an officer who served for a fixed term. It was appropriate, he said, in the case of the judiciary, since they hold their offices during good behavior. He stated that "[i]t is necessary therefore that a forum should be established for trying misbehaviour."[110] King added that since the President was to serve for a limited term, he would periodically be tried for his behavior by his electors" and "he ought to be subject to no intermediate trial, by impeachment."[111] Near the end of the debate Morris changed his view and argued for impeachment, asserting that it was necessary for cases of bribery, treachery, corruption and incapacity.[112] Following the debate the Convention, by a vote of eight to two, agreed to the clause providing for the President's removal for "malpractice or neglect of duty."[113]

On July 23, a Committee of Detail was organized to prepare and report a Constitution in conformance with the proceedings held up until that time.[114] On July 24, the Committee of the Whole was discharged and the various plans of government were referred to the Committee of Detail; on July 26, the Convention reaffirmed the provision that the President

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107. Madison also noted that the executive was different from the legislative branch, stating: "It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust." He added that the "difficulty of acting in concert for purposes of corruption was a security to the public." Id. at 66.

108. Id.

109. Id. at 67.

110. Id.

111. Id.

112. Id. at 68-69. Earlier in the debate Morris said that corruption and "some few other offences . . . ought to be impeachable; but . . . the cases ought to be enumerated & defined." Id. at 65.

113. Id. at 61, 69. No decision was reached as to the forum for trying impeachments. Pinckney, King and Randolph urged that the legislature not be involved, since otherwise the President's independence would be sharply curtailed.

114. Id. at 95. Its members were John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania. Id. at 97.

shall be "removable on impeachment and conviction of malpractice or neglect of duty;"[115] and on July 27, the Convention adjourned so that the Committee of Detail could draft its report.

The Committee presented its report on August 6. Article IV of its report provided that the House of Representatives "shall have the sole power of impeachment."[116] Article X, the executive article, provided that the President "shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption."[117] Article XI, the judicial article, gave the Supreme Court original jurisdiction of "the trial of impeachments of Officers of the United States . . . ."[118]

The Committee's report was the subject of discussion for the next five weeks. On August 9, the Convention agreed to the clause giving the House the sole power of impeachment.[119] On August 20, a number of resolutions concerning the organization of the executive branch were proposed by Gouverneur Morris and Charles Pinckney, and referred to the Committee of Detail. These resolutions called for the appointment of various executive officers who were to "be liable to impeachment and removal from office for neglect of duty malversation, [*sic*] or corruption."[120] Gerry then moved that the Committee devise a method for trying judges in cases of impeachment. Two days later the Committee returned with the following addition to the good behavior provision of Article XI, Section 2: "The Judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives . . . ."[121]

On August 25, the Convention adopted a provision excluding cases of impeachment from the President's power to grant reprieves and pardons.[122] On August 27, the Convention postponed consideration of the impeachment provision at the request of Gouverneur Morris, who thought that the Supreme Court was an improper tribunal, "particularly, if the

115. Id. at 116.

116. Id. at 178-79.

117. Id. at 185-86. The "treason, bribery, or corruption" language appears to have been taken from a document in the handwriting of Edmund Randolph. Id. at 137 & n. 6.

118. Id. at 186. Section 4 of this article provided that there was to be no jury in impeachment cases. Section 5 provided that the judgment in cases of impeachment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honour, trust or profit, under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgement and punishment according to law." Section 2 of Article XI provided that judges of the Supreme Court and of the inferior courts would hold their offices during good behavior. Id. at 186.

119. Id. at 231.

120. Id. at 344.

121. Id. at 367.

122. Id. at 411.

first judge was to be of the [P]rivy Council."[123] Dickinson then moved to add, after the good behavior provision in the judicial article, the following qualification: "[P]rovided that they may be removed by the Executive on the application [of] the Senate and House of Representatives."[124] Gerry seconded the motion. Morris argued against it, on the theory that it was contradictory to "say that the Judges should hold their offices during good behavior, and yet be [removable] without a trial." In his opinion, "it was fundamentally wrong to subject Judges to so arbitrary an authority." Sherman disagreed, noting that a similar provision was contained in the British statutes. He felt that there was no impropriety if the provisions "were made part of the Constitutional regulation of the Judiciary establishment."[125] Wilson remarked that such a provision was less dangerous in the British statutes because it was unlikely that the House of Lords and House of Commons would concur on the same occasions. "The Judges would be in a bad situation," in Wilson's view, "if made to depend on every gust of faction which might prevail in the two branches of our [Government]."[126] Rutledge and Randolph also noted their objections to the provision. Randolph felt that it weakens "too much the independence of the Judges."[127] On the motion, only the state of Connecticut voted for it. It was opposed by seven states.

On the following day the Convention adopted the provision that the judgment in cases of impeachment would not extend further than to removal from office and disqualification to hold office in the future.[128] On August 31, a number of matters were referred to a Committee of Eleven which was commissioned to report on those parts of the Constitution that had been postponed or not acted upon. On September 4, David Brearley of New Hampshire, the chairman of the Committee, presented a partial report.[129] Among other things, this report called for the creation of an office of Vice President and proposed an electoral college method of electing the President. In the area of impeachment, it provided that the Senate

123. Id. at 427.

124. Id. at 428.

125. Id.

126. Id. at 429. Wilson noted that Chief Justice Holt "had successively offended by his independent conduct, both houses of Parliament. Had this happened at the same time, he would have been ousted." Id.

127. Id.

128. Id. at 435. It is interesting to note that also that day the words "high misdemeanor" were eliminated from the extradition provisions of Article XV and the words "other crime" substituted—"it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." Id. at 443. The expression "high misdemeanors" was also referred to by Rufus King during the debate concerning a definition of treason. King stated that treason against particular states could be punishable by such states as "high misdemeanors." Id. at 348.

129. Id. at 497-99.

would have the power to try all impeachments, with a two-thirds vote required for conviction. The Vice-President was to be *ex officio* President of the Senate, except when the President was tried, in which event the Chief Justice was to preside. The grounds for conviction of the President were limited to "treason or bribery."

In presenting his own and the Committee's reasons for the creation of the electoral college, Morris stated that it was difficult to find a body other than the Senate to try impeachment cases.[130] He thought that "[a] conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment."[131]

On September 8, the impeachment provisions were taken up by the Convention. Mason opened the discussion by questioning the limitation of impeachment to cases of treason and bribery. He felt that "[t]reason as defined in the Constitution [would] not reach many great and dangerous offences." He further was of the opinion that "[a]ttempts to subvert the Constitution [might] not be Treason as . . . defined" and that, since "bills of attainder . . . are forbidden," the power of impeachment should be extended.[132] Mason then moved to add "maladministration" as a ground for impeachment. Gerry seconded the motion. Madison objected that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." Mason thereupon withdrew the expression and substituted "other high Crimes & Misdemeanors against the State."[133] The motion carried without any discussion of the new phrase. The expression "against the State" was immediately changed to "against the United States."

Madison then directed his attention to the Senate as the forum for trying impeachments. He objected to this forum because the President "was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeasnor [sic]."[134] Under these circumstances, he said, the President was made "improperly dependent." Madison suggested the Supreme Court as either the forum or part of a forum. Gouverneur Morris argued for the Senate, believing that "there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes . . . ." The Supreme Court, he thought,

130. Id. at 500. This was one of the reasons why Congress was rejected as the body to elect the President. It apparently was felt that if Congress had the power to elect, it should not have the power to impeach.

131. Id.

132. Id. at 550. Mason noted that Hastings' actions would not have been deemed treason as defined.

133. Id.

134. Id. at 551.

"might be warped or corrupted."[135] Pinckney also spoke out against the Senate, stating that its use would make the President too dependent upon the legislature. Williamson, on the other hand, felt the Senate would be too lenient because of its sharing of various powers with the President, while Roger Sherman of Connecticut asserted that the Supreme Court was improper because the President appointed its members.[136] Madison's motion to eliminate the Senate was decisively rejected. The Convention then added to the impeachment provision that " '[t]he vice-President and other Civil officers of the U.S. shall be removed from office on impeachment and conviction as aforesaid.' "[137] Another addition was that the Senate would take an oath in an impeachment case.

A committee was then formed to revise the style of and arrange the articles, but without power to effect substantive changes. On September 12, the Committee returned a draft which, except for a few changes, was to become the Constitution.[138] One change made was the elimination of the words "against the United States" from the "high Crimes and Misdemeanors" expression. On September 14, Rutledge and Morris moved to amend the impeachment provisions to require that "persons impeached be suspended from their office until they be tried and acquitted."[139] Madison objected on the grounds that this would make the President even more dependent upon the legislature, since one branch would be able to effect his temporary removal. The motion was defeated by a vote of eight to three.[140] Three days later the Constitution was signed, with the impeachment provisions as they stand today.

D. *Ratifying Conventions*

Post-Convention discussion of the impeachment provisions was not extensive. One of the principal references in *The Federalist* occurs in number seventy-nine where, in commenting on the provision dealing with the compensation for judges, Hamilton stated:

> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point

135. Id.

136. Id.

137. Id. at 552.

138. With respect to that draft, Mason noted that there was an inconsistency between Article I, Section 3 and Article II, Section 4, in that the latter section did not mandate disqualification from holding office in the future in the event of a conviction on impeachment. Id. at 637.

139. Id. at 612.

140. Id. at 612-13.

which is consistent with the necessary independence of the judicial character, and is the only one which we find in our Constitution in respect to our own judges.

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.[141]

In *The Federalist* number sixty-five, where Hamilton gave the reasons for the Senate being chosen as the forum for trying impeachments, he stated:

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[142]

Hamilton went on to say that in England and in several states, the practice of impeachments was regarded "as a bridle in the hands of the legislative body upon the executive servants of the government."[143]

The impeachment provisions received some attention in the state ratifying conventions. Much of it centered on whether the Senate would convict persons to whose appointment it had consented, whether members of Congress were impeachable, whether the states could impeach state officers, and on the desirability of lodging the power of impeachment in the Congress. Some statements were made, however, which give a clue as to the understanding of the framers. In the Virginia ratifying convention, Edmund Randolph declared that "[i]n England, those subjects which produce impeachments are not opinions . . . . It would be impossible to discover whether the error in opinion resulted from a willful mistake of the heart, or an involuntary fault of the head."[144] In North Carolina, Governor Samuel Johnston, who was to become the state's first Senator, asserted that "[i]mpeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial pointed out for great misdemeanors against the public."[145] William MacLaine observed that members of Congress, while not impeachable, were "amenable to the law

141. 2 The Federalist No. 79, at 108-09 (Tudor Pub. Co. ed. 1937) (A. Hamilton).

142. Id. No. 65, at 17.

143. Id. at 18.

144. 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 401 (2d ed. 1836) [hereinafter cited as Elliot].

145. 4 id. at 48.

for crimes and misdemeanors committed as individuals."[146] James Iredell, the principal advocate of ratification in his state, stated that the power of impeachment was designed "to bring great offenders to punishment." "It is calculated," he said, "to bring them to punishment for crime which it is not easy to describe, but which everyone must be convinced is a high crime and misdemeanor against the government .... [T]he occasion for its exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot be easily reached by an ordinary tribunal."[147] He also noted that an official who is impeached might be liable for common law punishment if the offense "be punishable by that law."[148]

In the First Congress, during a debate regarding the advisability of empowering the President to remove public officers, Madison stated:

> The danger, then, consists in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.[149]

III. History of American Impeachment

In the 181-year history of the United States, there have been only twelve cases of impeachment at the federal level.[150] Eleven of these resulted in Senate trials, but only four ultimately resulted in conviction and removal. Among those impeached have been a President, a Senator, a Supreme Court Justice, a Cabinet member, a federal circuit court of appeals judge, and seven federal district court judges. An account of these impeachments follows. Since a proper understanding of the precedents, particularly the significance of the votes, is not possible without reference to the precise nature of the articles of impeachment themselves, the articles are summarized in detail in this section.

A. *William Blount*

On July 3, 1797, the United States House of Representatives received a confidential message from President John Adams regarding the conduct

146. Id. at 34.

147. Id. at 113.

148. Id. at 114.

149. 1 Annals of Cong. 498 (1789).

150. In J. Borkin, The Corrupt Judge (1962), the author states that fifty-five federal judges have been subject to congressional inquiry. Eight were censured but not impeached and seventeen resigned during the period of investigation. Id. at 210. According to Borkin, Judge Martin T. Manton of the Second Circuit Court of Appeals was the first federal judge indicted for "corrupting his office." Id. at 28.

of William Blount, then a Senator from Tennessee and a former delegate to the Continental Congress and the Constitutional Convention. On July 7, the House resolved to bring impeachment proceedings against him, and on the following day he was expelled from the Senate.[151]

The articles of impeachment were presented to the Senate on February 7, 1798. They alleged "high crimes and misdemeanors," specifically charging that, while Spain and England were at war, he conspired to transfer to Great Britain property belonging to Spain in Florida and Louisiana, thereby violating America's neutrality and the laws of the United States; that he caused tribes of Indians in the United States to commence hostilities against the subjects of Spain; that he conspired in violation of law to undermine the confidence of Indian tribes in an official agent of the United States appointed to reside among them; that he attempted to seduce another official from his duty; and that he attempted to foment certain tribes to disaffection toward the United States.[152]

In December, 1798, Blount attacked the jurisdiction of the Senate to try him. He contended that a Senator was not a civil officer within the meaning of the Constitution, and that even if he had been a civil officer, he lost that status when he was expelled from the Senate.[153] An extensive debate on the point followed. Finally, the Senate rejected, by a vote of fourteen to eleven, a proposed resolution overruling Blount's plea. The Senate then decided, by the same vote, to dismiss, finding that Blount's plea to its jurisdiction was sufficient.[154] Its decision has established the precedent that Senators are not impeachable.[155]

B. *John Pickering*

In February, 1803, the House of Representatives received from President Thomas Jefferson a message, together with certain evidence, regarding the conduct of John Pickering, a United States district court judge in New Hampshire. This launched, it is generally believed, an attempt by Jefferson to remove Federalist judges from the bench and replace them with Democratic-Republican judges.[156]

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151. 3 Hinds' Precedents § 2294-98, at 644-48.

152. Id. § 2302, at 653.

153. Id. § 2310, at 663. See also id. § 2316, at 671.

154. Id. § 2318, at 679.

155. See Potts, Impeachment As a Remedy, 12 St. Louis L. Rev. 15, 18-23 (1927); Thomas, The Law of Impeachment in the United States, 2 Am. Pol. Sci. Rev. 378, 386 (1908). Another interpretation is that once a member of the Congress has been expelled, he subsequently may not be impeached.

156. See 3 A. Beveridge, The Life of John Marshall 167 (1919); W. Carpenter, Judicial Tenure in the United States 110-11 (1918); M. Peterson, Thomas Jefferson and the New Nation 794, 796 (1970).

On March 2, following a committee's recommendation, the House voted, forty-five to eight, to impeach Pickering for "high Crimes and misdemeanors."[157] Four articles of impeachment were presented in the Senate on January 4, 1804. The first three referred to conduct committed in violation of law during a suit by the government to condemn a ship and its cargo. Specifically, it was alleged that, with intent to evade an Act of Congress, he returned a lawfully seized vessel to its owner without obtaining a bond for the value of the ship and a certificate from its owner showing that all duties had been paid as required by the Act; that he wrongfully refused to hear government testimony; and that "wickedly" intending to violate the law, he refused the United States Attorney's claim for an appeal from his decision. Article four charged that he was intoxicated and used profanity on the bench.[158]

Pickering did not answer the charges. His son, however, petitioned the Senate to accept evidence of his father's insanity.[159] This request was strongly opposed by some Senators, who apparently felt that if he were found insane the Senate would not be able to find him guilty of "high Crimes and misdemeanors."[160] After some debate, evidence was finally admitted as to the judge's possible insanity.[161] At the trial, the Managers appointed by the House of Representatives produced evidence consisting mainly of depositions of witnesses, transcripts of proceedings in Judge Pickering's court, and recitals of the laws he was said to have violated.[162] Testimony was received as to his habitual intoxication[163] but, since Pickering did not appear either in person or by counsel, there was no cross-examination of witnesses. One of the more heated discussions involved the form of the question to be voted upon by the Senate. The first form proposed was: "Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the — article of impeachment, or not guilty?"[164] This form, it was said, was similar to that used in the Hastings trial and would best "collect the sense of the Court."[165] A second proposal amounted to striking out the words "high Crimes and misdemeanors." After a closed-session debate, the second proposal was adopted.

Senator Alexander White of Virginia strongly objected to this form.

157. 3 Hinds' Precedents § 2319, at 682.
158. Annals of Cong., 8th Cong., 1st Sess. 319-22.
159. Id. at 328-29.
160. See W. Carpenter, supra note 156, at 117.
161. Annals of Cong., 8th Cong., 1st Sess. 332-33.
162. Id. at 333-53.
163. Id. at 354-59.
164. Id. at 364.
165. Id.

He argued that to remove a judge without a judgment that the acts constituted high crimes and misdemeanors would destroy the "good Behaviour" provision and place judges at the mercy of a majority of Congress.[166] When it became clear that the form would not be changed, some Senators walked out "because they did not choose to be compelled to give so solemn a vote upon a form of question which they considered an unfair one . . . ."[167]

The vote was taken on the form adopted and, on each article, Pickering was found guilty by a vote of nineteen to seven. A final question was put as to whether he should be removed from office. This question was answered affirmatively by a vote of twenty to six.[168]

C. *Samuel Chase*

Two months prior to Pickering's conviction, Representative John Randolph of Virginia offered a resolution calling for an investigation of the official conduct of Associate Justice Samuel Chase, a Federalist appointee to the Supreme Court whose views were anathema to the Democratic-Republicans.[169] Randolph made a statement of charges against Chase, to which strong objection was made on the grounds that, even if true, they amounted only to errors in judgment. It was contended that the charges did not justify such an investigation. The House decided to investigate[170] and, on March 12, 1804, it agreed to a resolution impeaching Chase. Interestingly, this was the same day that the Senate convicted Pickering.

Eight articles of impeachment were brought against Chase. The first six concerned his actions at the treason and sedition trials of John Fries and James T. Callender,[171] while the last two involved addresses he delivered to grand juries.[172] Article one charged that he violated his obligations of office, conducting himself during the Fries trial in an oppressive and unjust manner by depriving Fries of certain constitutional

166. Id. at 365.

167. Id. at 366.

168. Id. at 367.

169. See 3 A. Beveridge, supra note 156, at 170-71.

170. The Hastings trial was used as a precedent for a single member of Congress putting the impeachment process into motion. 3 Hinds' Precedents § 2343, at 713. See 14 Annals of Cong. 1173 (1804) for the investigating committee's report.

171. Fries was tried for opposing, in 1799, the collection of a federal property tax enacted by Congress in 1798. He was charged with treason, convicted, and sentenced to death, but was pardoned by President Adams against the advice of his Cabinet. 7 Dictionary of American Biography 34 (Johnson & Malone ed. 1931). Callender was tried under the Sedition Law for remarks about President Adams contained in a book he had written. He was convicted, fined two hundred dollars, and sentenced to imprisonment for nine months. In 1801 President Jefferson granted him a pardon. 3 id. at 425-26 (Johnson ed. 1929).

172. 3 Hinds' Precedents § 2346, at 722-24.

rights. Article two charged that in order to assure the convictions of Callender, who was accused of libeling President Adams, he allowed a juror to serve knowing that the juror had made up his mind prior to the trial. The third charged that, with intent to insure Callender's conviction, he refused to admit certain evidence offered by the defense. Article four charged him with a number of unjust trial practices, allegedly designed to prejudice the rights of Callender. Article five charged that, contrary to law, he ordered the arrest of Callender, who had been indicted for a non-capital offense, when only a summons should have been issued. The sixth article charged that Callender came before him and was ordered to trial during the same term, contrary to a law which provided that in non-capital cases the accused need not answer until the next term of court. The seventh article charged Justice Chase with improper suggestions to a grand jury concerning the conduct of a certain Delaware printer whom he had characterized as "seditious." The final article charged that he delivered an intemperate harangue to a grand jury with intent to excite resentment against the government.

Chase was defended at the trial by Luther Martin, a former delegate to the Constitutional Convention. At the trial the House Managers argued that mere misbehavior, if proven, would suffice to remove a judge. Martin strongly disagreed, stating that under the Constitution an officer could be impeached only for indictable offenses, and that no such offenses were involved in the case at bar.[173]

In voting on the articles of impeachment, the form of question put to each Senator was as follows: "Mr. —, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the — article of impeachment?"[174] On March 1, 1805, Justice Chase was found not guilty on each charge.[175] His acquittal has been

173. Annals of Cong., 8th Cong., 2d Sess. 432 (1805). During the course of his argument, Martin cited a number of common law commentators for the proposition that a "misdemeanor" was understood to be a crime. He said that "misbehavior" was synonymous with "misdemeanor" and that "to be guilty of a misdemeanor, is a violation of some law punishable . . . ." Id. at 436. He concluded that Chase's impeachment was an improper usage of the impeachment power and represented a great threat to the integrity of the judiciary. See 3 Beveridge, supra note 156, at 206.

174. 3 Hinds' Precedents § 2363, at 771.

175. The vote was as follows:

Article	Guilty	Not Guilty
1	16	18
2	10	24
3	18	16
4	18	16
5		Unanimous
6	4	30
7	10	24
8	19	15

Id.

viewed as a precedent that judges cannot be removed for political reasons or mere misbehavior, but only for the "gravest cause."[176]

D. *James H. Peck*

On April 22, 1830, James H. Peck, a federal district court judge in Missouri, was impeached by the House. He was charged in a single article with "high misdemeanors in office."[177] It was alleged that, under the color of law and his office, he wrongfully convicted and punished an attorney for contempt. The attorney's only offense was publication of a mildly critical reply to an article recently written by the judge, which attempted to justify the judge's decision in a case that was presently on appeal. The House noted in the charges that the acts alleged were willful, unjust, and committed in an official capacity.[178]

In January, 1831, the Managers appointed by the House commenced their arguments. Their primary contention was that impeachment should not be limited to indictable offenses. Propounding his views on the nature of impeachable offenses, Representative Ambrose Spencer of New York argued:

> A judicial misdemeanor consists, in my opinion, in doing an illegal act, colore officii, with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case, with bad motives.[179]

James Buchanan, who later was to become the fourteenth President, argued that misbehavior was a ground for impeachment—apparently conceding during his argument that to be impeachable the offenses must be committed in one's official capacity.[180] In contrast, counsel for Peck argued that mere mistake of law, without wrongful intent, does not constitute a high crime or misdemeanor, and that it would be absurd to hold a judge answerable for an error in judgment. He asserted that intent was a necessary element in any finding of impeachable conduct, and that

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176. Blackmar, On the Removal of Judges: The Impeachment Trial of Samuel Chase, 48 J. Am. Jud. Soc. 183, 187 (1965). Following the vote in the Chase trial, John Randolph, one of the House Managers, proposed an amendment to the Constitution making federal judges removable by the President on the address of the House and Senate. 2 Am. Hist. Ass'n. Ann. Rep. 1896, at 149 (1897); see 15 Annals of Cong. 1213 (1805).

177. 3 Hinds' Precedents § 2370, at 786-88.

178. See Taylor, The American Law of Impeachment, 180 N. Am. Rev. 502, 511 (1905).

179. 3 Hinds' Precedents § 2379, at 798. "Colore officii" has been defined as "[o]fficer's acts unauthorized by officer's position, though done in form that purports that acts are done by reason of official duty and by virtue of office." Black's Law Dictionary 332 (4th rev. ed. 1968).

180. 3 Hinds' Precedents § 2381, at 800-01.

such intent was lacking in Peck's case because his acts were within the purview of his official power.[181]

On January 31, 1831, the following question was put to each of the Senators in alphabetical order: "Mr. Senator ____ : What say you: Is James H. Peck, judge of the district court of the United States for the district of Missouri, guilty or not guilty of the high misdemeanor charged in the article of impeachment exhibited against him by the House of Representatives?"[182]

The vote on the question thus phrased was twenty-one in favor of conviction and twenty-two opposed.[183] Peck was therefore acquitted.

E. *West H. Humphreys*

Early in 1861, West H. Humphreys, United States district court judge in Tennessee, ceased holding court and commenced acting as a judge for the Confederacy. On January 8, 1862, a resolution was introduced and agreed to in the House of Representatives authorizing a committee to inquire into his conduct.[184] Two months later the committee submitted its report, in which it recommended impeachment proceedings. Subsequently, seven articles of impeachment alleging "high crimes and misdemeanors"[185] were presented against him.

The first article charged that, in violation of his oath and duties, he endeavored to incite revolt and rebellion against the government by publicly declaring that it was the right of the people, by an ordinance of secession, to absolve themselves from all allegiance to the United States government, the Constitution, and the laws thereof. Article two alleged that, with "intent to abuse" the trust reposed in him and to "subvert the lawful authority and Government of the United States," he unlawfully agreed to an ordinance of secession "with other evil-minded persons." The third article charged that, in conjunction with other persons, he "unlawfully" organized armed rebellion and levied war against the United States. In the fourth article, he was accused of conspiring with Jefferson

181. Id. § 2382, at 801-02. His attorney argued that the court had the power exercised by Peck but that if it did not have such power "or if, having it, the case was not a case proper for its application, still the act did not proceed from the evil and malicious intention with which it is charged, and which it is absolutely necessary should have accompanied it to constitute the guilt of an impeachable offense." Cong. Globe, 40th Cong., 2d Sess. 49(n.‡) (Supp. 1868).

182. 3 Hinds' Precedents § 2383, at 803. Following the trial, Congress promptly enacted an amendment to the judicial code limiting the power of judges to punish for contempt. L. Goldberg, Lawless Judges 93 (1935).

183. 3 Hinds' Precedents § 2383, at 804.

184. Id. § 2384, at 805.

185. Id. § 2390, at 810.

Davis and others to oppose the United States government by force. The fifth charged that, in disregard of his duties and with intent to aid and abet the overthrow of the government, he refused to hold court as required. Article six claimed that, with "intent to subvert the authority of the Government," he unlawfully acted as a Confederate court judge.[186] Article seven alleged that, while assuming to act as a Confederate judge and "without lawful authority, and with intent to injure," he caused the unlawful arrest of a United States citizen, one William G. Brownlow.

After hearing the articles, the Senate decided that a summons should issue directing Humphreys to answer the charges. The summons was issued and, on the return day, the Senate convened as a high court for the trial. Humphreys did not appear on that day or on the adjourned day. Consequently, the trial proceeded ex parte. Witnesses were called and examined but, since Humphreys was not represented, there was no cross-examination.[187] At the conclusion of the Managers' presentation, the following question was put to the Senate: "Is the accused, West H. Humphreys, guilty or not guilty of the high crimes and misdemeanors as charged in this article of impeachment?"[188]

Humphreys was found guilty by the requisite two-thirds vote on all the charges, except those in specification two of article six.[189] A resolution was then passed removing him from office and disqualifying him from holding any office of trust, honor or profit under the United States.

F. *Andrew Johnson*

Following his succession to the Presidency on April 15, 1865, Andrew Johnson became the protagonist in a bitter struggle between the executive

186. Specification two of this article charged that while acting as a judge of the Confederacy, he ordered the confiscation of the property of Andrew Johnson and one John Catron. Specification three charged that, acting in an illegal position, he caused the unlawful arrest of citizens of the United States for their rejection of the Confederacy. Id. at 811.

187. Id. § 2395.

188. Id. § 2396, at 817.

189. The vote was as follows:

Article	Guilty	Not Guilty
1	39	0
2	36	1
3	33	4
4	28	10
5	39	0
6 (Spec. 1)	36	1
(Spec. 2)	12	24
(Spec. 3)	35	1
7	35	1

Id. at 818.

and legislative branches of government over Reconstruction.[190] While the specifics leading to his eventual impeachment are numerous,[191] the Tenure of Office Act seems to have served as the catalyst. The ostensible purpose of the Act was to prohibit presidential appointments after the Senate had adjourned, while the intent of its sponsors was to strip the President of the power to remove Republicans from their appointed offices.[192] The Act forbade presidential removal of officials named by the President without his first obtaining the Senate's consent.[193] Johnson and his Cabinet felt the Act was unconstitutional,[194] and he therefore vetoed it. Despite his veto, the Act secured the two-thirds vote necessary for passage, thereby setting the stage for the drama that followed.[195] With a hostile Congress anxious to impeach Johnson, Stanton was informed of his dismissal in a letter from the President.[196]

On February 21, 1868, Stanton informed the House of Representatives of his removal and the appointment of Lorenzo Thomas, Adjutant-General of the Army, as Secretary of War *ad interim*.[197] That same day John Covode offered a resolution in the House that Johnson be impeached.[198] The Senate, after a seven hour deliberation, adopted a resolution finding that the removal was without authority,[199] and Stanton barricaded himself in his office. On February 22, Representative Thaddeus Stevens of Pennsylvania introduced in the House a resolution that "Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors."[200] After some discussion the vote was taken and the President was impeached by a vote of one hundred and twenty-six to forty-seven.[201] A House committee then drafted nine articles against

190. D. Dewitt, The Impeachment and Trial of Andrew Johnson 1 (1903) [hereinafter cited as Dewitt].

191. See E. McKitrick, Andrew Johnson and Reconstruction (1960); G. Milton, The Age of Hate (1930); J. Savage, Andrew Johnson (1866).

192. Dewitt 180-81.

193. C. Bowers, The Tragic Era 155 (1929) [hereinafter cited as Bowers].

194. Dewitt 202. As a result of his strong disapproval, Stanton was selected to assist Seward in preparation of the President's veto message. Id. at 203.

195. See Bowers 156. "[T]he next day the 'New York World' published the names of the two thirds in borders of black, with the comment: 'The time is coming when every man in the above list will stand accurst in our history.'" Id. (footnote omitted).

196. Dewitt 344.

197. The Great Impeachment and Trial of Andrew Johnson (1868) [hereinafter cited as Trial]; Dewitt 344-46.

198. Trial 14; Dewitt 346-56.

199. Trial 14.

200. Id. at 14-15.

201. Id. at 15.

Johnson. The first article charged that the removal of Stanton was unlawful as an intentional violation of the Constitution and Tenure Act. The second charged that the letter appointing Thomas was an intentional violation of the Constitution and of the Tenure Act. Article three alleged Thomas' appointment was a violation of the Constitution. Articles four through eight, referred to as the "Conspiracy Articles," also pertained to Stanton's removal. The fourth charged a conspiracy with Thomas and others to prevent Stanton from holding office, in violation of the Constitution. Article five accused the same persons of conspiracy to prevent the execution of the Tenure Act by attempting to remove Stanton. The sixth alleged conspiracy to forcibly take the property of the United States at the War Department. Article seven charged conspiracy to prevent Stanton from holding office, in violation of the Tenure Act. Article eight charged conspiracy to seize United States property, also in violation of the Tenure Act. Finally, article nine concerned a statute requiring all orders to pass through a General of the Army. Johnson had stated that the statute was unconstitutional and, accordingly, generals of lesser rank should take orders directly from him.[202]

Unsatisfied with these articles, Representative Benjamin Butler offered a tenth "to clothe that bone and sinew with flesh and blood and to show him [Johnson] . . . as the quivering sinner that he is . . . ."[203] Butler's article charged that Johnson, intending to bring the United States Congress into "disgrace, ridicule, hatred, contempt and reproach," did openly and publicly declare "with a loud voice, certain intemperate, inflammatory and scandalous harangues" against Congress and its laws, "amid the cries, jeers and laughter of the multitudes then assembled in hearing."[204]

Stevens conceived an eleventh article as a catch-all, explaining: "If my article is inserted, what chance has Andrew Johnson to escape?"[205] Representative John A. Bingham of Ohio introduced that article, which dealt with a speech of August 18, 1866, in which Johnson was alleged to have declared that the thirty-ninth Congress was not a Congress of the United States authorized to exercise legislative powers, but only a congress of part of the states, and that its legislation was not binding upon him. The article stated that in pursuance of this declaration and in violation of his oath of office, Johnson attempted to prevent the execution of the Tenure Act and two other statutes, such being a high misdemeanor in office.[206]

Johnson's trial opened on March 5, 1868, with Chief Justice Salmon

202. Id. at 19-20.
203. Id. at 20.
204. Id. at 21.
205. Bowers 178, quoting from the Congressional Globe of March 2, 1868.
206. Trial 22.

P. Chase administering to each senator an oath that he would do "impartial justice, according to the Constitution and laws."[207] At the outset of the trial, the Managers defined an impeachable crime or misdemeanor as:

> [O]ne in its nature or consequences subsersive [sic] of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives, or for any improper purpose.[208]

Butler, admitting this definition exceeded the common law definition, cited the 1388 English impeachment of Belknap and the other judges for the proposition that the Senate was bound by no law, being a law unto itself and "bound only by the natural principles of equity and justice."[209]

President Johnson never once appeared at the trial, but left the defense to an able team of attorneys.[210] Benjamin Curtis, a former Justice of the Supreme Court, opened his defense by seeking to demonstrate that Stanton's removal was not within the sweep of the Tenure Act.[211] In answer to the Managers' claim that the Senate was a law unto itself in convicting for a high crime or misdemeanor, Curtis paraphrased the constitutional provisions on impeachment and concluded:

> [I]t is impossible to come to the conclusion that the Constitution of the United States has not designated impeachment offenses as offenses against the United States. It has provided for the trial . . . established a tribunal for . . . trying them . . . directed the tribunal . . . to pronounce a judgment and to inflict a punishment, and yet the honorable manager tells us that this is not a court, and that it is bound by no law.[212]

Curtis argued that if every senator was a law unto himself, able to declare an act criminal after its commission, the constitutional prohibition against *ex post facto* laws would be violated. Comparing the Managers' argument to a bill of attainder, he asked: "Of what use would be [the] prohibition in the Constitution against passing bills of attainder if it is only necessary for the House of Representatives, by a majority, to vote articles of impeachment, and for two-thirds of the Senate to sustain the articles?"[213] Curtis declared that it was the duty of the Senate, having taken an oath to apply the law according to the Constitution, to find that a law existed,

207. Id. at 22-23.

208. Id. at 47 (emphasis deleted).

209. Id. at 48. While such a position had been espoused in 1388, 4 Hatsell 64, it had formally been rejected by the Lords as early as 1709. Id. at 282-83.

210. Dewitt 406-07.

211. Bowers 185-86; Dewitt 424-27.

212. Trial 110.

213. Id. at 111.

construe and apply it to the case, and find criminal intention to break it before it could convict on any article.[214]

On Saturday, May 16, 1868, the Senate met to vote on the articles. The eleventh article was to be voted upon first, after which the first ten articles were to be considered.[215] After the clerk had read the eleventh article, the Chief Justice inquired of each senator as he responded to the calling of the roll: "Mr. Senator — how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?"[216]

The result of this historic vote was thirty-five to nineteen, one vote short of conviction. After a ten day adjournment, the Senate reassembled to vote on the remaining articles. The Managers withdrew article one and permitted a vote on articles two and three. Again the vote was thirty-five to nineteen, one less than the number necessary for conviction. The Managers did not call for a vote on the remaining articles, but adjourned, leaving judgment on articles one, and four through ten, to posterity.[217]

G. *William W. Belknap*

Early in 1876, the House Ways and Means Committee proposed a resolution authorizing general investigations into the operations of various governmental departments. The resolution passed and less than two months later, on March 2, one of the investigating committees reported that it had uncovered "unquestioned evidence of . . . malfeasance in office" by William W. Belknap, then Secretary of War.[218] The report stated also that President Grant had that morning accepted Belknap's resignation. The report recommended the adoption of three resolutions: one impeaching Belknap; one calling for the preparation of articles against him; and the third instructing a committee to go immediately to the bar of the Senate and impeach Belknap. The resolutions passed.

On April 4, 1876, the House Managers appeared at the bar of the Senate and presented five articles of impeachment against Belknap.[219] The first article charged that, while serving as Secretary of War, Belknap appointed as post trader at Fort Sill one Caleb P. Marsh, who had an agreement with a John S. Evans under which Marsh would have Belknap appoint Evans as the post trader in his place. When this agreement was executed, it was charged, Belknap "unlawfully and corruptly" received

214. Id.
215. 2 Trial of Andrew Johnson 484-86 (1868).
216. Id. at 486.
217. Dewitt 574-76.
218. Cong. Rec., 44th Cong., 1st Sess. 1426 (1896).
219. 3 Hinds' Precedents § 2449, at 910.

certain sums of money from Marsh for appointing Evans, thereby being guilty of "high Crimes and Misdemeanors in office." Articles two, three, four and five also charged Belknap with knowingly receiving money in consummation of this scheme. Article three charged that Belknap "criminally" disregarded his duty in allowing Evans to remain post trader, causing great injury to personnel at that post and to the country.[220]

On April 17, 1876, Belknap attacked the jurisdiction of the Senate to try him, asserting that due to his resignation he was no longer a civil officer when the charges were made against him. The House Managers argued that the limitation of impeachment to "Officers" in Article II, Section 4, dealt with the position and not necessarily with the time when it was occupied.[221] Belknap's counsel argued that if he were convicted, Congress would be setting a precedent that every citizen could be impeached.[222] On May 29, after a lengthy debate, the Senate decided, by a vote of thirty-seven to twenty-nine, that it had jurisdiction.[223] The Senate then gave Belknap until June 16 to answer. When that date arrived, counsel for Belknap appeared but refused to put in a plea. Instead, he filed a document objecting to the previous vote because two-thirds of the Senate had not overruled Belknap's plea. It therefore was contended that the proceeding should be dismissed.[224] The case nevertheless proceeded to trial, and Belknap was acquitted. Although the required two-thirds vote for removal failed, a majority voted guilty on each of the five articles.[225]

H. *Charles Swayne*

Acting upon a joint resolution of the Florida legislature, Representative William B. Lamar rose in the House on December 10, 1903, and recommended that Charles Swayne be impeached.[226] At the time, Swayne was a United States district court judge in Florida. Lamar's resolution called for the House Committee on the Judiciary to investigate Swayne's

220. Id. at 910-14.

221. Id. § 2007, at 315.

222. Id. at 313.

223. Id. § 2459, at 934.

224. Id. § 2461, at 936-37.

225. The vote was as follows:

Article	Guilty	Not Guilty
1	35	25
2	36	25
3	36	25
4	36	25
5	37	25

Id. § 2467, at 945. See also Potts, Impeachment as a Remedy, 12 St. Louis L. Rev. 15, 20 (1927).

226. 38 Cong. Rec. 95 (1903).

conduct. A committee was appointed and in March, 1904, it reported that Judge Swayne had "continuously and persistently violated the plain words of a statute of the United States, and subjected himself to punishment for the commission of a high misdemeanor."[227] The report cited many examples of judicial misconduct, and the Committee recommended impeaching him on the ground "of high misdemeanor." A strong minority report opposed these conclusions, as a result of which a further investigation was conducted. In December, 1904, almost eight months later, a resolution of impeachment was finally agreed upon, with an amendment accusing him "of high crimes and misdemeanors."[228]

On January 24, 1905, the select committee of the House which had been appointed to formulate the articles against Swayne presented twelve articles of impeachment, charging as follows:[229] That Swayne, while a United States District Court Judge, made false claims against the government, and in support of these claims, prepared and signed false certificates of his expenses as a judge; that on another occasion he made false claims against the government and committed the crime of obtaining money under false pretenses; that he committed similar high crimes and misdemeanors on another occasion; that "while in the exercise of his office," he appropriated for his personal use a railroad car in the possession of a receiver appointed by him, making use of the railroad and its personnel without making compensation to the owner and allowing the receiver a credit for these expenses, thereby being guilty of "abuse of judicial power and of a high misdemeanor in office;" that he lived outside the district in which he was assigned, violating a statute which made it a "high misdemeanor" to do so; and that while in "the exercise of his office," he maliciously and unlawfully found an attorney guilty of contempt and fined and jailed him, thereby constituting an "abuse of judicial power and . . . a high misdemeanor in office."[230]

At the Senate trial, Judge Swayne submitted a brief in which he contended that neither indictability nor mere misbehavior was intended to be the standard for impeachment. After examining the common law precedents, the early state constitutions, the debates at the Constitutional Convention, and the American precedents, the brief concluded that impeachment lies for either treason or bribery committed anywhere and for

227. H.R. Rep. No. 1905, 58th Cong., 2d Sess. (1904); 3 Hinds' Precedents § 2470, at 951. It is to be noted that the only offense characterized by the committee as a high misdemeanor involved statutory violations. None of the other charges were so characterized.

228. 39 Cong. Rec. 248 (1904).

229. 39 Cong. Rec. 754-55 (1905).

230. A minority of the committee contended that none of the charges, except those relating to false certificates, were sufficient to warrant impeachment. Id. at 755.

other high crimes and misdemeanors, which "must consist of judicial acts, performed with an evil or wicked intent, by a judge while administering justice in a court . . . ."[231] Therefore, it was argued, since the first seven articles charged personal misconduct, the Senate did not have jurisdiction and should dismiss the proceeding. The House Managers argued that impeachment covered non-judicial acts and, in the alternative, that Swayne's conduct was official in nature.[232] In their closing arguments, Swayne's counsel urged that the impeachment provisions were embodied in the Constitution "with a meaning that can never be changed by the Congress of the United States.[233]

On February 27, 1905, a vote was taken and Swayne was acquitted on each article.[234]

I. *Robert W. Archbald*

In February 1912, the Interstate Commerce Commission brought to President Taft's attention charges of improper conduct against Robert Archbald, a United States circuit court judge, who was a member of the Commerce Court. The President ordered the Attorney General to conduct a full investigation, following which it was concluded that the information discovered should be transmitted to the House Judiciary Committee.[235]

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231. Id. at 3028-33 (1905) (emphasis deleted).

232. 3 Hinds' Precedents § 2011, at 328-29. In support of their primary argument, they suggested a situation in which a judge might be convicted and imprisoned for forging a note. It was argued that under those circumstances he obviously should not continue to draw his salary as a judge. Id. at 328. See generally Taylor, The American Law of Impeachment, 180 N. Am. Rev. 502, 512 (1905), where the author states that this situation can be cured only by constitutional amendment.

233. 3 Hinds' Precedents § 2010, at 327.

234. The vote was as follows:

Article	Guilty	Not Guilty
1	33	49
2	32	50
3	32	50
4	13	69
5	13	69
6	31	51
7	19	63
8	31	51
9	31	51
10	31	51
11	31	51
12	35	47

Id. § 2485, at 979. For a political analysis of this and the following cases, see ten Broek, Partisan Politics and Federal Judgeship Impeachments Since 1903, 23 Minn. L. Rev. 185 (1939). See also Littlefield, The Impeachment of Judge Swayne, 17 The Green Bag 193 (1905).

235. 6 Cannon's Precedents § 498, at 685.

A period of investigation followed, including appearances by Archbald and his counsel at committee hearings.

On July 11, 1912, the committee's report, including a memorandum of law and thirteen articles of impeachment,[236] was adopted by the House. Article one charged that Judge Archbald, while a judge on the commerce court, formed a partnership for the purpose of purchasing certain properties for future sale, using his office to induce a certain corporation which was then a party litigant before the commerce court to contract to sell the properties to the partnership. This, it alleged, constituted a "high crime and misdemeanor in office."

The second article asserted that Archbald, for consideration, interceded in a case before the Interstate Commerce Commission, using the influence of his office to effectuate a settlement and to induce agreement to a stock sale proposed by the party whom the judge was assisting. This charge further specified that the judge did so knowing that the case was subject to review in the Commerce Court, and that the party he sought to influence already had a case pending in that court. The article concluded that the judge therefore was guilty of misbehavior and of a "high crime and misdemeanor in office."

The third article charged a "high misdemeanor in office," alleging that Archbald used his official position to influence a coal company, which was owned by a railroad then a litigant in the commerce court, to lease certain properties to the judge and his friends, in return for which he agreed to use the railroad to transport the products of these properties.

Article four accused the judge of being guilty of "misbehavior in office" and of a "misdemeanor as . . . judge" as a result of his secret communications with an attorney for a litigant in a case before his court, in which he requested to see a witness for the purpose of obtaining his explanation of certain testimony, and informed the attorney of certain evidence "detrimental" to his client and asked for an explanation.

The fifth article charged that he attempted to use his influence as judge to secure an operating lease for a certain individual, knowing that this person had previously failed in such negotiations. The article further alleged that after the attempted negotiations, the judge accepted a promissory note for his efforts, constituting "misbehavior" and "high crimes and misdemeanors in office."

The sixth article charged him with using his influence as a judge to induce the officers of two related companies to purchase a certain tract of land. Article seven accused Judge Archbald of accepting an interest in a speculative stock enterprise with a person involved in a litigation

236. H.R. Rep. No. 946, 62nd Cong., 2d Sess. (1912), 48 Cong. Rec. 8697-708 (1912).

before his court. It further alleged, as did article eight, that Archbald had lent his name to a note, knowing it would be presented to a person subject to his official influence. The ninth article charged the judge with using his position to coerce a party to discount one of his notes by having it presented to an attorney who practiced before the commerce court, and further charged that after the note was discounted, it was never paid. The tenth article accused him of accepting large sums of money for pleasure trips from an individual who was an officer or director in a number of corporations under the jurisdiction of the commerce court. The eleventh article alleged that he accepted money from attorneys who practiced before his court and that money was solicited by court officers whom the judge had appointed. The twelfth article charged that Archbald had appointed as a jury commissioner the general counsel of a railroad company which was under the jurisdiction of the commerce court, and that, knowing of this relationship, he nevertheless allowed the attorney to serve.

The thirteenth and last article charged that Archbald had at various times sought to obtain credit from parties interested in the results of suits pending in his court; that he had carried on business for speculation and profit and, for consideration, compromised cases pending before the Interstate Commerce Commission; that he had used his influence as a judge to induce various officers and companies engaged in interstate commerce to enter into contracts and agreements in which he was then financially interested; that he received interests in these contracts in consideration of his using his influence; and that the judge's efforts in securing contracts from the railroad companies then having suits pending in the commerce court continued for more than a year.[237]

At his trial Archbald claimed that the charges, even if true, did not constitute impeachable offenses. He admitted most of the facts but denied the existence of any wrongful intent.[238] He also challenged articles seven through twelve and part of thirteen on the ground that the acts charged were committed, if at all, prior to his appointment as a court of appeals judge.[239]

The Managers argued in their brief that impeachment may be had

237. Id. at 8706-08.

238. Id. at 9795-802.

239. See Part III of Respondent's Brief, 6 Cannon's Precedents 640, citing Record of Trial at 1067. See also ten Broek, supra note 235, at 193. It is not clear in which way the challenge was settled. This is because the only article upon which a conviction was had, and which also charged offenses allegedly committed by the judge in his former position, was article thirteen, an article which the defense conceded consisted only partially of such charges.

for less than indictable conduct.[240] Counsel for Archbald argued to the contrary, based upon a study of the most current English precedents.[241] It was argued that, at the very least, conduct of a criminal nature must be found. In response, Representative John W. Davis, a House Manager, argued that such a standard gives the prosecution nothing to fear because "[i]f the phrase 'criminal in nature' means those things which might be made crimes by legislative prohibition, every act here charged against this respondent comes within the description."[242]

The trial, which was sparsely attended by senators,[243] resulted in a vote of guilty on the first, third, fourth, fifth and thirteenth articles, and Archbald was removed from office.[244] In addition, the Senate voted to disqualify him from holding future office.[245]

Following the vote a number of Senators filed opinions explaining their votes. Some stated that they thought criminality was the standard for removal;[246] some only voted guilty where they thought the offenses, as proven, constituted "high crimes or misdemeanors," and had voted not guilty where the charge involved only misconduct.[247] Others[248] said that they had voted not guilty on charges in which proof of evil intent

240. 48 Cong. Rec. 8702-05 (1912).

241. 6 Cannon's Precedents § 462, at 646.

242. Id. § 463, at 648.

243. See Simpson, Federal Impeachments, 64 U. Pa. L. Rev. 803, 820 (1916).

244. The vote was as follows:

Article	Guilty	Not Guilty
1	68	5
2	46	25
3	60	11
4	52	20
5	66	6
6	24	45
7	29	36
8	22	42
9	23	39
10	1	65
11	11	51
12	19	46
13	42	20

6 Cannon's Precedents 707. J. Borkin, The Corrupt Judge 199 (1962), characterized the Archbald conviction as being based on the judge using his "official position for private gain and accepting loans from litigants before him."

245. 6 Cannon's Precedents § 512, at 708. The vote to disqualify was 39 to 35, or less than two-thirds.

246. 49 Cong. Rec. 1499 (1913) (opinion of Senator Catron); id. at 1537-41 (opinion of Senator Paynter); see id. at 1497 (opinion of Senator Crawford).

247. 49 Cong. Rec. 1448 (1913) (opinion of Senators Henry Cabot Lodge and Elihu Root); see id. at 1535 (opinions of Senators Penrose and Cullom).

248. Id. at 1495 (opinion of Senator Gronna); id. at 1498 (opinion of Senator Oliver).

was lacking, and yet a few others said they had voted guilty on any charge involving less than good behavior.[249]

J. *George W. English*

On January 13, 1925, Representative Harry B. Hawes of Missouri introduced a resolution calling for an investigation of charges made in the *St. Louis Post-Dispatch* against Judge George W. English, a United States Judge for the Eastern District of Illinois.[250] A subcommittee of the House Judiciary Committee was appointed to investigate, and it presented its report on March 25, 1926.[251] This report consisted of a review of the evidence uncovered, the subcommittee's views on the law of impeachment, and a resolution containing five articles of impeachment.[252] The report was adopted on April 1, 1926, by a vote of three hundred and six to sixty-two.

The first article accused him of having disbarred several attorneys without notice or hearing, and of using his power to summon people in order to harass, threaten and oppress. The second article cited him for managing the bankruptcy affairs of his court for the personal benefit of himself and a certain referee. The third charged unlawful and intentional favoritism in the appointment of receivers and other practices, including his acceptance of a cash "gift" from one of his appointees. The fourth article alleged corrupt practices in the handling of the funds of bankrupt companies before his court, including an agreement to deposit funds in a particular bank which agreed, in turn, to employ his son. The last article alleged several instances wherein the judge had displayed unlawful, intentional and corrupt favoritism in his appointments, rulings and decrees.

On November 4, 1926, prior to the commencement of his trial, Judge English tendered his resignation to President Calvin Coolidge, who accepted it immediately. On November 10 the House Managers presented this information to the Senate, and subsequently recommended that the

249. Id. at 1494-95 (opinion of Senator John D. Works); id. at 1498-99 (opinion of Senator Porter J. M'Cumber).

250. H.R. Res. 402, 68th Cong., 2d Sess. (1925); 66 Cong. Rec. 1790 (1925); 6 Cannon's Precedents 778.

251. H.R. Rep. No. 653, 69th Cong., 1st Sess. (1926); 67 Cong. Rec. 6280-87 (1926); 6 Cannon's Precedents § 545, at 779.

252. The subcommittee stated that impeachable conduct included, among other things, gross betrayals of the public interest, tyrannical abuses of power, and inexcusable neglect of duty. All of these were impeachable, in the subcommittee's opinion, whether committed on or off the bench, as long as they were so grave as to shame the country. 67 Cong. Rec. 6283 (1926).

proceedings be discontinued.[253] On December 13, 1926, the Senate, by a vote of seventy to nine, ordered the proceedings discontinued.

K. *Harold Louderback*

In May, 1932, the San Francisco Bar Association wrote President Herbert Hoover concerning the conduct of Harold Louderback, a United States district judge in California. The letter contained references to various newspaper articles about the judge.[254] The matter was promptly transferred to the Attorney General's office which, in turn, referred it to the House Judiciary Committee. On May 26, 1932, Representative Fiorello LaGuardia of New York introduced a resolution calling for the designation of a special committee to inquire into the official conduct of the judge.[255] A special committee was appointed; it held hearings, conducted an investigation, and reported that the evidence failed to show that impeachment was warranted.[256] A minority of the committee, led by Representative Hatton W. Sumners of Texas, recommended impeachment. On February 24, 1933, after debating the two recommendations, the House passed a substitute resolution, stating, in part, that "Harold Louderback . . . be impeached of misdemeanors in office."[257] The resolution recited five articles of impeachment.[258]

The first article charged that the judge, at the instance of a party to whom he was indebted, by using promises of higher fees and threats of lower allowances, sought to force a court appointed receiver to designate as his counsel an attorney of the judge's choosing and that, not meeting with success, he "willfully" discharged the receiver. The article also charged that Louderback violated the law by establishing a fictitious residence, that he had done so to effectuate the removal of a case in which he shortly expected to be involved, and that he unlawfully registered to vote at this residence—an act which constituted a felony. Article two charged him with unlawfully granting excessive allowances to a receiver and, "contrary to the law," making an order requiring the receiver to pay certain sums over to an Insurance Commissioner conditional on

253. 6 Cannon's Precedents § 547, at 784-85. They made it clear, however, that in their opinion the resignation of English in no way affected the rights of the Senate to hear and determine the charges. The resolution containing this recommendation was passed, 290 to 23. Id. at 785.

254. 75 Cong. Rec. 12,470 (1932); 6 Cannon's Precedents § 513, at 710-11.

255. H.R. Res. 239, 72d Cong., 1st Sess.; 75 Cong. Rec. 11,358 (1932); 6 Cannon's Precedents § 513, at 709-10.

256. H.R. Rep. No. 2065, 72d Cong., 2d Sess. (1933); 6 Cannon's Precedents § 514, at 711. The report did censure the judge for his conduct.

257. The substitute resolution was proposed by Representative LaGuardia of New York. 6 Cannon's Precedents § 514, at 712.

258. 76 Cong. Rec. 4914-16 (1933).

the Commissioner's promise not to appeal from the allowances the judge had granted to the receiver. The third article charged that he appointed an incompetent receiver "in disregard of the rights" of litigants in his court and that he refused to allow a hearing on the subject, depriving interested parties of an opportunity to be heard. The fourth article charged that he "willfully and unlawfully" granted an improper application appointing a personal friend as receiver of a holding company, and that solely because of this appointment, a petition in bankruptcy was filed against the company. Article five charged that he was guilty of "a misdemeanor in office" as shown by his past conduct, including his methods for appointment of incompetent receivers, which practices led to widespread fear that cases in his court were decided with partiality and prejudice.

On April 11, 1933, Louderback answered the charges. He contended that the offenses, even if true, did not constitute impeachable conduct. He specifically objected to the vagueness of article five, as a result of which Manager Sumners consented to have the House revise the article. A month later, he presented a detailed charge. Nevertheless, objections in the form of a motion to strike or make more definite were again made to article five.[259] In addition to an objection based on vagueness, it was argued that certain offenses not committed in his present office were not within the Senate's jurisdiction in an impeachment proceeding. The House again amended article five, after which Louderback filed an answer. During the trial which followed, a dispute arose as to whether or not it was proper for the Managers to introduce evidence of orders made by Louderback when he was a state court judge. This evidence was intended to show that even at that time he had appointed the same close friends as appraisers. The evidence was accepted and upon the conclusion of the evidence, the following question was put to each Senator: "Senator, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article?" On the call of the roll, the necessary two-thirds vote was not attained and Louderback was acquitted on each of the five articles. Indeed, on four of the five articles not even a majority found him guilty.[260]

L. *Halsted L. Ritter*

In 1929, four years after moving to the State of Florida, Halsted L. Ritter was appointed a United States district judge. In May 1933, a resolution was passed in the House of Representatives directing an in-

259. 6 Cannon's Precedents § 521, at 731-32.

260. Id. § 524, at 742.

vestigation into his official conduct.[261] The investigation lasted three years. After its completion, Representative Green of Florida, in January of 1936, rose in the House and said: "I impeach Halsted L. Ritter . . . for high crimes and misdemeanors."[262] He supported his charge by reading from the committee's investigation report, which concluded that the judge's conduct warranted impeachment.[263]

Seven articles of impeachment were prepared and presented to the Senate.[264] The first charged that Ritter was guilty of "misbehavior and of a high crime and misdemeanor in office" resulting from his acceptance of remuneration from a former law partner, who paid it out of an allowance made by Ritter as compensation for services his former partner had rendered in a receivership. The second article charged him with "misbehavior . . . and high crimes and misdemeanors in office" based on a conspiracy with his former law partner and others to place a certain company in receivership and continue it in litigation before his court, and refusal to dismiss the case after the plaintiff had so requested. Article three stated that Ritter was guilty of "a high crime and misdemeanor in office" for violating a section of the Judicial Code making it unlawful for any federal judge to practice law while in office. It charged specifically that after becoming a judge, he wrote to the counsel for a client of his former law firm, stating that he would be available for consultation until completion of the matter upon which he was working when he became a judge. It was alleged that the letter spoke of the fee which he should be allowed and that shortly thereafter he accepted a fee in that amount. Article four also charged him with a "high crime and misdemeanor in office" for practicing law, in that he allegedly received compensation for representing a client in a Florida real estate transaction. Articles five and six both charged him with "high crimes and misdemeanors in office" consisting of willful evasion of income tax. Each of these articles cited separate instances in which Ritter had received sums of money and failed to report them in his return. The seventh and last article charged that Judge Ritter was guilty of a "high crime and misdemeanor" in that his offenses were such as to support a reasonable assumption that they would prejudice the public view of the court's fairness. This article also reiterated specific previous charges, such as practicing law while on the federal bench, accepting gratuities in receiverships, and evading the income tax.

In answer, Judge Ritter admitted most of the facts charged but denied

261. H.R. Res. 163, 73d Cong., 1st Sess., 77 Cong. Rec. 4575 (1933).
262. 80 Cong. Rec. 404 (1936).
263. Id. at 410.
264. Id. at 3486-88, 4654-56.

any wrongful intent.[265] He said that he had failed to mention the sums in his tax returns because they would simply have been cancelled out by a loss he had sustained in a prior year. He argued that the money he received from his former partner was due and owing to him by way of a prior debt, and he claimed the gratuities he received were innocently accepted. In his closing argument on behalf of the House Managers, Representative Sumners declared that once a substantial doubt as to a judge's integrity arises, he forfeits his right to office and "[i]t is not essential to prove guilt."[266] Sumners pointed out, however, the unavoidability of finding criminality in Judge Ritter's conduct and went to some length to show him as a corrupt and malicious judge.

On April 17, the Senate voted on the articles presented against Judge Ritter.[267] A majority of the Senate found him guilty on the first, second, third, sixth and seventh articles; however, the two-thirds vote of guilty, requisite for removal, was present only on the seventh and last article.[268] Thereupon, a judgment was entered removing him from office. A proposed order to disqualify him permanently from holding public office, however, was voted down unanimously.[269]

In an opinion filed after the vote, Senator Austin stated that the six acquittals could not have fairly added up to a conviction. He contended that under the circumstances, the conviction on article seven was violative of traditional and basic rules of our system of justice.[270] Subsequently, Ritter sued for his salary, charging that the Senate had exceeded its jurisdiction in trying and convicting him on charges which were not impeachable offenses under the constitution. The court of claims, however, dismissed the case, stating that the Senate has sole jurisdiction in impeachments.[271]

IV. An Interpretation of the Impeachment Provisions

The debates at the Constitutional Convention of 1787 show that the impeachment provisions contained in the Constitution were not hastily arrived at, but rather evolved over a period of months and were the subject

265. Id. at 4899-906.

266. Id. at 5469.

267. Id. at 5602-06. The form of the question read: "Senators, how say you? Is the respondent, Halsted L. Ritter, guilty or not guilty?" Id. at 5602.

268. Id. at 5602-06. There was one vote short of two-thirds on the first of the six articles. It is noteworthy that 55 of the 56 Senators who voted guilty on the seventh article had previously voted guilty on one or more of the first six articles. The remaining Senator (Minton) had voted not guilty on each of the first six.

269. Id. at 5607.

270. Id. at 5752-56.

271. Ritter v. United States, 84 Ct. Cl. 293, cert. denied, 300 U.S. 668 (1936).

of extensive consideration. In formulating the provisions, the framers were very much concerned with maintaining the independence of the executive and judiciary while at the same time establishing a procedure for removing public officials when the public security required it. They rejected the British system of "address" as a means of removing judges and the use of the word "maladministration" as a ground for impeachment, in both instances because of their concern that the judiciary or executive might be rendered subservient to the Congress.[272] They designed the impeachment provisions as a safeguard against having to continue in public office persons guilty of circumscribed conduct, namely, "Treason, Bribery, or other high Crimes and Misdemeanors." In an effort to assure that the power of impeachment would be fairly used, they required that the accused official be given a trial and that the judges, the Senators, take an oath to hear and try the case impartially. To limit the possibility of abuse of the impeachment power, each house of Congress was given a check over the other. The House of Representatives could not convict or remove an officer but could only initiate impeachment proceedings. Although the Senate could convict and remove, it could not act unless the House of Representatives had exercised its initiative. Even then, however, one-third plus one of the members of the Senate could prevent a conviction. Moreover, if a conviction were entered, the punishment was limited to removal from office and disqualification from holding public office in the future.[273] Punishment that might attach to the offense as a result of statutory law could be imposed only by the ordinary courts after indictment, trial and conviction.

To a large extent, the debates at the Constitutional Convention with regard to impeachment centered around the Presidency. The framers debated the propriety of making the chief executive, who was to serve for a fixed term, subject to impeachment. Some expressed the view that impeachment was unnecessary in the case of an officer serving a fixed term, since his electors would give their judgment about his conduct at election time. Others, however, were of the opinion that there were certain types of acts which might be committed by a public official, including the President, which would dictate his removal prior to that time. Among the acts that various delegates suggested as justifying impeachment were treason, bribery, corruption, misfeasance, malpractice, incapacity, neglect of duty, tyrannical and oppressive acts, "great crimes" and "great and dangerous offenses." These suggestions were made at

272. See text accompanying notes 124-27, 132-33 supra.

273. See 1 A. de Tocqueville, Democracy in America 106-11 (Bradley ed. 1945), where the author compares this limitation with the more extended power of punishment available to legislative bodies in European countries.

various times during the Convention debates but before the "high Crimes and Misdemeanors" expression was suggested by George Mason on September 8, 1787. While, unfortunately, there was no discussion as to the meaning of that expression, it seems clear from the references to British removal practices and the trial of Warren Hastings that it was taken from the parliamentary law.

In attempting to delineate the meaning of "high Crimes and Misdemeanors," reference to English impeachments is helpful and necessary. It is noteworthy that the grounds for impeachment in most English cases charged treason, conduct in the nature of treason, criminal and corrupt acts, or gross abuse of one's official powers. While conduct in violation of statutory or common law was involved in many cases, it does not appear that a violation of the positive law was essential to impeachability.[274] The English cases, on the other hand, furnish little precedent for impeaching an official for conduct not constituting either a crime or gross abuse of official duties.

Although the "high Crimes and Misdemeanors" terminology was not used in any of the early state constitutions, the grounds specified in many of those constitutions seemed to involve conduct associated with the duties of public office. "Maladministration," a frequently used ground, was defined in early dictionaries as mismanagement of one's office.[275]

The wording of the impeachment provisions themselves suggests that the framers contemplated that impeachable offenses would include crimes. For example, cases of impeachment are excluded from the President's pardoning power for "offenses against the United States," and cases of impeachment are excluded from the requirement that "the trial of all crimes . . . shall be by jury." Moreover, the expression "other high Crimes and Misdemeanors" appears in juxtaposition to the crimes of "Treason" and "Bribery," suggesting by the use of the word "other" that it would involve matters of a similar grave nature. While the term "Misdemeanor" was, as now, used in one sense to delineate a form of crime that is not a felony,[276] the use of the word "Crime" in Article II, Section 4, would seem to encompass both felonies and misdemeanors.

274. See 1 J. Bryce, The American Commonwealth 47 (1889).

275. See N. Bailey, Dictionary (1753); S. Johnson, Dictionary of the English Language (3d ed. 1765); T. Sheridan, A General Dictionary of the English Language (1780); R. Hunter, The Encyclopaedic Dictionary (1885); J. Murray, New English Dictionary 76 (1908).

276. 4 W. Blackstone, Commentaries 1 (4th ed. 1771); Jacobs Law Dictionary (1st Am. ed. 1811). See also T. Potts, Compendious Law Dictionary (1813). Most nonlegal dictionaries defined "misdemeanor" merely as behaving one's self ill. See, e.g., J. Ash, Dictionary of the English Language (1775); N. Bailey, Dictionarium Britannicum (1730); S. Johnson, Dictionary of the English Language (3d ed. 1765); T. Sheridan, A General Dictionary of the English Language (1780).

Consequently, it may be argued that "Misdemeanors" was intended to embrace more than criminal conduct; otherwise, its use is superfluous.

If viewed in its component parts, "other high Crimes and Misdemeanors" is susceptible to another construction: Since a "Crime" is a violation of an established law and since the prefix "high" denotes a grave violation, the expression "high Crimes" arguably covers serious criminal conduct, whether or not connected with the exercise of an office. The term "Misdemeanor" was also intended to be modified by the word "high." It would be illogical to limit impeachment to "high Crimes" and yet have it available for any misdemeanor. Moreover, if Article II, Section 4 is considered in connection with the debates, it becomes clear that the words following "other" were meant to cover offenses of a magnitude similar to "Treason" and "Bribery." In looking at the meaning of "high Misdemeanor," one finds it defined as "maladministration."[277] Yet, if this be so, why was that term rejected in favor of "high Crimes and Misdemeanors." An answer is that "maladministration," unlike "high Misdemeanors," was not a term of art and therefore was open to broad and dangerous interpretations. However, a search for the meaning of "high Crimes and Misdemeanors" from the words themselves ignores the important fact that the expression was taken bodily from parliamentary usage in England.

The debates at the Constitutional Convention and in the state ratifying conventions reveal that the primary concern of the framers was *not* acts that could be committed by any citizen, but rather acts associated with the exercise of a public trust that could endanger the nation. Thus, on July 20, in arguing that the President ought to be impeachable, Madison declared: "He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." Randolph asserted: "The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands." Morris, who gradually came around to the view that impeachment was necessary, observed that the President "may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard [against] it by displacing him."[278] On the day he offered the "high Crimes and Misdemeanors" language, Mason stated that treason as defined in the Constitution might not include other "attempts to subvert the Constitution." James Iredell of North Carolina said in his state's ratifying convention: "[T]he occasion for

277. See, e.g., 4 W. Blackstone, Commentaries 121 (4th ed. 1771).

278. 2 Farrand 68.

its exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot be easily reached by an ordinary tribunal." A common point made during the discussion of the subject in the Virginia, North Carolina and South Carolina conventions was that impeachment was an essential safeguard against a public officer betraying his trust with grave consequences to the country.

The author's examination of the debates at the Constitutional Convention and in the state ratifying conventions indicates that "Treason, Bribery, or other high Crimes and Misdemeanors" were to be the grounds of impeachment applicable to *all* officials subject to impeachment, including judges. There is no evidence from the debates that the "good Behaviour" provision was intended, either directly or indirectly, to furnish an independent or additional ground for impeachment in the case of judges, or to be read in conjunction with Article II, Section 4, in such cases. "Good Behaviour" was an expression of "tenure," used to secure the independence of the judiciary.[279]

As Hamilton stated in number seventy-eight of *The Federalist:*

> The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.[280]

Later in that paper he said:

> [A]s nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.[281]

At the Constitutional Convention the delegates discussed only two methods by which judicial tenure could be forfeited: impeachment on stated grounds; and the British system of address, which allowed for removal on grounds not warranting impeachment. In rejecting the system of removal by "address," the debates make clear that impeachment for

279. It is generally agreed that the "good Behaviour" clause was taken from the latin phrase "quamdiu se bene gesserit," as used in the Act of Settlement. This phrase has been defined as "[a] clause often used in Letters Patent of the Grant of Offices, as in those to the Barons of the Exchequer, which must be intended only as to Matters concerning their office; and is nothing but what the Law would have implied, if the Office had been granted for life." Cowel's Law Dictionary (1727); see Blount's Law Dictionary (3d. ed. 1717); Cunningham's Law Dictionary (1764). See generally E. Haynes, The Selection and Tenure of Judges 25 (1944).

280. 2 The Federalist No. 78, at 99 (Tudor Pub. Co. ed. 1937) (A. Hamilton).

281. Id. at 100.

"Treason, Bribery, or other high Crimes and Misdemeanors" were to be the only means and grounds by which the legislative branch could remove judges. In this regard, it is significant that in past American impeachment trials the House of Representatives has not couched its charges except in terms of "high Crimes and Misdemeanors," believing it necessary to use some form of the words "Treason, Bribery, or other high Crimes and Misdemeanors." The implication is that in the view of past Congresses, no standard other than those contained in Article II, Section 4, could stand as a separate and additional ground for impeachment.

The use of "during good Behaviour" can be viewed as the framers' way of saying that judges, unlike other public officers, have a lifetime tenure but, like other civil officers, may be impeached. If "bad behavior" is a standard of impeachment, it must be found as part and parcel of the grounds specified in Article II—irrespective of whether an officer serves for a fixed term or during good behavior. There is no indication from the debates that "Treason, Bribery, or other high Crimes and Misdemeanors" were meant to be synonymous with "bad behavior," an expression so vague that had it been suggested, it undoubtedly would have met the same fate as "maladministration."

Turning to the American impeachment cases for guidance in interpretation, it is noteworthy that the charges have ranged from offenses of mere intemperate behavior to criminality and have involved misconduct both on and off the bench. Since an impeachment proceeding involves charges which must be proven after a trial by the Senate, an acquittal may mean that the charges were not proven or, if proven, did not amount to impeachable offenses in the opinion of the Senate. Aside from political motivations, an adjudication by the Senate means that the accused has been proven guilty of conduct which, in the opinion of the Senate, warrants removal under the Constitution. For that reason, the convictions are more instructive than the acquittals. In examining the four cases resulting in convictions, it will be noted that Judge Pickering was convicted of statutory, though non-indictable, violations and of conduct committed in the exercise of official duties. Judge Humphreys was convicted of treasonous-like conduct.[282] The value of these cases

282. For various interpretations of Humphreys' conviction, see Brown, The Impeachment of the Federal Judiciary, 26 Harv. L. Rev. 684, 704 (1913) (treason or in nature of treason); Dougherty, Limitations on Impeachment, 23 Yale L.J. 60, 72 (1913) (treasonable conduct); Taylor, The American Law of Impeachment, 180 N. Am. Rev. 502, 511 (1905) (misconduct on the bench); Thomas, The Law of Impeachment in the United States, 2 Am. Pol. Sci. Rev. 378, 383 (1903) (treason or high crimes and misdemeanors off the bench).

as precedents, however, is somewhat diminished by the fact that neither accused defended himself, either in person or by counsel.

While the convictions of Judges Archbald and Ritter are regarded as senatorial precedents for impeaching judges for a general course of misconduct, whether or not indictable and whether or not connected with the exercise of official duties, they are subject to other and more narrow interpretations. It is suggested that the Archbald case stands simply for the proposition that a judge who willfully, corruptly and improperly uses the power of his office for personal gain is subject to impeachment. Judge Ritter, on the other hand, was convicted on an article which incorporated charges including statutory violations and criminal offenses. Although he was acquitted on those charges, it can be argued that fifty-five of the fifty-six Senators who found him guilty on the general article did so only because it incorporated specific charges of which they believed him guilty and on which they had previously voted guilty.

On the basis of his study, the author has concluded that it is not essential to impeachability that an act be indictable or violate a specific statutory provision. In framing the impeachment provisions, the concern of the framers was not limited to crimes of which private citizens and public officials could be equally guilty. Had that been their concern, impeachment might not have been necessary, as such offenses could be handled by the ordinary courts. What the framers seemed greatly concerned about during their discussion of impeachment was the abuse or betrayal of a public trust, offenses peculiar to public officials. This was made manifest by two decisions in particular: their rejection of the judiciary and the substitution of the Senate as the trial body; and their limitation of the punishment that could be imposed to removal from office and future disqualification. The debates reveal that the framers were heavily motivated in fashioning the impeachment provisions by the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office. Offenses of this character, involving as they do the highest officers of the country, required a special forum. As Montesquieu, whose views had a profound impact on the framers, said in his classic *The Spirit of Laws*:

> It might also happen that a subject entrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of crimes which the ordinary magistrates either could not or would not punish. But, in general, the legislative power cannot try causes; and much less can it try this particular case, where it represents the party aggrieved which is the people. It can only therefore impeach. But before what court shall it bring its impeachment; must it go and demean itself before the ordinary tribunals which are its inferiors, and being composed moreover of men who are chosen from the people as well as itself, will naturally be swayed by the

authority of so powerful an accuser? No: in order to preserve the dignity of the people, and the security of the subject, the legislative part which represents the people, must bring in its charge before the legislative part which represents the nobility, who have neither the same interests, nor the same passions.[283]

Richard Wooddeson, the English historian, stated in his lectures at Oxford in 1776 that:

> It is certain that magistrates and officers entrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, became suitors for penal justice, and they can not consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the legislature.
>
> On this policy is founded the origin of impeachments, which began soon after the constitution assumed its present form.[284]

He observed that "[s]uch kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are most proper—and have been the most usual—grounds for this kind of prosecution."[285]

A limitation of impeachment to indictable crimes was not, in the author's opinion, the intent of the framers and is not a proper interpretation of the constitutional provisions. On the other hand, the extension of impeachment to non-indictable offenses not connected with the use of official power was not within the intendment of the framers and is not supported by English impeachment precedents.

To be impeachable, an act must fall within one of two categories. It must violate some known, established law, be of a grave nature, and involve consequences highly detrimental to the United States. In the alternative, it must involve evil, corrupt, wilful, malicious or gross con-

283. C. Montesquieu, The Spirit of Laws 118 (6th ed. 1793).

284. 2 R. Wooddeson, A Systematical View of the Laws of England 596-97 (1792). Wooddeson elaborated on his views by stating: "Thus, if a lord chancellor be guilty of bribery, or of acting grossly contrary to the duty of his office, if the judges mislead their sovereign by unconstitutional opinions, if any other magistrate attempt to subvert the fundamental laws, or introduce arbitrary power, these have been deemed cases adapted to parliamentary inquiry and decision. So where a lord chancellor has been thought to have put the seal to an ignominous treaty, a lord admiral to neglect the safeguard of the sea, an ambassador to betray his trust, a privy counsellor to propound or support pernicious and dishonorable measures or a confidential adviser of his sovereign to obtain exorbitant grants or incompatible employments, these imputations have properly occasioned impeachments; because it is apparent how little the ordinary tribunals are calculated to take cognizance of such offences, or to investigate and reform the general polity of the state." Id. at 602.

285. Id. at 601.

duct in the discharge of office to the great detriment of the United States. Acts which result from error of judgment or omission of duty, without the presence of fraud, or from the misconception of duty, without the presence of a willful disregard, are not impeachable.[286] Acts of a non-indictable nature outside of one's office, such as writing books and articles, associating with persons and organizations engaged in questionable activities, delivering speeches of a political nature, and engaging in conduct which some view as socially and morally objectionable are not properly within the scope of impeachment. Indeed, it would be incongruous to find an official exercising constitutional rights of speech and association guilty of "high Crimes and Misdemeanors" against the United States. When a public official engages in private, independent conduct, he is subject to the positive laws as any other citizen, except that if he commits a "high Crime," he is subject to the additional punishment of impeachment and removal from office.

In a nation which espouses the rule of law and which abhors bills of attainder and *ex post facto* laws, it certainly would be desirable to define by statute all the acts constituting "high Crimes and Misdemeanors." However, since power can be corruptly used in so many different

286. The author's view of what is impeachable is by no means original. See, e.g., State v. Hastings, 37 Neb. 96, 55 N.W. 774 (1893); Ferguson v. Maddox, 114 Tex. 85, 263 S.W. 888 (1924). See also note 57 supra. For the views of various commentators, see 1 J. Bryce, The American Commonwealth 47, 208 (1889) (acts in violation of official duty and against the interests of the nation); C. Burdick, The Law of the American Constitution 87 (1922) (willful or corrupt misconduct in office or acts of a criminal character); T. Cooley, The General Principles of Constitutional Law 177-78 (3d ed. 1898) (serious abuses or betrayals of trust and whatever is deserving of the process in the opinion of Congress); 1 G. Curtis, Constitutional History of the United States 481-82 (1889) (violation of law plus unfitness to exercise office due to immorality, imbecility or maladministration); 1 A. de Tocqueville, Democracy in America 108, 110 (Bradley ed. 1945) (Senate "generally obliged" to find an offense at common law but no reason to tie them to the "exact definitions of criminal law."); R. Foster, Commentaries on the Constitution § 93 (1895) (offenses ranging from breach of official duty to off duty speeches encouraging insurrection); 1 J. Kent, Commentaries on American Law 319-21 (9th ed. 1858) (corrupt violations of public trust); J. Pomeroy, An Introduction to the Constitutional Law of the United States 483-93 (1868) (breaches of trust and acts relating to an official's duties and functions); W. Rawle, A View of the Constitution 209-19 (2d ed. 1829) (abuses of important trusts affecting the higher interest of society); F. Sheppard, The Constitutional Text-Book 75 (1855) (violations of law, acts of a political and extraordinary nature, misdemeanors in office, and violations of a public trust); 1 J. Tucker, The Constitution of the United States § 200 (1899) (criminal misbehavior, a purposed defiance of official duty, and lack of good behavior); 2 D. Watson, The Constitution of the United States 1032-37 (1910) (misconduct in office in exercise or non-exercise of a power and public misbehavior that would shame the country); W. Willoughby, Constitutional History of the United States §§ 927-34 (2d ed. 1929) (offenses of a political character and gross betrayals of the public interest). See generally 1 J. Story, Commentaries on the Constitution of the United States §§ 796-805 (5th ed. 1905).

ways, it would be a difficult, if not impossible, task to carve out for every office whose occupant is subject to impeachment, including that of the Presidency, a satisfactory body of laws describing everything that is permissible and impermissible. Many of the powers that attach to a public office must, of necessity, involve discretion. If statutes were enacted,[287] they would have to be of a general nature so as not to restrict the freedom of action and latitude that a public official requires in the discharge of his office. The benefits that might follow from the establishment of such a body of law would seem to be outweighed by the risks to freedom of action that would be incurred.

While the potential for abuse of the impeachment power may exist in any standard which permits impeachment for non-statutory offenses, this must be balanced against the potential danger to the nation arising from abuse of an official's power. Unless one found a violation of some specific provision of law, we would be powerless to remove from office a public official who willfully, corruptly, recklessly and maliciously used his power to the great injury of the country. In this connection, it is important to note that the construction which is given to the impeachment provisions applies to every official—Presidents as well as judges. As was stated by John W. Davis at the Archbald impeachment trial:

> To say that a judge need take as the guide of his conduct only the statutes and the common law with reference to crimes, and that so long as he remains within their narrow confines he is safe in his position, is to overlook the larger part of the duties of his office and of the restraints and obligations which it imposes upon him. We insist that the prohibitions contained in the criminal law by no means exhaust the judicial decalogue. Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing

287. For statutes involving criminal sanctions against members of the judiciary, see 18 U.S.C. § 155 (1964) (knowingly approving the payment of fixed fees in bankruptcy); id. § 203 (directly or indirectly seeking compensation for the performance of duty, other than as provided by law); id. § 205 (financial sharing in claims against the government in which they assist without authority); id. § 291 (Supp. V, 1970) (purchasing at less than face value certain claims for expenses against the United States). For statutory provisions relating to judicial discretion see 28 U.S.C. § 144 (1964) (disqualification for personal bias or prejudice); id. § 455 (disqualification when judge has a substantial interest in the case); id. § 958 (limitation on the appointment of receivers); 18 U.S.C. § 401 (1964) (restraints on power to punish for contempt). See also 28 U.S.C. § 134(b) (1964) (a district court judge "shall reside in the district or one of the districts for which he is appointed"); id. § 296 (judges shall discharge all judicial duties to which they are designated and assigned). Upon entering office, a judge takes the following oath: "I [name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [title] according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God." Id. § 453.

and notorious partiality and favoritism, indolence and neglect, all are violations of his official oath, yet none may be indictable.[288]

The standard for impeachment suggested by this article does not totally eliminate the possibility of congressional abuse of this power. In contrast, the potential harm which can be caused by the abuse of power lodged in the hands of a single public official should not be minimized. It is suggested that the probability of abuse of power is greater where power is concentrated than where it is diffused among many. Furthermore, while the Constitution states that the House has the sole power to impeach and the Senate the sole power to try, it can be argued that the Supreme Court has, as in the case of other legislative acts, the power to declare that a particular act does not constitute a "high Crime and Misdemeanor" and, therefore, that Congress has exceeded its power in removing an official.[289]

The suggestion made during the current session of Congress that an impeachable offense is whatever a majority of a particular Congress says it is, after the fact, is not only unsupported by the Constitution but it is a dangerous doctrine.[290] If accepted, it would not only pose a serious threat to the independence of the other branches of government but it might gravely limit the freedom which public officials require in discharging the duties of office. Indeed, as applied to judges, it would be tantamount to amending the Constitution by legislative *fiat* so as to provide for the procedure of address—a procedure specifically rejected at the Constitutional Convention as seriously encroaching upon the independence of the judiciary.

While the conduct of judges and other public officials should reflect favorably on the institutions of which they are members, the failure to maintain such conduct, if it does not involve an indictable offense or a willful or corrupt use of power, is not a ground for impeachment. The benefits that might be derived from dealing with personal misconduct of a non-indictable nature and not related to the exercise of official power clearly are outweighed by the risks that would be incurred by giving Congress power to impeach for any reason whatsoever. The remedy for correcting the failure of officials to maintain the highest standards of conduct may be in improving the appointive process, and in other restraints that presently exist within our system through the in-

288. 50 Cong. Rec. 1266 (1914).

289. See Powell v. McCormack, 395 U.S. 486 (1969).

290. Indeed, this is made clear by the debates at the Convention. As noted, the framers specifically rejected the term "maladministration" lest an impeachable offense be equated to whatever a particular Congress said it meant (see text accompanying notes 132-33 supra).

fluence of public opinion, colleagues, members of other branches of government, and bar associations. If experience demonstrates that additional legal restraints are necessary, there may be areas where legislation can be passed, and if it becomes essential, the Constitution can be amended.[291]

Impeachment should be resorted to only for cases of the gravest kind. The process of removing should be made as difficult as possible, though not to the extent of leaving the nation powerless to remove an official who betrays his public trust. If there be any doubt as to the gravity of an offense or as to an official's conduct or motives, the doubt should be resolved in his favor. In the author's opinion, this is the necessary price for having an Independent Judiciary and Executive. Tampering with that price by seeking to broaden the impeachment power invites the use of power "as a means of crushing political adversaries or ejecting them from office."[292] Nothing could be more destructive of our system of government.

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291. 2 Am. Hist. Ass'n Ann. Rep. 1896, at 149-51 (1897), discussing proposed amendments to the Constitution with respect to the removal of federal judges.

292. Simpson, Federal Impeachments, 64 U. Pa. L. Rev. 803, 812 (1916), citing a statement attributed to de Tocqueville "that a decline of public morals in the United States would probably be marked by the abuse of the power of impeachment as a means of crushing political adversaries or ejecting them from office." See de Tocqueville, supra note 286.

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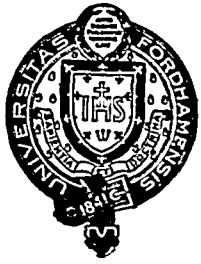

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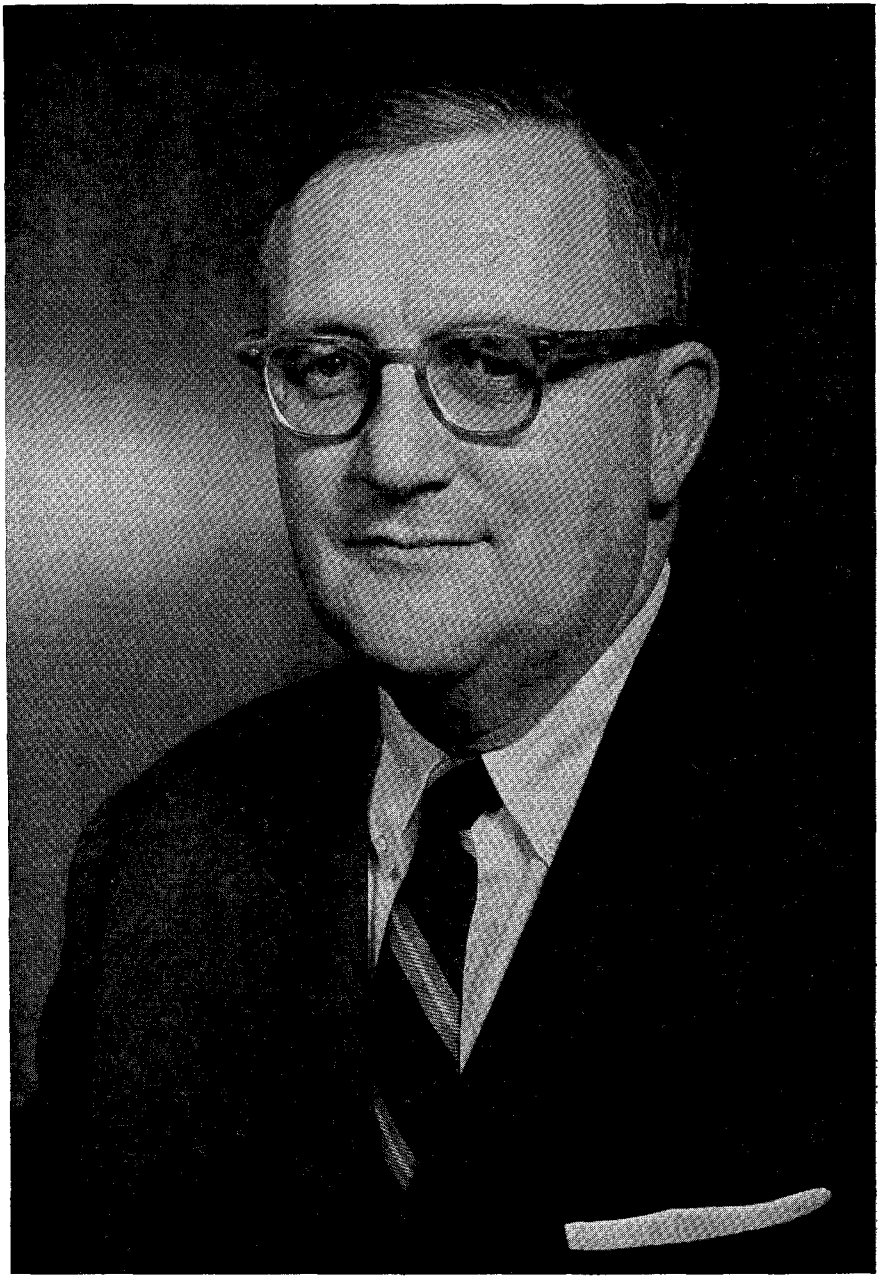
ADDENDA

Errata

Page 127, note 65, last line. For "64" read "63."
Page 159, line 23. For "anomoly" read "anomaly."
Page ii (No. 2), line 11. For "Privelege" read "Privilege."
Page 288, note 52. For "Id." read "18 F.R.D."
Page 291, note 80. For "(7th Cir.)" read "(7th Cir. 1970)."
Page 353, line 9. For "show by 'equal protection mode of analysis'" read "show by an 'equal protection mode of analysis.'"
Page 481, line 23. For "6" read "5".
line 24. For "5" read "6".
notes 5 and 6. For the content of note 5 read the content of note 6 and for the content of note 6 read the content of note 5.
Page 483, note 16. For "5" read "6."
Page 487, note 42, last line. For "5" read "6."
note 44. For "5" read "6."
Page 489, note 62, line 1. For "note 5 supra" read "note 6 supra."

Subsequent Dispositions of Cases Noted

Page 783, *Pearlstein v. Scudder & German.* The Supreme Court denied certiorari at 39 U.S.L.W. 3435 (U.S. April 5, 1971) (No. 1000).
Page 801, *Shiles v. News Syndicate Co.* The Supreme Court denied certiorari at 400 U.S. 999 (1971).



Dean William Hughes Mulligan

J.D. *cum laude,* 1942, Fordham University; LL.D., 1966, Saint Peter's College; L.H.D., 1967, Siena College. Lecturer in Law, 1946-1952, Associate Professor of Law, 1952-1954, Professor of Law, 1954-1960, Wilkinson Professor of Law, 1960-, Dean, 1956-1971, Fordham University School of Law.

DEAN WILLIAM HUGHES MULLIGAN

FOR the past fifteen years, Fordham Law School has enjoyed the energetic and creative guidance of a true professional—Dean William Hughes Mulligan. In administering the needs of the Law School, Dean Mulligan has always employed his vast abilities with a perceptive regard for the proper balance between the competing interests inevitable in the modern educational institution. He has represented the Law School as an extremely effective public speaker able to combine the deep sincerity with which he undertook his task with a delightful sense of humor.

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Over and above his prowess as dean and instructor stands the man himself. In addition to great enthusiasm and prodigious energy, Dean Mulligan is possessed of a happy and unique combination of uncompromising integrity, genuine warmth, and lively wit.

His decision to step down as dean will result in an irreparable loss to Fordham, only partially mitigated by his continued presence on the faculty. In recognition and appreciation of his total devotion to Fordham and to the students who have commenced their lives in the legal profession under his guidance, the thirty-ninth volume of the *Fordham Law Review* is dedicated, in respect and with esteem, to Dean William Hughes Mulligan.

THE EDITORS

WILLIAM HUGHES MULLIGAN—AN APPRECIATION

"FIORELLO!" was not yet a musical. The man himself was masquerading as the mayor of the City of New York. With consummate grace a youthful Joe DiMaggio was roaming centerfield for the New York Yankees and Yankee domination left baseball a little monotonous. In entertainment radio was king—sparkled by the occasional stroll of Jack Benny and Mary Livingstone down Allen's Alley. But radio's reign was not long to last. Over in the Flushing meadows, in the shadow of the Trylon and the Perisphere, visitors looked with disbelief upon a boxed picture called television. Though the hobnail boot of the Nazi had already been heard on the cobblestones of Prague and swastika tanks were rumbling into Poland, the world was young then and "all the trees were green." At Fordham Law School, high up in the Woolworth Building, one might have noted a day in September which marked the very first beginnings of the emergence of Fordham to an ultimate position of preeminence in legal education.

On one of those young September days, Bill Mulligan rode the D train down from the Concourse, was swooshed up twenty-eight floors of vertical travel, and registered at the Law School. He was a tall, skinny lad—yes, amazing as it may now seem, a tall splinter of a lad. He registered simply as William Mulligan. Four score and ten pounds later he changed his name to William *Hughes* Mulligan. And legend has it that the insertion of that celebrated center name led to a deanship. The legend, like most legends, is hollow. To that, I propose to attest.

In those days of Fordham-in-the-Woolworth-Building, Bill Mulligan was challenged by great teachers, by John Blake and George Bacon, Ignatius Wilkinson and Maurice Wormser. Those who knew Bill then knew that—were he to will it and were he willing to work at it—he could and would join that circle of great teachers. He willed it and he was willing to work, and work most arduously, at it.

When he joined the faculty, Fordham had already left the overly polished, non-academic boxes which, in the Woolworth Building, passed for a law school. Fordham had started its move uptown. Quite a move! It was then at 302 Broadway, an archaic, mercantile building on whose outer facing a Latin scholar inscribed the thought that "Ignatius loved the teeming cities." But there was no denying that In-Town-Fordham was ready to seek more space to breathe. Fordham's president, Father Laurence McGinley, had started his search for a dean to plan and to build a new Law School. Archbishop Hughes, who presided at the formal opening of Fordham College in 1841 and whose statue looks down upon the Rose Hill Administration Building, must have smiled an exuberant smile

when William Hughes Mulligan, his collateral descendant, was named to the deanship.

The granite archbishop had good reason to smile. There were, to be sure, wise deans before him—Wilkinson and Bacon, for example—who were of impeccable integrity. Bill Mulligan has integrity in abundance. Indeed his integrity, his honesty, his frankness bubbles out of him as readily as his wit and wisdom. But those attributes alone do not signify the strength of the man or mark his greatest contribution to Fordham. Nor does the Law School building here at Lincoln Center, which he as dean came to plan and over which he has since presided. The Law School here at Lincoln Center may well stand as a physical sign of Bill Mulligan's success. But the building is no more than a symbol.

What I am struggling to say—to dare to admit—is that fifteen years ago Fordham Law School students did not travel—and could not easily buy passage—in Harvard, Columbia and Michigan circles. Today Fordham is preeminent in legal education—second neither to Harvard, nor Columbia, nor Michigan. Fifteen years ago when Bill Mulligan was named dean of Fordham Law School, Fordham had, I know, the makings of excellence. In those short fifteen years, while all the world grew old, Bill Mulligan brought excellence to maturity. That excellence, not mortar, nor stone, nor shining marble, is his gift to Fordham.

LEONARD F. MANNING
ALPIN J. CAMERON PROFESSOR OF LAW

DEAN WILLIAM HUGHES MULLIGAN—A TRIBUTE

IT is with genuine regret that the entire University has learned of Dean William H. Mulligan's decision to step down as Dean of the Fordham Law School at the end of the current academic year. Dean Mulligan has served the Law School with great distinction for almost twenty-five years, first as a member of the faculty and subsequently as Dean, a post he has held for the past fifteen years.

Dean Mulligan's association with Fordham has been a long and fruitful one. He entered Fordham College as a freshman in 1935 and, after graduating with honors, enrolled in the Law School in 1939 from which he, similarly, graduated with honors in 1942. After four years of service with the U.S. Army Counterintelligence Corps, he returned to the Law School and has been continuously associated with it since 1946.

In 1956, young Professor Mulligan was asked to become Dean of the School. He assumed the leadership of the Law School at a critical period, for it was during the early days of his administration that plans for the new building and the School's move to Lincoln Center from downtown Manhattan were being developed. Dean Mulligan played a very significant role in the design of the School's new quarters. The handsome structure which evolved from the endless days and hours of planning is due in no small way to his appreciation for the right blend between the practical and the aesthetic.

But it was not just bricks and mortar that preoccupied the young Dean at that time. For he was even more deeply engaged in strengthening the Law School and moving it to the forefront of legal education in the United States. His efforts to strengthen the faculty, expand and intensify the curriculum quickly caught the attention of the professional associations and the legal profession in general. During his years of stewardship, interest in Fordham's Law School greatly expanded, with the result that today it is barely able to admit one in seven applicants, and its graduates are avidly sought by law firms, government, and individual private enterprise. However, the recognition achieved by the Law School did not come easily. It could not have been realized by one with lesser talents, desire, tenacity, and toughness of mind than Bill Mulligan brought to his assignment. As any administrator or fellow dean who locked horns with him on budgetary and other matters can attest, he was a worthy adversary. He gave no quarter to any man, and it is owing to his persistence and will to fight for what he thought was in the best interests of the Law School, which he always insisted were synonomous with those of the entire University, that the Law School enjoys the prominence it does at the present time.

However, Dean Mulligan's accomplishments have not been restricted to teaching and administration. He has succeeded in coupling a brilliant academic career with an equally illustrious one in public service. His achievements outside the classroom and away from the administrator's desk would be impressive even for one who devoted all of his time and energies to them. Since 1958, Dean Mulligan has served as a Member of the Law Revision Commission in the State of New York. In 1964, he served as Chairman of the Citizens' Committee on Reapportionment. In that year, too, he was appointed Chairman of the Examining Board of the Manhattan and Bronx Surface Transit Operating Authority and has continued to serve in that capacity since that time. He was intimately involved in the New York State Constitutional Convention during the mid-sixties, serving first as a Member of the Commission, making arrangements for the holding of the Convention, and subsequently as General Counsel to the Republican Delegation at the Convention. In 1968, he was appointed as a Member of the Advisory Council for the Labor and Management Improper Practices Act. Early this year, he was designated as a Member of the State Commission to Review Legislative and Judicial Salaries and more recently was appointed by the Presiding Justice of the Appellate Division to the Committee on the Administration of the Courts.

Dean Mulligan's accomplishments have not gone unnoticed either in or out of the University. He holds honorary degrees from Saint Peter's College and Siena College. He has also been honored by Manhattan College which in 1967 awarded him the Saint John de LaSalle Medal. His own Alma Mater has acknowledged his many accomplishments by bestowing upon him the Alumni Achievement Award and the coveted Encaenia Medal. But Dean Mulligan's professional contributions, albeit formidable, cannot transcend in importance the exemplary life he has led as a Christian gentleman; and so he was very fittingly honored in 1968 by induction into the Knights of Malta. Bricks and mortar, the development and enrichment of the faculty, his involvement with alumni and legal associations were all second to his concern, interest and personal involvement with the students of the Law School. He gave of himself generously and unstintingly to the personal anxieties and desires of students at the Law School. For years his door has been wide open to students. We are happy and pleased that he intends to remain as a Professor where he will be given even more opportunities to relate closely and intimately with students.

As we contemplate the many successes which Dean Mulligan has achieved at the Law School in such a short period of years, all of us in the University cannot help but feel an extra surge of pride, because he belongs not only to the Law School but to Fordham. We are proud of him not only because of his scholarly, administrative and professional accom-

plishments, but more importantly because he personifies so well those qualities of character, intellect, and personality which Fordham has traditionally sought to develop in her alumni.

Although we are saddened that Dean Mulligan's stewardship, under which the Law School waxed so prosperously, is coming to a close, our sorrow is tempered by joy and gratitude. Fordham is joyful because it is proud of his accomplishments and grateful because he has been such a loyal and excellent alumnus.

In behalf of the entire University I want to wish him, his lovely wife, Roseanne, and his three children good health, continued success, and many more years of happy association with the Law School and the Fordham Community.

MICHAEL P. WALSH, S.J.
PRESIDENT
FORDHAM UNIVERSITY