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IMPEACHMENT OF FEDERAL JUDGES: AN HISTORICAL OVERVIEW

FRANK THOMPSON, JR.* AND DANIEL H. POLLITT†

"The Place of Justice is an hallowed place, and therefore ought to be preserved without scandal and corruption." These were the words of Francis Bacon, philosopher, scientist, and the most gifted of the English Renaissance men. But in his capacity as Lord Chancellor, he came a cropper. In 1621, the highest judicial officer in England was impeached for accepting bribes from litigants—sometimes from litigants on both sides of the case—and his only defense was that he never gave the briber his due unless he deserved it on the merits. Bacon was charged by the House of Commons, found guilty by the House of Lords, and sentenced to imprisonment in the Tower "during the King's pleasure." King James liberated him from the prison within a few days and gave him a full pardon. But Bacon never regained his lost glories. In 1626 he contracted a cold while stuffing a goose with snow in order to study the effects of refrigeration on putrefaction. The exposure proved fatal to both.¹

The Bacon impeachment illustrates the problem raised by the Roman philosopher Juvenal: *Quis quotodiet ipsos custodes*, or, who is to judge the judges. The matter was debated in the Philadelphia Constitutional Convention when John Dickinson proposed that federal judges should be removed from office on petition to the President by both the House of Representatives and the Senate. This practice was then in effect in England and in seven states, but it was decisively rejected by the Founding Fathers on the theory that it would make the Judiciary dangerously dependent upon the whim of the current legislatures.² Instead, the Consti-

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¹ J. BORKIN, *THE CORRUPT JUDGE* 5 (1962) [hereinafter cited as BORKIN]. Mr. Borkin's book is by far the most definitive work on the subject of impeachment, and it should be heavily used by all subsequent writers on the subject. It complements very well the earlier study on the subject—A. SIMPSON, *FEDERAL IMPEACHMENTS* (1916)—which appends all the charges in impeachment cases to the date of publication. See also Simpson, *Federal Impeachments*, 64 U. PA. L. REV. 803 (1916). Other notable law review coverage of the subject includes: Brown, *Impeachment of Federal Judiciary*, 26 HARV. L. REV. 684 (1913); ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185 (1939) [hereinafter cited as ten Broek]; and Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L. REV. 849 (1938).

² Gouverneur Morris and James Wilson argued that such dependence by the

tutional Framers provided that federal judges "shall hold their offices during good behavior" and at a salary not subject to cut by the Congress.³ Like all other civil officers of the United States, the judges were made subject to removal from office "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."⁴ Moreover, the Framers deliberately created a complicated and cumbersome process for the removal of federal judges to prevent hasty, unthinking action.

The House of Representatives has "the sole power of impeachment"⁵ and plays a role roughly comparable to that of a grand jury. Impeachment is initiated by a proposed resolution to investigate the conduct of a judge.⁶ If the resolution is adopted, the matter is referred to a committee (usually, but not always, the Judiciary Committee) for investigation.⁷ If the investigating committee finds the evidence sufficient, it may issue a report favoring impeachment. The report is then voted up or down by the whole House.⁸ If the House votes impeachment, it notifies the Senate

judiciary upon the good will of the other branches was contradictory to tenure during good behavior. Dickinson's motion received the vote of only one state, his own state of Delaware. The matter is discussed in Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 492 (1949).

³ U.S. CONST. art. III, § 1: "The Judges, both the supreme and inferior Courts, shall hold their Offices during good Behaviour; and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

⁴ U.S. CONST. art. II, § 4: "The 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." It was originally intended that this section of the Constitution provide the exclusive process and the sole grounds for removal of federal judges. Thus, Alexander Hamilton in his articles explaining the Constitution to the State Conventions called to adopt it wrote that federal judges "are liable to be impeached for mal-conduct by the House of Representatives, and trial by the Senate. . . ." THE FEDERALIST No. 7 (Cooke ed. 1961).

⁵ U.S. CONST. art. I, § 2, cl. 5: "The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."

⁶ Impeachment may be initiated by charges made on the Floor by a member of the House, 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2342, 2400, 2469 (1907) [hereinafter cited as HINDS]. Impeachment may also be initiated by a memorial containing charges under oath, *id.* §§ 2364, 2486, 2491, 2494; by a message from the President, *id.* §§ 2294, 2319; by a charge preferred by a State or territorial legislature, *id.* §§ 2469, 2487; or by petition, *id.* § 2030.

⁷ Charges have been examined by the House before impeachments have been voted. After the charge is originally made, it is by resolution referred to a standing committee or to a special committee for investigation and report. *Id.* §§ 2519, 2342.

⁸ Upon conclusion of the investigation by the designated committee, a report favoring impeachment may be referred to the House Calendar. 4 *Id.* § 499. Or it may be committed to the Committee of the Whole House on the State of the Union, 3 *Id.* § 2365. The question is generally submitted to the House in the following form: "Will the House adopt the articles, as its articles of impeachment, against _____?"

and appoints "managers" to argue the case for the House before the Senate.⁹

The Constitution delegates to the Senate "the sole power to try all impeachments";¹⁰ and the Senate acts much like any court, hearing evidence first from the prosecution and then from the defense.¹¹ Witnesses are sworn, examined, and cross-examined;¹² and at the close of the trial the Senate votes on each article of impeachment separately. A two-thirds vote on any article by the Senators then present is necessary to convict.¹³

If the Senate votes in favor of impeachment, the only permissible judgment extends no further than "removal from office" and "disqualification to hold and enjoy any office of honor" under the United States. But the person so convicted remains liable to indictment, trial, judgment, and additional punishment by other tribunals "according to law."¹⁴

William O. Douglas is the latest federal judge put to this gauntlet. On April 15, 1970, Congressman Gerald R. Ford of Michigan opened the attack on the Supreme Court Justice with a four-pronged charge.¹⁵ The first concerned Mr. Justice Douglas' associations with Ralph Ginzburg, the publisher of magazines described by Congressman Ford as "not com-

⁹ Managers are usually appointed from those in accord with the sentiment of the House and from both parties. After the House has voted impeachment, it notifies the Senate thereof by message. *Id.* §§ 2413, 2446. Upon receipt of the message, the Senate adopts an order and sends a memorial to the House that it is ready to receive articles. *Id.* §§ 2078, 2345. The managers, on the part of the House, present to the Senate the articles of impeachment signed by the Speaker, and the chairman of the managers impeaches at the bar of Senate by oral accusation. *Id.* §§ 2413, 2446.

¹⁰ U.S. CONST. art. I, § 3, cl. 6. "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present."

¹¹ The respondent may demur to the charges on the grounds that the offense alleged is not a high crime or misdemeanor within the meaning of the Constitution. 3 HINDS § 2453.

¹² The presiding officer has power to issue all orders, mandates, and writs needed to compel the attendance of witnesses and to enforce obedience of his orders. The presiding officer rules on all questions of evidence and incidental questions which may arise. He may, at his option, submit questions to a vote of the members of the Senate. Witnesses are sworn and examined by the managers of the House and may be cross-examined by the respondent or his counsel. *Id.* at §§ 2082-89.

¹³ See note 10 *supra*.

¹⁴ U.S. CONST. art. I, § 3, cl. 7: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

¹⁵ 116 CONG. REC. H. 3112 (daily ed. April 15, 1970).

monly found on the family coffee table." In 1963 Ginzburg had been tried and convicted of sending an "obscene" publication named *Eros* through the mails.¹⁶ Justice Douglas was one of the four justices who dissented from the conviction.¹⁷ This was in 1966. In 1969, Justice Douglas received \$350.00 from *Avant Garde* magazine for an article he wrote on "Appeal of Folk Singing." *Avant Garde* is also published by Ralph Ginzburg. But there is more, according to the Republican House Leader. Ginzburg had another magazine called *Fact* and during the 1964 Presidential Campaign, *Fact* ran an article to the effect that Barry Goldwater had a "severely paranoid personality and was psychologically unfit" to be President.¹⁸ After the campaign Goldwater sued Ginzburg for libel and recovered a verdict of \$75,000. Ginzburg appealed to the Supreme Court, and Justice Douglas was one of the dissenters who would have ruled in favor of Ginzburg on the theory that the Constitutional guarantees of free speech and free press are absolute.¹⁹ This was in 1970. Congressman Ford finds fault in the failure of Mr. Justice Douglas to disqualify himself in the Goldwater-Ginzburg controversy because of his "substantial interest" in the outcome.²⁰

The second prong of the attack on Justice Douglas also concerned his publications: this time, a 97-page book called *Points of Rebellion*. Congressman Ford objected because the book is "a fuzzy harangue evidently intended to give historic legitimacy to the militant hippie-yippie movement."²¹ Congressman Ford also found it offensive that "the most extreme excerpts from the book" were republished in the April 1970 issue of *Evergreen* magazine in company with "shocking" arty nudes of the kind "the U.S. Supreme Court's recent decisions now permit to be sold to your children and mine on almost every newsstand."²²

¹⁶ *United States v. Ginzburg*, 224 F. Supp. 129 (E.D. Pa. 1963).

¹⁷ *Ginzburg v. United States*, 383 U.S. 463, 482 (1966).

¹⁸ *Ginzburg v. Goldwater*, 396 U.S. 1049 (1970) (Black & Douglas, JJ., dissenting).

¹⁹ *Id.* at 1052.

²⁰ 116 CONG. REC. H. at 3114-15. Congressman Fraser interrupted to say that the earlier version of the Ford press release

charged Justice Douglas with having accepted a fee for an article in a magazine at the time that person had a case pending in the Supreme Court. In fact, that was a false allegation . . . [A]pparently between that time and the time he spoke on the floor he learned it was false and modified his statement. My only purpose in asking him to yield was so that the press would be clear that in fact he had changed that very serious allegation since it was brought.

Id. at 3115.

²¹ *Id.*

²² *Id.* at 3116.

The other two grounds for attack concerned Justice Douglas' associates. Justice Douglas, until recently, had received \$12,000 a year as chairman of the Parvin Foundation, a tax-exempt charitable organization established to aid in the education of developing young leaders in Latin America by providing them with scholarships for study in the United States. This association between Justice Douglas and the Foundation is well and good on its face, but the Foundation was financed by Albert Parvin who operated hotels and gambling casinos in Las Vegas. According to Mr. Ford, the ties of Mr. Parvin with "the international gambling fraternity never have been sufficiently explored."²³

Finally, Congressman Ford charged that Justice Douglas is a "long time consultant" and "member of the board of directors" of the Center for the Study of Democratic Institutions. The "offense" here is that the Center is headed by Dr. Robert Hutchins, the former President of the University of Chicago, and that in 1965 the Santa Barbara Center "sponsored and financed the National Conference for New Politics which was, in effect," the Congressman surmised, "the birth of the New Left as a political movement."²⁴

These four charges are not offensive to most Americans, even if true. Most certainly, they do not constitute "Treason, Bribery, or other High Crimes and Misdemeanors." This latter fact is admitted by Congressman Ford, whose entire argument is that an offense need not be indictable to be impeachable.²⁵

The term of federal judges, recites the Congressman, is "during good behaviour"; and when behavior ceases to be "good," the right to hold judicial office ceases also. Further, contends the Congressman, "good behaviour" (and an impeachable offense) "is whatever a majority of the House of Representatives considers [it] to be at a given moment in history"; and conviction in the Senate should result "from whatever offense or offenses two-thirds of that body considers to be sufficiently serious to require removal of the accused from office."²⁶

Congressman Ford reached his conclusion from a study of "our his-

²³ *Id.* at 3116-17.

²⁴ *Id.* at 3118.

²⁵ *Id.* at 3113.

²⁶ What, then is an impeachable offense? The only honest answer is 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 other body considers to be sufficiently serious to require removal of the accused from office.

Id. at 3113-14.

tory of impeachments."²⁷ This "history," however, does not support his conclusion, whether one considers only the eight judges who have been impeached in the House and tried in the Senate, or the much larger number of federal judges whose fates have been decided in the House of Representatives without trial in the Senate.

THE EIGHT COMPLETED IMPEACHMENT CASES

Eight federal judges have been impeached, or charged, by the House of Representatives and tried by the Senate. Four were acquitted, and four were convicted. The first case was in 1804; the most recent, in 1936.²⁸ The first two cases—those of John Pickering and Samuel Chase—must be considered together and in light of the political events of the period.

When the Jeffersonian Republicans won the Presidency and a majority in both Houses of the Congress in 1802, they were bent upon a "political purge" of the federal judiciary, and not without cause. President John Adams and the Federalist majority in the House of Representatives and the Senate had sought to win the election by enactment and rigorous enforcement of a Sedition Law that made it illegal to criticize the United States or the incumbents in office.²⁹ Matthew Lynn, a Vermont Congressman, was the first victim of this law. He was sentenced to a fine and four months in jail because of a political speech in which he accused President Adams of having "an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."³⁰ The editor of the Bennington Gazette sought to raise funds to pay the fine by a lottery and advertised with a caption addressed "to the enemies of political persecutions in the western district of Vermont."³¹ For this activity, he was indicted for sedition, convicted, and sentenced to two months' imprisonment. A New York state senator was indicted and arrested under the Alien and Sedition Law because he circulated a petition to Congress among his neighbors asking for repeal

²⁷ *Id.* at 3114.

²⁸ John Pickering (1803), *convicted*; Samuel Chase (1804), *acquitted*; James H. Peck (1831), *acquitted*; West H. Humphreys (1862), *convicted*; Charles Swaine (1903), *acquitted*; Robert W. Archbald (1912), *convicted*; Harold Louderback (1932), *acquitted*; and Halsted L. Ritter (1936), *convicted*.

²⁹ Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596.

³⁰ 3 A. BEVERIDGE, LIFE OF JOHN MARSHALL 30 (1919) [hereinafter cited as BEVERIDGE]. Congressman Lyon was indicted under the accusation that by this speech he had tried "to stir up sedition and bring the President and the Government of the United States into contempt." *Id.* at 31. He was convicted.

³¹ *Id.* at 32. Editor Anthony Haswell also asserted in the advertisement that Congressman Lyon "is holden by the oppressive hand of usurped power."

of the law.³² Jeffersonian candidates and supporters felt the fangs of this law deeply. Indeed, things got so bad under this law that when President Adams campaigned in Newark and the New Jersey local artillery company fired a salute in his honour, a by-stander was convicted for an idle remark that he "wished the wadding from the cannon had been lodged in the President's backside."³³

The Jeffersonians disliked the law; they disliked even more the men who enforced the law: the Federalist United States Marshals,³⁴ who selected juries of sympathizers; the Federalist United States Attorneys, who prosecuted these cases with unusual zeal; the Federalist Judges, who presided in partisan manner. They especially disliked Justice Samuel Chase because of his repeated jury charge that "if a man attempts to destroy the confidence of the people in their officers, he effectually saps the foundation of the government."³⁵ This charge was first announced in the trial of a Pennsylvania editor who was convicted because of an editorial asserting that President Adams had "saddled [us] with the expense of a permanent navy [and] threatened [us] with the existence of a standing army."³⁶

Jefferson and his Republicans had other grievances against the Federalists. Jefferson had promised the position of Chief Justice of the United States Supreme Court to his political lieutenant Spencer Roane of the Virginia Supreme Court. But before Jefferson took office, Chief Justice Oliver Ellsworth, a staunch but aging Federalist from Connecticut, retired prematurely creating the opportunity for President Adams to appoint his Secretary of State John Marshall to this post.³⁷

³² *Id.* at 42. In the words of Beveridge, "[i]t seems that such were the demonstrations of the people, . . . that the case was dropped."

³³ *Id.* The by-stander, one Baldwin, was fined \$100.00.

³⁴ The method of securing indictments and convictions also met with public condemnation. In many states the United States Marshals selected what persons they pleased as members of the grand juries and trial juries. These officers of the National Courts were, without exception, Federalists; in many cases, Federalist politicians.

Id.

³⁵ *Id.* at 34.

³⁶ Dr. Thomas Cooper, editor of the "Sunbury And Northumberland Gazette," editorialized about Adams that at the beginning of his administration, "even those who doubted his capacity thought well of his intentions . . . Nor were we yet saddled with the expense of a permanent navy, or threatened . . . with the existence of a standing army. . . Mr. Adams . . . had not yet interfered . . . to influence the decisions of a court of justice." *Id.* at 33, quoting F. WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 661-62 (1849).

³⁷ *Id.* at 113.

And there was more. After the political sweep of the Republicans at the polls, the lame-duck Federalist Congress met and (1) created sixteen federal circuit court judgeships for defeated Federalist politicians,³⁸ (2) created forty-two justice of the peace positions in Washington, D.C. for lesser Federalist office holders,³⁹ and (3) reduced the size of the Supreme Court from six to five members⁴⁰ (as of the next vacancy) to deprive Jefferson of an appointment for the foreseeable period of his Presidency.⁴¹

Jefferson thundered that, "The Federalists have retired into the judiciary" and "from that battery all the works of republicanism are to be beaten down."⁴² He would have none of this; and when his party assumed office, President Jefferson pardoned all persons convicted under the Alien and Sedition Law and fired all the United States Marshals and United States Attorneys who had enforced it.⁴³ Meanwhile, his Congress repealed the Sedition Law and the Judiciary Act of 1801 and thereby the judgeships created for the defeated Federalist opponents.⁴⁴ When Chief Justice Marshall threatened to declare the repeal of the 1801 Judiciary Act unconstitutional⁴⁵ as an illegal short-cut of the impeachment process,⁴⁶ the Jeffersonian Congress cancelled the terms of the Supreme Court for

³⁸ Act of Feb. 13, 1801, ch. 4, § 7, 2 Stat. 90.

³⁹ Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 107; this statute authorized the appointment of justices of the peace in Washington, D.C. President Adams then filled forty-two of these posts with Federalists. 3 BEVERIDGE at 110.

⁴⁰ Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89.

⁴¹ 3 BEVERIDGE at 56-57.

⁴² *Id.* at 21.

⁴³ *Id.*

⁴⁴ Jefferson was inaugurated on Mar. 4, 1801 and commented in his address that "The Judiciary system . . . and especially that portion of it recently enacted, will, of course, present itself to the contemplation of Congress." *Id.* at 51. On Jan. 6, 1802, Senator John Breckenridge of Kentucky "pulled the lanyard that fired the opening gun" with a motion to repeal the Judiciary Act of 1801. *Id.* at 58.

⁴⁵ John Marshall held firmly to the opinion that in so far as the Republican Judiciary Repeal Act of 1802, Act of March 8, 1802, ch. 8, §§ 1-5, 2 Stat. 132, deprived federal judges of their offices and salaries, that legislation was unconstitutional. He urged the appointed judges to ignore the 1802 Act and perform their duties. *Id.* at 122.

Certain of the deposed National judges had taken steps to bring the Republican measure before the supreme Court, but their energies flagged, their hearts failed, and their only action was a futile and foolish protest to the very Congress that had wrested their judicial seats from under them. Marshall was thus deprived of the opportunity at the only time he could have availed himself of it.

Id. at 123.

⁴⁶ During the floor debate, Senator Gouverneur Morris of New York argued in vain that "to repeal the Federal Judiciary Law would be a declaration to the remaining judges that they hold their offices subject to [Congress'] will and pleasure. Thus, the check established by the Constitution is destroyed." *Id.* at 60.

the next fourteen months.⁴⁷ During this interval, the Jeffersonian Congress went after the federal judiciary via the impeachment process, with Marshall himself as the ultimate target.⁴⁸ The impeachment proceedings against John Pickering and Samuel Chase are part of this tumultuous, explosive political partisanship.

John Pickering, judge of the federal district court in New Hampshire, has the dubious distinction of being the first judge to be impeached by the House, tried by the Senate, and removed from office—and for reasons unrelated to “Treason, Bribery, and other High Crimes and Misdemeanors.” Senator William Giles of Virginia, the Jeffersonian leader in the Senate, was quite blunt on this score. He told his Federalist colleagues, in language not unlike that of Congressman Gerald Ford, that “We want your offices, for the purpose of giving them to men who will fill them better.”⁴⁹ His announced theory was that removal by impeachment is nothing more than a declaration by Congress that, “You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the Nation.”⁵⁰ Federalist Senators objected that this interpretation of the Constitution’s impeachment clause would make our “judges as independent as spaniels”,⁵¹ but they argued in vain. Giles insisted, with majority backing, that federal judges were removable “[f]or any cause that a dominant political party considered to be sufficient.”⁵²

The choice of Judge Pickering as the first target in the Jeffersonian onslaught against the federal judiciary was excellent political strategy. The unfortunate old man had been an insane drunkard for some time and was clearly unable to perform his duties as a federal judge. The Judiciary

⁴⁷ In answer to the threat that the Supreme Court would declare unconstitutional the Republican Repeal Act, a Senate committee was appointed to examine further the National Judiciary establishment. . . . Within a week the committee proposed and the Senate enacted a law eliminating the June session of the Supreme Court, and directing that the Court should convene but once each year, and fixed the second Monday of February as the time of the annual session.

Id. at 95.

⁴⁸ “There was a particular and powerful reason for Marshall to fear impeachment, for, should he be deposed, it was certain that Jefferson would appoint Spencer Roane of Virginia to be Chief Justice of the United States.” *Id.* at 113.

⁴⁹ *Id.* at 157.

⁵⁰ *Id.* at 158. The Jeffersonian Republicans also beat down a Federalist proposal that the form of final vote should be whether or not Pickering was guilty or not guilty “of high crimes and misdemeanors.” Instead, the form of the vote was whether or not Pickering was guilty “as charged.” Turner, *supra* note 2, at 504.

⁵¹ 3 BEVERIDGE at 93.

⁵² *Id.* at 159.

Act of 1801 had provided for such cases as Pickering's by authorizing the circuit judges to appoint one of their own members to exercise the functions of any district judge who became incapacitated.⁵³ Under this Act, the circuit judges determined that Pickering was indeed incapacitated and assigned Circuit Judge Jeremiah Smith to take over his duties. With the repeal of the 1801 Judiciary Act and the elimination of the circuit judges, Pickering resumed his judicial functions.⁵⁴ His family and friends urged that he resign, but Portsmouth Federalist leaders advised strongly against a resignation as the "successor will be a man whom we cannot approve" referring to John Samuel Sherburne, the newly appointed Republican United States Attorney.⁵⁵

So Judge Pickering stayed on the bench, and one of the first cases to reach him involved the ship *Eliza*, seized by the Republican custom officials for smuggling. The ship belonged to Eliphalett Ladd, a prominent Federalist merchant, who filed suit for its return.⁵⁶ On the opening day of trial, Pickering came to the courthouse thoroughly intoxicated. He staggered to the bench and ordered the court to open. Then, apparently feeling lonely, he ordered a young lawyer named John Wentworth to sit beside him. The startled attorney demurred, and the judge started down from the bench to cane him. But seeing a former British Naval officer among the spectators, he ordered him to sit and give advice on these nautical matters. Thus fortified against the "Jacobins," Pickering roared, "Now damn them, we will fight them" and ordered the parties to proceed.

United States Attorney John Sherburne began to read the pleadings, but the Judge interrupted stating that he had heard enough and would decide the case in four minutes. He suddenly ordered that the ship *Eliza* be returned to his long-time political ally Eliphalett Ladd. Attorney Sherburne protested that his witnesses had not yet been allowed to testify, and the Judge replied, "Very well, we will hear everything—swear every damn scoundrel that can be produced—but if we sit here four thousand years the ship will still be restored." A few minutes later, however, he shut off the witness and ordered the case dismissed. When the Government sought an appeal order, the trial judge refused to sign one although the law clearly commanded that he do so.⁵⁷

The impeachment charges against Pickering related to his above con-

⁵³ Act of Feb. 13, 1801, ch. 4, § 25, 2 Stat. 97.

⁵⁴ Turner, *supra* note 2, at 488-89.

⁵⁵ *Id.* at 490-91.

⁵⁶ *Id.*

⁵⁷ *Id.* at 490.

duct and rulings. Pickering did not appear at the Senate trial, but his son did, and he moved to dismiss the charges because they did not allege "treason, bribery, or other high crimes and misdemeanours," and in the alternative he argued that his father lacked the mental capacity to have the "intent" to commit a crime.⁵⁸ The Senate rejected the underlying theory behind this defense and ruled by a party-line vote of nineteen Republicans against seven Federalists that federal judges were removable from office for any reason that the dominant political party considered to be sufficient. Five Republican Senators refused to convict; but rather than offend their party, they left the Senate chamber during the vote.

Thus, a partisan body of Senate judges gave to poor, crazy John Pickering the unwelcome distinction of becoming the first victim of the first judicial purge in our national history. The impeachment would have seemed less brutal if its innocent victim had not been one of New Hampshire's most distinguished citizens. The author of her constitution, a revolutionary patriot, Pickering had been universally admired until he became incapacitated at the end of his long public career.⁵⁹

The fact that after Pickering's impeachment the Senate quickly reversed its position on the underlying Constitutional issues has made that trial a minor development in a continuing story rather than the historic landmark it seemed at the time. John Pickering was convicted by the Senate on March 12, 1804. Within an hour, the House voted to impeach Samuel Chase.

Samuel Chase, a Baltimore lawyer, was aggressive and militant in everything he did. As a young man, he opposed the British Stamp Act and led the Sons of Liberty on midnight raids against the public offices where they rifled the files, destroyed the records, and set fire to the stamps. His militant opposition to British rule gave him a notoriety which resulted in his election to the First Continental Congress where he championed the Declaration of Independence and became one of its signers. He was a leader of the Maryland Convention that ratified the Constitution, and in 1796, President Washington appointed him an Associate Justice of the Supreme Court of the United States.⁶⁰

The Supreme Court did not have a busy docket in the early days of the Republic. It met for two brief terms a year in Washington, and during

⁵⁸ Senator Jackson of Georgia argued that insanity was not a defense because "a still more important case was coming up soon" and "by-and-by we should have Judge Chase's friends come and pretend he was mad." *Id.* at 499.

⁵⁹ *Id.* at 487-88.

⁶⁰ 3 BEVERIDGE 184-85.

the remaining months the six Justices "rode circuit" sitting as circuit court judges with jurisdiction to preside at the trial of important cases and hearing appeals from district court judges in lesser matters.

Justice Chase was a terror on the bench. He "bullied counsel, brow-beat witnesses, ruled juries,"⁶¹ and with his sallies from the bench "brought down the laughter of the spectators" on helpless and unfortunate defense counsel.⁶² Even his friend John Marshall admitted on cross-examination during the Senate impeachment trial that Chase, as a judge, was "tyrannical, oppressive, and overbearing."⁶³

Marshall was testifying about the conduct of Chase during the trials under the Alien and Sedition Laws: it was there that Chase proved most obnoxious to the Jeffersonians because of his vigorous and overbearing enforcement of these laws during the campaign against John Adams.

He presided at the trial of Thomas Cooper, the editor of the *Sunbury Gazette* in Pennsylvania, and directed the jury to convict on the theory that any criticism of public officials "effectually saps the foundation of the government."⁶⁴ He presided at the trial of Fries, a Pennsylvania farmer who had refused on grounds of principle to pay certain federal taxes. Chase charged that this was "treason" and sentenced the defendant to be "hanged by the neck until dead." The resulting Republican uproar resulted in a Presidential pardon.⁶⁵

Chase then went to Baltimore where he impaneled a large number of grand jurors and during the impaneling process denounced the Republican proposal for universal suffrage because it would "sink" the country "into a mobocracy, the worst of all popular governments."⁶⁶

Chase then hurried to Richmond to preside at the trial of a noted editor named Callender who had published a tract hostile to President Adams. Chase read the pamphlet prior to trial and announced in a public coach that "he would certainly punish" the editor and "teach the lawyers of Virginia the difference between the liberty and licentiousness of the press."⁶⁷ When trial began, Chase (i) refused to excuse a juror who

⁶¹ *Id.* 46-47.

⁶² *Id.* at 39.

⁶³ *Id.* at 195.

⁶⁴ See note 35 *supra*.

⁶⁵ 3 BEVERIDGE 36.

⁶⁶ Chase also condemned to the assembled grand jurors "the modern doctrines by our late reformers that all men, in a state of society, are entitled to enjoy equal liberty and equal rights. . . ." *Id.* at 169. The members of the Maryland legislature demanded that the Justice be impeached and removed from the bench. *Id.* at 170.

⁶⁷ *Id.* at 37.

announced that he was morally-bound to find the defendant guilty, (ii) refused to hear distinguished witnesses offered by the defense, and (iii) throughout the trial was "tyrannical, overbearing and oppressive."⁶⁸

Chase then went to New Castle, Delaware where he refused to dismiss a grand jury until it returned an indictment against a Jeffersonian newspaper publisher. When the grand jury refused to indict, he ordered the United States Attorney to read all back issues of the paper and report any abusive language to the jury. But that body reported that it discovered nothing "treasonable" except a brief and unpleasant reference to Chase himself. Chase let the matter drop.⁶⁹

The impeachment charges issued by the House of Representatives against Chase related to these actions and rulings while he was on the bench. Admittedly, they did not constitute "high crimes and misdemeanors"; but Senator Giles announced here, as he had earlier in the impeachment of John Pickering, that the process of impeachment "is nothing more than an inquiry by the two Houses of Congress whether the office of any public man might not be better filled by another."⁷⁰

The Federalists responded, as they had in the Pickering trial, that such a theory of impeachment undercut "the vital necessity of the independence of the Judiciary" and put in peril "the integrity of the whole National judicial establishment."⁷¹

This time they fared much better. The Republican senators who had absented themselves during the Pickering vote bolted party ranks, and the fight was over.⁷² There were thirty-four senators: nine Federalists and twenty-five Republicans. Two-thirds of this number, or twenty-two votes, was necessary to convict. Six of the Republicans—mostly from the

⁶⁸ *Id.* at 39.

⁶⁹ *Id.* at 41.

⁷⁰ *Id.* at 173.

⁷¹ *Id.* at 205-06. The Federalists argued that while the Judge's "unusual rude and contemptuous expressions" from the bench were "a violation of the principles of politeness" and displayed a "want of decorum," they did not constitute an impeachable "High Crime and Misdemeanor." *Id.* at 202.

⁷² Six days before the Senate trial ended, it was interrupted by Vice President Aaron Burr to announce the Electoral College returns: Thomas Jefferson and George Clinton were duly elected to the respective offices of President and Vice-President. Burr had been "dumped" by Jefferson in favor of Burr's arch political rival, George Clinton of New York; and it is worthy of some comment that the Republican Senators who voted against impeachment were from the Burr strongholds of the Northeast and the West. *Id.* at 197. Burr was one of the few Republicans who had voted against the repeal of the 1801 Judiciary Act, and it was his followers in the Senate who had abstained in the Pickering vote. *Id.* at 280.

Northern and Western states—and the nine Federalists answered not-guilty on every article of impeachment.⁷³

John Randolph of Virginia, a House manager who argued the impeachment, rushed from the scene of defeat to the floor of the House where he offered a constitutional amendment providing that the President might remove federal judges on the joint address of both Houses of Congress.⁷⁴ Congressman Micholson, another floor manager, was almost as frantic with wrath, and he followed with a proposal to amend the Constitution so that state legislatures might recall their United States Senators at will.⁷⁵ Neither proposal progressed very far, and President Jefferson remarked that "impeachment is a farce which will not be tried again."⁷⁶

On the other side there was jubilation. As John Marshall's biographer, Albert Beveridge, put it, "[f]or the first time since Jefferson's election, the National Judiciary was rendered independent. For the first time in five years, the Federalist members of the Supreme Court could go about their duties without fear that upon them would fall the avenging blade of impeachment One of the few really great crises in American history had passed."⁷⁷

But there was to be one more test case, that of *James Hawkins Peck*.

Freed from the threat of Congressional impeachment, the Supreme Court under John Marshall began to strengthen the powers of the central government and protect the interests of the industrial and monied classes.⁷⁸ This was at the expense of the small farmer in the South and West and required the nullification of the laws of many states. By 1825, the Supreme Court declared unconstitutional the laws of at least ten states.⁷⁹ Naturally, there was a good deal of resentment against the Supreme Court resulting with a number of "court curbing" plans.

Jefferson proposed that the Constitution be amended so that all federal judges serve an initial term of six years with the possibility of re-appointment by the President, but only with the consent of both Houses of Congress.⁸⁰

⁷³ *Id.* at 219-20.

⁷⁴ *Id.* at 221.

⁷⁵ *Id.*

⁷⁶ *Id.* at 222.

⁷⁷ *Id.* at 220.

⁷⁸ Reinhardt, *The Impeachment Proceedings Against Judge James Hawkins Peck*, 13 U. KAN. CITY L. REV. 106, 108-09 (1944) [hereinafter cited as Reinhardt].

⁷⁹ *Id.* at 108.

⁸⁰ *Id.*

Senator Johnson of Kentucky introduced a constitutional amendment that whenever the Supreme Court declared the laws of a state to be unconstitutional, there would be a further appeal to the United States Senate for final decision.⁸¹ A proposal which received even more support but also failed to muster majority backing would have required the vote of five of the then seven Supreme Court justices (instead of a simple majority) to overturn a state law.⁸²

It was during this period of growing antagonism toward the federal courts that James Hawkins Peck was appointed the United States District Judge for Missouri. In effect, he was *the* "federal presence"; however, he was disliked not only in principle, but also because of his arbitrary abuse of judicial authority.

When Judge Peck took office, he was faced with a number of suits by the early settlers of Missouri (the Upper Louisiana Territory) claiming title to large acreages under grants from the Spanish crown. The United States resisted these claims and countered that the land was part of the public domain and available for future distribution. A lawyer named Luke Edward Lawless represented many of these claimants, including the heirs of one Antoine Soulard.⁸³

The Soulard case was tried first, and Judge Peck ruled for the government. He then wrote a letter to the editor of the *Missouri Republican* explaining the basis for his decision. Attorney Lawless promptly wrote an answering letter to a rival newspaper, the *Missouri Advocate*, in which he challenged the facts and legal conclusions of the judge.⁸⁴

Judge Peck was incensed. He ordered the attorney to be arrested and brought to court, and without a trial, the judge held him in contempt. He imposed a sentence of twenty-four hours in jail and disbarment from the federal court for a period of eighteen months.⁸⁵

Congressman John Scott of Missouri promptly presented a memorial requesting the House to inquire into the conduct of Judge Peck.⁸⁶ On

⁸¹ *Id.* at 109. John Marshall, when he thought all was lost during the Chase impeachment trial, made a similar proposal, i.e., that "the doctrine of impeachment should yield to an appellate jurisdiction [of Supreme Court decisions] *in the legislature.*" 3 BEVERIDGE at 177 (emphasis added).

⁸² Reinhardt at 109.

⁸³ See generally *Id.* at 110-12.

⁸⁴ See *Id.*

⁸⁵ See *Id.*

⁸⁶ This was in 1826. The matter was referred to the Judiciary Committee, which reported back in 1827 that the Congressman had leave to withdraw his memorial. On December 29, 1828, Congressman McDuffie of South Carolina presented a

April 21, 1830, the House overwhelmingly voted (123 to 49) to impeach the judge because of his "unjust, oppressive and arbitrary" contempt order.

Judge Peck might well have shown a lack of "good behaviour"; but his on-the-bench activities did not constitute "Treason, Bribery, or other high Crimes and Misdemeanors." For this reason, the Senate decided on January 23, 1831, in favor of Judge Peck by a vote of 21 guilty, 22 not guilty.⁸⁷ This was just short of a majority and far less than the two-thirds vote necessary for removal from office.

This vote did not mean that the Senate approved of what Judge Peck had done. Far from it. Within a few weeks, on February 10, 1831, the Senate enacted a bill denying federal judges the power to punish for contempt except in cases of misbehavior "in the presence of the said courts, or so near thereto as to obstruct the administration of justice. . . ."⁸⁸ This bill swept through the House and was signed into law by the President on March 2 of that year.⁸⁹

The heirs of Antoine Soulard were also vindicated when they appealed Judge Peck's adverse decision to the Supreme Court and there won a unanimous reversal.⁹⁰ Be that as it may, the House of Representatives has never again voted impeachment against a federal judge because of his rulings or conduct on the bench. Nor has it *ever* voted to impeach a judge because of private activities or association unrelated to judicial duties unless that activity or association involved some criminal offense.

West H. Humphreys of the United States District Court for Tennessee was the next judge to be impeached by the House and tried in the Senate. The charge, filed in 1862, was "Treason" based on the alleged fact that he had incited "revolt and rebellion" in Tennessee "against the Constitution and Government of the United States" by "openly and unlawfully" advocating an "ordinance of secession."⁹¹ The judge was summoned by the Senate "to appear and answer certain articles of impeachment," and upon his refusal, the Senate voted unanimously that he be removed from

similar memorial. It was referred to the Judiciary Committee, which took no action during that session of Congress.

On December 14, 1829, McDuffie repeated the motion he had made the previous session, and this time the Judiciary Committee recommended impeachment. *Id.* at 110.

⁸⁷ 3 HINDS § 772.

⁸⁸ Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487.

⁸⁹ Reinhardt at 117-18.

⁹⁰ *Soulard v. United States*, 35 U.S. (10 Pet.) 100 (1836).

⁹¹ A. SIMPSON, *supra* note 1, at 197-99.

office. Judge Humphreys was by then serving as a judge on the "District Court of the Confederate States of America."⁹²

The next four impeachment cases tried by the Senate involved allegations of "high Crimes and Misdemeanors" although all were not provable.

Charles Swayne, the United States Judge of the District Court in Florida, was impeached and tried in 1904. Always a vigorous and forthright person, he had been appointed by Republican President Harrison over the protest of all the Democratic members of the Senate. His job was to convict the Florida Democrats who had violated the voting rights of Republicans in the last election. He was relentless in this task, extending court sessions to bring all offenders to his bar of justice.⁹³

He was equally vigorous in pursuit of his personal goals. Thus, in 1901, a number of suits were filed in Pensacola concerning title to what was known as the "Rivas Tract." One Florida McGuire was the principal plaintiff, and one Edgar was the principal defendant. Prior to trial, the lawyers for Miss McGuire requested the judge to disqualify himself because they had learned that defendant Edgar had sold part of his interest in the land to the Judge. The Judge refused the motion to excuse himself, saying that he had not purchased the land interest, but that a relative of his had done so. Later, it developed that this relative was his wife.⁹⁴

Unwilling to try the case before Judge Swayne, the plaintiffs filed a new, but identical, suit in the state court against the old defendant Edgar with Judge Swayne added as a new defendant. They then went into the federal court to have the old case dismissed. Judge Swayne was presiding and quickly expressed his feelings about the new suit against him in the state court in Escambia County. After a few "abusive remarks," he held the attorneys guilty of contempt and sentenced them to ten days in jail, a fine of \$100 each, and disbarment from the federal court for a term of two years.⁹⁵

This abuse of judicial power, reminiscent of Judge Peck, undoubtedly fueled the flames of impeachment. But the serious charges related to various "high Crimes and Misdemeanors," namely, that the judge was not

⁹² The text of the charges against Judge Humphreys is set forth verbatim in A. SIMPSON, *supra* note 1, app. See also Brown, *supra* note 1, at 701.

⁹³ ten Broek at 187.

⁹⁴ PROCEEDINGS IN THE SENATE OF THE UNITED STATES IN THE MATTER OF THE IMPEACHMENT OF CHARLES SWAYNE 282-84 (1905). A version more favorable to Judge Swayne is presented in Littlefield, *The Impeachment of Judge Swayne*, 17 GREEN BAG 193, 200-05 (1905).

⁹⁵ Article VIII of the impeachment charge, A. SIMPSON, *supra* note 1, app.

a resident of his judicial district as required by law (the Judge was a native of Delaware and lived there with his family while not holding court in Florida), that he padded his expense account (the judge admitted that he always claimed the maximum \$10.00 per diem expenses whether he spent that much or not), and that he accepted favors from litigants before his court (the Judge admitted that he had accepted from a railroad, then in bankruptcy proceedings before his court, a free ride to California and back for himself, his wife, his sister-in-law, and her husband and had subsequently approved of the costs of the trip as part of the necessary expenses of operating the railroad).⁹⁶

Judge Swayne's only defense was a legal one—that the offenses were not "impeachable." He argued, in effect, that the particular bribery, expense account padding, and failure to abide by the residence requirement were all minor or "low" crimes and misdemeanors. The Democratic House of Representatives rejected this defense and impeached by an almost solid party-line vote. The Republican Senate, also by party-line vote, acquitted on all charges.⁹⁷

Robert W. Archbald, Judge of the United States Commerce Court, was impeached and convicted in 1912 on charges of "having used his judicial office and influence for his personal financial gain."⁹⁸

Like Judge Swayne, Judge Archbald had accepted a free trip for himself and his family from a railroad then in litigation before his court. The only distinction between the two situations was that where Judge Swayne had gone to California, Archbald had made a grand tour of Europe.

There were other differences, some of which were political, between the two situations. Judge Archbald had accepted a "purse" from certain lawyers who practiced before him, and he served on a very unpopular court when the federal judiciary as a whole was under attack.

The Commerce Court of which Judge Archbald was a member was created by the administration of President William Howard Taft to review the orders and decisions of the Interstate Commerce Commission. Increasingly, the Commerce Commission ruled against the railroads on behalf of the consumers, and just as insistently, the Commerce Court ruled against the Commission when the railroads appealed.⁹⁹

⁹⁶ ten Broek at 189 n.19.

⁹⁷ A. SIMPSON, *supra* note 1, 585.

⁹⁸ ten Broek at 189 n.20.

⁹⁹ *Id.* at 192 n.30.

The Commerce Court, as an institution, became the fulcrum of a bitter political controversy. Teddy Roosevelt, campaigning for the Presidency, promised to abolish the Commerce Court if elected; but the Democratic majority in Congress pre-empted this issue (and the popular appeal) by voting to abolish the court during mid-campaign.¹⁰⁰

The general adverse reaction against the Commerce Court undoubtedly hurt the members of that Court, including Judge Archbald. So did the general anti-court sentiment of that period. Around the turn of the century, the Granger Movement swept through the agrarian mid-west, resulting in state legislation regulating the railroads, the graineries, and other utilities in favor of the consumer. At the same time, labor began to show its political muscle in the industrial states which was instrumental in bringing about the enactment of laws regulating child labor, maximum hours, and minimum wages for women. The federal courts, almost as matter of routine, declared all these state laws to be unconstitutional.¹⁰¹

LaFollette, Norris, Shipstead, Hiram Johnson and other progressive legislators introduced a series of anti-court constitutional amendments to reduce the terms of federal judges to a fixed number of years, to authorize their recall upon petition, and to require of the courts a two-thirds vote or more before they could declare a state law unconstitutional.

It was in this political climate that the Democrats and their Roosevelt "Bull Moose" allies in the Senate voted to affirm the impeachment charges of the House and thereby to remove Judge Archbald from his office.¹⁰²

Harold L. Louderbach, Judge of the United States District Court in California, was impeached by the House of Representatives in 1932, and it is not altogether certain that the accusation met Constitutional standards. The charge against him was "favoritism in the appointment of incompetent receivers" and the "allowance of excessive fees."¹⁰³ This is not "good behavior," but is it a crime?

Judge Louderbach owed his job to Senator Samuel Shortridge, and when it came to the appointment of receivers in the bankruptcy and reorganization cases that came before him, the Judge saw to it that Samuel Shortridge, Jr., the son of the benefactor, got more than his share of the lucrative positions.¹⁰⁴ There was no evidence that Judge Louderbach—

¹⁰⁰ *Id.* at 192.

¹⁰¹ *E.g.*, *Lochner v. New York*, 198 U.S. 405 (1905).

¹⁰² ten Broek at 191-92.

¹⁰³ 3 HINDS § 515.

¹⁰⁴ ten Broek at 196.

unlike Judge Archbald—received any direct personal financial gain from these appointments. The Senate voted to acquit.

Halsted L. Ritter is the last of the federal judges to be both impeached by the House and tried by the Senate. He was convicted. A successful lawyer in Denver, Ritter moved to Florida in 1925 for reasons of family health. Four years later, President Coolidge appointed him to a federal judgeship on recommendation of his Postmaster General. The appointment was opposed locally by both Republicans and Democrats.¹⁰⁵

This opposition was justified. He was impeached by the House of Representatives in 1936, and the principal charges were that he participated in champertous proceedings brought before him for a cash consideration and that he prepared and filed false income tax returns. What he had done was to appoint a former law partner to a "receivership" which paid a \$75,000 fee with a \$4,500 kick-back and to conceal this income when filing his annual tax returns.¹⁰⁶

The odd element in this case was the Senate action. Eighty-four Senators voted, which meant that fifty-six votes were needed to meet the two-thirds majority required by the Constitution in impeachment cases. This fifty-six figure was reached, but barely. Forty-nine Democratic Senators were joined by five Republicans who usually bolted party ranks—Borah of Idaho, Capper of Kansas, Cousins of Michigan, Frazier of North Dakota, and Norris of Nebraska—and by the two Senate independents—Shipstead, Farmer-Labor from Minnesota, and LaFollette, Progressive from Wisconsin.¹⁰⁷

This completes the "history" of the eight federal judges impeached by the House and tried by the Senate. In 1803, Judge Pickering of New Hampshire was impeached and found guilty of conduct certainly not "good" but also not constituting "Treason, Bribery, or other high Crimes and Misdemeanors," unless blasphemy and public drunkenness fall within this category.¹⁰⁸ Not since that time has the Senate removed a judge from office in an impeachment trial because of lack of "good" behavior unless that behavior was also criminal.

Supreme Court Justice Chase was acquitted by the Senate in 1804 although his behavior in presiding at the Alien and Sedition trials of his

¹⁰⁵ *Id.* at 199.

¹⁰⁶ The impeachment charges are set out in S. Doc. No. 200, 74th Cong., 2d Sess. 3066-69, 4597-99 (1936).

¹⁰⁷ Ten Broek at 200; Yankwich, *supra* note 1, at 857-58.

¹⁰⁸ See text at note 57 *supra*.

Jeffersonian opponents was "tyranical, overbearing and oppressive."¹⁰⁹ District Court Judge Peck was acquitted in 1831 by the Senate although its disapproval of his abuse of the "contempt" power was written into a federal law.¹¹⁰ Since 1831 almost 150 years have passed with no impeachment charges by the House because of "bad" behavior except where there was evidence of "Treason, Bribery, or other high Crimes and Misdemeanors."

West H. Humphreys was charged with "Treason" and convicted by the Senate in 1862 when the Tennessee judge threw his lot in with the Confederacy.¹¹¹ Charles Swayne, the Delaware lawyer who sat on the United States District Court in Florida, was acquitted by the Senate in 1904 on the House charges of defrauding the government with false expense accounts and accepting favors from litigants before his court.¹¹² Robert W. Archbald was convicted by the Senate in 1912 and removed from his judgeship on the Commerce Court for accepting cash bribes and other favors from litigants before his court.¹¹³ Harold L. Louderbach was acquitted by the Senate in 1932 upon a finding that his judicial appointments to lucrative posts were motivated by personal gratitude to his political mentor rather than by hope of financial gain.¹¹⁴ Halstead Ritter was convicted by the Senate in 1936 for accepting bribes and kick-backs and for income tax evasion,¹¹⁵ certainly judicial behavior which is not good, but also clearly behavior that falls within the constitutional grounds for impeachment—"Treason, Bribery or other high Crimes and Misdemeanors."

In short, the constitutional history as reflected by the eight "completed cases" demonstrates that Congressman Ford is in error when he asserts that the Congress has authority under the Constitution to impeach Mr. Justice William Douglas (or any other judge) for whatever conduct a sufficient majority of the Congress considers to be an impeachable offense "at any given moment in history."

IMPEACHMENT CASES RESOLVED IN THE HOUSE OF REPRESENTATIVES WITHOUT SENATE ACTION

The eight impeachment cases tried by the Senate reflect merely the top of the iceberg. The qualifications of at least forty-seven other federal

¹⁰⁹ See text at note 68 *supra*.

¹¹⁰ See text at note 89 *supra*.

¹¹¹ See text at note 92 *supra*.

¹¹² See text at notes 95 & 96 *supra*.

¹¹³ See text at note 98 *supra*.

¹¹⁴ See text at notes 103 & 104 *supra*.

¹¹⁵ See text at note 106 *supra*.

judges have been questioned in the House of Representatives since 1796 when impeachment charges against George Turner of the Northwest Territory were dropped on the assurance of Attorney General Harry Lee that he would initiate grand jury proceedings against the Judge.¹¹⁶

The decisions and actions of the House of Representatives in connection with these federal judges are an important part of the impeachment history and teach that the House refuses to impeach because of judicial misbehavior unless the offense charged constitutes "Treason, Bribery, or other high Crimes and Misdemeanors."

Treason

In 1862, Judge West Humphreys was impeached by the House and convicted by the Senate when he joined the Confederacy.¹¹⁷ The only other "Treason" charge was brought against Harry Innes in 1808 on the allegation that the Kentucky federal judge had joined forces with Aaron Burr and conspired with Spain to "seduce Kentucky from the Union." The judge denied the charge, and a House Investigating Committee found him not guilty.¹¹⁸

Bribery and Financial Irregularity

Thirty-three federal judges have been charged with offenses directly involving financial corruption. Twenty-two did not accept the challenge, and their resignations ended any further inquiries by the House of Representatives.¹¹⁹ Five were "censured" but not impeached,¹²⁰ four were acquitted of wrong-doing after investigation,¹²¹ and a House committee

¹¹⁶ 1 STATE PAPERS, MISC. 4th Cong., 1st Sess. 151-52 (1796).

¹¹⁷ See text at note 92 *supra*.

¹¹⁸ 18 ANNALS OF CONG. 2760-90 (1808).

¹¹⁹ These include Judges Philip K. Lawrence of Louisiana (1839); John C. Watrous of Texas (1860); Mark H. Delahay of Kansas (1872); Edward H. Durell of Louisiana (1874); Charles T. Sherman of Ohio (1873); Richard Busteed of Alabama (1875); Cornelius H. Hanford of Washington (1912); Daniel Threw Wright of the District of Columbia (1914); George W. English of Illinois (1925); Francis A. Winslow of New York (1929); Ferdinand R. Geiger of Wisconsin (1939); Minton T. Manton of New York (1939); Warren J. Davis of New Jersey (1941); and Albert T. Johnson of Pennsylvania (1945). Four other judges resigned pending inquiry, and the House did not disclose the nature of the charges against them: Thomas Irvin of Pennsylvania (1859); D. C. Humphreys of the District of Columbia (1875); Andrew Wylie of the District of Columbia (1875); and William Stephens of Georgia (1818).

¹²⁰ These include Judges Alec Boarman of Louisiana (1890); Augustus J. Ricks of Ohio (1895); Emory Speer of Georgia (1914); Grover M. Moscovitz of New York (1930); and Harry B. Anderson of Tennessee (1941).

¹²¹ Judges William P. Van Ness of New York (1818); Charles Tait of Ala-

turned the other two cases over to the Attorney General for possible criminal prosecution without impeachment recommendations.¹²²

Excessive consumption of whiskey drove some of these judges into accepting bribes and kick-backs. Thus, in 1839, Judge Philip K. Lawrence of Louisiana was charged with corrupt conduct and "intemperate use of ardent spirits."¹²³ In 1872, Judge Mark H. Delahay of Kansas was charged with corrupt transactions and "intoxication."¹²⁴ In 1874, Judge Edward H. Durell of Louisiana was charged with improper procurement of money and "drunkenness."¹²⁵

In more recent periods, the judges were caught in an economic squeeze from the Crash of 1929 and could not resist the subsequent temptations that came their way. A notable example is Martin T. Manton, Chief Judge of the Second Circuit Court of Appeals.

Manton began his judicial career in 1916; at thirty-six he was the youngest federal judge in the country. In the following twenty-three years, he well justified his early appointment. His well-reasoned decisions and his articles in professional journals were cited as authority by bench and bar alike. He testified before congressional committees on complicated aspects of patent and bankruptcy law, and he was in great demand as a speaker before the American Bar Association, the Academy of Political Science, and other distinguished assemblies. Honorary degrees came from all sides: Columbia, Fordham, Manhattan, Vermont, and others. He was generally regarded by lawyers and knowledgeable lay persons as the tenth-ranking judge in the United States, a slight edge below the nine Justices on the Supreme Court.¹²⁶

But Manton was equally active in the business world, and his holdings crashed around his head during the Great Depression. This fact did not lessen the public shock when on January 29, 1939, young Manhattan District Attorney Tom Dewey wrote the Judiciary Committee of the House of Representatives an itemized list of Judge Manton's corrupt transactions. The list included, in small part, a \$12,500 kick-back from John M. McGrath, a bankruptcy receiver Manton had appointed, and bribes from litigants in cases pending before his court: \$77,000 from the

bama (1822); Harry W. Blodgett of Illinois (1879); and Albert L. Watson of Pennsylvania (1947).

¹²² Judge Joseph L. Smith of Florida (1830); and Judge William F. Story of Arkansas (1874).

¹²³ H.R. REP. No. 272, 25th Cong., 3d Sess. 35 (1839).

¹²⁴ BORKIN at 229.

¹²⁵ H.R. REP. No. 732, 43d Cong., 1st Sess. 1 (1874).

¹²⁶ BORKIN at 25-26.

Dictograph Products Corporation, \$250,000 from the American Tobacco Company (in the form of a loan to Manton's former legal partner), and \$50,000 from Warner Brothers (in the form of a personal loan from Harry Warner).¹²⁷

After the story broke, Judge Manton tendered his resignation to President Franklin Roosevelt who accepted it on the spot.¹²⁸ This prompt resignation avoided impeachment proceedings ("Why kick at the place where the fellow used to be?" asked Chairman Hatton Sumners of the Judiciary Committee),¹²⁹ but the State of New York was not so forgiving. Manton was tried, convicted, and sentenced to two years in jail.¹³⁰

The investigation of the Manton bribes and kick-backs led to the discovery of similar corruption by Judge J. Warren Davis of the Third Circuit United States Court of Appeals. Like Manton, J. Warren Davis was one of the most esteemed American jurists. Elected to the New Jersey Senate in 1911, he acted as floor leader for Governor Woodrow Wilson. When Wilson was elected President, he appointed Davis to the position of United States Attorney for New Jersey in 1913 and to the Court of Appeals for the Third Circuit in 1920.¹³¹

Davis quickly earned his laurels as a judge, but he did not do so well on the stock market. With the crash of 1929, he ended up deeply in debt (he owed \$85,000 to various banks), with an expensive style of living, an annual salary of \$10,000, and power to decide the financial future of desperate men.¹³² This spelled trouble, and it was not long in coming.

The Fox Film Corporation was in bankruptcy, and William Fox, its founder and President, was struggling to maintain corporate control against the demands of its creditors. The plum was a juicy one, for Fox Film claimed patent rights to "talking pictures." This claim, if established, would have put Fox Film in a position to dominate the industry and William Fox back in control of Fox Film.

On five occasions from 1935 to 1939, the trial court ruled against William Fox on his various claims, and on all these occasions, the Court of Appeals reversed and ruled for him.¹³³ All these Court of Appeals decisions were signed by Judge Joseph Buffington who had been appointed

¹²⁷ *Id.* at 44-45.

¹²⁸ *Id.* at 27.

¹²⁹ *Id.* at 28.

¹³⁰ *Id.* at 79-80.

¹³¹ *Id.* at 98.

¹³² *Id.* at 99.

¹³³ *Id.* at 106-07.

to the bench by President Benjamin Harrison in 1892. By the time of the Fox litigation, Buffington was in his eighties, deaf, and practically blind, and he refused to have a law clerk to look up the law, read briefs, and help write decisions. The decisions favorable to Fox were signed by Buffington but were actually written, and sold, by Judge Davis.¹³⁴

Subsequent investigations disclosed that Fox had paid Judge Davis substantial bribes in fifty and one-hundred dollar bills: once in a hallway at the corner of Twelfth and Chestnut Streets in Philadelphia, more often in the apartment of Fox's attorney Morgan S. Kaufman.¹³⁵ Kaufman knew a good thing when he saw one, and after the Fox litigation ended, he acted as counsel and go-between with Judge Davis on behalf of the Universal Oil Products Company,¹³⁶ the American Safety Table Company,¹³⁷ and other important business concerns not unwilling to spread a little cash wherever it would advance their corporate interests.

Judge William E. Clark, the third member of the Third Circuit Court of Appeals, grew suspicious of his colleagues Davis and Buffington and relayed these suspicions to the Department of Justice. On November 8, 1941, Attorney General Francis Biddle requested Congress to investigate and impeach Judge Davis.¹³⁸ Davis blocked this move with a prompt resignation and a waiver of all pension and retirement rights. He retired to his Norfolk, Virginia, childhood home and died a broken man in 1945.

Unlike Manton and Davis, Judge Albert W. Johnson chose to bluff out the corruption charges until the verdict was certain.

Born in 1872, Johnson began his adult life as a school teacher in Lewisburg, Pennsylvania, and "read law" at night without the benefit of formal legal training. Admitted to the bar in 1898, he became active in public affairs. He was elected on several occasions to the state legislature¹³⁹ and served as the national president of the Patriotic Orders of the Sons of America. His activities reflected a long time dual interest: vigorous opposition to subversive movements and equally vigorous efforts to preserve the sanctity of the Sabbath.¹⁴⁰

Johnson was appointed to the United States District Court for the Middle District of Pennsylvania by President Calvin Coolidge in 1925

¹³⁴ *Id.* at 101.

¹³⁵ *Id.* at 107.

¹³⁶ *Id.* at 108.

¹³⁷ *Id.* at 113.

¹³⁸ *Id.* at 120.

¹³⁹ *Id.* at 142.

¹⁴⁰ *Id.* at 143.

over the strenuous objections of the local bar associations and the local press.¹⁴¹

Criticism soon erupted again when, in 1931, the *Philadelphia Inquirer* disclosed that Judge Johnson had appointed his son-in-law Carl Schug as trustee in eleven of the first twenty bankruptcy cases filed that year.¹⁴² Subsequent newspaper stories revealed that the Judge and his sons owned an exclusive hunting club called the Tea Springs Lodge. The high initiation and annual dues were apparently worth the price, for eighty-two per cent of the members were appointed by Judge Johnson to lucrative posts as appraisers, receivers, trustees, attorneys for trustees, special masters, or referees in bankruptcy.¹⁴³

Subsequent investigations came hot and heavy. In 1933, Attorney General Homer Cummings announced a federal inquiry into the "receiver-ship racket" in Pennsylvania.¹⁴⁴ In 1934, a Pennsylvania grand jury looked into the matter, and in 1936 and again in 1939, there were federal probes of his judicial behavior. In 1941, Judge Albert L. Watson, who sat on the same court with Judge Johnson and who was subsequently impeached, officially complained to the Court of Appeals that Judge Johnson was "hogging" the bankruptcy business.¹⁴⁵

Judge Johnson miraculously survived all this, but he came a cropper in 1943 when the United States prosecuted a clothing manufacturer for stealing cloth from the government.

The government attorneys had an "air tight" case, so they were not worried when the Judge's son was associated with the defense. But they were dismayed at the subsequent shuttlecock exchange between the judge and jury. The judge charged the jury to find the defendant innocent of all charges. The jury refused this instruction and found the defendant guilty. Judge Johnson refused to accept this verdict, berated the jury, and sent it back to the jury room with instructions to bring in a verdict of not guilty. The jury compromised this time and found the defendant guilty on some counts of the indictment and not guilty on others. Then came the sentence. A local reporter predicted to the government attorneys that the defendant would withdraw the motion for a new trial then pending, throw himself on the mercy of the court, and that Judge Johnson would do no

¹⁴¹ *Id.* at 142.

¹⁴² *Id.* at 143.

¹⁴³ *Id.* at 144.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 146-47.

more than impose a nominal fine. This came to pass, and the government attorneys returned to Washington boiling.¹⁴⁶

Congressman Sautoff of Wisconsin was informed of the case and discussed it on the floor of Congress. A few days later the House passed a resolution authorizing an investigation by the House Judiciary Committee. Judge Johnson then met his match, for the investigation was conducted by Congressman (later Senator and Vice-Presidential candidate) Estes Kefauver of Tennessee.

Kefauver went at it with vigor and, after lengthy hearings into all phases of the Judge's activities, issued a scathing report. He concluded that Judge Johnson had "notoriously engaged in the barter and sale of court offices" and that his "decisions, decrees, orders and rulings commonly were sold for all the traffic would bear."¹⁴⁷ The clothing manufacturer who got off (despite his guilt of wartime theft of scarce materials) with a small fine was merely small potatoes. The Bethlehem Steel Company, for one of many given examples, had paid Judge Johnson \$250,000 for a decision in a bankruptcy case where it, as a creditor, wanted a favored priority position over other creditors.¹⁴⁸

The Kefauver report showed that very little had escaped the avarice of Judge Johnson. He owned an apartment house where all the court attaches were required to live at rents higher than those paid by other tenants for similar quarters. He even required his government secretary to begin her day's work cleaning and dusting his home and preparing the Judge's breakfast.¹⁴⁹

Judge Johnson resigned after the report was issued, and the House Committee voted to let the matter drop because the "Senate is engaged in the consideration of so many issues vital to the welfare of the nation."

The most baffling aspect of the whole situation is that Judge Johnson was elected president of the local bar association when he returned to the private practice of law.¹⁵⁰

There were others like Judge Johnson who resigned when charges were made in the House that they had sold justice or taken kick-backs: Judge Charles T. Sherman of Ohio, who had actually threatened to sue the New York Stock Exchange in 1873 when it reneged on its promised payment,¹⁵¹

¹⁴⁶ *Id.* at 148-49.

¹⁴⁷ H.R. REP. No. 1639, 79th Cong., 2d Sess. 2 (1946).

¹⁴⁸ *Id.* at 26-38.

¹⁴⁹ *Id.* at 43-44.

¹⁵⁰ BORKIN at 186.

¹⁵¹ 3 HINDS § 2511; CONG. GLOBE, 43d Cong., 3d Sess. 1655-56 (1873).

Judge Francis A. Winslow, when Congressman LaGuardia charged in 1929 that he had organized a "bankruptcy ring" in New York City and had taken "improper considerations" from a lawyer with a large practice in his court;¹⁵² Judge Daniel Threw Wright of the District of Columbia Supreme Court, who was charged by the House in 1914 with appropriating court money for his own use;¹⁵³ Judge Ferdinand A. Geiger of Wisconsin, who thereby avoided the necessity in 1939 of explaining why he had abruptly dismissed a grand jury before it could report an antitrust indictment against Chrysler, Ford, and General Motors.¹⁵⁴

Judge George H. English of Illinois delayed his resignation until the day the Senate was due to begin his impeachment trial. He owed his appointment as a judge to a politician named Charles B. Thomas, and the charge was that the Judge appointed Thomas to bankruptcy positions, that Thomas in turn appointed George H. English, Jr. as his attorney, that the Judge approved outrageous fees out of the bankrupt estates for both his former mentor and his son, and that they in turn made "loans" to the Judge. Other parts of the impeachment charge were that the Judge deposited the court funds in a hitherto obscure bank which he and his relatives controlled, and the bank made large loans to the Judge with little or no collateral and at little or no interest.¹⁵⁵

The following charges made against the judges whom the House of Representatives "reprimanded" but did not impeach are equally serious: that in 1890 Aleck Boorman of Louisiana took the money of the court for his personal use and "borrowed" additional funds from the court marshal;¹⁵⁶ that Judge Emory Speer of Georgia accepted railroad passes in 1914 and deposited bankruptcy funds in favored banks;¹⁵⁷ that in 1930 Judge Grovery Moscovitz continued a business interest in his former New York law firm and appointed members of that firm to high-paid receiverships.¹⁵⁸

The Judges whom the House of Representatives acquitted of wrongdoing were all charged, at least on the face of the accusations, with

¹⁵² 70 CONG. REC. 5067-68 (1929).

¹⁵³ 51 CONG. REC. 5238 (1914).

¹⁵⁴ The President of the Wisconsin State Bar Association testified that Judge Geiger dismissed the grand jury because he disapproved of the Government's use of a grand jury as a means of coercing the motor companies into a "consent decree." *Hearings Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess., ser. 2, at 7 (1938).

¹⁵⁵ ten Broek at 195.

¹⁵⁶ 21 CONG. REC. 3595 (1891).

¹⁵⁷ 50 CONG. REC. 3824 (1913).

¹⁵⁸ H.R. REP. NO. 1106, 71st Cong., 2d Sess. 3 (1930).

bribery or "other high Crimes and Misdemeanors" even though the evidence did not support the charge: Judge Henry Blodgett of Illinois in 1879¹⁵⁹ and Judge Augustus Ricks of Ohio in 1895¹⁶⁰ were charged with having borrowed court funds for personal use, and Judge William Van Ness of New York in 1818¹⁶¹ failed to exercise vigilance over the court funds with the consequence being that a clerk made off with them.

The charges filed against Mr. Justice William O. Douglas by Congressman Gerald Ford obviously are not of the same nature as those detailed above, nor do they approach in character the behavior, discussed below, of judges who were charged, but not impeached by the House, on the basis of job-related misconduct which did not constitute "Treason, Bribery or other high Crimes and Misdemeanors."

Scandalous or Improper Job-Related Behavior

In 1804, the House impeached and the Senate convicted John Pickering on a multitude of charges, one being that he "did appear upon the bench in a state of total intoxication, produced by the free and intemperate use of inebriating liquors."¹⁶² Since that early date, the House of Representatives has declined to impeach a judge when the only charge against him is alcoholism. Thus, in 1808, the legislature of Mississippi requested the House to impeach Territorial Judge Peter Bruin for this reason, but the House refused to do so.¹⁶³ And, one hundred years later in 1925, the Judiciary Committee recommended against the impeachment of West Virginia Judge William E. Baker although it was charged that he was drunk on duty, drunk, moreover, on liquor confiscated by prohibition agents and stored in the courthouse for safe-keeping.¹⁶⁴

Drunkenness is only one kind of scandalous judicial behavior which is not "good." Some judges abstain, or leave their liquor at home, and carry with them to the courtroom a quick temper, a sharp prejudice, or a vanity which is openly displayed at the expense of counsel, litigants, and witnesses.

The House of Representatives impeached Mr. Justice Chase¹⁶⁵ and Judge Peck¹⁶⁶ for abusive misuse of their judicial authority, but in neither

¹⁵⁹ 8 CONG. REC. 2388 (1879).

¹⁶⁰ H.R. REP. NO. 1670, 53d Cong., 3d Sess. 1 (1895).

¹⁶¹ H.R. REP. NO. 464, 15th Cong., 2d Sess. 1 (1819).

¹⁶² See text at notes 56-58 *supra*.

¹⁶³ 6 H.R. JOUR., 10th Cong., 1st Sess. 264 (1808).

¹⁶⁴ BORKIN at 222.

¹⁶⁵ See text at note 70 *supra*.

¹⁶⁶ See text at note 87 *supra*.

situation did the Senate agree that such behavior was an impeachable offense. Since those early years of the past century, the House has consistently refused to impeach for misuse of judicial authority: when it was charged, in 1804, that Judge Richard Peters of Pennsylvania engaged in on-the-bench misconduct in the trial of Sedition cases,¹⁶⁷ in 1822, that Judge Charles Tait of Alabama engaged in "tyrannical conduct" toward members of the Bar;¹⁶⁸ in 1825, that Judge Buckner Thurston was "rude, insolent, and undignified" while presiding on the circuit court for the District of Columbia;¹⁶⁹ in 1833, that Judge Benjamin Johnson of the territory of Arkansas displayed favoritism of counsel, irritability, rudeness, and habitual intemperance;¹⁷⁰ in 1908, that Judge Lebbus R. Wilfley of the United States Court in China maintained a "dictatorial attitude" on the bench,¹⁷¹ and, in 1935, when Congressman (later Senator) Dirksen charged that Judge Samuel Alschuler sat on a case and openly favored the Pullman Company, which was represented by the son of former governor Edward Dunne with whom the Judge had long political ties.¹⁷²

More germane to the charge against Mr. William O. Douglas that he ruled in favor of Ginzburg's pornographic magazines is the House of Representatives' history, since getting off to a bad start with Justice Chase and Judge Peck, of refusing to impeach a judge because of his rulings in a particular case or because of a line of his decisions.¹⁷³ In this century, the House refused to impeach Judge Alston G. Dayton when Congressman (later Senator) Neeley charged him in 1914 with "improperly issuing injunctions to prevent the miners from exercising their just and legal rights under the laws of West Virginia."¹⁷⁴

¹⁶⁷ 4 H.R. JOUR., 8th Cong., 1st Sess., 520, 643 (1804).

¹⁶⁸ 40 ANNALS OF CONG. 463 (1822).

¹⁶⁹ H.R. REP. NO. 327, 24th Cong., 2d Sess. 1 (1837). The defense was that Judge Thurston labored under a mental disease. *Id.* at 5.

¹⁷⁰ H.R. REP. NO. 88, 22d Cong., 2d Sess. 1 (1833). The House Committee also reported that a territorial judge, holding office for a term of four years, "is not a proper subject of trial by impeachment." *Id.*

¹⁷¹ Among other things, it was charged that when Judge Wilfley was appointed to the United States Court for China, he gave a bar examination to the practicing lawyers and flunked them all. 42 CONG. REC. 2263 (1908).

¹⁷² 79 CONG. REC. 7081 (1935). When the impeachment resolution was introduced in the House, Senator Ashurst introduced in the Senate a resolution authorizing a committee of 12 Senators to receive evidence in the trial of any impeachment. *Id.* at 8309.

¹⁷³ See text at notes 70 & 87 *supra*.

¹⁷⁴ The Judiciary Committee recommended against impeachment although it reported that Judge Dayton "issued restraining orders of very drastic scope and comprehension in certain cases brought by coal operators of West Virginia against their operatives and employees" and that "his manner and language toward the

The House refused to impeach Judge Frank Cooper of New York in 1927 when Congressman LaGuardia charged that he "ignored and disregarded the law of the land" in permitting government agents to decoy persons into violation of the Prohibition laws.¹⁷⁵

The House refused to impeach Judge James A. Lowell when Congressman Howard Smith of Virginia charged him with "disregard of the Constitution . . . and the decisions of the Supreme Court" because the Massachusetts judge had refused to extradite a Negro fugitive back to Virginia for trial because "negroes there were excluded from jury service."¹⁷⁶

The House refused to impeach Judge Joseph W. Molyneaux in 1934 when Congressman Shoemaker charged that the judge had interfered with an investigation of several banks by the Minnesota State Commerce Commission by issuing an illegal injunction.¹⁷⁷

It is for this reason that impeachment charges against Judge Herald Cox never reached the House floor,¹⁷⁸ although the behavior of the Mississippi judge was not "good" when he repeatedly referred to Negro litigants before his court with racist slurs (he called them chimpanzees).¹⁷⁹ For the same reason, the Ku Klux Klan of Richmond, Virginia, did no more than whistle Dixie when it threatened to institute impeachment proceedings against federal Judge Robert R. Merhige if he incorporated a "busing" provision in the city's school desegregation plan.¹⁸⁰

In summary, the charges against Justice William O. Douglas are unique in our history of impeachment. The House has stood ready to impeach judges for Treason, Bribery, and related financial crimes and misdemeanors. It has refused to impeach judges charged with on-the-job misconduct when that behavior was not also an indictable criminal offense. Only once before has a judge even been charged with impeachment for non-job-related activities—in 1921, when Judge Kenesaw Moun-

defendants (union members) while upon the bench was that of hatred and bitterness." H.R. REP. NO. 1490, 63d Cong., 3d Sess. 4 (1915).

¹⁷⁵ The Judiciary Committee concluded that "while certain activities of the Hon. Frank Cooper with relation to the manner of procuring evidence in cases which would come before him for trial are not to be considered as approved by this report, it has reached the conclusion and finds that the evidence does not call for the interposition of the constitutional powers of the House with regard to impeachment." H.R. REP. NO. 2299, 69th Cong., 2d Sess. 1 (1927).

¹⁷⁶ 77 CONG. REC. 2416-17 (1933).

¹⁷⁷ 78 CONG. REC. 1099 (1934).

¹⁷⁸ NEW REPUBLIC, Sept. 4, 1965, at 13.

¹⁷⁹ NEW YORK TIMES, Jan. 12, 1965, at 18, col. 6.

¹⁸⁰ THE WASHINGTON POST, Aug. 4, 1970, § A, at 13, col. 3.

tain Landis was charged with accepting the job as Commissioner of big-league baseball—and there the House Judiciary Committee refused to dignify the charge with a report pro or con.¹⁸¹ Never in our impeachment history, until Congressman Ford leveled his charges against Mr. Justice Douglas, has it ever been suggested that a judge could be impeached because, while off the bench, he exercised his First Amendment rights to speak and write on issues of the day and to associate with others in educational enterprises.

CONCLUSION

This brief history of Congressional impeachment shows several things. First, it shows that it works. It is not a rusty, unused power. Since 1796, fifty-five judges—approximately one in every three to four years—have been charged on the Floor of the House of Representatives. Thirty-three judges have been charged with “Treason, Bribery, or other High Crimes and Misdemeanors.” Three of them have been found guilty by the Senate and removed from office; twenty-two additional judges have resigned rather than face Senate trial and public exposure. This amounts to one “corrupt” judge for approximately every seven years. Presumably, most of the federal judges who should be impeached are impeached.

Second, by its deeds and actions, Congress has recognized what Chief Justice Burger recently described as “the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”¹⁸² Except for a few aberrations in the early-1800 period of unprecedented political upheaval, Congress has refused to impeach a judge for lack of “good behaviour” unless the behavior was both job-related and criminal. This has been true whether the judge was drunk on the bench,¹⁸³ whether the judge exploited and abused the authority of his robes,¹⁸⁴ or whether the judge handed down unpopular or wrong decisions.¹⁸⁵

How could it be otherwise? The purpose of an “independent Judiciary” in our system of government-by-separation-of-powers is to check the excesses of the legislative and executive branches of the govern-

¹⁸¹ The Committee on the Judiciary recommended that the charges be considered by the next congress, H.R. Rep. No. 407, 66th Cong., 1st Sess. 1 (1921). The Sixty-seventh Congress took no action.

¹⁸² *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84 (1970).

¹⁸³ See text following note 162 *supra*.

¹⁸⁴ See text following note 166 *supra*.

¹⁸⁵ See text following note 173 *supra*.

ment and to cry a halt when popular passions grip the Congress and laws are adopted which abridge and infringe upon the rights guaranteed to all citizens by the Constitution. The judges must be strong and secure if they are to do this job well.

John Dickinson proposed at the Constitutional Convention that federal judges should be removed upon a petition by the majority of each House of Congress. This proposal was rejected because it was contradictory to judicial tenure during good behavior and because it would make the judiciary "dangerously dependent" on the legislature.¹⁸⁶

During the Jeffersonian purge of the federal bench, Senate leader William Giles proclaimed that "removal by impeachment" is nothing more than a declaration by both Houses of Congress to the judge that "you hold dangerous opinions." This theory of the impeachment power was rejected in 1804 because it would put in peril "the integrity of the whole national judicial establishment."¹⁸⁷

Now Congressman Ford suggests that "an impeachable offense" is nothing more than "whatever a majority of the House of Representatives considers it to be at a given moment in history."¹⁸⁸

Does he really mean that Chief Justice Warren might have been impeached because "at a given moment in history" a majority of the House and two-thirds of the Senate objected strongly to his opinion ordering an end to school-segregation or to his equally controversial decision against school prayer? Does he really mean that Judge Julius Hoffman is impeachable if a majority of this or the next Congress decides that he was wrong in his handling of the "Chicago Seven"? Does he really want a situation where federal judges must keep one eye on the mood of Congress and the other on the proceedings before them in court in order to maintain their tenure in office? If Congressman Ford is right, it bodes ill for the concept of an independent judiciary and the corollary doctrine of a constitutional government of laws.

However, to suggest that Congress should not capriciously wield its impeachment power does not mean that Congress should keep its hands off the judiciary. Far from it. Many congressional actions are desirable and appropriate and entirely in keeping with the maintenance of an "independent judiciary."

Some few of our most distinguished judges (Martin Manton and J.

¹⁸⁶ See text at note 2 *supra*.

¹⁸⁷ See text at note 71 *supra*.

¹⁸⁸ See text at note 26 *supra*.

Warren Davis, for example) have succumbed to the lure of "easy money" when caught in a financial bind. Congress should ensure that federal judges are always paid a comfortable salary ahead of inflationary costs of living. This would at least minimize the temptations for selling justice.

Other judges, with advancing age, get crotchety, forgetful, arbitrary, or just lose touch with modern currents of style and thought. A mandatory retirement age at around seventy would deprive us of the maturing wisdom of a Holmes, a Brandeis, a Frankfurter, or a Black; but it would eliminate the John Pickerings and the Joseph Buffingtons; and it would benefit over-all with the infusion of new minds and fresh outlooks.

Judges in the past, and perhaps some today, drink too much. Others bring their cupidity, their racial and other prejudices to the bench with them. Some few are incompetent and are appointed for reasons totally unrelated to merit. These undesirable traits are discernible long before late middle-age when most lawyers are tapped for federal judgeships. The answer lies not in "impeachment" after the fact, but in curing the initial appointive processes. Judge Harold Carswell was confirmed by the Senate to a top judicial post on the Court of Appeals for the Fifth Circuit after no more than an hour or two of perfunctory "hearings." There was no exploration of his background or his fitness to serve as a judge in the deep South until President Nixon appointed him to the Supreme Court when his "racial" bias was uncovered.

The American Bar Association purports to "grade" and "qualify" judicial appointees. There is no reason why the House of Representatives (with the Constitutional mandate to initiate impeachment) should not also appoint a "watch dog" committee to scrutinize all judicial appointees and share its knowledge through testimony before the appropriate Senate body.

Despite all precautions in the appointive processes, a few judges will exploit their public position for private gain. It has happened in the past, it will happen in the future. Presently, there is no central forum to hear complaints against judges at early stages, and, as a result, the Judge Albert Johnsons survive on corruption and bribery for twenty years with the individual members of the local bar fearful of making a public outcry. A House of Representatives "watch dog" committee should be available, as a matter of course, to hear complaints from fellow judges, local lawyers, newsmen, and private litigants and to sift them carefully in closed session. The approach suggested above is a better answer to the problem of the

non-judicious judge who abuses his robes than the answer suggested by Congressman Ford.

In 1835, the French observer de Tocqueville wrote:

A decline of public morals in the United States will probably be marked by the abuse of the power of impeachment as a means of crushing political adversaries or ejecting them from office.¹⁸⁹

Let us hope that that day has not yet arrived.

¹⁸⁹ ten Broek at 185, *quoting* Alexis de Tocqueville.