Notre Dame Law Review

Volume 46 | Issue 4 Article 2

6-1-1971

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IMPEACHMENT—A MACE FOR THE FEDERAL JUDICIARY

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> *Whenever, as seldom happened, an individual Member became turbulent and seemed beyond the Speaker's control, the Sergeant at Arms, on order of the Speaker, lifted the mace from its pedestal and "presented" it before the offending person. Order was promptly restored, so great was the respect for the mace as a symbol of legislative authority. Thus the Members of the House, who are themselves lawmakers, very properly set an example for the whole country of respect for discipline.* THE MACE OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 9 (7th ed. 1969).

Article I of the United States Constitution establishes the Congressional power of impeachment for removing a federal official from office. The House of Representatives is given "the sole Power of Impeachment"[1] and consequently serves as grand jury and prosecutor. The Senate acts as judge and petit jury: "The Senate shall have the sole Power to try all Impeachments . . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present."[2]

One must continually remember that the writers of the Constitution did their work with the experience of the British Crown and Parliament freshly in mind. There is so much that resembles the British system in the Constitution that the even sharper differences are sometimes overlooked—one of the sharpest is the divergent view of impeachment.

In Great Britain an impeachment is initiated by motion in the House of Commons[3] and tried in the House of Lords.[4] Under the English system of impeachment the Lords can try, convict and punish any impeached subject (private person or official) with *any* lawful penalty for his crime—including death.[5] The United States Constitution, on the contrary, provides only the relatively mild penalties of removal from office and disqualification for future federal office. The worst punishment the United States Senate can mete out is *both* removal and disqualification:

> 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.[6]

In other words, impeachment *resembles* a regular criminal indictment and trial but it is *not* the same thing. It is a proceeding of an entirely *political* nature

* Minority Leader of the United States House of Representatives; Representative from the Fifth District of Michigan since 1949; B.A., University of Michigan, 1935; LL.B., Yale University, 1941.

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

2 U.S. CONST. art. I, § 3.

3 Blair's Case, 12 How. St. Tr. 1207 (1689).

4 Middlesex's Case, 2 How. St. Tr. 1183 (1624).

5 *See e.g.*, Dernwentwater's Case, 15 How. St. Tr. 761 (1716).

6 U.S. CONST. art. I, § 3.

and relates solely to the accused's right to hold civil office, not to the many other rights which are his as a citizen and which protect him in a court of law.[7] By pointedly voiding any immunity an accused might claim under the double jeopardy principle, the framers of the Constitution clearly established that impeachment is a unique *political* device, designed explicitly to dislodge from public office those who are patently unfit for it but cannot otherwise be promptly removed. Furthermore, impeachment is made the sole exception to the constitutional guarantee that trial of all crimes shall be by jury[8]—perhaps the most fundamental of all constitutional protections.

The Congressional power of impeachment is one of the most difficult of the *political* mechanisms provided by the Constitution. It is rarely resorted to—a majority of the House of Representatives has voted to impeach only twelve times in 184 years.[9] Even more rare is a successful impeachment. In only four of the twelve cases has the Senate, by the required two-thirds vote, convicted and removed the accused official from office.[10] Seven federal officials escaped conviction and removal[11] while in one case the accused resigned during trial, halting further proceedings against him.[12]

The difficulty of the impeachment process is in part deliberate, as the debates of the Constitutional Convention clearly show, but it is also partly the result of our political development which has not always gone the way the founding fathers

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7 As James Bayard, chairman of the House managers (once the House of Representatives decides to impeach an official it appoints "managers" to argue the case for the House before the Senate) during the first impeachment proceeding against a federal official, said:

> [I]mpeachment is a proceeding of a purely political nature. It is not so much designed to punish the offender, as to secure the State. It touches neither his person nor his property, but simply divests him of his political capacity. F. WHARTON, STATE TRIALS OF THE UNITED STATES 263 (1849).

8 U.S. CONST. art. III, § 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

9 A majority of the House of Representatives has voted to impeach in the following instances: (1) William Blount, United States Senator (1797). *See* 7 ANNALS OF CONG. 459 (1797). (2) John Pickering, Judge of the United States District Court for New Hampshire (1803). *See* 12 ANNALS OF CONG. 642 (1803). (3) Samuel Chase, Justice of the United States Supreme Court (1804). *See* 13 ANNALS OF CONG. 1180 (1804). (4) James Peck, United States Judge for the District of Missouri (1830). *See* 6 CONG. DEB. 819 (1830). (5) West Humphries, United States Judge for the several districts of Tennessee (1862). *See* CONG. GLOBE, 37th Cong., 2d Sess. 1966 (1862). (6) Andrew Johnson, President of the United States (1868). *See* CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868). (7) William Belknap, United States Secretary of War (1876). *See* 4 CONG. REC. 1433 (1876). (8) Charles Swayne, United States Judge for the Northern District of Florida (1904). *See* 39 CONG. REC. 249 (1904). (9) Robert Archbald, United States Circuit Judge for the Commerce Court (1912). *See* 48 CONG. REC. 8934 (1912). (10) George English, United States Judge for the Eastern District of Illinois (1926). *See* 67 CONG. REC. 6736 (1926). (11) Harold Louderback, United States Judge for the Northern District of California (1933). *See* 76 CONG. REC. 4925 (1933). (12) Halsted Ritter, United States Judge for the Southern District of Florida (1936). *See* 80 CONG. REC. 3092 (1936).

10 (1) Judge John Pickering (1804). *See* 13 ANNALS OF CONG. 367 (1804). (2) Judge West Humphries (1862). *See* CONG. GLOBE, 37th Cong., 2d Sess. 2953 (1862). (3) Judge Robert Archbald (1913). *See* 49 CONG. REC. 1448 (1913). (4) Judge Halsted Ritter (1936). *See* 80 CONG. REC. 5607 (1936).

11 (1) Senator William Blount (1799). *See* 8 ANNALS OF CONG. 2319 (1799). (2) Justice Samuel Chase (1805). *See* 14 ANNALS OF CONG. 669 (1805). (3) Judge James Peck (1831). *See* 7 CONG. DEB. 45 (1831). (4) President Andrew Johnson (1868). *See* CONG. GLOBE (Supplement—TRIAL OF THE PRESIDENT), 40th Cong., 2d Sess. 415 (1868). (5) Secretary of War William Belknap (1876). *See* 4 CONG. REC. 357 (1876) (TRIAL OF WILLIAM BELKNAP). (6) Judge Charles Swayne (1905). *See* 39 CONG. REC. 3472 1905). (7) Judge Harold Louderback (1933). *See* 77 CONG. REC. 4088 (1933).

12 Judge George English (1926). *See* 68 CONG. REC. 303 (1926).

anticipated. The framers of the Constitution were primarily interested in impeachment as an extraordinary way of removing a President. Experience under the Articles of Confederation proved the need for a strong executive, and the framers responded by creating one.[13] Nonetheless, protection from the arbitrary abuse of executive power such as had been experienced under the King and the King's agents was present in their minds. Consequently, the last recourse against presidential abuse—removal by impeachment without waiting for the expiration of the President's four-year term—was given to Congress.

As it turned out, however, all but three of the twelve impeachment proceedings and all four of the successful ones have involved federal judges.[14] The reason is obvious. Abuse of power actually developed not so much in the executive branch as the framers feared. The checks and balances they established in Congress and the courts combined with the political restraints of regular elections to prevent executive excesses. Rather, abuse of power developed most often in the judicial branch, where impeachment offers the *only* constitutional remedy.

It is irrelevant, therefore, to dwell on the difficulty of impeachment. The cumbersome constitutional mechanism serves a most commendable purpose in safeguarding the independence of the federal judiciary as the framers intended. Difficult, cumbersome, archaic as it may be, impeachment is the sole check and balance in our system to prevent judicial independence from degenerating into judicial tyranny or judicial caprice.

The rarity and the difficulty of impeachment, however, do contribute to much public misunderstanding. The literature of impeachment is limited and the precedents are few, not fully documented and susceptible to conflicting interpretations. In this generation there is a definite scarcity of experts on the subject since the most recent impeachment trial took place in 1936. Not a single incumbent Senator and only five members of the present House of Representatives held office when United States District Judge Halsted L. Ritter of Florida was impeached and removed from office thirty-five years ago.[15] Nevertheless, developments in recent years have revived interest in the subject and led to a great deal of misunderstanding. The purpose of this article is to examine the nature of the impeachment process itself and to discuss four major misconceptions which have arisen to cloud the issue.

The first and most serious misconception is that of regarding impeachment as primarily a judicial process. It is not that at all; it is a political device, a unique part of our political system under the Constitution. That part of the confusion which is not deliberately promoted may be due to a failure to make the necessary distinction between "political" in its precise meaning and "partisan," which is a different matter. Both in principle and in practice the impeachment process should not be and usually has not been unduly partisan, but it has always been political.

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13 *See* U.S. CONST. art. II.

14 *See* notes 9 & 10 *supra*. A discussion of the impeachment proceedings brought against federal judges can be found in Kelley & Wyllie, *The Congressional Impeachment Power as It Relates to the Federal Judiciary*, 46 NOTRE DAME LAWYER 678 (1971).

15 The five members of the House of Representatives are: Leslie Arends (R-Ill.), Emanuel Celler (D.-N.Y.), William Colmer (D.-Miss.), George Mahon (D.-Tex.), Wright Patman (D.-Tex.).

There are a number of ways of gaining civil office in any government. One may be born to it, appointed to it, elected to it, or nominated and confirmed in it. One also may seize it by brute force. In the United States the hereditary route has been outlawed and the coup d'etat has been outgrown. The other ways of gaining civil office are *political.*

Conversely, there are many ways of losing civil office: death, natural or otherwise; resignation or retirement; forcible eviction by illegal means; and summary or administrative discharge by legal process. There are also political ways, the most common of which is failure to be reappointed or reelected at the end of a fixed term. In addition, each body in the Congress can disqualify and even expel its members whether duly elected or not.[16] This is a *political* removal. Recall is another political method, though not present in the federal system. Finally, among the political processes for removing unfit officials is impeachment.

Impeachment inevitably must be a political rather than a judicial process since in the end it is resolved, without appeal or any necessity of explanation, by constitutional majorities of the House and Senate. The requirement of a two-thirds vote in the Senate to convict has, in practice, kept this use of political power from becoming a purely partisan exercise. Even in the supercharged partisanship of the Jeffersonian takeover from the Federalists, and the post-Civil War reprisals against Lincoln's moderate successor, impeachment efforts failed to muster pure party-line support. This is to be applauded, but to condemn *any* effort to employ the constitutional process of impeachment as "politics" is to misconstrue the legitimate right of the people, through their elected representatives, to rid the federal judiciary of judges who have brought it into discredit and disrepute. Since impeachment is the only *legal* remedy, what other recourse do the Sunday morning critics recommend?

Even though it has been employed on the average of only once every fifteen years, and usually in the more turbulent periods of our history, the constitutional power of impeachment stands, like the historic Mace in the House of Representatives, as a constant warning of potential punishment if power and immunity are too flagrantly abused.

The second widespread misconception is that federal judges and the Justices of the Supreme Court are appointed for life. The founding fathers would have been the last to make the mistake of giving life terms to such officials since the American Revolution had been waged against a hereditary system. The King always had a life term and, as English history bloodily demonstrated, he could be removed from office only by the headsman's axe or the assassin's dagger. The Constitution does not guarantee a lifetime of power and authority to any public official. The terms of members of the House are fixed at two years;[17] of the President and Vice President at four;[18] of United States Senators at six.[19] Members of the federal judiciary hold their offices only "during good behaviour."

16 U.S. CONST. art. I, § 5: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

17 U.S. CONST. art. I, § 2.

18 U.S. CONST. art. II, § 1.

19 U.S. CONST. amend. XVII.

The first section of article III of the Constitution states in full:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of 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. (Emphasis added.)

It suggests further that the income of jurists was, even then, a highly sensitive matter and that the salaries of federal judges should be adequate to their needs. The 91st Congress agreed to a Presidential recommendation raising the salaries of United States District Judges to $40,000 per annum, of Associate Justices of the Supreme Court to $60,000 and of the Chief Justice to $62,500.

The Constitution is perfectly clear about the tenure, or term of office of all federal judges—it is "during good behaviour."[20] It is implicit in this that when behavior ceases to be good, the right to hold judicial office ceases also. Thus, one comes quickly to the central question: What constitutes "good behaviour" or, conversely, bad or disqualifying behavior?

The words employed by the framers of the Constitution were, as the proceedings of the convention detail, chosen with exceedingly great care and precision. Note the word "behaviour." It relates to action—not merely to thoughts or opinions. It refers to a pattern or continuing sequence of action—not to a single act. A federal judge cannot and should not be removed for the legal views he holds—this would be as contemptible as excluding him from serving on the Supreme Court for his ideology or past decisions. Nor should he be removed for a minor or isolated mistake—this does not constitute "behavior" in the common meaning. What should be scrutinized in judges is their continuing pattern of action—their behavior. The Constitution does not demand that it be exemplary or perfect, but it does have to be "good."

Naturally, there must be an orderly procedure for determining whether or not a federal judge's behavior is good. The courts, arbiters in most such questions of judgment, cannot judge themselves. The founding fathers, therefore, vested this ultimate power where the ultimate sovereignty of our system is most directly reflected—in the Congress, in the elected representatives of the people and of the states.

Article II of the Constitution, dealing with the executive branch, states in section 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." This has been the most controversial of the Constitutional references to the impeachment process. No consensus exists as to whether, in the case of federal judges, impeachment must depend upon conviction of one of the two specified crimes of treason or bribery or be within the nebulous category of "other high crimes and mis-

20 The clause in article III dealing with the compensation of federal judges bolsters the fact that their "Continuance in office" was not unlimited. If the framers had intended unlimited tenure, it would have been much simpler to have said "during their lifetimes."

demeanors," even though the point has been well argued in past impeachment proceedings.[21]

It is this author's view that conviction of one or more of the offenses cited in article II is required for removal of the indirectly-elected President and Vice President or of appointed civil officers of the executive branch of the federal government, whatever their terms of office. In the case of members of the judicial branch, federal judges and justices, however, an additional and much stricter requirement is imposed by article III—namely, "good behaviour." This view has substantial support in the history of past impeachment proceedings.[22]

The third common misconception about impeachment is that federal judges can be impeached and removed only by being convicted of violating the law at a proceeding with all the ordinary protections and presumptions of innocence to which an accused is entitled. A study of the principal impeachment actions that have been initiated over the years reveals that there are too few cases to make very good law. About the only thing most authorities can agree upon in recent history is that an offense need *not* be indictable to be impeachable.[23] In other words, something less than a criminal act or criminal dereliction of duty may nevertheless be sufficient grounds for impeachment and removal from public office.

It is fair, however, to come to one conclusion from our history of impeachment: a higher standard *is* expected of federal judges than of any other "civil Officers" of the United States. The President and Vice President, and all persons holding office at the pleasure of the President, can be thrown out of office by the voters at least every four years. To remove them in midterm might indeed require crimes of the magnitude of treason and bribery. Other elected officials, such as members of Congress, are so vulnerable to public displeasure that their removal by the complicated impeachment route has not even been tried since 1798.[24] But nine federal judges, including one Associate Justice of the Supreme Court, have been impeached by the House and tried by the Senate;[25] four were acquitted,[26] four were convicted,[27] and one resigned.[28] Certainly this is not a record of congressional power misused.

In the most recent impeachment trial conducted by the Senate, that of

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21 *See generally* SPECIAL SUBCOMM. ON H. RES. 920 OF THE COMM. ON THE JUDICIARY, 91st CONG., 2d SESS., LEGAL MATERIALS ON IMPEACHMENT (Comm. Print 1970).

22 *See generally* Kelley & Wyllie, *The Congressional Impeachment Power as It Relates to the Federal Judiciary*, 46 NOTRE DAME LAWYER 678 (1971).

23 *See e.g.*, C. PRITCHETT, THE AMERICAN CONSTITUTION 204-05 (2d ed. 1968); H. ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 412 (1939); Burton, *An Independent Judiciary: The Keystone of Our Freedom*, 39 A.B.A.J. 1067, 1068 (1953).

This issue, however, was hotly contested until President Andrew Johnson's impeachment and during the proceedings against Judge Swayne. *See generally* 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2008-21 (1907).

24 William Blount was expelled by the Senate before the House of Representatives impeached him. Blount then successfully asserted that the Senate no longer had jurisdiction over him. *See* 8 ANNALS OF CONG. 2319 (1799). Blount's case stands as a precedent for the proposition that Senators are not subject to impeachment, although to be precise, it immunized only ex-Senators or expelled Senators.

25 *See* note 9 *supra.*

26 *See* note 11 *supra.*

27 *See* note 10 *supra.*

28 *See* note 12 *supra.*

United States District Judge Halsted L. Ritter of the Southern District of Florida in 1936, the point of judicial behavior was paramount, since the criminal charges were admittedly thin. This case was in the context of FDR's effort to pack the Supreme Court with justices more to his liking; Judge Ritter was a transplanted Colorado Republican appointed to the federal bench in solidly Democratic Florida by President Coolidge. He was convicted by a coalition of liberal Republicans, New Deal Democrats and Farmer-Labor and Progressive Party Senators in what might be called the "Northwestern Strategy" of that era. The arguments of the Senators were persuasive.

In a joint statement, Senators Borah, La Follette, Frazier and Shipstead said:

> We therefore did not, in passing upon the facts presented to us in the matter of the impeachment proceedings against Judge Halsted L. Ritter, seek to satisfy ourselves as to whether technically a crime or crimes had been committed, or as to whether the acts charged and proved disclosed criminal intent or corrupt motive; we sought only to ascertain from these facts whether his conduct had been such as to amount to misbehavior, misconduct —as to whether he had conducted himself in a way that was calculated to undermine public confidence in the courts and to create a sense of scandal.
>
> There are a great many things which one must readily admit would be wholly unbecoming, wholly intolerable, in the conduct of a judge, and yet these things might not amount to a crime.[29]

Senator Elbert Thomas of Utah, citing the Jeffersonian and colonial antecedents of the impeachment process, bluntly declared:

> Tenure during good behavior . . . is in no sense a guaranty of a life job, and misbehavior in the ordinary, dictionary sense of the term will cause it to be cut short on the vote, under special oath, of two-thirds of the Senate, if charges are first brought by the House of Representatives. . . . To assume that good behavior means anything but good behavior would be to cast a reflection upon the ability of the fathers to express themselves in understandable language.[30]

The best summary, however, was that of Senator William G. McAdoo of California, son-in-law of Woodrow Wilson and his Secretary of the Treasury:

> I approach this subject from the standpoint of the general conduct of this judge while on the bench, as portrayed by the various counts in the impeachment and the evidence submitted in the trial. The picture thus presented is, to my mind, that of a man who is so lacking in any proper conception of professional ethics and those high standards of judicial character and conduct as to constitute misbehavior in its most serious aspects, and to render him unfit to hold a judicial office.
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> . . . .
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> Good behavior, as it is used in the Constitution, exacts of a judge the

29 80 CONG. REC. 5657 (1936) (statement of Senators Borah, La Follette, Frazier and Shipstead in the matter of the impeachment of Halsted L. Ritter).

30 *Id.* at 5657-58 (memorandum opinion in the impeachment trial of Judge Halsted L. Ritter submitted by Senator Elbert D. Thomas).

> highest standards of public and private rectitude. No judge can besmirch the robes he wears by relaxing these standards, by compromising them through conduct which brings reproach upon himself personally, or upon the great office he holds. No more sacred trust is committed to the bench of the United States than to keep shining with undimmed effulgence the brightest jewel in the crown of democracy—justice.
>
> However disagreeable the duty may be to those of us who constitute this great body in determining the guilt of those who are entrusted under the Constitution with the high responsibilities of judicial office, we must be as exacting in our conception of the obligations of a judicial officer as Mr. Justice Cardozo defined them when he said, in connection with fiduciaries, that they should be held "to something stricter than the morals of the marketplace. *Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.* (Meinhard v. Salmon, 249 N. Y. 458.)"[31] (Emphasis added.)

The fourth and final misconception is that the impeachment process, or even the prospect of its use by Congress, is somehow destructive of the cherished constitutional principle of separation of powers.[32] How one constitutional concept can be subversive of another defies logic, but this is frequently parroted. Far from being a threat to the tripartite system of federal government, impeachment is an integral part of it. The separation of powers is not and never was a watertight compartmentation of executive, legislative and judicial powers and duties, but rather a delicate mixture and balance among them.

The separate character of the three co-equal branches becomes fuzzed up even in the pristine text of the Constitution, and even more so in practice. This is because the founding fathers were practical politicians who resolved hard dilemmas precisely the way practical politicians do today. A certain amount of fuzzing up of pure theory inevitably ensues. For instance, the Chief Executive exercises legislative power when he vetoes and judicial power when he pardons. The Congress wields executive power when the House impeaches and judicial power when the Senate tries an impeachment. The judiciary is the only branch not constitutionally empowered to encroach upon the executive and legislative domain, yet it has successfully asserted a veto against the acts of both. And who will deny that today's Supreme Court legislates as well as adjudicates in its momentous decisions?[33]

The plain truth is that tripartite separation of powers never was neat or absolute. It has always been untidy and pragmatic. The abuse of political power in all three branches is a continuing threat; its prevention relies upon a delicate division of powers with the scales shifting in every generation, only to be righted by the counterforce of centending powers.

Under the Constitution and the ever-widening franchise the abuse of executive and legislative powers can be corrected in two or four or six years at the worst. But judicial misbehavior can be reached by the body politic through one method and one method only—impeachment.

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31 *Id.* at 5756-58 (memorandum opinion of Senator McAdoo in the matter of the impeachment of Halsted L. Ritter).

32 *See e.g.,* Letter from Simon H. Rifkind to Emanuel Celler, Aug. 18, 1970, in 103 CONG. REC. 8687-89 (daily ed. Sept. 14, 1970).

33 *See e.g.,* Brown v. Bd. of Education, 347 U.S. 483 (1954).

That the independence of the federal judiciary depends upon an extraordinary degree of job security is unarguable. But to jump from this to the proposition that once elevated to the bench, federal judges henceforth and forever wear their robes by some Divine Right and bear no responsibility to the com-one method and one method only—impeachment.

It has been alleged that use of the impeachment process in today's controversial political climate threatens the integrity of the judiciary and the United States Supreme Court in particular.[34] It can be argued with greater force that the removal of unfit judges can only enhance the esteem and confidence in which the high court is held. In any event, the Constitution makes Congress the Mace of the federal judiciary—not Congress acting concurrently as it does in legislating, but the House and Senate in separate and unusual roles. Neither body can effectively touch any judge without the other. Surely this is a far cry from the bugaboo of "judges serving at the pleasure of Congress."

What is central to the entire question of impeachment is neither the privileges and powers of the judicial branch nor the privileges and powers of the legislative branch but the primary interest of the public. Confidence in government is the touchstone of a free society. If the duty of the courts is to protect citizens from bad laws, it is equally the duty of the Congress to protect them from bad judges.

34 *See e.g.*, Letter from Simon H. Rifkind to Emanuel Celler, Aug. 18, 1970, in 103 CONG. REC. 8687-89 (daily ed. Sept. 14, 1970).