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THE CONGRESSIONAL IMPEACHMENT POWER AS IT RELATES TO THE FEDERAL JUDICIARY

Bethel B. Kelley and Daniel G. Wyllie***

I. Introduction

The United States Constitution, article III, § 1, provides that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ." Article II, § 4, provides that "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." The relationship of these provisions has been the subject of much controversy in virtually every impeachment proceeding brought against a federal judge which has resulted in a Senate trial. The purpose of this article is to trace the development of this controversy and to attempt to delineate the exact nature of the impeachment power as it relates to the federal judiciary.[1] The problem basically involves the definition of an impeachable offense. The basic source material for such a determination is, first, the Constitution itself, second, the debates of Congress in interpretation of that power, third, the application of the constitutional provision in the nine impeachment proceedings involving the federal judiciary, and fourth, the comments of scholars who have analyzed the problem.

Before an extensive examination of the debates is made, a brief review of the various impeachment proceedings resulting in a Senate trial of a federal judge is in order. The first impeachment of a federal judge, and the first impeachment to succeed, was that of John Pickering, United States District Judge for the District of New Hampshire. Judge Pickering was charged with the violation of a United States statute by wrongfully releasing a vessel which had been seized by the government without requiring the prescribed indemnity bond. He was also charged with conducting court while intoxicated and with blasphemy on the bench. Judge Pickering did not respond to the articles of impeachment but his son did and was allowed to introduce testimony to show that the judge was mentally irresponsible. The Senate convicted the judge on each of the articles and removed him from office on March 12, 1804.[2]

On the same day, the House of Representatives voted to impeach Samuel Chase, Associate Justice of the Supreme Court, on eight articles.[3] He was charged with certain misconduct to the prejudice of impartial justice in the course of a

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1 For an examination of the nature of the impeachment process and the four major misconceptions which have arisen in connection with it, see Ford, *Impeachment — A Mace for the Federal Judiciary,* 46 NOTRE DAME LAWYER 669 (1971).

2 12 ANNALS OF CONGRESS 642 (1803) [1802-1803]; 13 ANNALS OF CONGRESS 367 (1804) [1803-1804].

3 13 ANNALS OF CONGRESS 1180-81 (1804) [1803-1804].

trial for sedition, with misconduct in improperly inducing or coercing a grand jury to return an indictment against an editor of a newspaper for an alleged breach of the sedition laws, and with misconduct in addressing an inflammatory harangue to a grand jury. In the course of the trial an extensive debate was had concerning the nature of the impeachment power. The impeachment failed for want of a two-thirds majority even though a majority voted to convict on several of the articles.[4]

James H. Peck, judge of the United States District Court for the District of Missouri, was impeached in 1830 on one general article,[5] containing eighteen specifications, charging abuse of official power and arbitrary conduct in severely punishing for contempt of court an attorney who had published a criticism of one of the judge's opinions. In his answer, the judge alleged that his conduct was legally correct and justifiable. He also denied the existence of a malicious motive. The trial resulted in a majority of the Senate voting against impeachment.[6]

In 1862 Judge West H. Humphries was impeached and convicted for activities relating to the secession of Tennessee and for serving as a Confederate judge.[7] Judge Humphries did not appear to defend the articles and was removed by a unanimous vote of the Senate.[8]

The next impeachment affecting the judiciary was that of Charles Swayne, United States District Judge for Florida.[9] In 1904 Judge Swayne was impeached on twelve articles, charging that he had rendered false claims in his expense accounts; that he had appropriated to his own use, without making compensations therefor, a certain railroad car belonging to a defunct railroad company, then in the hands of a receiver appointed by the judge; that he had resided outside of his judicial district in violation of the statute; and that he had maliciously adjudged certain parties to be in contempt of court and had imposed excessive punishments upon them. The judge defended, and was acquitted by a majority on each article.[10]

In 1912 the House of Representatives impeached Robert W. Archbald, United States Circuit Judge for the Commerce Court, upon thirteen articles.[11] The articles charged the judge with the use of his official power and influence to secure business favors and concessions. He was also charged with various misconduct while a district court judge but was acquitted thereon, apparently because the Senate did not wish to set a precedent of impeaching a person for acts occurring while in a former office.[12] The judge was found guilty on five of thirteen articles and removed from office.[13]

In 1926 George W. English, United States District Judge from Illinois, was impeached by the House of Representatives.[14] He was charged with an abuse of

4 14 ANNALS OF CONGRESS 669 (1805) [1804-1805].
5 16 CONG. DEB. 819 (1830) [1830].
6 7 CONG. DEB. 45 (1831) [1830-1831].
7 CONG. GLOBE, 37TH CONG., 2D SESS. 1966 (1862).
8 *Id.* at 2953.
9 39 CONG. REC. 248-49 (1904).
10 *Id.* at 3467-72 (1905).
11 48 CONG. REC. 8933-34 (1912).
12 49 CONG. REC. 1438-48 (1913).
13 *Id.* at 1448.
14 67 CONG. REC. 6735-36 (1926).

power in the suspension and disbarment of two attorneys and for using his office for personal gain by appointing a personal friend as the sole bankruptcy referee for his court. The charges against Judge English were dropped after he resigned from office.[15]

In 1933 Harold Louderback, United States District Judge from California, was impeached by the House of Representatives.[16] The articles charged the judge with using his office for the enrichment of his personal friends and political allies. He had appointed them as receivers even though no receiver should have been appointed and though the persons appointed did not qualify. Judge Louderback was acquitted on all articles.[17]

The last impeachment proceeding was brought in 1936 against Halsted L. Ritter, United States District Judge for Florida.[18] Of the seven articles of impeachment, the first six alleged specific instances of wrongdoing on the part of Judge Ritter involving the use of his office for personal gain, including the receipt of "kickbacks" from legal fees he awarded to his former law partner. Judge Ritter was acquitted on all six of these articles.[19] The seventh article was a recitation of the first six and charged the judge with bringing his office into disrespect by his questionable conduct. On this article, Judge Ritter was convicted and removed from office.[20] As will be noted later, the Ritter case is one of the most enlightening because it was the only trial in which individual Senators filed written opinions expressing the reasons for their votes.

II. The Precedents

The impeachment trial of Judge Pickering affords little precedential value because of the tragic circumstances under which he was impeached and because he did not actually defend himself at the trial. However, a minor debate took place over the form of the question to be put to the Senate. Some Senators insisted that they should be asked whether the judge was guilty of "high Crimes and Misdemeanors." They took the position that the Senate must first determine whether the facts alleged in the articles of impeachment were true, and then decide whether they constituted impeachable offenses. However, a majority of the Senate decided that the question should be merely whether the judge was guilty as "charged."[21] Although this form of question was used in subsequent impeachment trials, little emphasis has been placed on the fact that it implies that the Senate is not limited to removal by impeachment for "high Crimes and Misdemeanors" only.

The first extensive debate concerning the nature of the impeachment power occurred during the trial of Justice Chase. In that case, counsel for Chase stoutly maintained that impeachment would only lie for "indictable offenses." Counsel for Chase advanced three major arguments in support of this proposition. The

15 68 CONG. REC. 298-303 (1926).
16 76 CONG. REC. 4914-26 (1933).
17 77 CONG. REC. 4088 (1933).
18 80 CONG. REC. 3092 (1936).
19 *Id.* at 5602-06.
20 *Id.* at 5606-07.
21 13 ANNALS OF CONGRESS 363-64 (1804) [1803-1804].

first contention was that the very definition of the words "high Crimes and Misdemeanors" means an "indictable offense." As Luther Martin, a member of the Constitutional Convention, said on behalf of Justice Chase:

> There can be no doubt but that treason and bribery are indictable offenses. We have only to inquire, then, what is meant by high crimes and misdemeanors? What is the true meaning of the word "crime?" It is the breach of some law which renders the person who violates it liable to punishment. There can be no crime committed where no such law is violated.
>
> . . . .
>
> Thus, it appears, crimes and misdemeanors are the violation of a law, exposing the person to punishment, and are used in contradistinction to those breaches of law, which are mere private injuries, and only entitle the injured to a civil remedy.[22]

The second assertion made in support of the proposition that impeachable offenses must be "indictable" was that all the provisions of the Constitution relating to impeachment are couched in the terminology of the criminal laws. Thus, a civil officer must be "convicted of . . . high crimes and misdemeanors."[23] "The trial of all crimes, except in cases of impeachment, shall be by jury."[24] "No person shall be convicted [of impeachment] without the concurrence of two-thirds of the members present."[25] These clauses of the Constitution, argued counsel for Chase, support the principle that impeachment is in effect a criminal prosecution which cannot be maintained without the proof of some indictable offense of the laws.[26]

The third point raised by Chase's counsel was that the framers of the Constitution intentionally restricted impeachment to indictable offenses to safeguard the independence of the judiciary. A judge must be free to decide the cases before him based on his own conscience without having to fear impeachment because two-thirds of the Senate disagree with him. It should be noted that the impeachment of Justice Chase was apparently motivated, to a large degree, by political factors. Justice Chase was a Federalist who had incurred the wrath of the Jeffersonian Republicans by many of his rulings. His counsel contended that the stability and integrity of the Supreme Court demanded a strict interpretation of the impeachment clause. As one of his counsel stated in the debate:

> I have considered these observations on the necessary independence of the Judiciary applicable and important to the case before this honorable court, to repel the wild idea that a judge may be impeached and removed from office although he has violated no law of the country, but merely on the vague and changing opinions of right and wrong—propriety and impropriety of demeanor. For if this is to be the tenure on which a judge holds his office and character, if by such a standard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our Judiciary.[27]

22 14 ANNALS OF CONGRESS 81, 432 (1804) [1804-1805].
23 U.S. CONST. art. II, § 4.
24 U.S. CONST. art. III, § 2.
25 U.S. CONST. art. I, § 3.
26 14 ANNALS OF CONGRESS 81, 505-14 (1804) [1804-1805].
27 *Id.* at 363-64.

In response to the position advanced by the counsel for Chase, the House managers contended that impeachable offenses are not limited to indictable crimes. They argued that the Constitution, in restricting punishment for impeachment to removal from and disqualification for office, makes a distinction between "indictable" offenses and "impeachable" offenses. Insofar as the conduct of a judge is injurious to society because it is an abuse of the office he holds, it is impeachable. Insofar as the conduct is criminal in nature, it may be indictable and punishable under the criminal law.[28] The managers also contended that the Justice, by violating his oath of office to be fair and impartial in the administration of justice, committed an impeachable offense.[29]

The most illuminating argument advanced by the House managers is that a judge may be impeached for misbehavior without resort to the impeachment provisions in article II, § 4. Manager Nicholson pointed out that:

> The Constitution declares, that "the judges both of the supreme and inferior courts shall hold their commissions during good behavior." The plain and correct inference to be drawn from this language is, that a judge is to hold his office so long as he demeans himself well in it; and whenever he shall not demean himself well, he shall be removed. I therefore contend that a judge would be liable to impeachment under the Constitution, even without the insertion of that clause which declares, that "all civil officers of the United States shall be removed for the commission of treason, bribery, and other high crimes and misdemeanors." The nature of the tenure by which a judge holds his office is such that, for any act of misbehavior in office, he is liable to removal. These acts of misbehavior may be of various kinds, some which may, indeed, be punishable under our laws by indictment, but there may be others which the law-makers may not have pointed out, involving such a flagrant breach of duty in a judge, either by doing that which he ought not to have done, or in omitting to do that which he ought to have done, that no man of common understanding would hesitate to say he ought to be impeached for it.[30]

According to this argument, the tenure provision of the Constitution draws a distinction between judges and other civil officers. Both judges and other civil officers may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors." But judges may also be impeached for misbehavior. This additional ground for impeachment is required in the case of judges because of their life tenure while other civil officers are subject to periodic removal for misbehavior through the ballot box. This contention also relies on a construction of the impeachment provision. Article II, § 4, provides that "civil Officers . . . *shall* be removed . . . ." (Emphasis added.) Thus, it is a mandatory but not a restrictive provision. It leaves the power in the Congress to determine what, if any, other offenses or conduct is impeachable. This argument is important because it supplies the basis for other arguments which were raised in subsequent impeachment proceedings.

Although Justice Chase was acquitted, it cannot be said that his trial set a precedent that only indictable offenses are impeachable. It is impossible to

28 *Id.* at 331-32.
29 *Id.* at 608-10.
30 *Id.* at 563.

determine upon which factors the vote of an individual Senator turned. A vote for acquittal could have meant that the facts charged were not proven or that the facts proven did not constitute an impeachable offense. Unquestionably, some votes also were politically motivated. However, at least one commentator stated that:

> [A] precedent was established to the effect that the judges are not to be removed from office because of the content of their decisions or because of unusual or offensive mannerisms. Removal from office is in order only for serious misconduct, [or] charges bordering on the criminal.[31]

The proposition that an impeachable offense need not be "indictable" was assumed to have been settled by all parties in the trial of Judge Peck in 1830. The managers for the House of Representatives defined an impeachable offense on the part of a judge as follows:

> A judicial misdemeanor consists . . . in doing an illegal act, *colore officii*, with bad motives, or in doing an act within the competency of the court or judge in some cases, but unwarranted in a particular case from the facts existing in that case, with bad motives.[32]

Former President Buchanan, then a member of the House of Representatives, stated in the course of argument that misbehavior on the part of a judge is a forfeiture of the office. He conceded that the Chase trial settled that the judicial misbehavior must consist of a violation of the Constitution or some known law of the land, but it need not be "indictable" because misbehavior could consist in the abuse of a power granted to the judge, such as the contempt power, as well as in the usurpation of authority.[33]

Counsel for Peck did not dispute this position, but argued that the abuse of official power must have been intentional. Their position was that a mere mistake on the part of the judge as to what his powers were could not constitute an impeachable offense. They claimed that a judge must act with the knowledge that he was violating the law in order to commit an impeachable offense.[34] Since the discussion of the power of impeachment in the Peck case was merely preliminary, with the main force of the arguments going to the question of law in regard to the right of the judge to punish for contempt and the question of fact as to his intention, the Peck trial added little definition to the precise nature of the impeachment power.

The major point of debate during the impeachment trial of Judge Swayne in 1904 was whether a judge could be impeached for misconduct not directly related to his judicial duties. As noted earlier, none of the misconduct charges against Judge Swayne took place while he was actually holding court. His counsel argued that all previous impeachments, both English and American, conclusively established that impeachment would lie only for misconduct in the exercise of the

31 Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 48 J. Am. Jud. Soc'y 183, 184 (1964).
32 3 Hind's Precedents of the House of Representatives 798 (1907).
33 *Id.* at 800.
34 *Id.* at 802.

office since none had ever involved the personal misbehavior of a judge. Their position rested on the proposition that the term "high Crimes and Misdemeanors" was a term of art which must be construed in light of English parliamentary usage.[35] As counsel for Swayne stated:

> In English and American parliamentary and constitutional law the judicial misconduct which rises to the dignity of a high crime and misdemeanor must consist of judicial acts, *performed with an evil or wicked intent,* by a judge while administering justice in a court, either between private persons or between a private person and the government of the State. All personal misconduct of a judge, occurring during his tenure of office and not coming within that category, must be classed among the offenses for which a judge may be removed by address, *a method of a removal which the framers of our Constitution refused to embody therein.*[36] (Emphasis added.)

The reference to "removal by address" referred to a practice used in England. In England, impeachment had a much broader scope since it could be used against any subject of the king and the penalty was not restricted to removal from office. A majority of both houses of Parliament could request the king to remove an official without convicting him of impeachment. Counsel for Swayne contended that the refusal to adopt this method of removal showed that the impeachment power was intended to be restricted to "high Crimes and Misdemeanors" committed in an official capacity. Counsel pointed out that "removal by address" was deliberately left out of the Constitution "with a view of giving stability to those who hold the offices, especially the judges."[37] Counsel for Swayne placed emphasis on the fact that during the Constitutional Convention, Randolph opposed the motion to include "removal by address" because it would weaken too much the independence of the judges.[38] Counsel also argued that the substitution of the term "high Crimes and Misdemeanors" in article II, § 4, for the original term "maladministration" added further proof of an intentional restriction of the impeachment power.[39]

In the Swayne case, the managers for the House of Representatives contended that the Constitution was not intended to restrict impeachment to conduct directly related to the official duties of a judge. They referred to the absurdity of holding that a judge who had been convicted and imprisoned for murder could not be impeached because his conduct did not occur while on the bench.[40] Instead, the managers submitted that the Constitution gave Congress the power to impeach a judicial officer for any misbehavior that showed disqualification to hold and exercise the office, whether moral, intellectual or physical, since the judicial tenure is expressly conditioned upon the good behavior of the judge.[41]

The House managers in the Swayne trial again advanced an argument which had been raised in the Chase trial. They contended that article I, §§ 2 and 3, which give the House and Senate the sole impeachment power are merely

35 39 CONG. REC. 3026-29 (1905).
36 *Id.* at 3033.
37 *Id.* at 3258-59.
38 *Id.* at 3258.
39 *Id.* at 3365-66.
40 *Id.* at 3246.
41 *Id.* at 3179-81.

jurisdictional and not definitional clauses. Article II, § 4, they said, is a mandatory provision directing Congress to remove those officers who are convicted of treason, bribery, or other high crimes and misdemeanors. The managers stated that there may be other offenses for which an officer may be impeached. Article III, § 1, provides a definition of such additional grounds in the case of the judiciary, i.e., misdemeanor.[42] The managers concluded that:

> [O]ur fathers adopted a Constitution under which official malfeasance and nonfeasance, and, in some cases, misfeasance, may be the subject of impeachment, although not made criminal by act of Congress, or so recognized by the common law of England, or of any State of the Union. They adopted impeachment as a means of removing men from office whose misconduct imperils the public safety and renders them unfit to occupy official position. All American text writers support this view.[43]

Indeed, the textual authorities have in fact unanimously rejected the position that a "high Crime or Misdemeanor" must be an "indictable" offense before an impeachment will lie. As was stated by Roger Foster:

> The Constitution provides that "the judges, of both the Supreme and inferior courts, shall hold their office during good behavior." This necessarily implies that they may be removed in case of bad behavior. But no means, except impeachment, is provided for their removal, and judicial misconduct is not indictable by either a statute of the United States or the common law.[44]

George Curtis looked to the purpose of the impeachment power in this statement:

> The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office or aside from its functions, he has violated a law, or committed what is technically denominated a crime. But a cause for removal from office may exist, where no offense against positive law has been committed, as when the individual has, from immorality or imbecility or maleadministration [*sic*] become unfit to exercise the office.[45]

As was stated in the *American and English Encyclopedia of Law*:

> The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase "high crimes and misdemeanors" is to be taken, not in its common law, but in its

42 *Id.*
43 *Id.*
44 R. FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 569 (1896).
45 2 G. CURTIS, HISTORY OF THE CONSTITUTION OF THE UNITED STATES 260-61 (1858). *See also* T. COOLEY, PRINCIPLES ON CONSTITUTIONAL LAW 178 (3d ed. 1898); W. RAWLE, THE CONSTITUTION OF THE UNITED STATES 198 (1825); 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 769-99 (5th ed. 1891); 2 D. WATSON, THE CONSTITUTION OF THE UNITED STATES 1034 (1910).

> broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruptions, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, *and even gross improprieties*, by judges and high officers of state, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute.[46] (Emphasis added.)

Although many excellent arguments were raised by both sides in the Swayne trial, it cannot be conclusively stated which position carried the day. Judge Swayne's acquittal could have been due to the fact the Senate thought that impeachable misconduct must be directly related to the office or that the facts charged were not proven, or even that the judge's proven conduct, although impeachable, did not warrant removal from office. However, it is difficult to understand how the Senate could have adopted the first position because of its obvious result in leaving no remedy as to removal of a judge who has been imprisoned by a state or federal court for crimes committed in his personal life, totally unrelated to his office or judicial duties.

The 1912 impeachment trial in which Judge Robert W. Archbald was found guilty was the first proceeding resulting in removal in which the nature of the impeachment power was extensively debated. In adopting the articles of impeachment, the House of Representatives took the position that a breach of judicial "good Behaviour," regardless of its criminality, was impeachable. The Chairman of the Impeachment Committee conceded that none of the articles would sustain a criminal charge.[47] The Chairman of that committee stated the charges as follows: "From 1908 to the present time we have shown that he has been acting improperly and violating good judicial ethics by prostituting his official position for personal profit and otherwise."[48]

In the Senate, counsel for the judge adhered to the argument which had been made previously on the part of the counsel for Justice Chase that an impeachable offense must be, by the very terms of the Constitution, an indictable offense, or at the very least, must have the characteristics of a crime. They attempted to sustain this proposition, as did counsel for Chase, by referring to the fact that the impeachment power throughout the Constitution is couched in the terminology of the criminal law.[49]

On the other hand, the House managers advanced several theories to prove that nonindictable judicial misbehavior was impeachable. The broadest of these theories was that the Constitution left the definition of "high Crimes and Misdemeanors" and judicial "good Behaviour" to Congress, placing no restrictions on the impeachment power except to limit its use to civil officers and its punishment to removal and disqualification from office. As Manager Sterling said in his final argument:

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46 XV Am. & Eng. Encyc. of Law 1067-68 (2d ed. 1900).
47 3 Proceedings of the United States Senate in the Trial of Impeachment of Robert W. Archbald, S. Doc. No. 1140, 62nd Cong., 3d Sess. 1745 (1913).
48 *Id.* at 1747.
49 The Impeachment of the Federal Judiciary, S. Doc. No. 358, 63d Cong., 2d Sess. 16 (1913-1914).

> And so, Mr. President, I say, that outside of the language of the Constitution, which I quoted, there is no law which binds the Senate in this case to-day except that law which is prescribed by their own conscience, and on that, and on that alone, must depend the result of this trial. Each Senator must fix his own standard; and the result of this trial depends upon whether or not these offenses we have charged against Judge Archbald come within the law laid down by the conscience of each Senator himself.[50]

In rebutting the argument that conduct to be impeachable must be indictable, the managers pointed to the object of the impeachment power. Impeachment, they said, is not intended to punish the individual but rather to protect the public "from injury at the hands of their own servants and to purify the public service."[51] Thus, according to this argument, a federal judge should be removed "whenever, by reason of misbehavior, misconduct, malconduct, or maladministration, the judge has demonstrated his unfitness to continue in office . . . ."[52]

The managers also advanced the theory based upon a construction of the judicial tenure provision [article III, § 1] and the removal provision [article II, § 4]. It must be assumed that the two provisions were not intended to be mutually antagonistic. Therefore, the judicial tenure provision is of necessity either an addition to the enumerated offenses of the removal section or a definition of "high Crimes and Misdemeanors" as applied to the judiciary to include misbehavior. Any other interpretation would destroy the effect of the "good Behaviour" clause which would be a violation of the basic rule of constitutional construction which gives full effect to all words.[53] Thus, the managers contended that the Constitution adopted one standard for the judiciary and another for all other civil officers, saying:

> In other words, our forefathers in framing the Constitution have wisely seen fit to provide for requisite of holding office on the part of a judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite fixed term, and any misbehaving in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power, and is therefore subject only to removal for misbehavior. Since he cannot be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, *it must necessarily follow that misbehavior in office is an impeachable offense.*[54] (Emphasis added.)

In rebutting an argument that the independence of the judiciary demands a strict interpretation of the Constitution, the managers replied that the Constitution was not meant to establish an irresponsible judiciary. The office is a public trust and someone must determine whether that trust has been abused. The Constitution required that Congress make the determination. The managers said:

50 49 CONG. REC. 1210 (1913).
51 *Id.* at 1259.
52 *Id.*
53 *Id.*
54 *Id.* at 1264-65.

> In requiring first of all a majority of the House of Representatives in order to prefer articles of impeachment and then two-thirds of the Members of the Senate present to convict, they hedged the power about with all the safeguards necessary to protect the upright official and yet leave it sufficient play to preserve the public welfare.[55]

In summation, the managers submitted that a judge ought to be removed when his acts are "calculated with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice."[56]

In commenting on the outcome of the Archbald trial, one of the House managers subsequently wrote:

> [I]t will be observed that none of the articles exhibited against Judge Archbald charged an indictable offense or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen. *The case rested on the alleged attempt of the respondent to commercialize his potentiality as a judge,* but the facts would not have been sufficient to support a prosecution for bribery. Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application.[57] (Emphasis added.)

During the trial of Judge Harold Louderback, all parties agreed that the Archbald impeachment did so settle the question. In fact, counsel for Judge Louderback expressly adopted the position that the judicial tenure provision implies that a judge may be impeached for a breach of good behavior:

> The Constitution of this country provides that an appointment of this kind is for life, depending on good behavior. So I have concluded, and I respectfully submit to you, that "high Crimes and Misdemeanors" so far as this proceeding is concerned, means anything which is bad behavior, anything which is not good behavior.[58]

Judge Louderback's defense basically was that his conduct was not intrinsically wrong and did not amount to impeachable misbehavior.

In attempting to define what constituted impeachable misbehavior, the House managers pointed to the defensive nature of the impeachment power. Since it was not a punitive measure, the criminal law standard of guilt beyond a reasonable doubt need not be met.[59] Rather, if it be proven that a judge's conduct cast substantial doubt on the integrity of the judiciary, he has committed impeachable misbehavior:

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55 *Id.* at 1267.
56 *Id.* at 1266.
57 Brown, *The Impeachment of the Federal Judiciary* 26 HARV. L. REV. 684, 704-05 (1913).
58 PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HAROLD LOUDERBACK, S. DOC. NO. 73, 73d Cong., 1st Sess. 796 (1933) [hereinafter cited as LOUDERBACK PROCEEDINGS].
59 *Id.* at 779.

> [T]he duty of the Senate . . . is to protect the Federal judiciary and to protect the people against those persons connected with the judiciary whose conduct arouses doubt as to their honesty. . . . From an examination of the whole history of impeachment and particularly as it relates itself to our system of government, when the facts proven with reference to a respondent are such as are reasonably calculated to arouse a substantial doubt in the minds of the people over whom that respondent exercises authority, that he is not brave, candid, honest, and true, there is no other alternative than to remove such a judge from the bench, because wherever doubt resides confidence cannot be present. It is not in the nature of free government that the people must submit to the government of a man as to whom they have substantial doubt.[60]

In the last impeachment trial held, that of Judge Halsted L. Ritter in 1936, the managers of the House of Representatives reiterated the position asserted in the trial of Judge Louderback. The managers insisted that conduct on the part of a federal judge which casts doubts as to his integrity constitutes impeachable misbehavior. Their position was that the public confidence in the judiciary demands a strict standard of judicial conduct. Manager Summers said in final argument as to the meaning of "good Behaviour":

> It means obey the law, keep yourself free from questionable conduct, free from embarrassing entanglements, free from acts which justify suspicion, hold in clean hands the scales of justice. That means that he shall not take chances that would tend to cause the people to question the integrity of the court, because where doubt enters, confidence departs. . . . When a judge on the bench, by his own conduct, arouses a substantial doubt as to his judicial integrity he commits the highest crime that a judge can commit under the Constitution. It is not essential to prove guilt. There is nothing in the Constitution and nothing in the philosophy of a free government that holds that a man shall continue to occupy office until it can be established beyond a reasonable doubt that he is not fit for the office. It is the other way. When there is, resulting from the judge's conduct, a reasonable doubt as to his integrity he has no right to stay longer.[61]

Since Judge Ritter was convicted by the Senate and since the counsel for the judge did not dispute the standard applied but attempted to prove that the judge's conduct was proper, it is reasonable to conclude that the Senate, in a relatively contemporaneous trial, has adopted this standard for impeachment of a federal judge. In this connection it is important to note that Judge Ritter was acquitted on the first six articles which accused him of specific acts of wrongdoing. His conviction and removal were based on article seven which charged that:

> The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter . . . since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the

60 *Id.* at 815.

61 PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, S. Doc. No. 200, 74th Cong., 2d Sess. 611 (1936) [hereinafter cited as RITTER PROCEEDINGS].

> Federal judiciary, and to render him unfit to continue to serve as such judge.[62]

The import of the Ritter trial is emphasized by the fact that various Senators filed written opinions explaining their vote. As Senator Key Pittman, who voted to acquit on the first six articles, said:

> I voted for article 7 because it contains a general charge that the judge, by reason of his conduct in the various matters charged, has raised a substantial doubt as to the integrity of the judge and destroyed confidence in such court and in the efficiency of the judge.[63]

Senators Borah, La Follette, Frazier and Shipstead stated in a joint opinion:

> It is our view that a Federal judge may be removed from office if it is shown that he is wanting in that "good behavior" designated as a condition of his tenure of office by the Constitution although such acts as disclose his want of "good behavior" may not amount to a crime.
>
> . . . If a judge is guilty of such conduct as brings the court into disrepute, he is not to be exempt from removal simply because his conduct does not amount to a crime.
>
> . . . [*W*]*e 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.*[64] (Emphasis added.)

Senator Elbert D. Thomas noted in his opinion that the standard of impeachable offenses of a federal judge is different from that of other civil officers. This is due, he stated, to the fact that the judicial tenure of office is for life or good behavior whereas other offices have a fixed time duration. The judicial office is a public trust and the judge who abuses that trust must be removed.[65]

This then is the congressional authority as to what constitutes an impeachable offense on the part of a federal judge. It amounts to an evolutionary adoption of the principle that a judge whose conduct casts doubt on the integrity of the federal judiciary has committed an impeachable offense. It is a complete rejection of the notion that "high Crimes and Misdemeanors" which amount to indictable crimes are the only standard of impeachment. Through the years, Congress has interpreted article III, § 1, as providing either additional grounds of impeachment or a definition of "high Crimes and Misdemeanors" as applied to federal judges. Congress has recognized that federal judges must be held to a different standard of conduct than other civil officers because of the nature of their positions and the tenure of their offices. Congress has rejected impeachment

62 *Id.* at 34.
63 *Id.* at 644.
64 *Id.* at 644-45.
65 *Id.* at 646.

as a method of removing those judges whose only "offense" is to render unpopular opinions in the course of their duties or espouse unpopular political philosophies on or off the bench.

III. Analysis

A review of the past impeachment proceedings has clearly established little constitutional basis for the argument that an impeachable offense must be indictable as well. If this were to be the case, the Constitution would then merely provide an additional or alternate method of punishment, in specific instances, to the traditional criminal law violator. If the framers had meant to remove from office only those officials who violated the criminal law, a much simpler method than impeachment could have been devised. Since impeachment is such a complex and cumbersome procedure, it must have been directed at conduct which would be outside the purview of the criminal law. Moreover, the traditionally accepted purpose of impeachment would seem to work against such a construction. By restricting the punishment for impeachment to removal and disqualification from office, impeachment seems to be a protective, rather than a punitive, device. It is meant to protect the public from conduct by high public officials that undermines public confidence. Since that is the case, the nature of impeachment must be broader than this argument would make it. Much conduct on the part of a judge, while not criminal, would be detrimental to the public welfare. Therefore it seems clear that impeachment will lie for conduct not indictable nor even criminal in nature. It will be remembered that Judge Archbald was removed from office for conduct which, in at least one commentator's view, would have been blameless if done by a private citizen.[66]

A sound approach to the constitutional provisions relating to the impeachment power appears to be that which was made during the impeachment of Judge Archbald. Article I, §§ 2 and 3, give Congress jurisdiction to try impeachments. Article II, § 4, is a mandatory provision which requires removal of officials convicted of "Treason, Bribery or other high Crimes and Misdemeanors." The latter phrase is meant to include conduct which, while not indictable by the criminal law, has at least the characteristics of a crime. However, this provision is not conclusively restrictive. Congress may look elsewhere in the Constitution to determine if an impeachable offense has occurred. In the case of judges, such additional grounds of impeachment may be found in article III, § 1, where the judicial tenure is fixed at "good Behaviour." Since good behavior is the limit of the judicial tenure, some method of removal must be available where a judge breaches that condition of his office. That method is impeachment. Even though this construction has been criticized by one writer as being logically fallacious,[67] it seems to be the construction adopted by the Senate in the Archbald and Ritter cases. Even Simpson, who criticized the approach, reaches the same result because he argues that "Misdemeanor" must, by definition, include misbehavior in office.[68]

66 Brown, *supra* note 57.
67 Simpson, *Federal Impeachments*, 64 U. PA. L. REV. 803, 806-08 (1916).
68 *Id.* at 812-13.

In determining what constitutes impeachable judicial misbehavior, recourse must be had to the previous impeachment proceedings. Those proceedings fall mainly into two categories, misconduct in the actual administration of justice and financial improprieties off the bench. Pickering was charged with holding court while intoxicated and with mishandling cases. Chase and Peck were charged with misconduct which was prejudicial to the impartial administration of justice and with oppressive and corrupt use of their office to punish individuals critical of their actions. Swayne, Archbald, Louderback and Ritter were all accused of using their office for personal profit and with various types of financial indiscretions. English was impeached both for oppressive misconduct while on the bench and for financial misdealings. The impeachment of Humphries is the only one which does not fall within this pattern, and the charges brought against him probably amounted to treason.[69]

While various definitions of impeachable misbehavior have been advanced, the unifying factor in these definitions is the notion that there must be such misconduct as to cast doubt on the integrity and impartiality of the federal judiciary. One author has defined that misbehavior as follows:

> It must act directly or by reflected influence react upon the welfare of the state. It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute. . . . An act or course of misbehavior which renders scandalous the personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness. . . .[70]

As another author stated with respect to the outcome of the Archbald impeachment:

> [I]t determined that a judge ought not only be impartial, but he ought so to demean himself, both in and out of court, that litigants will have no reason to suspect his impartiality; and that repeatedly failing in that respect constitutes a "high misdemeanor" in regard to his office. If such be considered the result of that case, everyone must agree that it established a much needed precedent.[71]

John W. Davis, House manager in the impeachment of Judge Archbald, defined judicial misbehavior as follows:

> Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect—all are violations of his official oath . . . . And it is easily possible to go further and imagine . . . such willingness to use his office to serve his personal ends, as to be within reach of no branch of the criminal law, yet calculated

69 Brown, *supra* note 57, at 704.
70 *Id.* at 692-93. *See also* Ford, *Impeachment — A Mace for the Federal Judiciary*, 46 NOTRE DAME LAWYER 669 (1971).
71 Simpson, *supra* note 67, at 813.

> with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice.[72]

Representative Summers, one of the managers in the Louderback impeachment, gave this definition:

> [W]hen the facts proven with reference to a respondent are such as are reasonably calculated to arouse a substantial doubt in the minds of the people over whom that respondent exercises authority, that he is not brave, candid, honest, and true, there is no other alternative than to remove such a judge from the bench, because wherever doubt resides confidence cannot be present.[73]

IV. Conclusion

In conclusion, the history of the constitutional provisions relating to the impeachment of federal judges demonstrates that only the Congress has the power and duty to remove from office any judge whose proven conduct, either in the administration of justice or in his personal behavior, casts doubt on his personal integrity and thereby on the integrity of the entire judiciary. Federal judges must maintain the highest standards of conduct to preserve the independence of and respect for the judicial system and the rule of law. As Representative Summers stated during the Ritter impeachment: "When a judge on the bench, by his own conduct, arouses a substantial doubt as to his judicial integrity he commits the highest crime that a judge can commit under the Constitution."[74]

Finally, the application of the principles of the impeachment process is left solely to the Congress. There is no appeal from Congress' ultimate judgment. Thus, it can fairly be said that it is the conscience of Congress—acting in accordance with the constitutional limitations—which determines whether conduct of a judge constitutes misbehavior requiring impeachment and removal from office. If a judge's misbehavior is so grave as to cast substantial doubt upon his integrity, he must be removed from office regardless of all other considerations If a judge has not abused his trust, Congress has the duty to reaffirm public trust and confidence in his actions.[75]

72 49 CONG. REC. 1266 (1913).
73 LOUDERBACK PROCEEDINGS at 815.
74 RITTER PROCEEDINGS at 611.
75 For an excellent discussion of Congress' role in the impeachment process, see Ford, *Impeachment—A Mace for the Federal Judiciary,* 46 NOTRE DAME LAWYER 669 (1971).