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Justice James D. Heiple: Impeachment and the Assault on Judicial Independence

*Jerome B. Meites & Steven F. Pflaum**

In 1997, the Illinois House of Representatives conducted its first impeachment investigation of an Illinois Supreme Court justice in 145 years. In this Article, the authors discuss the appropriate standards for impeachment under the Illinois constitution and the need to ensure that the independence of the judiciary is not harmed by politically motivated impeachment proceedings. The authors also examine how the Special House Investigating Committee ("House Committee") applied those standards to its investigation of Illinois Supreme Court Justice James D. Heiple. Finally, they propose reforms to the judicial disciplinary provisions of the Illinois constitution as a result of the Heiple experience.

On April 14, 1997, for the first time in 145 years, the Illinois House of Representatives commenced an impeachment investigation of an Illinois Supreme Court justice. Illinois House Resolution 89 ("H.R. 89") created a special ten-member committee to investigate charges against Chief Justice James D. Heiple.¹ Unlike all other House committees, there was no partisan majority. The House Committee was co-chaired by House Majority Leader Barbara Flynn Currie (D. - Chicago) and Representative Jack Kubik (R. - Riverside), and had five members from each party.² On May 15, 1997, the House Committee voted eight-to-two to recommend to the full House that Justice Heiple not be impeached.³

* Mr. Meites is a past chair of The Chicago Bar Association's ("CBA") Constitutional Law Committee. Mr. Pflaum is the CBA's General Counsel. In the spring of 1997, at the request of the Special Committee of the Illinois House of Representatives investigating the potential impeachment of Illinois Supreme Court Justice James D. Heiple, they co-authored a series of reports regarding legal issues pertaining to the potential impeachment under the Illinois constitution.

1. See H.R. 89, 90th Leg., 1st Sess. (Ill. 1997). The Illinois House of Representatives enacted H.R. 89 authorizing the impeachment investigation by a vote of 113-0. See Rick Pearson & Christi Parsons, *House Panel Selected for Heiple Probe: Action Is First Step Toward Impeachment*, CHI. TRIB., Apr. 15, 1997, § 1, at 1.

2. See Ill. H.R. 89; Ken Armstrong & Christi Parsons, *Heiple Panel Looks for Starting Point: House Commission Finds Few Precedents*, CHI. TRIB., Apr. 16, 1997, § 1, at 1.

3. See *infra* Appendix (conclusion) (reprinting *Heiple Impeachment Report: Text of*

Justice Heiple first came to the attention of most Illinois citizens in June 1994 when he wrote the court's opinion in *In re Doe*⁴ (the "Baby Richard Case"). In that case, the Illinois Supreme Court unanimously reversed the Circuit Court of Cook County and the Illinois Appellate Court⁵ decisions approving the adoption of Baby Richard by his adoptive parents. Because Baby Richard had lived with his adoptive parents for more than three years, the Illinois Supreme Court's reversal of the adoption caused a public uproar. Bob Greene, a columnist for the *Chicago Tribune*, wrote dozens of highly critical columns about the Baby Richard Case, many of which focused directly on Justice Heiple.⁶

Both before and after the Baby Richard Case, Justice Heiple purportedly was involved in a series of traffic offenses in which police officers alleged that Justice Heiple did not immediately stop in

House Committee Report Recommending Heiple Not Be Impeached, CHI. DAILY L. BULL., May 16, 1997) (appearing with the permission of *Chicago Daily Law Bulletin*, 415 N. State Street, Chicago, IL 60610). The *Chicago Daily Law Bulletin* article contains the text of the Special Investigative Committee of the Ninetieth Gen. Assembly of the State of Illinois Investigating Supreme Court Justice James D. Heiple, Report of the Committee, 90th Leg., 1st Sess. (Ill. 1997). The entire House Committee Report is included as an appendix to this Article. See *infra* Appendix at 807-40.

While the impeachment proceedings were pending, Chief Justice Heiple resigned his position as Chief Justice, but remained as a justice of the court. Justice Heiple resigned as chief justice on May 2, 1997, two days after he was censured by the Illinois Courts Commission in connection with his conduct during four traffic stops from 1992 to 1996. See Dirk Johnson, *After Censure, Chief Justice of Illinois Quits*, N.Y. TIMES, May 3, 1997, at 3A. The Courts Commission held that Justice Heiple's misconduct was particularly damaging to the integrity of the court system. See *In re Heiple*, No. 97-CC-1, Order at 8 (Cts. Comm'n of Ill. Apr. 30, 1997). The Courts Commission held by a five-to-zero vote that Justice Heiple had abused his authority by flashing his supreme court badge to the officers and otherwise trying to use his office to avoid receiving traffic citations. See *id.*

4. 159 Ill. 2d 347, 638 N.E.2d 181 (1994).

5. See *In re Doe*, 254 Ill. App. 3d 405, 627 N.E.2d 648 (1st Dist. 1993), *rev'd*, 159 Ill. 2d 347, 638 N.E.2d 181 (1994).

6. See e.g., Bob Greene, *The Sloppiness of Justice Heiple*, CHI. TRIB., June 26, 1994, § 5, at 2 [hereinafter Green, *Sloppiness of Heiple*] (attacking the quality of the legal reasoning in Justice Heiple's opinion, including the lack of any case citations and the declaration that "[i]t was [the adoptive parents'] decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal," when in fact, all appeals in the case, up to that time, had been pursued by the biological father, not the adoptive parents); see also Bob Greene, *Supreme Injustice for a Little Boy*, CHI. TRIB., June 19, 1994, § 5, at 1 [hereinafter Green, *Supreme Injustice*] (criticizing the Illinois Supreme Court for applying property standards to "protect natural parents in their preemptive rights to their own children," instead of the "best interests of the child" standard that Justice Dom Rizzi applied when he upheld the validity of the adoption in the appellate court). Justice Heiple referred to these newspaper columns in his opinion denying the adoptive parents' petition for rehearing. See *Doe*, 159 Ill. 2d at 365-67, 638 N.E.2d at 189.

response to their flashing lights and attempted to use his position as a supreme court justice to avoid receiving traffic citations.⁷ These charges resulted in the commencement by the Judicial Inquiry Board ("JIB") in 1996 of an investigation of Justice Heiple's conduct. The JIB is the agency charged under the Illinois Constitution of 1970 with investigating alleged improprieties of judges.⁸

The Heiple case presents several important issues regarding impeachment and judicial independence in Illinois. The Illinois constitution fails to provide any explicit guidance as to what is an impeachable offense. Illinois lacks experience with impeachment matters.⁹ Thus, this Article will discuss what the appropriate standards should be for impeachment of Illinois public officials.¹⁰ The Article then applies those standards to the work of the House Committee as set forth in the House Committee Report and its two dissents. Finally, the Article will recommend certain constitutional reforms in the wake of the Heiple matter.

The Heiple controversy raises serious questions regarding the vitality of judicial independence in Illinois. Although all of the members of the House Committee stressed that they did not consider the Baby Richard Case when evaluating Justice Heiple's conduct, that case clearly served as the political catalyst for the impeachment investigation.¹¹ This Article will address the concern that the treatment

7. See *infra* Appendix pt. I.A.

8. See ILL. CONST. art. VI, § 13. The JIB found the officers' charges credible. Therefore, on January 23, 1997, the JIB issued a complaint against Justice Heiple, arising out of the traffic stops. See David Bailey, *State's Chief Justice Under Fire from Within and Without: JIB Charges Heiple with Numerous Ethics Violations*, CHI. DAILY L. BULL., Jan. 23, 1997, at 1 [hereinafter Bailey, *Under Fire*]. The JIB alleged that Heiple's efforts to use his position as a supreme court Justice to avoid traffic citations constituted violations of Illinois Supreme Court Rule 61, which provides that a judge "should personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved," and Illinois Supreme Court Rule 62 which requires a judge to "respect and comply with the law and [to] conduct himself or herself at all times in a manner that promotes public confidence in the integrity of the judiciary." ILL. SUP. CT. R. 61, 62. On February 13, 1997, Justice Heiple filed a pleading stating that he did not contest the facts set forth in the JIB complaint. See David Bailey, *Won't Contest Ethics Accusations: Heiple*, CHI. DAILY L. BULL., Feb. 13, 1997, at 1 [hereinafter Bailey, *Won't Contest Accusations*].

9. The last effort by the Illinois House to remove a judge took place in 1842-43 when the legislature targeted Illinois Supreme Court Justice Thomas Brown. See Pearson & Parsons, *supra* note 1, at 1. For more on the Brown impeachment, see *infra* note 159.

10. See ILL. CONST., art IV, § 14. See *infra* Part II for a discussion of the impeachment standards.

11. In its report, the House Committee majority said, "The Committee is sensitive to the constitutional imperative that it should not consider the judicial decisions of a judge, however it may disagree with them, in the determination it makes." *Infra* Appendix

of Justice Heiple with respect to the Baby Richard Case is not an aberration. Rather, this situation reflects the burgeoning political environment, found not only in Illinois, but throughout the United States, in which politicians and private citizens alike call for the impeachment of a judge or his or her removal from office merely because he or she renders unpopular decisions.¹²

I. THE BABY RICHARD CASE

In order to understand the Heiple impeachment investigation and its implications for the judicial independence of Illinois judges, it is necessary to understand the Baby Richard case. The essential facts are set forth in Justice Heiple's original opinion for the court, rendered on June 16, 1994.¹³ In short, the case involved a custody dispute

(conclusion). Likewise, in his dissenting report, Representative Douglas P. Scott (D. - Rockford) agreed that "[r]egardless of what anyone thinks of [the Baby Richard] decision, or of any other opinion of the Court, it is clear that such rulings can play no part in this or similar proceedings." *Infra* Appendix pt. IV (Rep. Scott, dissenting).

12. Perhaps the most notorious example of judges being punished for unpopular decisions was the successful campaign by proponents of capital punishment in 1986 against the retention of three California Supreme Court justices, Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso. Those justices had participated in a series of decisions overturning the imposition of capital punishment. *See, e.g.*, *People v. Anderson*, 694 P.2d 1149 (Cal. 1985); *People v. Lanphear*, 680 P.2d 1081 (Cal. 1984); *People v. Haskett*, 640 P.2d 776 (Cal. 1982); *People v. Darrell*, 633 P.2d 186 (Cal. 1981); *People v. Green*, 609 P.2d 468 (Cal. 1980). For a thorough discussion of this campaign, see John H. Culver and John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1986), Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980-81 (1988), and Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2036-43 (1988).

13. *See In re Doe*, 159 Ill. 2d 347, 349-51, 638 N.E.2d 181, 181-82 (1994). On July 12, 1994, Justice Heiple issued the court's opinion denying the petition for rehearing filed by the adoptive parents and the guardian *ad litem* of Baby Richard. *See id.* at 362, 638 N.E.2d at 187. Subsequently, the Illinois Supreme Court granted the petition for writ of habeas corpus filed by the biological father of Baby Richard. *See In re Kirchner*, 164 Ill. 2d 468, 649 N.E.2d 324 (1995) (*per curiam*). It was the granting of the habeas corpus petition which ultimately resulted in custody of Baby Richard being transferred from his adoptive parents to his biological parents shortly after his fourth birthday. *See id.* at 478-82, 502, 649 N.E.2d 329-31, 340. The opinion of the court in the habeas corpus petition was a *per curiam* opinion. *See id.* at 470, 649 N.E.2d at 326. Justices Miller and McMorrow filed dissenting opinions to both the denial of the petition for rehearing and the habeas corpus petition. *See Doe*, 159 Ill. 2d at 370, 638 N.E.2d at 188 (Miller & McMorrow, JJ., dissenting to denial of petition for rehearing); *Kirchner*, 164 Ill. 2d at 502, 649 N.E.2d at 340 (Miller, J., dissenting to habeas corpus decision); *Kirchner*, 164 Ill. 2d at 509, 649 N.E.2d at 343 (McMorrow, J., dissenting to habeas corpus decision).

The purpose of this Article is not to discuss the merits of the Baby Richard Case. Rather, the discussion of Baby Richard is solely to put into context the events leading

concerning a child whose natural parents were Daniella Janikova and Otakar Kirchner. Janikova and Kirchner were not married when the baby was conceived and born.¹⁴ During the last month of Janikova's pregnancy, Kirchner went to his native Czechoslovakia to attend to his gravely ill grandmother.¹⁵ During this time, Kirchner's aunt told Janikova that Kirchner had resumed a romantic relationship with another woman.¹⁶ As a result, Janikova moved out of the apartment she had shared with Kirchner, refused to talk to him upon his return, and gave birth at a different hospital from where they had originally planned.¹⁷

Janikova told Kirchner that the child had died shortly after birth. In reality, Janikova consented to allowing the Does to adopt the child, Baby Richard.¹⁸ She told the Does that she knew who the father was but would not furnish his name.¹⁹ Fifty-seven days after the child was

up to the impeachment investigation of Justice Heiple.

For a discussion of the substantive issues raised by the Baby Richard Case, see e.g., Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). These authors state:

The sense that social norms and legal rules are divergent is reinforced in the popular culture by cases such as "Baby Jessica" and "Baby Richard," in which courts have ordered the removal of young children from their adoptive families and returned them to their biological parents. While public response in both cases is based perhaps on a distorted view of the legal situation, the reaction indicates a powerful disquiet with a legal regime that speaks in the language of parental rights.

Id. at 2473.

An extensive discussion of the substantive adoption issues raised in the Baby Richard Case and in the equally renowned "Baby Jessica" case, *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992), appears in Herma Hill Kay's *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703 (1996). Professor Kay uses Baby Jessica and Baby Richard to argue that the courts in both cases erred by applying the child custody analysis for children of divorced parents set forth in the Uniform Child Custody Jurisdiction Act rather than the adoption analysis of the Uniform Adoption Act. See Kay, *supra*, at 706-12.

There is also a significant discussion of the Baby Richard Case as it pertains to the parental rights of unwed fathers in Mary L. Shanley, *Unwed Fathers' Rights, Adoption and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 96-100 (1995). Finally, the approach of both the Illinois Appellate Court and the Illinois Supreme Court in the Baby Richard Case to the use of the trial court record and the facts derived from it is discussed briefly in Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 594 n.13 (1996). See also Paul V. McCord, *In the Child's Best Interest: The "Baby Richard" Case*, 82 ILL. B.J. 578 (1994).

14. See *Kirchner*, 164 Ill. 2d at 471, 649 N.E.2d at 326.

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.* at 472, 649 N.E.2d at 326.

19. See *id.*

born, Kirchner discovered that his son was alive and had been placed for adoption. Kirchner then began a court proceeding in the Circuit Court of Cook County in Chicago, contesting the Does' adoption. The trial court ruled that Kirchner was an unfit parent under the Illinois Adoption Act²⁰ because he failed to show a reasonable degree of interest in the child within the first thirty days of the child's life.²¹ Therefore, the trial court found that Kirchner's consent to the adoption was unnecessary under section eight of the Adoption Act.²² The Illinois Appellate Court, by a two-to-one vote, affirmed the trial court's decision, retaining custody of Baby Richard with his adoptive parents.²³

On June 16, 1994, the Illinois Supreme Court reversed²⁴ the decisions of the trial court and the appellate court.²⁵ In an opinion written by Justice Heiple, the supreme court held that the evidence showed that Baby Richard's biological father, Otakar Kirchner, had done everything possible during the first thirty days of Baby Richard's life to determine whether his son was alive, where he was, and what had happened to him.²⁶ Consequently, the court determined that, without explicit evidence showing that Otakar Kirchner was unfit to be a father, he had an absolute right to custody of his biological son.²⁷ The initial decision was a unanimous one, although Justice Mary Ann McMorrow submitted a lengthy concurrence in which Justices Ben Miller and Charles Freeman joined.²⁸

The opinion provoked a firestorm of public protest. *Chicago Tribune* columnist Bob Greene wrote a barrage of columns regarding the case.²⁹ Illinois Governor Jim Edgar sought leave from the

20. See 750 ILL. COMP. STAT. ANN. 50/0.01-50/24 (West 1993 & Supp. 1997) (amended).

21. See *In re Doe*, 159 Ill. 2d 347, 350, 638 N.E.2d 181, 182 (1994) (reviewing the trial court's holding); 750 ILL. COMP. STAT. 50/1(D)(I) (West 1996).

22. See *Doe*, 159 Ill. 2d at 350, 638 N.E.2d at 182; 750 ILL. COMP. STAT. ANN. 50/8(a) (West 1993 & Supp. 1997). The relevant text of the statute provides: "[e]xcept as hereinafter provided in this section, consents shall be required in all cases, unless the person whose consent would otherwise be required shall be found by the court, by clear and convincing evidence: (1) to be an unfit person as defined in Section 1 of this Act" 750 ILL. COMP. STAT. ANN. 50/8(a).

23. See *In re Doe*, 254 Ill. App. 3d 405, 627 N.E.2d 648 (1st Dist. 1993).

24. See *Doe*, 159 Ill. 2d at 351, 638 N.E.2d at 183, *rev'g* 254 Ill. App. 3d 405, 627 N.E.2d 648 (1st Dist. 1993).

25. See *id.* at 351, 638 N.E.2d at 183.

26. See *id.* at 350, 638 N.E.2d at 182.

27. See *id.* at 351, 638 N.E.2d at 182.

28. See *id.* at 352-61, 638 N.E.2d at 183-87.

29. See, e.g., Bob Greene, *The Only Person to Think About*, CHI. TRIB., July 17, 1994, § 5, at 1 [hereinafter Greene, *The Only Person*]; Bob Greene, *Outraged Edgar to*

supreme court to intervene in connection with the petition for reconsideration filed by the adoptive parents and Baby Richard's guardian *ad litem*.³⁰ The Illinois General Assembly also passed emergency legislation requiring that a hearing be held to determine the "best interests of the child" before any child could be returned from adoptive parents to biological parents in circumstances such as those in the Baby Richard Case.³¹

On July 12, 1994, the Illinois Supreme Court, with Justices McMorro and Miller dissenting, denied the Does' petition for rehearing.³² Justice Heiple wrote the opinion for the court. In that opinion, he noted that in *Stanley v. Illinois*,³³ the United States Supreme Court had held that unmarried fathers cannot be treated differently than unmarried mothers or married parents when determining their rights to the custody of their children.³⁴ Justice Heiple again held that the adoptive parents failed to meet their burden of proving Otakar Kirchner's unfitness to act as a parent for Baby Richard.³⁵

In rendering his opinion, Justice Heiple inflamed the situation by discussing the Bob Greene columns, Governor Edgar's political motivations in seeking to intervene in the case, and the legislature's passage of the "best interests of the child" statute.³⁶ Legislators must have had Justice Heiple's comments in mind when passing H.R. 89, which authorized the commencement of the impeachment investigation. Therefore, it is important to look at exactly what Justice Heiple said:

The best interests of the child standard is not to be denigrated. It is real. However, it is not triggered until it has been validly determined that the child is *available* for adoption. And, a child is not available for adoption until the rights of his natural parents have been properly terminated. Any judge, lawyer, or guardian *ad litem* who has even the most cursory

Enter 'Richard' Adoption Case, CHI. TRIB., June 30, 1994, § 5, at 1; Bob Greene, *Richard's Story Is in the Transcripts*, CHI. TRIB., July 3, 1994, § 5, at 1; Bob Greene, *Silencing Richard's Voice in Court*, CHI. TRIB., June 29, 1994, §, at 1; Greene, *Sloppiness of Heiple*, *supra* note 6, at 1; Greene, *Supreme Injustice*, *supra* note 6, at 1; Bob Greene, *Will the Justices See New Evidence?*, CHI. TRIB., July 10, 1994, § 5, at 1.

30. See *Doe*, 159 Ill. 2d at 367, 638 N.E.2d at 190.

31. See Act of July 3, 1994, Pub. Act No. 88-550, § 20, 1993-1994 Ill. Laws. 3d Spec. Sess. (1994).

32. See *Doe*, 159 Ill. 2d at 362-72, 638 N.E.2d at 187-92.

33. 405 U.S. 645 (1972).

34. See *id.* at 658.

35. See *Doe*, 159 Ill. 2d at 350, 638 N.E.2d at 182.

36. See *id.* at 365-67, 638 N.E.2d at 189-90.

familiarity with adoption laws knows that. Justice Rizzi [the author of the appellate court opinion awarding custody to the adoptive parents], if he is to be taken at face value, does not know that.

Columnist Bob Greene apparently does not care. Rather, columnist Greene has used this unfortunate controversy to stimulate readership and generate a series of syndicated newspaper columns in the *Chicago Tribune* and other papers that are both false and misleading. In so doing, he has wrongfully cried "fire" in a crowded theater,³⁷ and has needlessly alarmed other adoptive parents into ill-founded concerns that their own adoption proceedings may be in jeopardy. In support of his position, Greene has stirred up contempt against the Supreme Court as an institution, concluding one of his columns by referring to all of the Justices with the curse, "Damn them all."³⁸

Greene's implicit objective is to secure justice for a child. With that ethical and moral imperative, of course, no one could disagree. Greene, however, elevates himself above the facts, above the law, and above the Supreme Court of Illinois. He arrogates to himself the right to decide the case.

In support of his objective, Greene brings to bear the tools of the demagogue, namely, incomplete information, falsity, half-truths, character assassination and spurious argumentation. He has conducted a steady assault on my abilities as a judge, headlining one of his columns "The Sloppiness of Justice Heiple."³⁹ Another was entitled "Supreme Injustice for a Little Boy."⁴⁰ He has shown my picture in his columns with bylines reading, respectively, "Justice Heiple: Ruling takes boy from

37. This is a reference to United States Supreme Court Justice Oliver Wendell Holmes' statement that, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). *Schenck* upheld the convictions of protesters against the World War I military draft who had violated the Espionage Act of 1917 by distributing pamphlets that claimed that the draft violated the Thirteenth Amendment's prohibition against involuntary servitude and urged American men to ignore their draft notices. *See id.* at 50-51. Ironically, in *State ex rel. Martin v. Burnquist*, 170 N.W. 201 (1918), discussed *infra* note 117, the Minnesota Supreme Court held that a judge could not be removed from the bench for similar anti-war activity. *See id.* at 293.

In any event, Justice Heiple's use of the "fire in a crowd theater" metaphor with respect to Bob Greene's columns is questionable. Greene argued and, by all indications, he sincerely believed that the Illinois Supreme Court was doing a profound injustice to Baby Richard. There can be nothing "false" about that or any other opinion; only factual allegations (on which opinions may be based) can be "false."

38. Greene, *Supreme Injustice*, *supra* note 6, at 1.

39. Greene, *Sloppiness of Heiple*, *supra* note 6, at 1.

40. Greene, *Supreme Injustice*, *supra* note 6, at 1.

home,"⁴¹ and "James D. Heiple: No justice for a child."⁴²

Make no mistake about it. These are acts of journalistic terrorism. These columns are designed to discredit me as a judge and the Supreme Court as a dispenser of justice by stirring up disrespect and hatred among the general population.

Lest we forget the place from which he comes, let us remind ourselves that Greene is a journalist with a product to sell. He writes columns for a living. His income is dependent on writing and selling his columns to newspapers. He cannot secure either sales or earnings by writing on subjects that lack impact or drama. So, he must seek out subjects that are capable of generating wide public interest. An adoption case involving two sets of parents contesting for the custody of a three-year-old boy is a ready-made subject for this type of journalist. So far, so good.

The trouble with Greene's treatment of the subject, however, is that his columns have been biased, false and misleading. They have also been destructive to the cause of justice both in this case and in the wider perspective. Part of Greene's fury may be attributable to the fact that he staked out his views on this case in a published column that appeared on August 22, 1993.⁴³ Subsequently, on June 16, 1994, the Supreme Court had the audacity to base its decision on the law rather than on his newspaper column. So much for his self-professed moralizing.

That Greene has succeeded to a limited degree cannot be denied. I have, indeed, received several pieces of hate mail with such epithets as idiot, jerk, etc. The Governor, in a crass political move, announced his attempt to intervene in the case. And the General Assembly, without meaningful debate or consideration, rushed into law a constitutionally infirm statute with the goal of changing the Supreme Court's decision.

Both the Governor and the members of the General Assembly who supported this bill might be well advised to return to the classroom and take up Civics 101. The Governor, for his part, has no understanding of this case and no interest either public or private in its outcome. The legislature is not given the authority to decide private disputes between litigants. Neither does it sit as a super court to review unpopular decisions of the Supreme Court. We have three branches of government

41. Greene *Supreme Injustice*, *supra* note 6, at 1.

42. Greene *Supreme Injustice*, *supra* note 6, at 1.

43. Bob Greene, *Who Will Hear the Child's Cry?*, CHI. TRIB., Aug. 22, 1993, § 5, at 1.

in this land. They are designated as the legislative, the executive and the judicial. Legislative adjudication of private disputes went by the wayside generations ago. Moreover, this case cannot be decided by public clamor generated by an irresponsible journalist. Neither can it be decided by its popularity or lack thereof. This case can only be decided by a court of law. That is a judicial function pure and simple. For the Supreme Court to surrender to this assault would be to surrender its independence, its integrity and its reason for being. In so doing, neither justice to the litigants nor the public interest would be served. Under the circumstances, this case looms even larger than the child or the two sets of contesting parents.

...
... If there is a tragedy in this case, as has been suggested, then that tragedy is the wrongful breakup of a natural family and the keeping of a child by strangers without right. We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home.⁴⁴

Bob Greene responded to Justice Heiple's opinion with many additional columns regarding the Baby Richard Case.⁴⁵ In addition, Governor Edgar and a number of legislators severely castigated the supreme court.⁴⁶

44. See *In re Doe*, 159 Ill. 2d 347, 365-68, 638 N.E.2d 181, 189-90 (1994) (citations added).

45. See, e.g., Greene, *The Only Person*, *supra* note 29, at 1; Bob Greene, *The Words That So Upset Them*, CHI. TRIB., Mar. 7, 1995, § 5, at 1.

46. On the same day that Justice Heiple issued his opinion denying the adoptive parents' motion for a rehearing (in which Justice McMorrow, joined by Justice Miller, dissented from the denial of rehearing), Illinois Governor James Edgar issued an attack on the supreme court, and particularly Justice Heiple. Governor Edgar's statement read:

This is a dark day for justice and human decency in Illinois. The highest court in the state has committed a travesty.

This is not just another law suit, as Justice Heiple smugly suggests. It is not about the rights of street thugs. It is not about whether one person is owed money by another because of a fender bender. It is not about the governor of Illinois. It is not about the Illinois General Assembly. It is not about a columnist for the Chicago Tribune. It is about a young boy whom the court has decreed should be brutally, tragically torn away from the only parents he has ever known—parents who by all accounts loved and nurtured him from the second he joined their family.

Justices Mary Ann McMorrow and Ben Miller expressed concern for the child's well-being and agreed this case deserved—at the very least—a rehearing. But the majority arrogantly refused to even reconsider its decision and, frankly, I cannot imagine how the justices who prevailed in this case will be able to sleep at night.

This young child should have found a champion—a protector—in the highest court of this state. Instead, he found justices who betrayed their obligations to him and to the people who placed them in their lofty positions.

Although one may question the wisdom and temperance of Justice Heiple's comments, they certainly do not create the basis for impeachment. However, such comments created the political climate in which additional events⁴⁷ would precipitate a consensus in the Illinois House of Representatives to investigate Justice Heiple for impeachment.

Before addressing the House Committee investigation of Justice Heiple, the next section reviews the Illinois constitutional provision relating to impeachment and sets forth the appropriate standards for impeachment of Illinois public officials.⁴⁸ Then, the following section reviews the charges considered by the House Committee and the standards it applied.⁴⁹

II. THE LAW OF IMPEACHMENT IN ILLINOIS

The Illinois constitution authorizes impeachment of judges,⁵⁰ but neither the Illinois constitution nor any Illinois decisions specify the grounds for impeachment. Consequently, it is necessary to review source material from the Illinois Constitutional Convention of 1970 ("Constitutional Convention") as well as case law from other jurisdictions and scholarly analyses, to formulate an appropriate standard.⁵¹

What Two Justices Wrote and How Edgar Responded, CHI. TRIB., July 13, 1994, § 1, at 17.

As late as his 1997 State of the State speech, delivered on January 22, 1997, Governor Edgar described the plight of Baby Richard as "a tragedy." Christi Parsons & Courtney Challos, *Justice Calls "Baby Richard" Criticism Unfair*, CHI. TRIB., Jan. 23, 1997, § 1, at 10.

47. See *infra* Parts III.A.1-9.

48. See *infra* Part II.B-C.

49. See *infra* Part II.C-D.

50. ILL. CONST. art. IV, § 14.

51. On April 29, 1997, the Chicago Bar Association ("CBA") submitted a written report to the Special House Committee in response to the House Committee's request for guidance regarding the standards for impeachment. See Jerome B. Meites & Steven F. Pflaum, SPECIAL INVESTIGATIVE COMM. ON THE PROPOSED IMPEACHMENT OF CHIEF JUSTICE JAMES D. HEIPLE, CHICAGO BAR ASS'N, REPORT OF THE CHICAGO BAR ASSOCIATION TO THE ILLINOIS HOUSE OF REPRESENTATIVES SPECIAL INVESTIGATIVE COMMITTEE ON THE PROPOSED IMPEACHMENT OF CHIEF JUSTICE JAMES D. HEIPLE (1997) [hereinafter CBA REPORT]. The CBA Report was admitted into evidence. See *infra* Appendix pt. I. The House Committee majority and both dissenters relied extensively on the CBA Report in developing a standard for impeachable conduct. The House Committee majority said:

The report of the Bar Association discussed the standards for impeachment and said:

"Not every violation of the Code of Judicial Conduct warrants impeachment. Impeachment should be reserved for egregious violations. Less serious ethical infractions should result in

A. A Brief History of Impeachment

The doctrine of impeachment is a venerable component of Anglo-American law.⁵² Moreover, the doctrine of impeachment was more than 400 years old when the framers of the United States Constitution met in Philadelphia in 1787. There are several explicit references to impeachment in the United States Constitution.⁵³ Unlike the Illinois Constitution of 1970, the United States Constitution specifies the grounds for impeachment.⁵⁴

In his article *The Scope of the Impeachment Power*,⁵⁵ Paul S. Fenton examines the history of judicial impeachments under the Federal Constitution. Based on that case-by-case examination, Fenton concludes that the appropriate scope of the impeachment power under the Federal Constitution "is not a political tool for arbitrary removal of officials."⁵⁶ Fenton also indicates that, "[w]ithin these limitations, it is extremely difficult to define the proper standard for an impeachable

discipline by the Courts Commission."

It is the conclusion of the Committee that legislative impeachment should be limited to extraordinary cases of judicial misconduct involving serious violations of the law or serious breaches of trust.

Infra Appendix pt. I (quoting CBA REPORT, *supra*, at 15); *see also infra* Appendix pt. IV (Rep. Scott, dissenting); *infra* Appendix (Rep. Krause, dissenting) (stating "I relied on [the CBA Report] both as to the burden of proof as well as the standard to be used to determine the grounds for impeachment.").

The authors of this Article also wrote the CBA Report. The discussion in this section is taken substantially from the CBA Report.

52. A summary of its history reads as follows:

The practice [of impeachment], as we have it, comes from England. The earliest record of an impeachment trial in England dates back to 1376. During the reign of Edward III and some of his successors, bills of Attainder, and proceedings in the Court of the Star Chamber took the place of impeachment trials. In 1620, impeachment was revived and during the next 68 years, there was an impeachment on the average of every 20 months. There has been no resort to impeachment in England since the trial of Henry, Lord Viscount Melville, Treasurer of his Majesty's Navy, for misappropriation of funds in 1806 in the reign of George III.

Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 849-50 (1938).

53. *See, e.g.*, U.S. CONST. art. I, § 2 (providing that the House of Representatives has "the sole [p]ower of [i]mpeachment"); *id.* art. I, § 3 (describing the Senate's power to conduct impeachment trials); *id.* art. II, § 2 (providing that the President's pardon authority does not apply to impeachments).

54. The Federal Constitution provides: "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." *Id.* art. II, § 4.

55. Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719, 746 (1970).

56. *Id.*

offense in affirmative terms . . . [and] the only generalization that can safely be made is that an impeachable offense must be serious in nature."⁵⁷

B. *Impeachment Under the Illinois Constitution*

The legislative article of the Illinois Constitution of 1970 contains an explicit impeachment provision.⁵⁸ Unlike the Illinois Constitution of 1870 that it replaced, the Illinois Constitution of 1970 does not expressly state the grounds for impeachment. The Illinois Constitution of 1870 provided that impeachment was available for any "misdemeanor" in office. During the 1970 Constitutional Convention, delegates expressed concern about the use of the word "misdemeanor."⁵⁹ Ultimately, the delegates to the Illinois Constitution

57. *Id.*

58. Illinois constitution article IV, section 14, provides:

The House of Representatives has the sole power to conduct legislative investigations to determine the existence of cause for impeachment and, by the vote of a majority of the members elected, to impeach Executive and Judicial officers. Impeachments shall be tried by the Senate. When sitting for that purpose, Senators shall be upon oath, or affirmation, to do justice according to law. If the Governor is tried, the Chief Justice of the Supreme Court shall preside. No person shall be convicted without the concurrence of two-thirds of the Senators elected. Judgment shall not extend beyond removal from office and disqualification to hold any public office of this State. An impeached officer, whether convicted or acquitted, shall be liable to prosecution, trial, judgment and punishment according to law.

ILL. CONST. art. IV, § 14.

59. On May 28, 1970, Delegate James Parker discussed that issue:

MR. J. PARKER: . . . The Constitution presently reads that "[t]he governor and all civil officers of this state shall be liable to impeachment for any misdemeanor in office." And the committee has changed this to read: "may be impeached for official misconduct." This is the only substantive change.

Now, the purpose of this change was that the committee felt that the terminology "misdemeanor" in the usual and ordinary sense of the word is of a minor offense, and that *they felt that there could be some confusion that a governor or the other state or civil officers could be impeached for some minor traffic offense*, which is technically a misdemeanor. Therefore, we felt that the real intent of this provision was that it should be that he would be liable for impeachment if he does something serious in his official capacity as a state officer.

And actually, as a practical matter, no matter what language we use here, the power to impeach is strictly within the General Assembly and that this language we use is merely a directive to the General Assembly as to what our intent on it is, and that it is just to be added as a guide in exercise of their discretion. We just felt that this language of "official misconduct" would direct that it is only for acts of an official nature and not his personal affairs, unless it is serious enough that it would reflect on his official job.

3 Record of Proceedings: Sixth Illinois Constitutional Convention 1310-11 (1970) (emphasis added) [hereinafter Constitutional Proceedings].

of 1970 even deleted the phrase "official misconduct," which had been proposed by the Convention's Legislative Committee, from the final document. Thus, article IV, section 14 of the Illinois Constitution of 1970 does not contain any explicit grounds for impeachment, but it simply entrusts the Illinois House with the right to impeach officials in the executive or judicial branch and charges the Illinois Senate with the duty to conduct trials of any impeached official.⁶⁰

There is no other guidance in the Illinois Constitution of 1970, or in the record of the 1970 Constitutional Convention, regarding what is an impeachable offense. Nor are there any reported Illinois decisions that address this issue.⁶¹ However, it is clear that impeachable conduct is not limited to misconduct that would authorize removal from office by the Illinois Courts Commission. In *People ex rel. Harrod v. Illinois Courts Commission*,⁶² the Illinois Supreme Court held "that only conduct violative of the Supreme Court Rules of judicial conduct may be the subject of a complaint before the Commission."⁶³ Thus, a judge

It is also ironic that a considerable portion of the Heiple hearing pertained to traffic stops. Of course, the amount of attention devoted to them was not because Justice Heiple was the subject of four stops in four years but rather because of his reaction upon being stopped on those occasions. See *infra* notes 166-74 and accompanying text.

60. ILL. CONST. art IV, § 14.

61. There is apparently only one published decision, *Palmer v. United States Civil Service Commission*, 191 F. Supp. 495 (S.D. 1961), *rev'd on other grounds*, 297 F.2d 450 (7th Cir. 1962), that discusses the grounds for impeachment under the Illinois Constitution of 1870. Although not directly involving any impeachment proceedings, the decision includes the following interpretation of the impeachment provisions contained in the 1870 constitution:

This provision of the Constitution [article IV, section 24] does not provide the basis for returning a bill of impeachment, but it does provide that the senators shall be upon oath or affirmation to do justice according to law and evidence. The meaning generally ascribed to such a provision is that impeachment proceedings generally lie as a rule for treason, bribery or any high crime or misdemeanor in office The grounds must be causes attaching to the qualifications of the officer, or his performance of his duties, showing that he is not a fit and proper person to hold the office.

In *State v. Hastings* . . . it is said: "Where the act of official delinquency consists in the violation of some provision of the constitution or statute which, if denounced as a crime or misdemeanor, or where it is a mere neglect of duty, willfully done, . . . or where the negligence is so gross, and the disregard of duty so flagrant, as to warrant the inference that it was willful or corrupt, it is a misdemeanor in office . . ." [B]ut mere negligence or mere excess of power without corrupt intention is not a 'crime or misdemeanor' for which the officer should be impeached.

Palmer, 191 F. Supp. at 510 (citations omitted) (quoting *State v. Hastings*, 55 N.W. 774 (Neb. 1893)).

62. 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

63. *Id.* at 64. The Illinois Supreme Court reasoned that permitting the Courts Commission to discipline judges for conduct that does not violate the *Code of Judicial*

is only subject to discipline by the Courts Commission if the judge has violated one of the ethical provisions contained in Illinois Supreme Court Rules 61 through 68.⁶⁴

In contrast, the scope of the Illinois House's power to investigate alleged wrongdoing by judges and to impeach them for that wrongdoing is not so limited. As Delegate Parker noted, the House has the "sole" power of impeachment.⁶⁵ Accordingly, it is solely up to the House to decide what type of conduct constitutes an impeachable offense.

Delegate John Linebough Knuppel, an attorney in the central Illinois towns of Petersburg and Havana, also underscored this point in his comments at the Constitutional Convention.⁶⁶ Delegate Knuppel discussed the problems that had arisen in 1969, the year before the Constitutional Convention took place, when a self-styled "legal reformer" in Chicago, Sherman Skolnick, and his assistant, Harriet Sherman, raised allegations of serious impropriety against Illinois Supreme Court Chief Justice Roy J. Solfisburg, Jr. and Associate Justice Ray I. Klingbiel.⁶⁷ Skolnick claimed that the justices had purchased stock in the Civic Center Bank in Chicago while the criminal appeal of one of the bank's officers was pending before the Illinois Supreme Court.⁶⁸ Solfisburg and Klingbiel, who had not publicly disclosed their stock purchase, ruled in favor of the bank officer.⁶⁹ After Skolnick made his allegations, the Illinois Supreme Court appointed a special commission to investigate the charges.⁷⁰

Conduct would undermine the court's exclusive authority under article VI, section 13(a) of the Illinois constitution to "adopt rules of conduct for Judges and Associate Judges." *Id.* In addition, serious due process vagueness and overbreadth concerns would exist if the Courts Commission were not tethered to the *Code of Judicial Conduct* in deciding, pursuant to its authority under article VI, section 15(c)(1) of the constitution, whether a judge was guilty of "willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute." *Id.* The Illinois Supreme Court concluded that "any other construction would effectively nullify section 13(a) of article VI, eliminate the decision-making function which the [Constitutional Convention] delegates unanimously intended this court to have, and jeopardize the integrity and independence of the judiciary which the delegates sought to protect." *Id.*

64. *See id.*

65. *See* Constitutional Proceedings, *supra* note 59, at 1310.

66. *See id.* at 2709.

67. *See* Paul Galloway, *Reissued Sherman Skolnick Is Back Raising, Well, Some Unusual Topics*, CHI. TRIB., Jan. 15, 1988, § 5, at 2.

68. *See* E.R. Shipp, *3 Chicago Judges Face Bribe Charges*, N.Y. TIMES, Dec. 15, 1983, at A1.

69. *See* Galloway, *supra* note 67, at 2.

70. *See id.*

The commission reported that Solfisburg and Klingbiel had engaged in "positive acts of impropriety," and shortly thereafter, they resigned.⁷¹

While the allegations against Solfisburg and Klingbiel were pending, but before the special commission had issued its report, the Illinois House of Representatives established a seven-member special committee, under the chairmanship of Representative George Lindberg,⁷² to conduct an investigation regarding the allegations. Almost immediately after the House created the committee, five citizens filed a taxpayer's suit, *Cusack v. Howlett*,⁷³ seeking to enjoin the expenditure of public funds by the legislative committee on the ground that the Illinois House of Representatives had no role in investigating judicial misconduct under the 1870 constitution.⁷⁴ The citizens argued that under the Judicial Article of the 1870 constitution, as it had been amended in 1962, only a commission appointed by the supreme court, and not the Illinois House, could investigate judicial misconduct or remove judges from office.⁷⁵

The Circuit Court of Cook County concurred with the citizens' argument and consequently entered an injunction preventing the special committee from proceeding with its investigation.⁷⁶ The Illinois Supreme Court, in an opinion by the highly respected Justice Walter Schaefer, affirmed that decision, holding that the judicial department now held the exclusive power to prescribe and enforce the standards

71. *Id.*

72. In 1976, George Lindberg gave up his seat in the legislature to run as the Republican candidate for state comptroller, a race which he lost. In 1978, Lindberg was elected to the Illinois Appellate Court for the Second District, a district which includes the "collar counties" of Chicago. In 1989, Lindberg was appointed by President George Bush to a seat on the United States District Court for the Northern District of Illinois. He continues to serve in that capacity today.

73. 44 Ill. 2d 233, 254 N.E.2d 506 (Ill. 1969). A taxpayer's suit is a statutory action that may be brought either by the Illinois Attorney General or by a private citizen. *See* 735 ILL. COMP. STAT. 5/11-301 (West 1996). It is "an act to restrain and enjoin the disbursement of public funds by any officer or officers of the State government." *Id.* The underlying premise of any taxpayer's suit is that the planned expenditure of public funds is unlawful. The usual grounds for attacking a proposed expenditure are: (1) it violates the state or federal constitution; (2) the General Assembly did not appropriate the money for the purpose for which the executive branch intends to spend it; or (3) the funds are being used for a private, rather than a public purpose. *See* Granberg v. Didrickson, 279 Ill. App. 3d 886, 889, 665 N.E.2d 398, 401 (1st Dist. 1996).

74. *See Cusack*, 44 Ill. 2d at 244, 254 N.E.2d at 511.

75. *Id.* at 233, 240-42, 254 N.E.2d at 509-10. The plaintiffs argued that "the authority to impeach members of the judiciary was eliminated when the constitution of 1870 was adopted" or, "alternatively that impeachment was supplanted in 1964 when the present section eighteen of the Judicial Article became effective." *Id.*, 254 N.E.2d at 509.

76. *See id.* at 234, 254 N.E.2d at 507.

for judicial conduct.⁷⁷ Justice Schaefer also ruled that the General Assembly's power was limited to "fixing . . . a mandatory retirement age for judges and . . . request[ing] that the Courts Commission be convened."⁷⁸ The Illinois Supreme Court did not decide whether judges could be impeached under the 1870 constitution because the House committee conceded at the oral argument that its enabling resolution "does not conform to the established pattern of investigating resolutions looking toward impeachment and that 'realistically' impeachment is not a factor in this case."⁷⁹

Delegate Knuppel told the 1970 Constitutional Convention that the first sentence of the impeachment provision in the 1970 constitution served to overrule *Cusack* and to ensure that the House could conduct impeachment investigations of judges as well as of executive branch officials.⁸⁰ That provision provides that the House has "the sole power to conduct legislative investigations to determine the existence of cause for impeachment."⁸¹

At the commencement of the House's investigation of Justice Heiple in April 1997, Heiple's attorney, former Governor James R.

77. *See id.* at 244, 254 N.E.2d at 511-12.

78. *Id.*, 254 N.E.2d at 512.

79. *Id.* at 240, 254 N.E.2d at 509. In addition, prior to the Illinois Supreme Court's *Cusack* decision, both Chief Justice Solfisburg and Justice Klingbiel had resigned from the supreme court, thus rendering any impeachment effort against them moot.

80. Delegate Knuppel stated:

Section 13 deals with impeachment. I think up until last year, there was a little question about the right of the legislature to impeach judicial and executive officers. In the case of *Cusack v. Howlett*, the court cast some doubts on the strength of this article or the ability of the legislature to impeach judicial officers under the new judicial article of the constitution adopted in 1964. [The amended Judicial Article of the 1870 Constitution was ratified by the voters in the November 1962 election. It took effect on January 1, 1964.] That is what has prompted including the impeachment in just a little different language . . . than it was in the 1870 Constitution, and you can read it: "The House of Representatives, by a majority of all the members elected, has the sole power to impeach all executive and judicial officers. (and including the following sentence) The House of Representatives shall have power to investigate to determine if cause for impeachment exists. Impeachment shall be tried by the senate when sitting for that purpose," et cetera.

Now there was a question as to the right of the Lindberg Commission to investigate the alleged improprieties of certain judges here in the state of Illinois under the resolution which they had adopted. What this attempts to do is to improve on the language of the old Constitution and assure, inviolate, the right of the House of Representatives to impeach members of the judicial and executive branch of government.

See Constitutional Proceedings, supra note 59, at 2709.

81. ILL. CONST. art. IV, § 14.

Thompson, raised the issue of whether the committee had the authority to proceed with an impeachment investigation prior to the Courts Commission's rendering of its decision on the traffic stop charges against Justice Heiple.⁸² Indeed, Thompson even indicated that he might argue that the legislature could never consider impeachment on any of the charges considered by the Courts Commission.⁸³

However, based on the plain language of the first sentence of article IV, section 14 of the Illinois Constitution of 1970 and on the discussion of this issue at the Constitutional Convention,⁸⁴ the Illinois House certainly possessed the authority to conduct an impeachment investigation *at any time*, regardless of the pendency of an ostensibly similar matter before the Courts Commission or the disposition of similar charges by the Courts Commission. Because the House has the "sole" right of any governmental body in Illinois to impeach, there is, by definition, no conflict between the House conducting an impeachment investigation and the Courts Commission adjudicating charges pending before it, even if such adjudication could result in removal of the judge from the bench. Furthermore, because the Illinois Supreme Court in *Harrod* limited the Courts Commission's authority regarding judicial discipline solely to violations of the *Code of Judicial Conduct* promulgated by the Illinois Supreme Court Rules,⁸⁵ the overlap between what the House can investigate and what the Courts Commission can adjudicate is not complete. Any partial overlap in a particular case simply does not mean that the House must wait until the Courts Commission has completed its work.

82. See Rick Pearson, *Thompson Turns on Old Charm at Capitol*, CHI. TRIB., Apr. 24, 1997, § 1, at 1.

83. See *id.* Thompson said, "There are some arguments that when the constitution sets up the Courts Commission and says its decision should be final, that precludes the legislature from acting on the same matters. That question has never been answered." *Id.*

84. See Constitutional Proceedings, *supra* note 59, at 2709.

85. See *People ex rel. Harrod v. Illinois Courts Comm'n*, 69 Ill. 2d 445, 470, 372 N.E.2d 53, 64 (Ill. 1977).

If judicial officers are to rely on the rules for guidance, then disciplinary actions should be limited to conduct that violates the rules' expressed requirements and prohibitions Accordingly, we hold that only conduct violative of the Supreme Court Rules of judicial conduct may be the subject of a complaint before the Commission.

Id.

C. *Analyzing the Most Recent Judicial Impeachment Proceeding Before the Heiple Investigation*

Because there have been no impeachment proceedings in Illinois since the 1840s, the standards for impeachment developed in other jurisdictions provide guidance for the appropriate use of impeachment today. Prior to the Illinois House's investigation of Justice Heiple, the most recent impeachment investigation of a state court judge occurred in Pennsylvania. In November 1993, the Pennsylvania House of Representatives passed House Resolution 205 authorizing the Subcommittee on Courts of the House Judiciary Committee ("House Subcommittee") to conduct an investigation into allegations against Justice Rolf Larsen of the Pennsylvania Supreme Court.⁸⁶ The impeachment provision of the Pennsylvania constitution authorizes impeachment for "any misbehavior in office."⁸⁷

The Pennsylvania House Subcommittee reviewed seven specific grounds for the possible impeachment of Justice Larsen.⁸⁸ These seven allegations may be divided into three general types of alleged misconduct: (1) commission of felonies; (2) abuse of power as a judge; and (3) unethical conduct bringing the judiciary into disrepute. The felony allegations related to charges that Justice Larsen gave perjured testimony to a grand jury and misused the legal process by falsely accusing two other Pennsylvania Supreme Court justices of criminal and judicial misconduct in an attempt to obtain a reversal of his reprimand from the state's Judicial Inquiry and Review Board.⁸⁹

With respect to abuse of power or unethical conduct, Judge Larsen allegedly arranged for special treatment of certain petitions for leave to appeal so that the petitions would be specially handled by him and his staff.⁹⁰ Judge Eunice Ross of the Allegheny County Court of

86. See SUBCOMM. ON COURTS, JUDICIARY COMM., HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PA., INVESTIGATION INTO THE CONDUCT OF SUPREME COURT JUSTICE ROLF LARSEN AUTHORIZED BY HOUSE RESOLUTION 205 OF 1993, H.R. 177, 1st Sess. 1 (Pa. 1994) [hereinafter PENNSYLVANIA HOUSE REPORT].

87. PA. CONST. art. VI, § 6. This section reads, in its entirety:

The Governor and all other civil officers shall be liable to impeachment for any misbehavior in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under this Commonwealth. The person accused, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law.

Id.

88. See PENNSYLVANIA HOUSE REPORT, *supra* note 86, at 3-5.

89. See *id.* at 4, 34-35, 38-51.

90. See *id.* at 3, 22-34.

Common Pleas in Pittsburgh accused Justice Larsen of bringing about an improper *ex parte* contact by an attorney who was a friend of his with Judge Ross concerning a case that was pending before her.⁹¹ In addition, Judge Larsen's secretary, Barbara Roberts, apparently testified before the House Subcommittee that Justice Larsen had instigated, or allowed to be instigated, improper *ex parte* contact with another attorney with whom Justice Larsen was also very friendly, and who had two cases pending before the Pennsylvania Supreme Court.⁹² That attorney, Richard Gilardi, asked Justice Larsen to vote a certain way on two pending petitions for allowance of appeal in which Mr. Gilardi was serving as counsel to one of the parties.⁹³ The committee found documentary evidence that Justice Larsen had done as Mr. Gilardi requested.⁹⁴

In October 1993, Justice Larsen was charged in the Allegheny County Court of Common Pleas with criminal conspiracy and violations of the Pennsylvania Controlled Substances Act because he "regularly obtained certain psychotropic (anti-anxiety and anti-depressant) drugs for his own use by having one of his physicians, Dr. Earl Humphreys, issue prescriptions for the drugs in the names of the members of Justice Larsen's staff."⁹⁵ Based on the testimony of Dr. Humphreys and members of Justice Larsen's staff, the House Subcommittee found that Justice Larsen had used his position to influence his physician and his staff "to participate in his arrangement to obtain prescription drugs by fraudulent means."⁹⁶

The Special Pennsylvania House Subcommittee recommended that Justice Larsen be impeached on all of these grounds.⁹⁷ It also recommended that he be impeached because "[i]t is the cumulative effect of Justice Larsen's misbehavior that has the most profound and deleterious impact on the integrity of the judiciary as an institution."⁹⁸ Ultimately, the Pennsylvania House Subcommittee impeached Justice Larsen on all seven grounds recommended by the Special Subcommittee.⁹⁹ The Pennsylvania Senate, however, only convicted Justice Larsen on the allegations involving his *ex parte*

91. See *id.* at 4, 35-37.

92. See *id.* at 3, 29-30.

93. See *id.* at 29-32.

94. See *id.*

95. *Id.* at 51.

96. *Id.* at 52.

97. See *id.* at 6.

98. *Id.* at 5.

99: See GEORGE FOX RISHEL, LEGISLATIVE RESEARCH UNIT, ILL. GEN. ASSEMBLY, RESEARCH RESPONSE: IMPEACHMENT IN ILLINOIS AND OTHER JURISDICTIONS 7 (1995).

communications with his attorney friend who had matters pending before the Pennsylvania Supreme Court.¹⁰⁰

At the outset of the Pennsylvania House Report, the House Subcommittee explicitly addressed the standard for impeachment under the Pennsylvania constitution.¹⁰¹ This standard appears on its face to be broader than the following standard ultimately adopted by the Illinois House Committee: "It is the conclusion of the committee that legislative impeachment should be limited to extraordinary cases of judicial misconduct involving serious violations of the law or serious breaches of trust."¹⁰²

D. Conclusions Regarding the Grounds for Impeachment and Removal of Judges Under Illinois Law

Based on the sources discussed above, the standard for impeachment of Illinois public officials can be distilled to four grounds:

1. *Systemic nonfeasance*. This refers to a judge who is afflicted with such substantial physical or mental disabilities that it is not physically or mentally possible for the judge to continue functioning in office;¹⁰³

100. *See id.* at 8.

101. The Pennsylvania House Subcommittee described the standard as:

The Subcommittee on Courts has researched the grounds for impeachment set forth in article VI, section 6 of the Pennsylvania Constitution to determine whether any conduct of Justice Larsen warrants the adoption of Articles of Impeachment. The Constitution gives the "sole" impeachment power to the House of Representatives. Therefore, it is the unique responsibility of the House to interpret the standard for impeachment in article VI, section 6, and to determine whether a judicial officer's conduct falls within that standard. In the Subcommittee's view, "*misbehavior in office*" in the case of a judge or justice is conduct which brings the courts into disrepute, undermines public confidence in the integrity or impartiality of the court system, or brings into serious question a judicial officer's fitness to remain in office.

PENNSYLVANIA HOUSE REPORT, *supra* note 86, at 2 (emphasis added).

102. *Infra* Appendix pt. I.

103. *See* Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 85 (1970) (recognizing that impeachment is one, but not the sole, recourse for addressing problems of judges who are unable to perform their duties); Frank H. Easterbrook, *Unitary Executive Interpretation*, 15 CARDOZO L. REV. 313, 317 (1993) (recognizing the power to impeach senile judges); Melissa H. Maxman, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 427 (1987) (noting that the legislature may impeach incapacitated judges). *But see* Harvey T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 768 (1989) (noting that the Constitution is silent on the removal of judges with a serious disability).

2. *Willful malfeasance*. This generally refers to serious criminal conduct, such as accepting a bribe, committing perjury, or evading taxes;¹⁰⁴

3. *Egregious violations of the Code of Judicial Conduct*. This refers to ethical violations that also would warrant a judge's removal from the bench by the Illinois Courts Commission;¹⁰⁵ and

4. *Gross abuse of power*. This refers to intentional or bad faith misuse of judicial power that tends to bring the justice system into disrepute.¹⁰⁶

A judge who has become too physically or mentally ill to continue to function (systemic nonfeasance) obviously should not be on the bench. Similarly, willful malfeasance, such as the commission of a serious crime like accepting a bribe, is clearly a ground for removal from office. Because the necessity for removal is so self-evident in the wake of systemic nonfeasance and willful malfeasance and because there were no such allegations against Justice Heiple, this Article will focus on cases pertaining to the last two grounds: egregious violations of judicial ethics rules and gross abuse of power. This discussion will conclude with an analysis of the burden of proof needed to establish an impeachable offense.

1. *Illinois Code of Judicial Conduct*

Illinois Code of Judicial Conduct, found in Illinois Supreme Court Rules 61 through 68, is based on the ABA's *Model Code of Judicial Conduct*.¹⁰⁷ Not every violation of the *Code of Judicial Conduct*

104. "[I]mpeachment proceedings generally lie for treason, bribery, or any high crime or misdemeanor in office." *Palmer v. United States Civil Serv. Comm'n*, 191 F. Supp. 495, 510 (S.D. Ill. 1961), *rev'd on other grounds*, 297 F.2d 450 (7th Cir. 1962); *see also* Constitutional Proceedings, *supra* note 59, at 1310-11 (noting that legislature may impeach state officers for "serious" wrongdoing).

105. *See supra* notes 62-64.

106. *See infra* Appendix pt. I.

107. The ABA issued a revised *Model Code of Judicial Conduct* in 1990. *See* MODEL CODE OF JUDICIAL CONDUCT (rev. 1990). With respect to the House Committee's investigation of Justice Heiple, it appears that only Illinois Supreme Court Rules 61, 62(A), and 63(B) were relevant. *See* ILL. SUP. CT. R. 61, 62(A), 63(B). Specifically, rule 61 provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

ILL. SUP. CT. R. 61. Illinois Supreme Court Rule 62(A) reinforces the requirement that a judge promote the integrity of the judiciary, and states, "[a] judge should respect and

warrants impeachment. Normally, the Courts Commission should be permitted to fashion the appropriate punishment for misconduct that consists *solely* of ethical violations.¹⁰⁸ The Courts Commission has the power to remove a judge from office—the practical equivalent of impeachment.¹⁰⁹ Less serious ethical infractions can result in reprimand.

comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." ILL. SUP. CT. R. 62(A).

Finally, Rule 63(B) addresses the performance of a judge's duties both in his or her administrative capacity. This rule applies to appointments made by a judge, and provides in pertinent part:

A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials A judge should not make unnecessary appointments. A judge should exercise the power of appointment on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

SUP. CT. R. 63(B)(1), (4).

108. Article VI of the Illinois constitution authorizes the Courts Commission to discipline judges. See ILL. CONST. art. VI, § 15(e). Violations of the *Code of Judicial Conduct* constitute the sole grounds for such discipline. *People ex rel. Harrod v. Illinois Courts Comm'n*, 69 Ill. 2d 445, 469-470, 372 N.E.2d 53, 64 (1977).

109. The Illinois Courts Commission has removed five Illinois judges because of violations of the Judicial Canon of Ethics. See RISHEL, *supra* note 99, at 7. The judges and the causes of their removal are:

Name	Year of Removal	Grounds
Richard A. Napolitano	1970	Violated provision of Illinois constitution prohibiting judges from engaging in any outside business while on the bench.
Randall S. Quindry	1974	Involved in a vote fraud scandal.
James L. Oakley, Jr.	1975	Violated outside business provision.
William D. Vanderwater	1976	Unilaterally and summarily charged, accepted guilty plea, and sentenced defendant who allegedly stole a key to an apartment building in which the judge had an ownership and management interest.
John R. Keith	1994	Bad judicial temperament.

See *id.*

Justice Heiple served as Chair of the Illinois Courts Commission at the time of Judge Keith's removal from the bench. The cumulative effect of a number of incidents prompted Judge Keith's removal. During his testimony before the House Committee, Justice Heiple was asked about statements he had made during the Keith hearing and

mand, censure, or suspension without pay.¹¹⁰ Minor ethical infractions also can result in reassignment by the Illinois Supreme Court or by the trial court judge with supervisory or assignment power over the judge in question.¹¹¹

Given the rough engine of impeachment's all-or-nothing remedy and the existence of other avenues for redressing ethical violations, this ground for impeachment should be reserved for egregious ethical violations. It should be a rare case, such as one in which there is reason to believe that the judicial disciplinary process has malfunctioned or been thwarted,¹¹² in which ethical violations, standing alone, warrant impeachment. In most cases, ethical violations would justify impeachment only if other misconduct is present.

whether they applied to Justice Heiple, himself, with equal force. That exchange was as follows:

Q. The statement attributed to you and, I quote, is "One or two of the matters brought to our attention might have been overlooked or disregarded as a bad day for a judge or an aberration or a temporary lapse Considered in isolation, specific incidents of a judge's misconduct might have warranted only reprimand or censure. Considered as a whole however, the judge's misconduct indicates a person who should not occupy the position of a judge.

. . . .

Q. I point that out only to suggest or ask whether that stands for the proposition that in considering an issue of impeachment, this committee is empowered and indeed would be wise to consider not only individual incidents but courses of conduct. Do you agree to that?

A. I presume so, sir.

Infra Appendix (Rep. Krause, dissenting).

110. See ILL. CONST. art. VI, § 15(e).

111. See ILL. SUP. CT. R. 56 (authorizing chief circuit court judge to temporarily assign to restricted or non-judicial duties a judge against whom ethics charges are pending); SUP. CT. R 21(b) (granting chief judge's power to assign judges).

112. In the Heiple matter, there was some concern that Justice Heiple interfered with the judicial disciplinary process by selecting Justice Moses Harrison II to chair the Courts Commission, knowing that ethics charges arising out of the traffic stops were likely to come before the Commission. Justice Charles E. Freeman contended that the court's tradition was to select the justice who was next in line to be Chief Justice, which would have been Justice Freeman, to chair the Courts Commission. Justice Freeman also claimed that Justice Heiple passed over him and selected Justice Harrison to chair the Courts Commission because Justices Heiple and Harrison were good friends. Justice Heiple disputed these allegations and denied any wrongdoing in connection with the selection of Justice Harrison. See Ken Armstrong & Bob Sexter, *Has Heiple Stacked the Deck? Chief Justice Veered Away from Tradition*, CHI. TRIB., Feb. 12, 1997, § 1, at 1; *Illinois Chief Justice Draws Criticism from Colleague*, ST. LOUIS POST-DISPATCH, Feb. 13, 1997, News, at 2B, available in 1997 WL 3323696. The House Committee addressed the appointment of Justice Harrison to chair the Courts Commission in its report and determined that Justice Heiple had not committed an impeachable offense in connection with that selection. See *infra* Part III.A.4.

2. The Gross Abuse of Power Standard

There are at least three different elements to the ground of impeachment based on a judge's gross abuse of power. The first element involves whether the wrongful behavior constituted a misuse of judicial power or other misconduct.¹¹³ The second element relates to the judge's state of mind and whether impeachment is warranted for anything other than intentional misconduct.¹¹⁴ The third element relates to the importance of the subject matter of the misconduct.¹¹⁵ Each of these elements will be addressed in turn.

First, the gross abuse of power standard involves misuse of judicial power. Judicial power includes the decision of cases, the issuance of orders, the making of appointments, or other action taken as a judge. By definition, abuse of power does not involve non-judicial misconduct.¹¹⁶ This is not to say that a judge never can be impeached for non-judicial misconduct, but impeachable non-judicial misconduct generally involves serious criminal offenses.¹¹⁷

Second, the abuse of power standard involves intentional or bad faith misconduct. Intentional misconduct requires knowingly and willfully doing something that is improper or unauthorized by law.¹¹⁸

113. See *infra* notes 116-17 and accompanying text.

114. See *infra* notes 118-19 and accompanying text.

115. See *infra* note 120 and accompanying text.

116. See CBA REPORT, *supra* note 51, at 16.

117. See, e.g., State *ex rel.* Martin v. Burnquist, 170 N.W. 201 (Minn. 1918). *Burnquist* is a classic example of an effort to remove a judge based on non-judicial actions. In that case, the Governor of Minnesota sought to have a probate judge removed from the bench because of speeches he gave which strongly opposed the United States' entry into World War I. See *id.* at 202. Among other things, the judge had stated that Germany justifiably sank the *Lusitania*. *Id.* The judge also accused President Woodrow Wilson of lying to the American people during the 1916 presidential campaign when he said that he would never enter the war and then entering the war almost immediately after his re-election to a second term. See *id.* The Minnesota Supreme Court held that the judge's statements did not constitute the performance of judicial duties and were not grounds for removal from office:

The misconduct or malfeasance under our law must have direct relation to and be connected with the "performance of official duties," and amount either to maladministration, or to willful and intentional neglect and failure to discharge the duties of the office at all.

. . . But we are clear that scolding the President of the United States, particularly at long range, condemning in a strong voice the war policy of the federal authorities, expressing sympathy with Germany, justifying the sinking of the *Lusitania*, by remarks made by a public officer of the jurisdiction and limited authority possessed by the judge of probate under the Constitution and laws of this state do not constitute malfeasance in the discharge of official duties, and therefore furnish no legal ground for removal.

Id. at 203.

118. See *Murtagh v. Maglio*, 195 N.Y.S.2d 900, 905-06 (App. Div. 1960) (stating

Bad faith in this context means objective bad faith—misconduct that the judge could not have reasonably thought to be proper or authorized by law.¹¹⁹

Third, abuse of power involves serious “misconduct that tends to bring the judicial system into disrepute.”¹²⁰ This element recognizes that impeachment is an extreme remedy. In terms of a judge’s career, it constitutes capital punishment. Only very serious misconduct should constitute an impeachable offense.

3. Burden of Proof

In determining whether grounds exist for impeachment, proof of any such misconduct should be by clear and convincing evidence.¹²¹ The Illinois Supreme Court defines the clear and convincing evidence standard as “the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question.”¹²² Neither Justice Heiple nor any member of the House Committee questioned the application of the clear and convincing standard.¹²³

that “neither error of judgment, nor error in the decision of particular cases, nor mistakes in the construction of statutes, nor mistakes in the determination of the extent or limitation of his powers, without further proof of unworthy or illegal motives, will sustain” removing a city magistrate).

119. *Cf. Spruance v. Commission on Judicial Qualifications*, 532 P.2d 1209, 1221 (Cal. 1975) (emphasizing “the importance of an objective rather than a subjective appraisal of judicial conduct”).

120. CBA REPORT, *supra* note 51, at 16-17; *cf. ILL. CONST.* art. VI, § 15(e) (authorizing the Courts Commission to discipline judges whose conduct “is prejudicial to the administration of justice or . . . brings the judicial office into disrepute”).

121. *See In re Inquiry Relating to Rome*, 542 P.2d 676, 684 (Kan. 1975) (holding that clear and convincing evidence is the appropriate burden of proof relating to depriving a judge of his office or subjecting him to some form of discipline); *In re Diener*, 304 A.2d 587, 594 (Md. 1973) (stating that the severity of the circumstances regarding judicial misconduct warrants a clear and convincing standard).

122. *Bazydlo v. Volant*, 164 Ill. 2d 207, 213, 647 N.E.2d 273, 276 (1995) (noting that “courts consider clear and convincing evidence to be more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense); *see also Cronin v. McCarthy*, 264 Ill. App. 3d 514, 525, 637 N.E.2d 668, 675 (1994) (“The spectrum of increasing degrees of proof, from preponderance of the evidence, to clear and convincing evidence, to evidence beyond a reasonable doubt, would be clearer if the degrees of proof were defined, respectively, as probably true, highly probably true, and almost certainly true.”).

123. Another interesting evidentiary issue that arose in the Heiple case, but never surfaced in the public proceedings, was whether Justice Heiple held a “property interest” in his judgeship that allowed him to have the full panoply of due process rights provided for under the Fourteenth Amendment to the Federal Constitution and under article I, section 2, of the Illinois constitution. Initially, the House Committee indicated that Justice Heiple’s counsel, former Illinois Governor James R. Thompson, could ask “clarifying questions” of witnesses, but could not formally cross examine them. Justice

Heiple contended that he possessed a "property interest" in his judgeship and, therefore, had a due process right to have his counsel "cross examine" witnesses. Ultimately, Justice Heiple's counsel was allowed to cross-examine witnesses, so the issue disappeared.

The CBA was asked by counsel to the Special House Committee to opine on this issue. The CBA submitted a supplement to the CBA Report on this issue and on the issue of judicial privilege, *see supra* note 51, written by the authors of this Article. The following is a summary of that supplement as it relates to the question of whether an Illinois judge has a "property interest" in his judgeship for due process purposes.

Existing precedent indicates that at least elected judges (as contrasted to appointed judges who serve for life under the federal system) do not have a "property interest" in their judgeships. In *Larsen v. Senate of the Commonwealth of Pennsylvania*, former Justice Larsen of the Pennsylvania Supreme Court contested the procedures used in his impeachment proceeding by the Pennsylvania House and in his trial by the Pennsylvania Senate on the ground that he did not receive the full panoply of due process protections. *Larsen v. Senate of the Commonwealth of Pa.*, 955 F. Supp. 1549 (M.D. Pa. 1997). The district court held that: "according to the teachings of [*Board of Regents v. Roth*, 408 U.S. 564 (1972)] . . . [Larsen] may not pursue [his] procedural due process claims . . . unless an independent source such as state law affords [him] a legitimate claim of entitlement to his post as a supreme court justice." *Id.* at 1567-68 (citation omitted and ellipsis in original) (quoting *Independent Enter., Inc. v. Pittsburgh Water and Sewer Auth.*, 103 F.3d 1165, 1177 (3d Cir. 1997)). The Larsen court relied on two prior Pennsylvania cases, *Sweeney v. Tucker*, 375 A.2d 698, 713 (Pa. 1977) and *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132, 140-41 (Pa. 1992). *See id.* at 1568. In the *Reapportionment Comm'n* case, the Pennsylvania Supreme Court held that "elected officials' interest in their offices does not merit constitutional protection." *Reapportionment Comm'n*, 609 A.2d at 141. In *Sweeney*, a state legislator unsuccessfully argued that he had a property interest in his office that entitled him to procedural due process in proceedings seeking his expulsion from the legislature. *See Sweeney*, 375 A.2d at 712-13. The court held that: "an elected office is a public trust, not the private domain of the officeholder An elected official can never have tenure in the same sense as an ordinary public employee." *Id.* at 713.

Two Illinois cases, although not involving impeachment, both indicate that state court judges do not hold a property interest in their judgeships. In *Field v. Boyle*, 503 F.2d 774 (7th Cir. 1974), a Cook County magistrate, who had been elected by the full circuit court judges under the 1870 constitution for a one-year term on January 1, 1971, complained that he had been denied a due process hearing when he was not converted to an associate judge by the full circuit court judges when the Illinois Constitution of 1970 took effect on July 1, 1971. Magistrate Field claimed that he had a property interest in his judgeship for the full year and that his removal without a formal hearing violated the Due Process Clause of the Fourteenth Amendment. *See Field*, 503 F.2d at 775. The Seventh Circuit rejected that argument, stating "[w]e disagree that Field had a property interest or expectancy of employment which could not—consonant with the Federal Constitution—be divested without Field first being afforded some kind of due process hearing." *Id.* at 776.

Similarly, in *Nicholson v. Chicago Bar Ass'n*, 233 Ill. App. 3d 1040, 1050, 599 N.E.2d 1132 (1992), the Illinois Appellate Court held that an Illinois judge does not have a property interest in a judgeship. *See id.* at 1139. In that particular case, Judge Nicholson (who coincidentally had been a delegate to the 1970 Illinois Constitutional Convention) served as a judge on the Circuit Court of Cook County. *See id.* at 1133. She sought appointment by the Illinois Supreme Court to the Illinois Appellate Court to fill a vacancy pending the next election. *See id.* at 1134. The Illinois Supreme Court required Judge Nicholson to submit her credentials to the CBA. The CBA found her "[n]ot

E. Relationship Between Grounds for Impeachment and the Doctrine of Judicial Independence

In his supplemental opinion denying rehearing in the Baby Richard Case, Justice Heiple emphatically reminded everyone that the judiciary is independent of the other branches of government.¹²⁴ The Illinois House Committee also acknowledged the importance of maintaining the independence of the judiciary.¹²⁵

Judicial independence is the bedrock of the judicial system and the constitutional separation of powers among the three branches of government.¹²⁶ The essence of judicial independence is a judge's

[q]ualified" for the position. *Id.* Judge Nicholson claimed that the CBA failed to give her due process in its consideration of her qualifications. *See id.* at 1135. Although the appellate court held the CBA was not a state actor, so that the due process clause did not apply to it, the appellate court went on to hold that even if the CBA were a state actor, Illinois citizens do not have property interests in judgeships and, therefore, are not entitled to due process pertaining to their efforts to become judges or, presumably, to remain judges. *See id.* at 1139-40.

124. *See In re Doe*, 159 Ill. 2d 347, 367, 638 N.E.2d 181, 190 (1994). Heiple declared:

We have three branches of government in this land. They are designated as the legislative, the executive and the judicial. Legislative adjudication of private disputes went by the wayside generations ago. Moreover, this case cannot be decided by public clamor generated by an irresponsible journalist. Neither can it be decided by its popularity or lack thereof. This case can only be decided by a court of law. That is a judicial function pure and simple. For the Supreme Court to surrender to this assault would be to surrender its independence, its integrity and its reason for being. In so doing, neither justice to the litigants nor the public interest would be served. Under the circumstances, this case looms even larger than the child or the two sets of contesting parents.

Id.

125. *See infra* Appendix pt. I. The House Committee majority stated at the outset of its report:

History teaches us that freedom is threatened when one branch of government is able to control or ignore the independence of another branch. Each branch of government, the executive, the legislative and the judiciary, must function cooperatively with but independently of the other two. This doctrine of separation of powers requires that each branch of government respect and protect the independent function of the other two branches within their own sphere. Flowing from that concept is the necessary independence of the judiciary. The independence of the judiciary is indispensable to the rule of law and therefore to the protection of individual liberty. A fundamental aspect of judicial independence is that the legislature cannot intervene in judicial affairs on political grounds or because of disagreement with or dissatisfaction with the opinions of a judge. Any such authority would destroy judicial independence and make judicial tenure dependent on legislative pleasure. It would deprive the citizens of this state of a major safeguard for their constitutional rights.

Infra Appendix pt. I.

126. *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also infra* note 141

ability—indeed, sometimes his or her responsibility—to render unpopular decisions. Judges cannot fulfill this responsibility effectively if they fear impeachment for doing so.

In considering the grounds for impeachment, it was essential for the House Committee to ensure that Justice Heiple not be impeached because of the opinions he had rendered. This was especially so because, as a practical matter, without the unpopular Baby Richard opinion, the ostensibly unrelated impeachment charges probably never would have been brought. Both the majority and the dissenters on the House Committee quite properly said that they had given no weight to the Baby Richard Case in reaching their conclusions.¹²⁷

Most Americans learn about the constitutional role of the judiciary prior to high school. They learn that judges are not to make decisions based on majority vote or on their own personal predilections, but rather on what the law says. This is an easy standard to articulate but often a very difficult one to put into practice.

At the same time, Americans often have had a very difficult time accepting unpopular decisions by judges who may be unelected and, even if elected, are unavailable to be lobbied and persuaded as are other public officials, such as aldermen, state legislators, and congressmen, but who have the authority to block the public will. For example, in California, in 1995, public outrage erupted after a federal judge found portions of California's Proposition 187 unconstitutional.¹²⁸ This law, the result of a referendum passed by an overwhelming vote of California citizens, amended the California constitution to severely limit the rights and benefits of legal and illegal aliens in California.¹²⁹ Another act by the judiciary that spurred animosity among white Americans in the South in the 1940s, 1950s, and 1960s occurred when federal judges declared various aspects of

(providing a defense of judicial independence).

127. See *supra* note 11 in which both the House Committee majority and dissenting Representative Scott are quoted on the issue.

128. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995); William Claibourne, *Judge Strikes Some California Immigrant Bans*, WASH. POST, Nov. 21, 1995, at A1, available in 1995 WL 9847927; Paul Feldman, *Prop. 187 Ruling Frustrating for Voters*, L.A. TIMES, Nov. 22 1995, at A1; James O. Goldsborough, *Prop. 187 Is Dead: Its Burial Is Overdue*, SAN DIEGO UNION TRIB., Dec. 4, 1995, at B7, available in 1995 WL 10340964.

129. See *League of United Latin Am. Citizens v. Wilson*, 1998 U.S. Dist. LEXIS 3418 (C.D. Cal. Mar. 13, 1998). The Proposition 187 provisions held unconstitutional by the district court are modified at: CAL. WELF. & INST. CODE § 10001.5(a), (b), and (c); CAL. HEALTH & SAFETY CODE § 130(a), (b), and (c); CAL. EDUC. CODE § 48215 and § 66010.8(a), (b), and (c); CAL. PENAL CODE § 834b(a), (b), and (c); and CAL. GOV'T CODE § 53069.65.

segregation unconstitutional under the Federal Constitution. Indeed, white outrage became so high after the United States Supreme Court's decisions in cases like *Brown v. Board of Education*¹³⁰ and *Cooper v. Aaron*¹³¹ that "Impeach Earl Warren" billboards sprang up all over the South.

More recent events reveal threats to the independence of Illinois courts. In December of 1997, the Illinois Supreme Court, in a five-to-one vote, held the "Tort Reform Act of 1995"¹³² unconstitutional under the Illinois constitution.¹³³ Among other things, the act placed "caps" on the amounts of damages plaintiffs in medical malpractice cases could recover for "pain and suffering."¹³⁴ After the Illinois Supreme Court held the bill unconstitutional, the *Chicago Tribune* reported that the decision might trigger a wave of political contributions to judicial candidates who are sympathetic to "tort reform."¹³⁵

130. 358 U.S. 463 (1954) (declaring "separate, but equal" elementary schools unconstitutional).

131. 371 U.S. 1 (1958) (ordering immediate desegregation of Central High School in Little Rock, Arkansas).

132. Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7.

133. See *Best v. Taylor*, 179 Ill. 2d 367, 378, 689 N.E.2d 1057, 1063 (Ill. 1997).

134. See *id.*

135. See Ken Armstrong & Sheryl Kennedy, *Tort Reform Struck Down by Justices*, CHI. TRIB., Dec. 19, 1997, § 1, at 1. The report notes that:

For years, supporters and opponents of tort reform have flooded the legislature with campaign dollars. Trial lawyers, the measure's biggest opponents, consistently have given Democrats big donations. Manufacturing and medical associations, the measure's biggest supporters, have ponied up for the Republicans.

Given the fact that Illinois elects its judges, the donations flowing into the campaigns of judicial candidates could see a marked increase.

"Organizations like ours have always paid a great deal of attention to who is elected to the legislature and the governor's office. I think now we'll have to pay closer attention to who is elected to the courts," said Greg Baise, president of the Illinois Manufacturers' Association.

Id.

Article VI, section 10 of the Illinois Constitution of 1970 provides that members of the Illinois Supreme Court and Illinois Appellate Court will serve ten-year terms, whereas trial court judges who sit on one of the state's twenty-two circuit courts will serve six-year terms. See ILL. CONST. art. VI, §10. All of these judges are initially elected by the voters in partisan elections (except those judges initially appointed by the Illinois Supreme Court to fill vacancies until the next election). See *id.* art. VI, §12(c). When the initial term of these elected judges expires, they run for "retention." See *id.* art. VI, §12(d). In a retention election, the judge has no opponent. See *id.* Instead, a proposition, which essentially reads, "Shall Judge Smith be retained in office?" is put before the voters in the district in which the judge serves. See *id.* art. VI, § 12(d). Voters then vote either "yes" or "no." To be retained, a judge must receive "yes" votes from 60% of those voting on his or her retention. See *id.* In downstate Illinois, there are often only a handful of retention candidates in any given election. By

The Illinois Manufacturers' Association ("IMA") responded to the supreme court's tort reform decision by issuing a press release that ignores the doctrine of separation of powers and the principle of judicial review. The IMA stated:

Today's action by the Illinois Supreme Court represents an outrageous affront to a co-equal branch of the Illinois government. By throwing out the entire tort reform act, five of the justices of the court have sent a message that the will of the people, acting through their elected representatives in the General Assembly is irrelevant The complete dismantling of the Illinois business community's efforts to improve the business climate and future prosperity of Illinois is disheartening to say the least. Apparently, it is time for the business community to take a much closer look at the individuals who seek to be the leaders of our judicial system in Illinois.¹³⁶

The theory of the supreme court's tort reform decision is, of course, that the General Assembly violated the limits placed on it by "the will of the people" in acting beyond the scope of the legislative powers delineated in the Illinois constitution. The role of judges in such cases is similar to that of baseball umpires calling balls and strikes without regard to which team benefits. Judges are supposed to "call" legislation "constitutional" or "unconstitutional" based on what the constitution says and how the judges interpret it, not based on whether the decision will help or hurt any particular interest group.

The reported reactions to the Illinois Supreme Court's decision in the tort reform case are by no means atypical. Americans believe in majority rule. Majority rule appropriately governs the legislative and executive branches of government. Yet, since Chief Justice Marshall's decision in *Marbury v. Madison*¹³⁷ in which he held that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"¹³⁸ the third branch, the judiciary, has "undone" the work of the other branches when, in an ostensibly neutral way, it applies "the law" to declare a statute unconstitutional. Organized

contrast, in Cook County, there are always a substantial number. For example, in 1998, if all of the judges in Cook County whose terms expire run for retention, there will be 81 retention candidates on the November, 1998 general election ballot.

136. Press release by Gregory W. Baise, President of Illinois Manufacturers' Association ("IMA") (Dec. 18, 1997) (referring to overturning of tort reform) (on file with the author). Mr. Baise previously served as an official in the administration of former Illinois Governor James R. Thompson, and was the unsuccessful Republican candidate for State Treasurer in 1990.

137. 5 U.S. 137 (1 Cranch) (1803).

138. *Id.* at 177.

opposition to judges in retention elections, as threatened by the IMA,¹³⁹ is as serious a threat to judicial independence as a politically motivated impeachment arising out of a controversial decision by a judge.

A recent commentary on impeachment of federal judges addressed the inextricable connection between judicial independence and the appropriate limits on the ability of the legislature to impeach judges.¹⁴⁰ That discussion harkened back to the original intent of the framers of the Constitution in providing both an impeachment provision and assurances of judicial independence.¹⁴¹ The framers went to great lengths to institute a system that would preserve judicial independence. The reasons for this were discussed by Alexander Hamilton in *Federalist Paper No. 78*, a treatise that Hamilton devoted entirely to the rationale for insuring judicial independence under the Constitution.¹⁴²

139. See *supra* note 136 and accompanying text (regarding IMA statements).

140. See Maxman, *supra* note 103.

141. In defense of judicial independence, one article notes:

The debates at the Constitutional Convention make clear that the Framers' primary goal for the judiciary was to preserve its independence. The importance of this objective traces back to the colonists' resentment of the iron-fisted monarchical control of the judges in England. This is evidenced by one of the principal grievances recited in The Declaration of Independence: King George had "made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries." The colonists' dissatisfaction with the English system led them to adopt only those provisions that promulgated the ideal of judicial autonomy.

Id. at 439 (footnotes omitted) (citing W. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* 2 (1913); 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 65 (M. Farrand ed. 1911)).

The Framers accurately recognized the need to protect the judiciary's independence. "Today's judges frequently find that they have to cope with 'dramatic litigation in which [they find themselves] confronted with the need to decide an explosive issue' and the attendant 'risk[s] of unpopularity.'" *Id.* at 440-41 (quoting [Justice] John Paul Stevens, *Reflections on the Removal of Sitting Judges*, 13 *STETSON L. REV.* 215 (1984)). Both the Federal and Illinois Constitutions' complex impeachment design, and their requirement of a two-thirds majority of the Senate for conviction, ultimately protects citizens by ensuring that their judges do not make political decisions in order to preserve their own tenure in office. This principle is as important today as it was at the time of the drafting of the Constitution.

142. As Hamilton explained:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

....

Judges today are rightly concerned that their independence is being attacked because of the opinions they render. The kind of adverse public reaction prompted by Justice Heiple's decision in the Baby Richard Case is all too common.¹⁴³ So, too, is the reaction of the IMA to the supreme court's decision in the Tort Reform case.¹⁴⁴

One way in which the attacks on judicial independence have manifested themselves is the efforts by some members of Congress to amend Article III of the Federal Constitution to end life tenure for federal judges and substitute fixed terms. Indeed, Senator Bob Smith (R. - N.H.) has introduced a constitutional amendment to limit the terms of all federal judges to ten years.¹⁴⁵ Interestingly, this proposal is not new. Indeed, President Thomas Jefferson was one of the first proponents of fixed terms for federal judges. Jefferson supported life tenure during the ratification debates for the adoption of the Constitution in 1789 and 1790 and continued to support them prior to his taking office as President at noon on March 4, 1801. However, just before noon that day, Jefferson's predecessor President John Adams, whom Jefferson had defeated for re-election in a very bitter race, made a number of "midnight appointments" to the federal bench and other federal offices, including the appointment of John Marshall as Chief Justice.¹⁴⁶ Jefferson was furious, both with Marshall's

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, (Alexander Hamilton); *see also* *Geras v. LaFayette Display Fixtures, Inc.*, 742 F.2d 1037, 1039 (7th Cir. 1984) ("Judicial independence is crucial to the preservation of our system of government.").

143. *See* M.A. Stapleton, *Loss of Judicial Independence Termed Real Risk*, CHI. DAILY L. BULL., Aug. 1, 1997, at 1. The story discusses a report issued by the American Bar Association's Commission on Separation of Powers and Judicial Independence. The report stated, "Recently, individual judges have been subjected to misleading criticism, demagogic attacks and threats of impeachment from representatives of both political branches in both political parties." *Id.* The article also noted that earlier in the year Congressman Thomas DeLay, the House Majority Whip, stated that "Congress should impeach federal judges whose rulings are particularly egregious." *Id.*

144. *See* *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (Ill. 1997).

145. Walter R. Mears, *Clinton Gets a Recess, But No Resolution in the Fight Over Federal Judges*, ASSOC. PRESS, Dec. 6, 1997.

146. In fact, Marshall's seminal decision in *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1803), in which he declared that "it is emphatically the province and duty of the Judicial department to say what the law is," involved the midnight appointments which Marshall had certified in his capacity as Adams' Secretary of State. *Id.* at 177.

appointment and, later, with decisions that the Supreme Court made under Marshall's leadership during Jefferson's eight years in office. Consequently, while President, Jefferson recommended that Congress adopt an amendment to the Constitution, limiting the tenure of judges.¹⁴⁷

The current political climate reflects the inherent unpopularity of judicial independence, especially in instances where the exercise of that independence means that popular legislation is rendered unenforceable.¹⁴⁸ Moreover, there is often little that judges can do to counter that unpopularity. Judicial ethics rules generally prohibit judges from explaining or defending their decisions outside of the proceedings in which they are rendered.¹⁴⁹ Given judges' limited ability to defend themselves, the constitutional necessity of maintaining judicial independence, and judges' vulnerability to attacks from well-organized groups that disapprove of a decision, it is especially important that the legislative branches of government, whether it be Congress or the Illinois General Assembly, show great restraint in exercising the impeachment power.

In April 1996, Chief Justice William Rehnquist delivered a major speech on this subject occasioned by the decision of Judge Harold Baer, Jr., a federal district judge in New York, barring certain evidence from being admitted in a criminal drug trial.¹⁵⁰ Judge Baer's decision ignited a political firestorm in the then-on-going presidential campaign between President Bill Clinton and Senator Bob Dole. Senator Dole suggested that impeachment might be in order and

See generally Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997) (providing historical details).

147. Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side*, in RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.9, at 117 (2d ed. 1992).

148. *See supra* notes 31, 128-29, 132-33.

149. *See* ILL. SUP. CT. R. 63A(6) ("A judge should abstain from public comment about a pending or impending proceeding."); Ill. Judicial Ethics Comm., Advisory Op. 96-5 (1996) ("A Judges Response to News Media Inquiries Regarding a Pending Case"), available in 1996 WL 136795. This opinion held, in sum, that a violation of Supreme Court Rule 63A(6) occurs if a judge speaks to a reporter about a ruling in a pending case, unless the judge's comments are limited to: explanations of administrative procedures of the court; the contents of the official transcript of the proceeding; or the contents of the court order or written opinion. *See id.*; *see also* ILL. SUP. CT. R. 67 (limiting a judge's political activities, including the prohibition against a judicial candidate "mak[ing] statements that commit or appear to commit the candidate with respect to cases, to controversies or issues within cases that are likely to come before the court").

150. *See* *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996); Chief Justice William H. Rehnquist, Address at Washington College of Law (Apr. 9, 1996).

President Clinton stated that the judge, whom he had appointed, should consider resigning if he did not reverse his decision.¹⁵¹ Chief

151. Newspapers around the country criticized both President Clinton and Senator Dole for their statements. In an editorial, the *Chicago Tribune* stated, "Both remarks amounted to nothing less than a frontal assault on the independence of the judiciary, which [Chief Justice] Rehnquist rightly described as 'One of the crown jewels of our system of government' That Dole and Clinton were willing to make political football of a principle so fundamental to our system is deeply worrying." Editorial, CHI. TRIB., Apr. 11, 1996, §1, at 28. Similar editorials criticizing Clinton and Dole and commending Chief Justice Rehnquist for his speech appeared in other papers. See, e.g., Editorial, *Judicial Independence Listen to Rehnquist*, ARIZ. REPUBLIC-PHOENIX GAZETTE, May 3, 1996, at B4, available in 1996 WL 7704386; Editorial, *Judicial Independence: A Matter for the Courts*, HERALD-SUN, Apr. 22, 1996, at A8, available in LEXIS, News Library, Hldsun File.

In a column, David Broder, a long-time syndicated political writer for the *Washington Post*, quoted approvingly from the comments of Jon O. Newman, Chief Judge of the United States Court of Appeals for the Second Circuit, and three of his predecessors:

"The recent attacks on a trial judge of our Circuit have gone too far," they said in a March 30 statement. "They threaten to weaken the constitutional structure of this nation, which has well served our citizens for more than 200 years."

"Last Friday, the White House Press Secretary announced that the President would await the judge's decision on a pending motion to reconsider a prior ruling before deciding whether to call for the judge's resignation. The plain implication is that the judge should resign if the decision is contrary to the President's preference. That attack is extraordinary intimidation."

"Last Saturday," the statement continued, "The Senate Majority Leader escalate the attack by stating that if the judge did not resign, he should be impeached. The Constitution limits impeachment to those who have committed 'high crimes and misdemeanors.' A ruling in a contested case cannot remotely be considered a ground for impeachment"

"The Framers of our Constitution . . . did not provide for resignation or impeachment whenever a judge makes a decision with which elected officials disagree."

David Broder, Editorial, *When Justice and Politics Collide*, ATLANTA J. & ATLANTA CONST., Apr. 19, 1996, at A19. To a similar effect were the following articles: Nat Hentoff, *Judges in the Dock*, WASH. POST., Apr. 13, 1996, at A2; Michael Kramer, *Cheap Shots at Judges: Where Clinton and Dole Took Presidential Politics Too Far*, TIME MAG., Apr. 22, 1996, at 57; and Anthony Lewis, *The Stupid Politics of Judge-Bashing*, TAMPA TRIB., Apr. 13, 1996, at 15, available in 1996 WL 9959309; and Marianne Means, *Playing Judicial Politics Is Not Good for the Nation*, CHATTANOOGA TIMES, Apr. 17, 1996, at A7, available in LEXIS, News Library, Chtms File.

Intriguingly, Carol McHugh Sanders, a staff writer for the *Chicago Daily Law Bulletin* wrote an analysis in April 1996 comparing Judge Baer's plight to that of Justice Heiple, nearly a year before the impeachment investigation of Justice Heiple began. See Carol McHugh Sanders, *Judges Find Themselves Caught in Spotlight's Cold Glare*, CHI. DAILY L. BULL., Apr. 27, 1996, at 24. The *American Bar Association Journal*, in an article which appeared in its May 1996 issue, noted that House Speaker Newt Gingrich (R. - Ga.) and 150 other members of Congress had issued a statement urging Judge Baer to resign. See Henry J. Reske, *A Duffle Bag of Controversy for Judge: Jurist Reverses his Criticized Decision to Bar Drug Evidence Stashed in Luggage*, 82 A.B.A. J. 32 (May 1996).

Justice Rehnquist nevertheless implicitly defended Judge Baer against attacks by the other branches of government. Rehnquist began his discussion by recounting the impeachment trial of Supreme Court Justice Samuel Chase in 1805, which was prompted by and based explicitly on the decisions Chase had rendered as a trial court judge. The Senate narrowly acquitted Justice Chase, a result which Rehnquist strongly applauded.¹⁵² Chief Justice Rehnquist concluded that “the independence of the . . . judiciary is essential to its proper functioning and must be retained.”¹⁵³

The granting of judicial independence to judges and either life tenure or tenure for a substantial number of years carries with it certain obligations on the part of judges. Among those obligations are that judges conduct themselves in a “decorous” and “judicial” manner.¹⁵⁴

There were also some newspaper columns and editorials that supported President Clinton and Senator Dole in their comments regarding Judge Baer. An *Indianapolis Star* editorial explicitly disagreed with Justice Rehnquist’s statement that judges can only be impeached for a commission of serious crimes or grossly unethical conduct. The editorial commented, “[A]s long as judicial activists like Judge Baer come up with offbeat rulings, there will be howls of protest from the other branches of government. The principle of an independent judiciary is not a license for abuse of the Constitution.” Editorial, *A Vote for Original Intent*, INDIANAPOLIS STAR, Apr. 17, 1996, at A16, available in 1996 WL 3133586.

In a column in the *Boston Globe*, Jeff Jacoby explicitly called for the use of impeachment in cases where judges make offensive decisions. He said, “The impeachment tool has grown rusty with disuse. It ought to be resorted to more frequently. When judges make blunders that shock the conscience, calls for their removal aren’t cheap shots. They are healthy and honest, just what the Framers intended.” Jeff Jacoby, Editorial, *Judges Aren’t Untouchable—Incompetent Ones Should Be Impeached*, BOSTON GLOBE, Apr. 18, 1996, at 17; see also Bruce Fein, *It’s OK to Judge Judges*, RECORDER, May 22, 1996, at 4.

152. In commenting on that decision and its importance today, Chief Justice Rehnquist said:

This decision by the Senate was enormously important in securing the kind of judicial independence contemplated by Article III. Coming only two years after the seminal decision of the Court in *Marbury v. Madison*, it, coupled with the authority of the federal courts to declare legislative acts unconstitutional [established in *Marbury*], [provided] the assurance of federal judges that their judicial acts—their rulings from the bench—would not be a basis for removal from office by impeachment and conviction. And that has been the guiding principle of the House of Representatives and the Senate from that day to this; federal judges have been impeached and convicted—happily, only a very few—but it has been for criminal conduct such as tax evasion, perjury and the like.

Chief Justice William H. Rehnquist, Address at Washington College of Law (Apr. 9, 1996).

153. *Id.*

154. ILL. SUP. CT. R. 62(A) (“A judge . . . should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”).

They must speak about cases only through their rulings¹⁵⁵ and they must endeavor to base their decisions on neutral, non-political principles.¹⁵⁶ Judges never must use their immense power for any private end.¹⁵⁷

Justice Heiple may well have breached these obligations by his conduct in the Baby Richard Case. He certainly violated "rules" requiring decorum and proscribing political opinions by including his virulent criticisms of Bob Greene, Governor Edgar, and the General Assembly in his opinion on the motion for reconsideration.¹⁵⁸ This action diminished the court's stature and demonstrated poor judgment. Heiple's opinion also injected the court into a direct political dialogue with the executive and legislative branches of state government, a dialogue the court was institutionally not well-equipped to carry on. However, despite Justice Heiple's clear lapses in judgment, it is not at all clear that these actions warranted an impeachment hearing or investigation.

III. THE HOUSE COMMITTEE'S DISPOSITION OF THE CHARGES AGAINST JUSTICE HEIPLE

The Special House Investigating Committee's impeachment investigation of Justice Heiple was handled on an expedited basis. On April 14, 1997, the House adopted H.R. 89, which authorized the creation of the Special House Investigative Committee. In H.R. 89, the House required the House Committee to report its findings by no later than May 12, 1997, only twenty-eight days later. On April 17, 1997, then Chief Justice Heiple retained former Illinois Governor James R. Thompson to act as his attorney in the impeachment proceedings.¹⁵⁹ The Special House Investigating Committee hired its

155. See *supra* note 149 and accompanying text.

156. ILL. SUP. CT. R. 63(A)(1) ("A judge should be faithful to the law and . . . should be unswayed by partisan interests, public clamor, or fear or criticism.").

157. ILL. SUP. CT. R. 62(B) (mandating that judges not allow family or other relationships to influence the judge's conduct).

158. *In re Doe*, 159 Ill. 2d 347, 365-68, 638 N.E.2d 181, 189-90 (Ill. 1994). See *supra* text accompanying notes 13-49 for relevant excerpts of this decision.

159. See Daniel J. Leahmann, *Thompson to Defend Heiple at Hearings*, CHI. SUN-TIMES, Apr. 18, 1997, at 4.

Justice Heiple was not the first Illinois Supreme Court Justice threatened with removal by the Illinois House to retain a prominent former public official to act as his counsel. In 1842, Justice Thomas Brown retained former State Representative Abraham Lincoln (Whig-Springfield) to represent him in removal proceedings being held in the House. See Kevin McDermott, *Lincoln Defended Judge in 1843 Case that Parallels 1997*, ST. LOUIS POST-DISPATCH, May 4, 1997, § 1, at 7C, available in 1997 WL 3339845. Justice Brown was one of the original members of the Illinois Supreme Court when the state was

counsel on April 24, 1997, when it retained former United States District Court Judge Frank McGarr.¹⁶⁰

On April 29, 1997, the Special House Investigating Committee held its first hearing.¹⁶¹ At that hearing, the House Committee heard from: Donald Hubert, the President of the Chicago Bar Association ("CBA"), who both testified and tendered the CBA report; Ralph A. Gabric, the President-elect of the Illinois State Bar Association; and Martin J. Oberman, the President of the Chicago Council of Lawyers. Each of the bar association presidents testified as to what they thought were the important legal issues confronting the House Committee. All three bar leaders emphasized the need to preserve judicial

formed in 1818. *See id.* In 1839, the Whig-Party dominated supreme court had allowed a Whig Secretary of State to remain in office over the objection of a newly-elected Democratic governor. The same supreme court essentially disenfranchised Irish and German immigrants from voting in elections, to the perceived political detriment of the Democratic Party. *See* Doug Pokorski, *Heiple's Call to Big Jim Not Without Precedent: Lincoln Once Served at Impeachment Hearing*, STATE J.-REG., May 4, 1997, § 1, at 1. In response, when the Democrats took control of the legislature, they enacted a "court-packing" scheme which increased the membership on the Illinois Supreme Court from four to nine, with all five of the new members being Democratic. *See id.* Despite now holding a majority on the court, the Democrats sought to punish Justice Brown and so they alleged that he lacked the physical or mental capacity to continue serving as a judge. *See id.* Bill Bierd, currently the Assistant Editor of the Lincoln Legal Papers Research Project in Springfield, Illinois, reports that Justice Brown had not written an opinion in nearly a decade at the time the House considered removing him from the bench. *See id.*

Lincoln spoke at the second House hearing on Justice Brown's potential removal which was held on New Year's Day of 1843. *See id.* Lincoln was apparently so eloquent on Brown's behalf that the Democratic majority passed a gag rule barring him from speaking again for the remainder of the hearing. Thereafter, the House would only allow Justice Brown and members of the House to speak. *See id.* By contrast, the Special House Committee allowed former Governor Thompson to speak on Justice Heiple's behalf throughout the 1997 impeachment investigation.

The House in 1843 never took any definitive action with respect to Justice Brown. It is not clear from the record if the House actually conducted an impeachment investigation or considered removing Justice Brown through the mechanism of "legislative address," a procedure under the Illinois Constitution of 1818 which allowed a judge to be removed for "reasonable cause" that was insufficient for impeachment. *See* RISHEL, *supra* note 99, at 3. Two-thirds of both the Illinois House and Senate had to vote for removal and the governor had to approve. *See id.* In any event, Lincoln succeeded in preserving his client's tenure on the Illinois Supreme Court.

160. Andrew Fegelman & Christi Parsons, *House's Heiple Panel Picks Retired Judge*, CHI. TRIB., Apr. 25, 1997, § 2, at 1. Judge McGarr has served as a member of the District Court for the Northern District of Illinois, sitting in Chicago from 1970 to 1988. Possibly the most recognized case over which he presided was *Charles O. Finley & Co. v. Kuhn*, No. 76C-2358 (N.D. Ill. 1977), *aff'g* 569 F.2d 527 (7th Cir. 1978). In this case, McGarr upheld baseball commissioner Bowie Kuhn's right to disallow trades made by Oakland A's owner Charlie Finley on the ground that the trades were not in the "best interest of baseball." *Id.*

161. *See infra* Appendix pt. I.

independence. The House Committee then recessed until May 5, 1997, at which time it began four days of evidentiary hearings.¹⁶²

The Special House Investigating Committee consisted of ten members.¹⁶³ The House Committee heard testimony from twenty-four witnesses.¹⁶⁴ The witnesses included: (1) several of the police officers who had been involved in the traffic altercations with Justice Heiple; (2) Bonita Welch, a law clerk working for the Illinois Appellate Court in Justice Heiple's home third judicial district whose salary Justice Heiple allegedly improperly reduced; (3) Illinois Supreme Court Justices Charles Freeman, Moses Harrison II, and Benjamin Miller; and (4) Justice Heiple himself.¹⁶⁵

The House Committee heard evidence on nine subjects. These included:

- (1) Justice Heiple's traffic violations and his alleged efforts to use his office to avoid receiving citations;
- (2) Justice Heiple's discussion of one of the traffic incidents that occurred in Pekin, Illinois, with fellow members of the court, including Justice Harrison, prior to the Courts Commission hearing;
- (3) Issues pertaining to Justice Heiple's election as Chief Justice by his fellow justices in September 1996;
- (4) Justice Heiple's selection of Justice Harrison to chair the Courts Commission in January 1997;
- (5) The appointment in January 1997, by Justice Heiple of Illinois Appellate Court Justice William Holdridge of the third judicial district to serve as the Administrator of the Office of Illinois Courts, while simultaneously continuing to serve as a judge;

162. See *infra* Appendix pt. II.

163. The House Committee consisted of five Democrats and five Republicans. Representative Barbara Currie (D. - Chicago) and Representative Jack Kubik (R. - Riverside) served as co-chairpersons of the House Committee. See *infra* Appendix (conclusion). The other four Democratic members were Representative Judy Erwin (D. - Chicago), Arline Fantin (D. - Calumet City), Lovana Jones (D. - Chicago), and Douglas Scott (D. - Rockford). The other Republican members were Representatives Verna Clayton (R. - Buffalo Grove), Brent Hassert (R. - Lemont), Carolyn Krause (R. - Mt. Prospect), and Dan Rutherford (R. - Pontiac). See *infra* Appendix (conclusion). The House of Representatives in the 90th Illinois General Assembly is composed of 60 Democrats and 58 Republicans. Although virtually all standing committees contain a partisan majority, both House Speaker Michael Madigan (D. - Chicago) and House Minority Leader Lee Daniels (R. - Elmhurst) felt that the Heiple investigation committee should have an equal number of Democrats and Republicans. See Pearson & Parsons, *supra* note 1, at 1.

164. See *infra* Appendix.

165. See *infra* Appendix pt. II.

- (6) The reduction in salary of Bonita Welch;
- (7) Justice Heiple's alleged failure to include on his Statement of Economic Interest certain loan transactions into which he had entered;
- (8) Issues pertaining to Justice Heiple's rental of space for his Peoria office as a justice of the court in a building owned by a bank in which his wife was a director and shareholder; and
- (9) Issues pertaining to Justice Heiple's request to be excused from serving on jury duty.

In its majority report, the House Committee examined each of these nine issues. It commented on what it felt were the essential facts and, with the exception of the Bonita Welch matter, set forth its conclusion that impeachment was not warranted. The two dissenters, Representatives Douglas Scott (D. - Rockford) and Carolyn Krause (R. - Mt. Prospect), filed separate reports addressing certain of these issues in detail and explaining why they felt impeachment was warranted.

In this section, the House Majority's appraisal of the facts surrounding each of the nine categories of charges will be examined first and then the dissenting views of Representatives Scott and Krause will be considered.

A. *The House Committee's Majority Report*

1. Traffic Violations

The House Committee addressed the conduct of Justice Heiple with respect to the four traffic stops that served as the subject of the Courts Commission hearing. Three of the stops were for speeding; in each of those instances, no citation was issued. On two of those occasions, Justice Heiple, when asked for his driver's license and proof of insurance, displayed his court credentials in a manner calculated to insure that the officer knew of his position as a supreme court justice.

The fourth traffic stop occurred in Pekin, Illinois, when a police officer tried to pull Justice Heiple over for speeding. The incident escalated into a confrontation, resulting in Justice Heiple's arrest and the issuance of charges for speeding, failure to yield to an emergency vehicle, resisting a police officer, and two counts of disobeying a police officer.¹⁶⁶ Justice Heiple ultimately pled guilty to speeding and disobedience to a peace officer, which resulted in a fine of \$346. The

166. See Bailey, *Under Fire*, *supra* note 8, at 1.

other charges were dismissed.¹⁶⁷

At some point in the summer of 1996, the JIB commenced an investigation of Justice Heiple regarding his conduct during these four traffic stops. On January 23, 1997, the JIB issued a complaint against Justice Heiple.¹⁶⁸ Subsequently, Justice Heiple filed a written response in which he stated that he would not refute the facts alleged by the JIB.¹⁶⁹

167. See *infra* Appendix pt. II.A.

168. See Bailey, *Under Fire*, *supra* note 8, at 1.

169. See Bailey, *Won't Contest Accusations*, *supra* note 8, at 1. On February 28, 1997, the Courts Commission set a public hearing on the complaint for April 1, 1997, to be held in Collinsville, Illinois. See David Bailey, *Convenience of Site Cited for Chief Judge Ethics Hearing*, CHI. DAILY L. BULL., Mar. 3, 1997, at 1 [hereinafter Bailey, *Convenience Cited*]. On March 14, 1997, Justice Heiple moved that no witnesses or other evidence be presented at the public hearing. See David Bailey, *Act Quickly, Heiple Asks Commission*, CHI. DAILY L. BULL., Mar. 14, 1997, at 1. The JIB opposed Justice Heiple's motion and sought to call several of the officers as witnesses. See David Bailey, *Ethics Panel Wants Heiple Evidence Heard*, CHI. DAILY L. BULL., Mar. 19, 1997, at 1. Heiple's attorney subsequently sought leave to submit transcripts of JIB interviews with the police officers and to permit Heiple to address the Commission. See Ken Armstrong & Christi Parsons, *When his Hearing Ends, Heiple Does the Talking: Judge Tells His Side After Panel Session*, CHI. TRIB., Apr. 2, 1997, § 1, at 1. In a controversial ruling, the Courts Commission decided that no evidence could be permitted because Chief Justice Heiple was not disputing the allegations of the complaint. See *Panel Putting Witnesses on Hold Until Hearing on Heiple Charges*, CHI. TRIB., Mar. 25, 1997, § 2, at 3; *Heiple Gets a Hearing: No Testimony Heard, But Press Session Held*, CHI. DAILY L. BULL., Apr. 1, 1997, at 1.

The JIB also unsuccessfully sought to have Illinois Supreme Court Justice Moses Harrison II recused as the chair of the Courts Commission for Justice Heiple's case. See David Bailey, *Courts Panel Rejects Bid to Boot Harrison*, CHI. DAILY L. BULL., Mar. 24, 1997, at 1 [hereinafter Bailey, *Panel Rejects Bid*]. The JIB argued that "Harrison should be recused because Heiple selected him for chairman while already under investigation for ethics violations. The JIB had also contended that if Harrison could not be replaced for cause, the board could still ask for his substitution as a matter of right," pursuant to section 2-1001 of the ILLINOIS CODE OF CIVIL PROCEDURE, 735 ILL. COMP. STAT. ANN. 5/2-1001(a)(2) (West Supp. 1997), which allows a party to disqualify one judge in a civil trial court proceeding for any reason, prior to the judge rendering a substantive ruling in the case. *Id.* With Justice Harrison abstaining, the Courts Commission held that the *Illinois Code of Civil Procedure* did not apply to proceedings before the Courts Commission because members of the Courts Commission are more akin to appellate judges than trial judges, even though they normally do hear witnesses and make findings of fact. See *id.* There is, however, also no right of appeal of a Courts Commission decision. See ILL. CONST. art. VI, § 15(e). Because there is no right of substitution of judge for appellate or supreme court proceedings, the Courts Commission reasoned that the JIB had no right of substitution in its proceeding against Chief Justice Heiple. See Bailey, *Panel Rejects Bid*, *supra*, at 1.

The Illinois constitution mandates that the Courts Commission consist of one member of the Illinois Supreme Court, two appellate court Justices, and two circuit court judges. See ILL. CONST. art. VI, § 15(e). But see *infra* Part IV.B (discussing a proposed amendment to the Illinois constitution to be submitted to Illinois voters for ratification in November 1998 which would change the composition of the Courts Commission, by

On April 30, 1997, after the commencement of the impeachment investigation, the Illinois Courts Commission sustained the JIB's position and issued its opinion and order in which it censured Justice Heiple for his conduct regarding the traffic violations.¹⁷⁰ The Courts Commission found that Justice Heiple violated canons of judicial ethics set forth in Illinois Supreme Court Rules 61 and 62A.¹⁷¹ The Courts Commission held that "Justice Heiple's conduct was prejudicial to the administration of justice and brought the judicial office into disrepute."¹⁷²

The House Committee majority concluded that Justice Heiple "used his position on the Court to influence the officers detaining him to treat him with leniency."¹⁷³ The House Committee also found that Heiple disregarded his obligation as a citizen to respond to police instructions and flashing patrol lights. The House Committee concluded that "[Heiple's] conduct during the confrontation . . . was arrogant and overbearing . . . [but] did not rise to the level of an impeachable offense."¹⁷⁴

2. Justice Heiple's Discussion of the Pekin Incident with Fellow Members of the Supreme Court

At the first meeting of the Illinois Supreme Court, following the Pekin incident in January, 1996, Justice Heiple conveyed his version of those events to his fellow justices.¹⁷⁵ About a year later, when the JIB filed a complaint against Justice Heiple, Justice Freeman raised the issue of whether the Illinois Courts Commission was the appropriate

adding public lay members and alternate judicial members).

The press criticized the Courts Commission for both the location and the date of the hearing. See Bailey, *Convenience Cited, supra*, at 1. All prior Courts Commission hearings had taken place in either Springfield or Chicago. See *id.* The Courts Commission held the Heiple hearing in Justice Harrison's hometown, Collinsville, a small city in the southern tip of Illinois, far from the Chicago and Springfield media markets. See *id.* The Commission held the hearing on municipal election day in Illinois. See *id.* Among the cities holding a hotly contested mayoral election that day was Peoria, the largest city in Chief Justice Heiple's third judicial district. Some commentators charged that the Courts Commission chose April 1, 1997 as the hearing date knowing that it would obtain little media coverage because of the media attention paid to the elections. See Bob Greene, *Will the Public Believe the Fix Is in?*, CHI. TRIB., Mar. 30, 1997, § 1, at 2.

170. See *In re Heiple*, No. 97-CC-1, order at 8 (Cts. Comm'n of Ill. Apr. 30, 1997).

171. See *id.*

172. See *id.*; see *infra* Appendix pt. II.A.

173. *Infra* Appendix pt. II.A.

174. *Infra* Appendix pt. II.A.

175. The "Pekin incident" refers to Justice Heiple's arrest by the Pekin police. See *supra* text accompanying notes 166-67.

body to consider the charges against Justice Heiple because Justice Moses Harrison chaired the Courts Commission and had been a witness to Justice Heiple's description of the facts of the Pekin incident.¹⁷⁶ Justice Freeman sought a meeting of the justices to discuss whether a special commission or some other vehicle should be established to adjudicate the charges against Justice Heiple.¹⁷⁷ However, only two other justices, Justices Mary Ann McMorrow and Benjamin Miller, joined in Justice Freeman's call for such a meeting. Four justices needed to be present for such a meeting to be held.¹⁷⁸ In considering Justice Heiple's refusal to vote for the holding of such a meeting, the House Committee declared that Heiple's action did not constitute an impeachable offense.¹⁷⁹

3. Election of the Chief Justice

Article VI, section 3, of the Illinois constitution provides that the seven members of the Illinois Supreme Court are to elect, from their number, a chief justice who serves a three-year term.¹⁸⁰ It has been a practice of the supreme court to alternate the election of the chief justice between a member of the court from Cook County, from which there are three members, and a member from one of the four downstate districts, based on seniority.¹⁸¹ Upon the expiration of Chief Justice Michael Bilandic's three-year term in December 31, 1996, pursuant to the geographic and seniority practice, Justice Heiple was next in line to serve as chief justice.¹⁸²

176. See *infra* Appendix pt. II.B.

177. See *infra* Appendix pt. II.B.

178. See *infra* Appendix pt. II.B.

179. See *infra* Appendix pt. II.B. Specifically, the House Committee noted that "[i]t would appear to have been a better course had Justice Heiple voted for a meeting to discuss alternatives to the Courts Commission's resolution of this matter, but this internal administrative decision does not rise to the level of impeachable conduct." *Infra* Appendix pt. II.B.

180. ILL. CONST. art VI, § 3.

181. See Adriana Colindres, *Freeman New Chief Justice*, STATE J.-REG., May 13, 1997, at 1 ("Traditionally, Supreme Court members choose as their Chief Justice the person who has the most seniority on the court but who has not yet been chief justice. The Chief Justice's title has also traditionally alternated between justices from Cook County and downstate."); *Heiple Named Chief Justice*, CHI. DAILY L. BULL., Sept. 26, 1996, at 1.

182. Justice Bilandic is from Cook County. Justice Heiple, from the third judicial district, was the second-most senior justice from the four downstate districts. The most senior, Justice Ben Miller from the fourth judicial district, had served as chief justice from January 1, 1991 through December 31, 1993. As the senior-most justice on the court, Justice Miller also served as acting chief justice during the two-week period in May 1997 after Justice Heiple had resigned as chief justice and before the court convened to elect Justice Freeman to serve the balance of Justice Heiple's term as chief justice

Traditionally, the court votes on the election of a new chief justice in November of the year of expiration of the current chief justice's term.¹⁸³ However, in September 1996, Justice Freeman suggested that the court hold its election of a new chief justice, presumably Justice Heiple, during its September term rather than waiting until November because "an earlier election might serve to avoid an anticipated letter-writing campaign against the election of Justice Heiple."¹⁸⁴

According to the House Committee, Justice Freeman asked Justice Heiple, on a number of occasions in September, 1996, whether there was an ongoing JIB investigation of his conduct regarding the traffic stops and, if so, what had come of it.¹⁸⁵ Justice Freeman wanted that

through December 31, 1999.

183. See *infra* Appendix pt. II.C.

184. *Infra* Appendix pt. II.C. Justice Freeman testified to this effect when he appeared before the House Committee. Both his testimony and the Illinois Supreme Court's unusual action in electing Justice Heiple in September 1996 instead of November 1996 indicate that the court itself demonstrated a surprising fear of public opinion. See *infra* Appendix pt. II.C.

185. See *infra* Appendix pt. II.C. Testimony regarding this and other conversations between Justice Heiple and his colleagues on the supreme court was elicited at the House Committee hearing despite initial indications that Justice Heiple might attempt to invoke "judicial privilege" to bar such evidence. Judicial privilege enables judges to keep confidential conversations with their secretaries, clerks, and fellow judges. See *generally Statement of the Judges*, 14 F.R.D. 335, 335-36 (N.D. Cal. 1953) (noting that judicial privilege barred enforcement of a subpoena seeking to compel a judge to testify about a pending case). Justice Heiple's lawyers apparently raised this issue in private discussions without any privilege being asserted.

There are only a handful of Illinois cases that discuss the term "judicial privilege," and none of them pertain to a judge exercising such a privilege. See *People v. May*, 251 Ill. 54, 95 N.E. 999 (1911) (finding that "judicial privilege" required the Clerk to determine the adequacy of surety bond for stay pending appeal); *People v. Bartels*, 138 Ill. 322, 27 N.E. 1091 (Ill. 1891); *Cummings v. Beaton Assocs., Inc.*, 249 Ill. App. 3d 287, 311, 618 N.E.2d 292, 306 (1st Dist. 1992) (finding that judicial privilege did not support repudiation of a contract entered into in bankruptcy court proceeding).

It is fairly well established in both case law and commentary that judges do have a need for confidentiality in dealing with their staff members and, at least on an appellate level, with their fellow judges. The following succinctly states the rationale for such confidentiality:

The relationship between a judge and her staff is one that, until recently, the communities of the bench, the bar, and society at large have regarded as nearly sacred. The injury that would inure to that relationship if judges knew that their law clerks and other chamber staff could be summoned by judges serving on other courts would outweigh any conceivable benefit.

Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 117-18 (1987) (footnotes omitted).

A number of cases arose during the administration of President Richard M. Nixon in which federal courts, in addressing issues of executive privilege exercised by the

information before deciding whether to go forward in voting for Justice Heiple to be the new chief justice.¹⁸⁶ According to the House Committee, Justice Heiple had been informed by the JIB of the opening of a file, had acknowledged that fact in writing, and had been given a date to be interviewed by the JIB, all before the Illinois

President commented in *dicta* on the existence of judicial privilege. See, e.g., *New York Times v. United States*, 403 U.S. 713, 752 (1971) (Burger, C.J., dissenting) (commenting in the "Pentagon Papers Case" that the Court possesses the inherent power to protect the confidentiality of its internal operations by "whatever judicial measures may be required").

The lone out-of-state decision on the applicability of judicial privilege in an impeachment investigation indicates that a judge usually cannot assert the privilege in those circumstances. See *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986). That case concerned an investigation by the Judicial Council of the Eleventh Circuit into the possible impeachment proceedings of then United States District Court Judge Alcee Hastings. Judge Hastings had been acquitted of bribery charges as a basis for impeachment. The Judicial Council played an analogous role to that of the House Committee in the Heiple matter.

When Judge Hastings and his staff invoked judicial privilege in an effort to quash subpoenas directed to Judge Hastings' law clerk and secretary, the Court of Appeals held that the investigating committee has the burden of proving "the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means." *Id.* at 1521. However, the court held that judicial privilege is a qualified privilege that would ordinarily fall in the context of a judicial impeachment investigation: "Allowing witnesses to withhold evidence relevant to the Committee's investigation would call into question the Committee's ability to arrive at an accurate recommendation and thus could gravely impair the Committee's performance of its statutorily-assigned functions." *Id.* at 1522-23. Judge Hastings' staff was required to testify. In 1989, the House of Representatives did impeach Judge Hastings based on the bribery allegations. Later that year, the Senate convicted him and thus removed him from his judicial office. In 1992, former Judge Hastings became Congressman Hastings (D. - Fla.) when he was elected by an overwhelming margin from his Miami district. He continues to serve in that capacity today.

Rather than the broad judicial privilege exception for impeachment proceedings articulated by the Eleventh Circuit, a standard for Illinois judges should be employed similar to that used to determine the applicability in litigation of the crime-fraud exception to the attorney-client privilege. Just as the crime-fraud exception prevents the use of the attorney-client privilege "when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity," *In re Decker*, 153 Ill. 2d 298, 313, 606 N.E.2d 1094, 1101 (1992). The judicial privilege should not be used with respect to a judge's communications in furtherance of an abuse of power or an egregious violation of the *Code of Judicial Conduct*. Accordingly, the assertion of judicial privilege by the subject of an impeachment investigation should be overcome only if a showing is made adequate to support a good-faith belief by a reasonable person that the desired testimony may reveal evidence that the judge knew or should have known that the intended conduct addressed in those communications was illegal or unethical. *Cf. id.* at 322-25, 606 N.E.2d at 1106-07 (adopting a similar procedure for determining applicability of crime-fraud exception).

186. See *infra* Appendix pt. II.C.

Supreme Court held the election for a new chief justice.¹⁸⁷ The House Committee found that Justice Heiple did not disclose any of those facts to his fellow justices. Nonetheless, the House Committee held that this did not constitute an impeachable offense.¹⁸⁸

4. Election of Justice Harrison to Chair the Courts Commission

During Justice Bilandic's three-year term as chief justice from January 1994 through December 1996, Justice Heiple served as Chair of the Illinois Courts Commission. It is a normal practice of the Illinois Supreme Court to have the justice who is next in line to be chief justice serve as Chair of the Courts Commission.¹⁸⁹ Upon Justice Heiple's election as chief justice, Justice Freeman became next in line for the chief justice position by virtue of his seniority and the fact that he was from Cook County. However, in early January, 1997, at a meeting of the court, Chief Justice Heiple announced his resignation from his position as Chair of the Courts Commission and recommended that Justice Moses Harrison succeed him.¹⁹⁰ The justices thereupon elected Justice Harrison to chair the Courts Commission.¹⁹¹

At the time that then Chief Justice Heiple recommended Justice Harrison for election as Courts Commission Chair, he still failed to inform his fellow justices of the JIB's ongoing investigation.¹⁹² Moreover, Chief Justice Heiple had not disclosed that charges could be filed against him and that a trial could be held by the Courts Commission under the chairmanship of whomever the justices selected.¹⁹³ In considering these facts, the House Committee criticized Justice Heiple and suggested that he should have recused himself from the vote; however, the House Committee concluded that Justice Heiple's acts and omissions regarding the election of Justice Harrison did not constitute an impeachable offense.¹⁹⁴

187. See *infra* Appendix pt. II.C.

188. See *infra* Appendix pt. II.C. "It is the conclusion of the Committee that a concern for comity, cooperation and trust among the Justices should have led Justice Heiple to inform the Court of these facts, but his failure to do so does not rise to the level of an impeachable offense." *Infra* Appendix pt. II.C.

189. See *infra* Appendix pt. II.D.

190. The House Committee heard conflicting evidence regarding whether or not Justices Heiple and Harrison were close friends. See *infra* Appendix pt. II.D.

191. See *infra* Appendix pt. II.D.

192. See *infra* Appendix pt. II.D.

193. See *infra* Appendix pt. II.D.

194. The House Committee commented:

Thus, at the time of the election of the Chairman, the Chief Justice should have informed the Court of the open Judicial Inquiry Board file involving him

5. Appointment of Justice Holdridge as Court Administrator

In January, 1997, before the Illinois Supreme Court convened for its January term, Chief Justice Heiple informed his fellow justices that he was going to appoint his former law clerk and now Illinois Appellate Court Judge William Holdridge of the third judicial district¹⁹⁵ as the Director of the Administrative Office of Illinois Courts.¹⁹⁶ Three members of the court, Justices Miller, Freeman, and McMorrow, informed Justice Heiple that they objected to the appointment of Judge Holdridge on the ground that it violated the provision of the Illinois constitution that requires judges to “devote full time to judicial duties” and prohibits them from holding “office under the United States or this State or unit of local government or school district or in a political party.”¹⁹⁷ The three justices asked Justice Heiple to refrain from issuing his order appointing Justice Holdridge until they could file simultaneous dissents.¹⁹⁸ Despite these requests, Justice Heiple proceeded to issue his order after the close of business on a Friday afternoon without waiting for the dissents to be prepared. In its review of this action, the House Committee chided Heiple’s lack of collegiality.¹⁹⁹ The House Committee did not explicitly state that

and should have recused himself from voting on the Harrison appointment. While the Committee is highly critical of this conduct, it finds that it does not rise to the level of an impeachable offense.

Infra Appendix pt. II.D.

195. The third judicial district is the district which Justice Heiple “represents” on the supreme court and in which he had served on the appellate court.

196. *See infra* Appendix pt. II.E.

197. ILL. CONST. art. VI, §13(b); *see also infra* Appendix (Rep. Krause, dissenting) (providing portions of the dissents of Justices Miller, Freeman and McMorrow).

198. *See infra* Appendix pt. II.E.

199. *See infra* Appendix pt. II.E (The Committee notes, again, Justice Heiple’s lack of attention to collegiality on the Court.)

The Chicago Council of Lawyers (“Council”) took the preliminary steps necessary to commence a *quo warranto* proceeding against Justice Holdridge under section 18-101 of the *Illinois Code of Civil Procedure*. *See* 735 ILL. COMP. STAT. 5/18-101 (West 1996). A *quo warranto* action can be brought against any person who “unlawfully holds or executes any office created by the authority of this state.” *Id.* at 5/18-101(1). The Council would have sought to have Justice Holdridge removed as Administrator of the Office of Illinois Courts on the ground that he could not constitutionally serve in that capacity because of the full-time employment provision for judges contained in the Illinois constitution, article VI, section 13. Before filing its action, the Council was required to demand that the State’s Attorney of the appropriate counties (in this case, Cook and Sangamon Counties, where the Administrative Office of the Illinois Courts is located, and LaSalle County, where Justice Holdridge resides) and the Illinois Attorney General file the action and that they had refused to do so. *See id.* The Council had received notification from the Attorney General and all but one of the state’s attorneys that they were going to file a *quo warranto* action when, on April 17, 1997, Justice Holdridge resigned as the Director of the Administrative Office.

Justice Heiple's conduct did not constitute an impeachable offense. Instead, the House Committee indicated that it would not question the Court's interpretation of the Constitution on this issue.²⁰⁰

6. Reduction of the Salary of Bonita Welch

Bonita Welch served from 1982 to 1994 as the law clerk to Illinois Appellate Court Justice Tobias Barry, a member of the Illinois Appellate Court from the third judicial district. In 1990, Justice Barry, a Democrat, ran against Justice Heiple, a Republican, for the vacancy on the supreme court from the third district. Justice Heiple defeated Justice Barry by less than one percent of the popular vote and less than 2,300 total votes.²⁰¹

After Justice Barry announced his retirement from the appellate court in early 1994, Ms. Welch sought and received a position as a legal research clerk to the entire appellate court in that district.²⁰² The appellate court justices placed her salary at the mid-range for her grade, \$39,464. One of the justices then made a request to Justice Heiple, in his administrative capacity, to authorize an increase in Ms. Welch's annual salary to approximately \$40,200, the amount she had been receiving when she was clerking for Justice Barry.²⁰³ The House Committee found that, in response, Justice Heiple ordered that Ms. Welch's salary be reduced to the entry level salary of \$32,571.²⁰⁴ The House Committee found that Justice Heiple exceeded his authority under Rule 5(D)(1) of the Illinois Supreme Court Job Classification and Compensation Rules.²⁰⁵ The House Committee did not express any conclusion as to whether this conduct constituted an impeachable offense but instead noted the inconsistencies in the testimony.²⁰⁶

200. See *infra* Appendix pt. II.E.

201. See William Grady, *Democrats Keep High Court Edge*, CHI. TRIB., Nov. 8, 1990, § 3, at 15.

202. See *infra* Appendix pt. II.F.

203. See *infra* Appendix pt. II.F.

204. See *infra* Appendix pt. II.F. In explaining why he reduced Ms. Welch's salary, Justice Heiple testified that "a research clerk claiming twelve years of experience has but one year of experience repeated twelve times." *Infra* Appendix pt. II.F.

205. See *infra* Appendix pt. II.F.

206. The House Committee stated:

Testimony differs on this matter. Two witnesses testified that Justice Heiple ordered the reduction in salary. Justice Heiple said he was merely giving his opinion. Bonita Welch testified that Justice Heiple was motivated by hostility to her former judge employer, Justice Barry. Justice Heiple testified that he had no personal animus against Bonita Welch, and that he acted only on the general principle that her experience did not justify more than entry level compensation.

Infra Appendix pt. II.F.

7. Failure to Disclose Loans

Justice Heiple failed to include on his annual Statements of Economic Interest, two short-term loan transactions he entered into during the years 1991 and 1995.²⁰⁷ Justice Heiple repaid these two loans less than a month after receiving them.²⁰⁸ The House Committee found Justice Heiple's failure to report the loans inadvertent and insignificant.²⁰⁹

8. Office Rental

Justice Heiple leased his regional court office in Peoria from a bank in which his wife was a director and a shareholder. It is unlawful for an elected official to enter into a lease, or other contract, which will be paid for with state funds if the other party to the lease is a corporation in which the elected official's spouse owns at least seven and one-half percent of the outstanding stock.²¹⁰ However, the House Committee found that Justice Heiple's wife's ownership interest in the bank did not exceed the statutory minimum.²¹¹

9. Jury Summons

Media reports alleged that Justice Heiple may have improperly avoided jury duty.²¹² However, the House Committee found that he had properly asked to be excused because of an illness in his family.²¹³

10. House Committee's Conclusions

In examining the allegations against Justice Heiple, the House Committee found that Justice Heiple's conduct did not warrant impeachment. Instead, the House Committee found that Justice Heiple acted in a manner unbecoming an Illinois Supreme Court justice and that he had demeaned the Illinois Supreme Court. In summarizing its conclusions, the House Committee declared:

207. Virtually all Illinois state elected officials from all three branches of government are required to file statements of economic interests on an annual basis. *See* 5 ILL. COMP. STAT. ANN. 420/4A-101 (West 1993 & Supp. 1997). These statements require office-holders to disclose publicly certain economic interests they hold, especially in securities and real estate, in hopes of ferreting out conflicts of interest.

208. *See infra* Appendix pt. II.G.

209. *See infra* Appendix pt. II.G.

210. *See infra* Appendix pt. II.H; 30 ILL. COMP. STAT. ANN. 505/11.1 (West 1993 & Supp. 1997).

211. *See infra* Appendix pt. II.H; 30 ILL. COMP. STAT. ANN. 505/11.1.

212. *See* Bill Bush, *Heiple Cited Hardship to Get out of Jury Duty*, COPLEYS NEWS SERVICE, Mar. 4, 1997, State and Regional section.

213. *See infra* Appendix pt. II.I.

The Illinois House of Representatives and this Committee may consider the totality of Justice Heiple's conduct, even if his acts when viewed separately do not support the conclusion that impeachment is appropriate. There is no question that Justice Heiple's lapses in memory while testifying, poor judgment and repeated instances of arrogant behavior have diminished the public's respect for the Supreme Court. Nonetheless, the standard for impeaching a judge because his or her conduct brings the court into disrepute must be based on egregious conduct. It is clear that Justice Heiple's conduct does not meet the criminal standard such as treason, bribery, sale of office. A Justice may be impeached for non-criminal conduct. But that conduct must be of a magnitude of gravity comparable to the criminal standard. In the opinion of the Committee, Justice Heiple's transgressions do not meet that standard. The Committee's conclusions must be supported by clear and convincing evidence. Bearing this standard in mind the Committee finds the testimony it has heard has failed to show that Justice Heiple engaged in impeachable conduct. Breaches of comity, common sense and collegiality, while unfortunate, are not sufficiently grave to justify impeachment.

In no way should the Committee's failure to find grounds for impeachment lead to the conclusion that the Committee condones Justice Heiple's behavior. On the contrary, the Committee is severely critical of Justice Heiple's arrogance, his failure to deal with his colleagues with candor and trust, and his imperious internal administration of the Courts.

....

It is the conclusion of the Committee that the conduct of Justice Heiple evidenced by this hearing, while mean spirited and demeaning to the Court, and unbecoming a Justice of the Illinois Supreme Court, does not justify the recommendation to the Illinois Senate of Articles of Impeachment.²¹⁴

B. The Dissents

The two lawyer members of the House Committee, Representative Douglas Scott (D. - Rockford) and Representative Carolyn H. Krause (R. - Mt. Prospect), each filed dissents, arguing that Justice Heiple's conduct did warrant impeachment. Representative Scott contended that Justice Heiple should be impeached because he had committed serious violations of the *Code of Judicial Conduct* and had abused his power as a judge. Representative Krause argued that impeachment

214. *Infra* Appendix (conclusion).

was warranted because of the cumulative effect of Justice Heiple's conduct. Both dissents are examined in this section.

1. Representative Scott's Dissent

Representative Douglas Scott contended that Justice Heiple's conduct with respect to the traffic incidents, his interference with Bonita Welch's salary, his withholding of information from his fellow justices, and his failure to recuse himself from the election of Justice Harrison to chair the Courts Commission, all constituted abuses of power and breaches of the public trust.²¹⁵ Specifically, Representative Scott found "clear and convincing evidence demonstrat[ing] that Justice Heiple has both committed serious violations of the *Code of Judicial Conduct*, and has abused his power as a judge."²¹⁶

In connection with the traffic incidents, Representative Scott found that Justice Heiple's testimony was not credible. Commenting on both the Pekin incident and a prior incident that occurred in Mason City, Representative Scott said that Heiple's explanation of the incidents "neither comport with law or common sense."²¹⁷ Quoting the Courts Commission's opinion, Representative Scott's discussion of the traffic incidents concluded that "[b]ecause of [Heiple's] office and his position of leadership in the judiciary, he had a special obligation to comport himself properly and to set an example for others. Under these circumstances, [Heiple's] misconduct was particularly damaging to the integrity of the court system."²¹⁸

With respect to Bonita Welch's salary, Representative Scott set forth a detailed summary of the testimony that the House Committee heard from other witnesses. Because virtually all of the other witnesses contradicted Justice Heiple's testimony, Representative Scott did not find Justice Heiple's testimony credible.²¹⁹ Representative Scott contended that, "[w]hile the motivation may not be clear, it is clear that

215. See *infra* Appendix pts. II.A-C (Rep. Scott, dissenting).

216. *Infra* Appendix pt. I (Rep. Scott, dissenting).

217. *Infra* Appendix pt. II.A (Rep. Scott, dissenting). Specifically, Representative Scott commented:

Justice Heiple's explanation for failing to pull over was that, in both the incident in Pekin and the Mason City incident, where he did not pull over for over five miles, Justice Heiple stated that he did not believe the lights were meant for him. This explanation neither comports with law or common sense, as drivers are taught to, and, in fact, legally required to, pull over for emergency vehicles approaching from the rear, whether they think they are meant to be pulled over or not. This is also part of the Vehicle Code.

Infra Appendix pt. II.A (Rep. Scott, dissenting) (citations omitted).

218. *Infra* Appendix pt. II.A (Rep. Scott, dissenting) (citation omitted).

219. See *infra* Appendix pt. II.B (Rep. Scott, dissenting).

Ms. Welch was treated differently and unfairly . . . and that this different treatment was the direct result of actions by Justice Heiple."²²⁰

Representative Scott concluded that Justice Heiple also abused his power in failing to tell his fellow justices about the pendency of the JIB investigation in September 1996 when he was elected chief justice, and then again in January 1997 when Justice Heiple sought approval of his nomination of Justice Harrison to chair the Courts Commission.²²¹ Representative Scott argued that Justice Heiple's conduct constituted violations of Canons 1, 2, and 3 of the *Code of Judicial Conduct*, as codified in Illinois Supreme Court Rules 61, 62, and 63.²²²

Representative Scott concluded his examination of the various incidents by arguing:

Individually, perhaps none of these incidents would warrant removal from the bench. But it is clear to me that the Legislature (and for that matter, the Courts Commission) should

220. *Infra* Appendix pt. II.B (Rep. Scott, dissenting). Representative Scott summarized the evidence as follows:

Justice Heiple's testimony with respect to this matter is simply not credible in light of the other evidence. He testified that his first involvement with the case was the phone call from Judge Slater. However, Mr. Davison testified that, on February 21st, and before Judge Slater's call to Justice Heiple, Justice Heiple had told him to reduce Ms. Welch's salary to the minimum level. This is corroborated by Mr. Davison's February 21st Order reducing Ms. Welch's salary to the minimum level.

. . . .

The only reasonable conclusion to be drawn is that Justice Heiple intervened in this matter, where no other Supreme Court justices have intervened in similar situations, in direct contravention of Supreme Court Rules, the practice of the Third District, and the desires of the judges of the Third District. While the motivation may not be clear, it is clear that Ms. Welch was treated differently and unfairly compared to other employees, and that this different treatment was the direct result of actions by Justice Heiple.

Infra Appendix pt. II.B (citations omitted).

221. *See infra* Appendix pt. II.C (Rep. Scott, dissenting) (citations omitted). Representative Scott stated,

Justice Heiple's participation in all of these decisions cannot be sloughed off, as it directly pertains to the integrity of the Court, and the Courts Commission.

. . . .

Not only his fellow justices, but the public has the right to expect that important judicial decisions are made with full knowledge of all pertinent information, and that individual justices are not withholding information for their own personal gain. That happened in this matter and it cannot be countenanced.

Infra Appendix pt. II.C (Rep. Scott, dissenting).

222. *See supra* notes 107-09 and accompanying text.

and does have the ability to remove a judge for a pattern of behavior that evidences the abuse of power and breach of the public trust that is evident in this case.

...

We have a Supreme Court Justice who not only refused to recuse himself from a decision impacting the selection of a person who would shortly thereafter rule on his case, but who helped to block an attempt even to discuss the issue, and who most importantly, withheld information and misrepresented his circumstances to his fellow justices to further his personal ends.

...

Justice Heiple's Post-Hearing Memorandum also makes the argument that an impeachment in this case would "dilute the force of the Constitution's impeachment clause." Again, I disagree. Simply because impeachment in Illinois has been used once, or because it was used for conduct different or arguably worse than these matters does not mean that it is improper to proceed in this case. If we do not proceed, we run the risk of weakening the bench, by destroying the integrity of the judiciary as set forth through the Canons. That is a far worse consequence.²²³

2. Representative Carolyn Krause's Dissent

Representative Krause dissented on the ground that the cumulative effect of Justice Heiple's conduct warranted impeachment because it constituted "egregious violations of the Code of Judicial Conduct."²²⁴ Representative Krause felt that the House Committee majority employed too narrow a standard of "egregious conduct" in its evaluation of Justice Heiple's conduct.²²⁵ In addition, Representative Krause relied on at least two sources outside of the *Illinois Code of Judicial Conduct* to formulate the standard she used to assess Heiple's conduct: (1) a North Dakota Supreme Court decision involving proposed discipline of a trial court judge, in which the Court explained that "[j]udges hold a unique position of administering justice" and are held to a higher standard than laymen;²²⁶ and (2) the Pennsylvania

223. *Infra* Appendix pt. IV (Rep. Scott, dissenting).

224. *Infra* Appendix (Rep. Krause, dissenting).

225. *Infra* Appendix (Rep. Krause, dissenting).

226. *See* Matter of Cieminski, 270 N.W.2d 321, 327 (N.D. 1978). The court found that:

It necessarily follows that judges must be and are held to higher standards than laymen. Judges hold a unique position of administering justice. They symbolize the law and justice and, consequently, their action and behavior will reflect favorably or unfavorably on the integrity of the judiciary and the

House Report concerning the impeachment of then Pennsylvania Supreme Court Justice Rolf Larsen in 1994.²²⁷

Representative Krause argued that Justice Heiple should be impeached for violating Illinois Supreme Court Rule 61, Rule 1 of the *Code of Judicial Conduct of Illinois*, because he failed to “personally observe[] high standards of conduct so that the integrity and independence of the judiciary may be preserved.”²²⁸ In particular, Representative Krause found that Justice Heiple’s failure to inform his fellow justices about the pendency of the JIB investigation prior to his election as chief justice and his conduct with respect to the traffic violations constituted violations of Rule 61.²²⁹

Representative Krause also concluded that Justice Heiple violated Illinois Supreme Court Rule 62, which requires a judge to “[a]void [i]mpropriety and the [a]pppearance of [i]mpropriety in [a]ll of the [j]udge’s [a]ctivities” by his participation in the election of Justice Harrison to chair the Courts Commission.²³⁰ Representative Krause stated that this act constituted an impeachable offense because the elected judge (whom Justice Heiple had nominated and voted for) would chair the trial of the JIB’s claims against Justice Heiple should the JIB file a complaint against him.²³¹

Finally, Representative Krause stated that Justice Heiple violated Illinois Supreme Court Rule 63, which requires a judge to “diligently discharge the judge’s administrative responsibilities, maintain professional competence in judicial administration, and facilitate the

high respect required in the administration of justice Any action or behavior of a judge which will destroy the public confidence in the integrity and impartiality of the judiciary will tend to cause disrespect for the law itself.

Id.; see *infra* Appendix (Rep. Krause, dissenting).

227. See *infra* Appendix (Rep. Krause, dissenting). Representative Krause cited the following language from the Pennsylvania House Report:

1. Because the House has the sole power of impeachment, it has broad discretion to consider a variety of serious misconduct as grounds for impeachment. If the misconduct may bring the courts into disrepute, undermine public confidence in the integrity or impartiality of the court system or bring into serious question a justice’s fitness to remain in office, it may be considered.

2. Impeachable misconduct is not limited to criminal offenses, but it must be serious and substantial in nature, and reasonably related to the judicial office of the subject.

3. The House of Representatives may consider a person’s misconduct in the aggregate in considering whether he or she is liable to impeachment.

PENNSYLVANIA HOUSE REPORT, *supra* note 86.

228. *Infra* Appendix (Rep. Krause, dissenting).

229. See *infra* Appendix (Rep. Krause, dissenting).

230. *Infra* Appendix (Rep. Krause, dissenting) (quoting ILL. SUP. CT. R. 62).

231. See *infra* Appendix (Rep. Krause, dissenting).

performance of the administrative responsibilities of other judges and court officials,” when he lowered Bonita Welch’s salary.²³² Like Representative Scott, Representative Krause found Justice Heiple’s testimony on this issue not to be credible. Justice Heiple’s appointment of Justice Holdridge without allowing dissents to be filed simultaneously with the order announcing the appointment also troubled Representative Krause. Representative Krause concluded her dissent by stating that “I believe that the cumulative effect of Justice Heiple’s actions can lead to no other conclusion but his conduct constitutes egregious violations of the Judicial Code of Ethics and . . . impeachment should proceed.”²³³

IV. DID THE HOUSE COMMITTEE GET IT RIGHT?

By all indications, all ten members of the House Committee took their responsibilities seriously and conducted the investigation in a nonpartisan and professional manner. The House Committee members made critical judgments regarding witness credibility as well as what type of behavior by a public official constitutes “egregious” behavior.²³⁴ In setting out what should be the appropriate standards for impeachment, the House Committee relied upon the CBA Report that had been presented to the House Committee on the first day of the hearings.²³⁵ In reaching its conclusion that Justice Heiple should not be impeached, the House Committee majority declared that “[t]o impeach on any basis less than the most serious misconduct is to

232. *Infra* Appendix (Rep. Krause, dissenting) (quoting ILL. SUP. CT. R. 63).

233. *Infra* Appendix (Rep. Krause, dissenting).

234. In the United States, politicians have always been the judges of other public officials in the impeachment process. Explaining why the Federal Constitution placed impeachment power in the legislative, rather than the judicial branch of government, Alexander Hamilton wrote:

[w]hat, it may be asked, is the true spirit of the institution [of impeachment] itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves?

THE FEDERALIST NO. 65 (Alexander Hamilton).

235. The House Committee said:

The report of the [Chicago] Bar Association discussed the standards for impeachment and said: “Not every violation of the Code of Judicial Conduct warrants impeachment. Impeachment should be reserved for egregious violations. Less serious ethical infractions should result in discipline by the Courts Commission.”

It is the conclusion of the Committee that legislative impeachment should be limited to extraordinary cases of judicial misconduct involving serious violations of the law or serious breaches of trust.

Infra Appendix pt. I (quoting CBA REPORT, *supra* note 51).

establish a precedent susceptible to future abuse of the legislative authority and unwarranted attempts to breach the doctrine of Separation of Powers.”²³⁶

The House Committee was correct in its general formulation of a standard. However, the House Committee majority did not adequately support the conclusions in its report because it failed to respond directly to the arguments raised by both Representatives Scott and Krause in their dissents. It certainly would have been helpful had the House Committee majority explained why it concluded that none of the allegations against Justice Heiple constituted impeachable conduct. For example, with respect to Justice Heiple’s conduct regarding the traffic violations, the House Committee concluded that Justice Heiple “used his position on the Court to influence the officers detaining him to treat him with leniency.”²³⁷ Both Representatives Scott and Krause set forth their reasons, in detail, for determining that such conduct constituted an impeachable offense.²³⁸ The majority should have explained *why* it found such conduct “serious” but not rising to the level of “egregious” conduct that would require impeachment. Instead, the House Committee merely provided a tautological statement that the Justice Heiple’s conduct was not impeachable because “[h]owever inappropriate,” it did “not rise to the level of an impeachable offense.”²³⁹

Similarly, both Representatives Scott and Krause explained, in detail, the bases for their conclusion that Justice Heiple committed an impeachable offense with respect to the reduction of Bonita Welch’s salary.²⁴⁰ By contrast, the House Committee majority merely set forth a short summary of the facts regarding the incident with Ms. Welch, without providing even a conclusory statement that the conduct did not warrant impeachment.²⁴¹ Because both of the dissents put such strong emphasis on the Bonita Welch matter and, in particular, their

236. *Infra* Appendix (conclusion).

237. *Infra* Appendix pt. II.A.

238. *See supra* Part III.B.

239. *Infra* Appendix pt. II.A.

240. Representative Scott relied upon the testimony of Justice Ken Slater of the Illinois Appellate Court in the third district and Bob Davison, the Director of the Administrative Office of Illinois Courts, as well as various correspondence to argue that Justice Heiple’s testimony of Bonita Welch salary was not credible and that his actions “constitute[d] an abuse of his judicial power.” *Infra* Appendix pt. II.B (Rep. Scott, dissenting).

Representative Krause relied on essentially the same evidence to argue that Justice Heiple’s conduct with respect to Bonita Welch constituted an “egregious” violation of Illinois Supreme Court Rule 63. *See infra* Appendix (Rep. Krause, dissenting).

241. *See infra* Appendix pt. II.F.

contentions that all of the other witnesses contradicted Justice Heiple's testimony, the House Committee majority should have addressed Justice Heiple's credibility and the bottom line issue of why the majority concluded that the conduct did not warrant impeachment.

Ultimately, President Gerald R. Ford's definition of impeachment, "whatever a majority of the House of Representatives consider it to be at a given moment in history,"²⁴² may be the most accurate practical description. In the case of Justice Heiple, it appears that eight of the ten members of the House Committee simply did not "feel" that impeachment was warranted, based on their "experiences" as politicians and legislators.

The House Committee majority made the correct political judgment in deciding not to pursue impeachment, but they did so based on a questionable rationale. According to what both the majority and the dissenters said in their opinions and based on the conclusion of the Illinois Courts Commission in its censure of Justice Heiple, it appears that Justice Heiple did, indeed, commit offenses that, at least in the aggregate, could be deemed impeachable. Certainly, the repeated use of his position to try to persuade the police officers not to issue tickets to him constituted an abuse of power. Justice Heiple's conduct with respect to the reduction in salary of the law clerk, Bonita Welch, also equated to an abuse of power and "egregious conduct;" even the House Committee majority did not try to dispute this.

Justice Heiple's actions in orchestrating the appointment of Justice Harrison to chair the Courts Commission and Justice Holdridge to become the Courts Administrator are also troubling. It appears that Justice Heiple misled his fellow justices about the status of the pending JIB investigation. If this conduct merely demonstrates Justice Heiple's lack of candor and collegiality, then the majority correctly decided that this act did not rise to the level of an impeachable offense. However, if Justice Heiple arranged the appointment of Justice Harrison to influence the Courts Commission, this would constitute a gross abuse of power and an egregious violation of ethical duty under Illinois Supreme Court Rule 63 that requires judges to "exercise the power of appointment on the basis of merit." Justice Heiple also

242. JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 405 (1980). President Ford rendered his definition in 1970 when, as the Minority Leader of the U.S. House of Representatives, he led an abortive effort to seek the impeachment of Supreme Court Justice William O. Douglas. *See id.* Four years later when Ford was serving as President Richard Nixon's Vice-President and while Nixon was the subject of a House impeachment investigation, Ford posited a much narrower definition: only the commission of a serious criminal offense could warrant impeachment. *See Philip Shabecoff, N.Y. TIMES*, Jan. 16, 1974, at 1.

demonstrated very poor judgment on April 1, 1997 when immediately after his Courts Commission hearing ended, at which none of the police officers were allowed to testify based on Justice Heiple's promise to the Commission to rely only on his pleading and not contest the facts, Justice Heiple conducted a ninety-minute press conference during which he repeatedly attacked the credibility of the police officers.²⁴³ All of these actions established a hostile political climate. Indeed, only two days after Justice Heiple's press conference, Representatives Gwenn Klingler (R. - Springfield) and Eileen Lyons (R. - Western Springs) filed their impeachment resolution.²⁴⁴

Despite all of Justice Heiple's actions, the potential damage to the independence of the Illinois court system had Justice Heiple been impeached and convicted would have been a greater blow to Illinois government than any damage resulting from not removing Justice Heiple from the bench. There would not have been an impeachment investigation of Justice Heiple but for the Baby Richard Case. Had Justice Heiple been impeached and convicted, albeit ostensibly for his conduct regarding the traffic stops or the Bonita Welch incident, or even for his aggregate conduct as a judge and judicial administrator, the lesson that would have been drawn by Illinois judges, legislators, and citizens is that impeachment is a legitimate punishment for a judge who renders an unpopular decision in a highly publicized case. Such a result would discourage Illinois judges from rendering controversial decisions in highly publicized cases, such as Baby Richard or the tort reform case.

V. A CALL FOR REFORM

As a result of the Heiple saga and the related issues already discussed, at least two significant reforms should be made regarding the Illinois judiciary:

243. See ILL. SUP. CT. R. 63(B)(4). The authors agree with the majority that none of the remaining allegations against Justice Heiple satisfies the standard for impeachment. For example, the appointment of Justice Holdridge as Director of the Administrative Office of the Illinois Courts before the dissenting Justices could file dissents displays an unfortunate lack of collegiality, but does not constitute a gross abuse of power or other impeachable offense. The same is true for Justice Heiple's lack of candor with his fellow justices regarding the status of the JIB investigation before his selection as chief justice.

244. Christi Parsons & Ken Armstrong, *Move to Impeach Under Way*, CHI. TRIB., Apr. 4, 1997, § 1, at 1.

1. The Illinois constitution should be amended to contain a formal definition of an impeachable offense.
2. The Illinois constitution should be amended to prohibit any member of a particular court from sitting as a member of the Courts Commission when another member of that same court is being tried. Laypersons also should be added to the Courts Commission.

A. Amend the Impeachment Provision of the Illinois Constitution

The absence of any description of appropriate grounds for impeachment in the Illinois Constitution of 1970 is problematic.²⁴⁵

245. It appears that the constitutions of 47 states have impeachment provisions. Hawaii, North Carolina, and Oregon appear to be the only states without them.

Of the states which have impeachment provisions, Illinois appears to be one of only six states whose constitutions provide for impeachment that does not define an impeachable offense. Texas, Montana, New York, Connecticut, and Georgia are the other five states. The Texas constitution simply provides for the impeachment of "Judges of the Supreme Court, Court of Appeals, and District Court" without defining the grounds. TEX. CONST. art. XV, § 2. The Montana constitution provides only that certain categories of public officials, including "judicial officers" are subject to impeachment, but it does not appear to define an impeachable offense. MONT. CONST. art. V, § 13. The New York constitution provides that judges may be removed by a two-thirds vote of both Houses of the Legislature "for a cause" but does not define "cause." N.Y. CONST. art. VI, § 23. The Connecticut constitution provides only that the executive and judicial offices "shall be liable to impeachment." CONN. CONST. art. IX, § 3. The Georgia constitution says that the Georgia House of Representatives may bring "impeachment charges" without defining any basis for such charges. GA. CONST. art. III, § 6.

The provisions of the remaining states can be divided into several general categories. Ten states have impeachment provisions which are essentially modeled on the impeachment provision in the federal constitution of "high crimes and misdemeanors." See ARIZ. CONST. art. 8, § 2; ARK. CONST. art. 15, § 1; DEL. CONST. art. VI, § 2; KAN. CONST. art. II, § 28.; MISS. CONST. art. IV, § 50; UTAH CONST. art. VI, § 19; VA. CONST. art. IV, § 17, WASH. CONST. art. V, § 2; WIS. CONST. art. III, § 18; WIS. STAT. § 17.06 (West 1996); W. VA. CONST. art. IV, § 9. Some of these states also provide for additional grounds. See ARIZ. CONST. art. VIII, § 2 (malfeasance in office); ARK. CONST. art. XV ("gross misconduct in office"); DEL. CONST. art. VI ("malfeasance in office, corruption, or neglect of duty"); VA. CONST. art. IV, § 17 ("malfeasance in office, corruption, or neglect of duty"); WIS. STAT. § 17.06 ("corrupt conduct in office").

A second group of states have impeachment provisions which tend to define impeachable conduct as "any misdemeanor in office." CAL. CONST. OF 1849 art. IV, § 19; FLA. CONST. art. III, § 17; IDAHO PENAL CODE §19-4001; IND. CONST. art. VI, § 7; KY. CONST. § 68; ME. CONST. art. IX, § 5; NE. CONST. art. IV, § 5; N.J. CONST. art. VII, § 3; NEV. CONST. art. 7, § 2; OHIO CONST. art. II, § 24. The Illinois Constitution of 1870 defined an impeachable offense as a "misdemeanor" in office, but that provision was removed from the Illinois Constitution of 1970 for the reasons set forth by delegate James Parker to the Illinois Convention of 1970. See *supra* note 59.

Five states, Alaska, Iowa, Massachusetts, Pennsylvania, and Vermont, have a definition of an impeachable offense as "malfeasance" or "misfeasance" or "maladministration" or a similar word. See ALASKA CONST. art. IV, § 12 ("malfeasance or misfeasance"); IOWA CONST. art. 3, sec. 20 ("misdemeanor or malfeasance in office");

The House Committee majority in the Heiple case was hindered by the failure of the Illinois constitution to define an impeachable offense. The inclusion of standards might have helped guide the House Committee in Justice Heiple's case. For example, there seemed to be relatively little dispute among the members as to *what happened* with respect to Justice Heiple's involvement in bringing about a significant reduction of Bonita Welch's salary. House Committee members obviously differed as to what Justice Heiple's conduct *meant* from the perspective of impeachment.

In light of the House Committee majority's view that impeachment should apply only to "egregious" conduct, the Illinois General Assembly should adopt an amendment to article IV, section 14, for ratification by the voters that would read, in pertinent part, with the new portion being italicized and added immediately after the current first sentence:

MASS. CONST. art. VIII, § 2, pt. 2c.1 ("misconduct and maladministration"); PA. CONST. art. VI, §6 ("any misbehavior in office"); and VT. CONST. ch. II, §58 ("maladministration").

Eight states explicitly provide for impeachment for the commission of crimes or felonies. These are Louisiana, Michigan, Minnesota, New Hampshire, New Mexico, Rhode Island, South Carolina, and Tennessee. Each of these states has slight variance of this felony theme. See LA. CONST. art. X, § 24 ("felony or for malfeasance or gross misconduct"); MICH. CONST. art. XI, § 7 ("crimes or misdemeanors"); MINN. CONST. art. VIII, § 2 ("corrupt conduct in office or for crimes and misdemeanors"); N.H. CONST. pt. 2, art. 38 ("bribery, corruption, mal-practice, or maladministration"); N.M. CONST. art. IV, § 36 ("crimes, misdemeanors, and malfeasance in office"); R.I. CONST. art. XI, § 3 ("incapacitated or guilty of the commission of a felony or crime of moral turpitude, misfeasance, or malfeasance"); S.C. CONST. art. XV, § 1 ("serious crimes or serious misconduct"); TENN. CONST. art. V, § 4 ("commit any crime in their official capacity which may require disqualification").

Six states have a very lengthy lists of impeachable offenses, all of which include the improper use of alcoholic beverages and most of which include moral turpitude, as well as some of the grounds listed in the less-inclusive constitutions of the states previously mentioned. These six states are Alabama, Missouri, North Dakota, Oklahoma, South Dakota, and West Virginia. See ALA. CONST. art VII, sec. 173 ("willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office"); MO. CONST. art. VII, § 1 ("crimes, misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, or any offense involving moral turpitude or oppression in office"); N.D. CONST. art. XI, § 10 ("habitual drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office"); OKLA. CONST. art. VIII, § 1 ("willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude committed while in office"); S.D. CONST. art. 16, § 3 ("drunkenness, crimes, corrupt conduct or malfeasance or misdemeanor in office"); W. VA. CONST. art. IV, § 9 ("maladministration, corruption, incompetency, gross immorality, neglect of duty or any high crime or misdemeanor").

The House of Representatives has the sole power to conduct legislative investigations to determine the existence of cause for impeachment and, by the vote of a majority of the members elected, to impeach executive and judicial officers.²⁴⁶ *Cause for impeachment with respect to judicial officers shall consist of egregious violations of judicial ethics, gross abuses of power, systemic nonfeasance, or willful malfeasance in office. Cause for impeachment with respect to executive officers shall include, but not be limited to, gross abuses of power, systemic nonfeasance, willful malfeasance, or other serious misbehavior in office.*

This proposed definition distills the concepts contained in many of the constitutional provisions in the other states in both the judicial discipline removal cases and impeachment proceedings. It is both complete and concise. It acknowledges that judges can commit “egregious violations of judicial ethics” whereas executive officers, by definition, cannot. Defining the grounds for impeachment would benefit members of all three branches of Illinois government by providing guidance and direction on these crucial matters. In addition, it would undercut any claim by a future subject of an impeachment investigation that the lack of any definition in the Illinois constitution of an impeachable offense constitutes a violation of the subject’s federal due process rights.²⁴⁷

B. The Composition of the Illinois Courts Commission

When it created the Illinois Courts Commission as part of the 1962 Amendment to the Judicial Article of the 1870 Illinois Constitution, the Illinois General Assembly most likely did not contemplate that a member of the Illinois Supreme Court would be brought up on charges before the Courts Commission. Specifically, article VI, section 15(e)

246. ILL. CONST. art. IV, § 14.

247. *See, e.g., In re Young*, 522 N.E.2d 386 (Ind. 1988). In *Young*, a judge challenged the constitutionality of the judicial disciplinary commission’s proceedings against him on the ground that the allegation that he had engaged in “conduct unbecoming a judge,” was void for vagueness. *See id.* at 387-88. It appears from the cases cited in *Young* that almost any definition of cause is constitutionally satisfactory in a judicial removal proceeding. *See, e.g., Keiser v. Bell*, 332 F. Supp. 608, 614 (E.D. Pa. 1971) (holding that a standard of “misconduct in office is constitutional”); *Napolitano v. Ward*, 317 F. Supp 79, 81 (N.D. Ill. 1970) (holding that a statute providing for dismissal “for cause” is constitutional); *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978) (“The constitutionality of necessarily broad standards of professional conduct has long been recognized.”). However, it is not absolutely clear that a state constitution’s impeachment provision which contains *no* definition of cause would survive a federal due process challenge. Thus, inclusion of some definition of grounds for impeachment in the Illinois constitution would be helpful.

of the Illinois Constitution of 1970 provided for the continued existence and functioning of the Illinois Courts Commission,²⁴⁸ but despite the 1969 scandal involving Illinois Supreme Court Justice Roy J. Solfisburg, Jr. and Ray I. Klingbiel,²⁴⁹ the constitution did not prescribe procedures to be followed in disciplinary cases against an Illinois Supreme Court Justice.

The ancient Romans used to ask the question, "*Quis custodes et custodiet?*" which means "Who guards the guards?"²⁵⁰ The Illinois Supreme Court is in an untenable position whenever the Courts Commission investigates one of its members because the Illinois constitution, in its current form, provides that a member of the supreme court must be the chair of the Courts Commission. This creates an inherent appearance of a conflict of interest.

Justice Heiple exacerbated this problem by using his power as chief justice to appoint Justice Harrison as his successor, at a time when Justice Heiple was under investigation by the JIB. Justice Harrison, was perceived, correctly or otherwise, as Justice Heiple's closest friend on the court.²⁵¹

The JIB moved for the disqualification of Justice Harrison from sitting on the Commission for the Heiple hearing.²⁵² The Courts Commission denied that motion, indicating that the constitution mandates that a member of the supreme court sit on and, indeed, preside over the Courts Commission's hearings.²⁵³ In other words, the Courts Commission relied on the "rule of necessity" that allows a

248. Article VI, section 15(e) of the Illinois Constitution of 1970 provides in pertinent part:

A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.

ILL. CONST. art. VI, § 15(e).

249. See *supra* notes 67-79 and accompanying text.

250. JUVENAL, SATIRES VI, act I, l. 347 (Niall Rudd Trans, Claredon Press 1991).

251. See Bailey, *Panel Rejects Bid*, *supra* note 169, at 1; Bailey, *Convenience Cited*, *supra* note 8, at 1.

252. See Bailey, *Panel Rejects Bid*, *supra* note 169, at 1; John Flynn Rooney, *Courts Commission Wrong on Recusal: JIB*, CHI. DAILY L. BULL., Mar. 27, 1997, at 1.

253. See Bailey, *Panel Rejects Bid*, *supra* note 169, at 1.

judge or group of judges, who have a conflict of interest, to nevertheless hear a case when no one else is legally eligible to hear the case.²⁵⁴ The only way to address the inherent conflict of interest is to amend the constitution.

Article VI, section 15(e) should be amended to provide that, when a member of the Illinois Supreme Court is brought before the Courts Commission, no member of the supreme court may serve on the Courts Commission for that proceeding. It should further read that in such proceedings the fifth member of the Commission should be chosen by the Illinois Appellate Court from amongst the presiding justices of all of the districts of the appellate court, other than the district in which the supreme court justice being charged resides.

To further improve the impartiality, and the appearance of impartiality, of Courts Commission proceedings, article VI, section 15(e) should be amended to provide that no judge from an appellate district or circuit court can sit on a Courts Commission hearing involving another judge from the same appellate district or circuit court. If the JIB brings a member of the First District Appellate Court of Illinois before the Courts Commission, then neither of the appellate court members of the Courts Commission who hear that matter should be from the first district. Similarly, if the JIB brings a judge from the nineteenth judicial circuit before the Courts Commission, neither of the two circuit court judges sitting on the Courts Commission who hear that matter should be from the nineteenth circuit.

Public confidence in the Courts Commission also would be enhanced if there were public lay members on the Courts Commission. The Attorney Registration and Disciplinary Commission ("ARDC") that hears charges against and disciplines Illinois attorneys does have public members.²⁵⁵ Having public members would tend to ensure the general public in high profile disciplinary actions, similar to that of Justice Heiple, that embarrassing matters were not being swept under the proverbial rug.

As this Article is going to press, the Illinois General Assembly has, just adopted, a proposed constitutional amendment for placement on the ballot for ratification by all Illinois voters at the November 3, 1998,

254. *See* United States v. Will, 449 U.S. 200 (1980) (holding that the rule of necessity authorized Supreme Court to decide cases involving compensation of federal judges); *Collura v. Board of Police Comm'rs*, 135 Ill. App. 3d 827, 482 N.E.2d 143, 149 (2d Dist. 1985) (authorizing the rule of necessity), *aff'd*, 113 Ill. 2d 361, 498 N.E.2d 1148 (1986).

255. *See* ILL. SUP. CT. R. 751(b) provides, in pertinent part, that, "the Commission shall consist of four members of the Illinois Bar and three nonlawyers appointed by the Supreme Court."

general election.²⁵⁶ Three amendments were originally proposed in the 1998 session of the Illinois General Assembly. Representative William Brady (R. - Bloomington)²⁵⁷ proposed House of Representatives Joint Resolution 14 ("H.R.J. Res. 14"), the first of these amendments. Next, Representatives Louis I. Lang (D. - Skokie) and Senator Dan Cronin (R. - Elmhurst) filed separate, but verbatim, amendments in both the House and Senate respectively. Lang filed the amendment as House of Representatives Joint Resolution 20 ("H.R.J. Res. 20"), and Cronin filed it as Senate Joint Resolution 52 ("S.J. Res. 52"). Elena Z. Kezelis, Governor Edgar's Chief Legal Counsel, served as the primary drafter of the Lang-Cronin Amendment.²⁵⁸ On March 25, 1998, the Illinois House Judiciary-Civil Law Committee voted eleven-to-zero to adopt H.R.J. Res. 20.²⁵⁹ On the same day, the Illinois Senate Executive Committee approved S.J. Res. 52 unanimously.²⁶⁰ On April 2, 1998, the entire Senate adopted S.J. Res. 52 by a vote of fifty-eight-to-one.²⁶¹ On April 21, 1998, the Illinois adopted H.R.J. Res. 20 by a vote of one-hundred-ten-to-one.²⁶²

The Lang-Cronin Amendment would increase the membership of the Courts Commission from five to seven. The Governor would appoint two new, public members who could be either attorneys or non-attorneys but who could not be judges.²⁶³ The five judicial

256. See David Heckelman, *House OKs Measure to Revamp Courts Panel*, CHI. DAILY L. BULL., Apr. 22, 1998, at 1 [hereinafter Heckelman, *House OKs Measure*]; David Heckelman, *Amendment to Change Courts Commission to Appear on Ballot*, CHI. DAILY L. BULL., Apr. 29, 1998, at 1 [hereinafter Heckelman, *Amendment to Appear on Ballot*].

257. Brady represents the legislative district in the heart of Justice Heiple's supreme court judicial district.

258. See David Heckelman, *Bill to Change Court's Commission Advances*, CHI. DAILY L. BULL., Mar. 25, 1998, at 24.

259. See *id.* at 1. At that hearing, Ms. Kezelis testified in support of the Lang-Cronin Amendment, as did Representative Lang himself. In addition, Jerome Meites, the co-author of this Article, testified in support of both the Lang-Cronin and Brady Amendments on behalf of the CBA. He testified that the CBA supported the principal provisions of both amendments, the inclusion of public members, the Courts Commission's publication of rules, and the use of alternates to avoid conflicts of interest. However, he also suggested an accommodation of the provisions of each in a the final draft of the amendment.

260. See Margaret Schroeder, *Proposals Would Amend Judiciary Article*, CHI. DAILY L. BULL., Mar. 25, 1998, at 1.

261. See *Measure Would Add 2 Laypersons to Courts Panel*, CHI. DAILY L. BULL., Apr. 3, 1998, at 1.

262. See Heckelman, *House OKs Measure*, *supra* note 256, at 1; Heckelman, *Amendment to Appear on Ballot*, *supra* note 256, at 1.

263. See H.R.J. Res. 20, 90th Leg., 2d Reg. Sess. (Ill. 1998); S.J. Res. 52, 90th Leg., 2d Reg. Sess. (Ill. 1998).

members would consist of: (1) one Illinois Supreme Court justice chosen by the supreme court; (2) two Illinois Appellate Court justices, elected by the appellate court justices; and (3) two Illinois Circuit Court judges appointed by the supreme court. Both the composition of the judicial members and their method of selection under the Lang-Cronin Amendment would be the same as they are under the current constitutional provision.²⁶⁴ As with the current constitutional provision, the person under investigation would not have the right to appeal.²⁶⁵ The public members would receive compensation on a per diem basis as well as reimbursement for their expenses. To avoid "Heiple" type situations, if the Courts Commission investigated a supreme court member, then none of the Justices would sit on the Courts Commission for that case. Rather, the appellate court justices would choose a third justice as a substitute. With respect to appellate court and circuit court judges, no appellate court justice from the same district and no circuit court judge from the same circuit would sit on a case with a judge from that district or circuit. Rather, an alternate from another district or circuit would join the Commission for that case. Ratification of the Lang-Cronin Amendment by Illinois voters this November, would provide a significant and helpful reform arising from the Heiple investigation.

VI. CONCLUSION

The impeachment investigation of Illinois Supreme Court Justice D. Heiple culminated an extraordinary episode in Illinois legal and political history. That Justice Heiple brought that investigation on himself by his imperious conduct both on and off the bench is beyond dispute. But the stakes involved in those impeachment proceedings were far greater than the career of a single judge.

When Alexander Hamilton wrote that judicial independence was essential "to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men . . . sometimes disseminate among the people,"²⁶⁶ he undoubtedly never envisioned that judicial independence would be undermined by the "ill

264. See ILL. CONST. art. VI, § 15(e); H.R.J. Res. 20, 90th Leg., 2d Reg. Sess. (Ill. 1998); S.J. Res. 52, 90th Leg., 2d Reg. Sess. (Ill. 1998).

265. By contrast, the Brady Amendment, H.R.J. Res. 14, does provide for a discretionary appeal to the Illinois Supreme Court by either the JIB or the judge facing discipline. The CBA supported the discretionary review provision in its testimony before both the House Judiciary Committee on March 25, 1998 and the Senate Executive Committee on March 18, 1998.

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humors” of the judiciary, itself. Yet it was Justice Heiple’s intemperate defense of the Baby Richard decision—including his gratuitous attacks on the General Assembly, the Governor, and the press—that inflamed a controversy which ultimately threatened the independence of all Illinois judges.

Fortunately, cooler heads prevailed. The House Committee should be commended for diffusing the controversy, and especially for the clear pronouncements by both the majority and the dissenters that neither the Baby Richard decision nor any other opinion rendered by Justice Heiple was relevant to the impeachment inquiry.

While the House Committee majority reached the right result in recommending against impeachment, it could have performed a greater public service by articulating a rationale for its decision rather than simply making tautological statements that the various charges did not rise to the level for which impeachment was appropriate. The dissenters’ cogent arguments in favor of impeachment warranted an equally measured, reasoned response.

The majority’s failure to provide such a response may have been a reflection of discomfort with the lack of any express standards for impeachable conduct in the Illinois constitution. Incorporation in the constitution of the standards discussed in this Article would provide valuable guidance to future legislators who are conducting or contemplating impeachment proceedings. Those standards would also ensure that judges are not unduly pressured to elevate politics and public relations over precedent. As evidenced by the increasing calls for retribution against judges who render unpopular decisions, those threats pose a far greater danger to our justice system than an angry, arrogant, and impolitic judge. That is the true lesson of the Heiple episode.

APPENDIX**

REPORT OF THE COMMITTEE

The Supreme Court of Illinois, and in particular Justice James D. Heiple, has been the subject of intense and continuous media criticism for many months. The criticism began with dissatisfaction with one or more decisions of the Court and in more recent months, allegations of personal misconduct by Justice Heiple.

On April 8, 1997, the House of Representatives passed House Resolution 89 which provided for a legislative investigation of allegations raised regarding the conduct of Supreme Court Justice James D. Heiple to determine whether there existed cause for impeachment.

A special Investigative Committee was thereafter named and a counsel for the Committee was chosen. The Committee directed that all of the reported allegations involving Justice Heiple be fully investigated with the goal that all facts relevant to a possible impeachment, be available for consideration by the Committee.

Rules governing the proceedings were adopted. There were four days of public hearings, Justice Heiple was permitted counsel, he was informed of all allegations being investigated, his counsel was allowed to cross examine witnesses and the subpoena power of the Committee was afforded him to call witnesses in his own behalf. Twenty-four witnesses were heard and the record of the hearing exceeds 1100 pages. That the Committee achieved its commitment to a full and fair fact finding hearing was acknowledged by Justice Heiple's counsel at the conclusion of the hearing.

In preparation for the hearing, counsel for the Committee interviewed persons with knowledge and assembled documents relevant to allegations able to be substantiated regarding the conduct of Justice Heiple, and every fact relevant to those issues was ascertained and presented to the Committee in a public hearing.

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I.

On April 29th, the hearing began with testimony from constitutional experts from the Illinois Bar Association, the Chicago Bar Association and the Chicago Council of Lawyers. These bar representatives acquainted the Committee with the legal history of and the standards that govern impeachment. All agreed that Separation of Powers is a central feature of the constitutional democracy created by the Constitution of the United States and embodied in the Constitution of the State of Illinois.

History teaches us that freedom is threatened when one branch of government is able to control or ignore the independence of another branch. Each branch of government, the executive, the legislative and the judiciary must function cooperatively with but independently of the other two.

This doctrine of separation of powers requires that each branch of government respect and protect the independent function of the other two branches within their own sphere. Flowing from that concept is the necessary independence of the judiciary. The independence of the judiciary is indispensable to the rule of law and therefore to the protection of individual liberty. A fundamental aspect of judicial independence is that the legislature cannot intervene in judicial affairs on political grounds or because of disagreement with or dissatisfaction with the opinions of a judge. Any such authority would destroy judicial independence and make judicial tenure dependent on legislative pleasure. It would deprive the citizens of this state of a major safeguard for their constitutional rights.

Another aspect of the independence of the judiciary is that judges in Illinois are elected by the voters; the suitability of their performance in office is entrusted to the determination of the electorate.

The 1970 Constitution of the State of Illinois, in furtherance of the assurance of an independent judiciary, provided that disciplinary matters within the judiciary be addressed by the judiciary. The Judicial Inquiry Board and the Courts Commission were created to investigate judicial misconduct, and in appropriate cases, remove a judge from office. The Courts Commission has a variety of remedies available to it from reprimand to removal. The legislative impeachment power, however, is a fail safe for the situation where extraordinary misconduct of a judge warrants his or her removal whether or not the Courts Commission has asserted its jurisdiction.

It is an exception to the intent that the judiciary discipline itself, that the Illinois Constitution provides the traditional power of the

legislature to impeach a judge. This impeachment power has been a historical feature of the American legal system. All four of the Illinois constitutions have authorized impeachment proceedings of judges and state officers. The Illinois Constitution does not provide particular guidance as to grounds for impeachment, but the history of the impeachment proceedings tells us that it was intended only for instances of very serious judicial misconduct and has rarely been invoked.

There have been but two occasions where the Illinois House of Representatives has voted to institute impeachment proceedings against judges. In 1832 impeachment proceedings began against Justice Theophilus Smith. The seven articles of impeachment recited a variety of egregious breaches of trust and criminal conduct. The seven articles of impeachment alleged that he:

- (1) allowed his son to “bargain off” the office of circuit clerk in Madison County to a named person for a \$25 monthly payment;
- (2) sold that office;
- (3) appointed circuit clerks without requiring a bond;
- (4) instituted two baseless lawsuits against other men, presided over the court where they were filed, and held the men in jail under excessive bail;
- (5) suspended and sought disbarment of a lawyer who had told his client to tell the court that he would agree to a change of venue if it was to a county where Smith did not preside;
- (6) jailed for contempt a juror who refused to remove his hat although he was Quaker and doing so was against his religion, as the judge knew; and
- (7) connived with the sheriff and treasurer of Madison County in rendering a judgment in a sham suit between the two officials that prejudiced the county, requiring it to appeal to the Supreme Court.

Despite these charges, the Senate did not remove Justice Smith from office.

In 1842, proceedings began in the House of Representatives to impeach Justice Thomas Brown on the ground of insufficient mental ability. Articles of impeachment were not voted and the Justice remained in office.

A consideration of impeachments of federal judges gives us more examples of conduct deemed impeachable. There have been 58 United States House of Representatives impeachment investigations. Of

these, eleven went to Senate hearing, resulting in seven convictions and four acquittals.

The following were removed from office:

(1) John Pickering, U.S. District Judge for New Hampshire, 1803-04

Charge: Drunkenness and senility.

Decision: Removed from office

(2) West H. Humphreys, U.S. District Judge for Tennessee, 1862

Charge: Supported succession of Tennessee. (Treason)

Decision: Removed from office

(3) Robert W. Archbald, U.S. Court of Appeals for the Third Circuit, 1912

Charge: Misconduct including personal profits, free trips and improper appointment of jury commissioner.

Decision: Removed from office

(4) Halsted L. Ritter, U.S. District Judge of S. Florida, 1936

Charge: Participating in champertous proceedings brought before him for a cash consideration, practicing law while serving as a federal judge, and preparing and filing false tax returns.

Decision: Removed from office

(5) Harry E. Claiborne, U.S. District Judge of Nevada, 1986

Charge: Tax evasion.

Decision: Removed from office

(6) Alcee L. Hastings, U.S. District Judge of S. Florida, 1988-89

Charge: Conspiracy to solicit a bribe.

Decision: Removed from office

(7) Walter L. Nixon, Jr., U.S. District Judge of S. Mississippi, 1988-89

Charge: False statements to a grand jury.

Decision: Removed from office

Since the adoption of the 1970 Illinois Constitution, there has been considerable activity concerning judicial conduct before the Illinois Courts Commission including five instances of removal of judges from office, but, except as a recognition that there is an alternative to impeachment in dealing with judicial misconduct, the details of those proceedings are not relevant here.

This history of impeachment proceedings sets the precedent for the level of seriousness of the kinds of offenses regarded as the appropriate subject of impeachment proceedings and deliberations.

The testimony of Donald Hubert, President of the Chicago Bar Association, was accompanied by a report which is in evidence. The report makes the point that for purposes of impeachment, the conclusions of the Committee must be supported by “. . . clear and convincing evidence . . .”, a standard higher than that demanded in ordinary civil law suits. The point is also made that the 1870 Constitution provided for the impeachment for “. . . any misdemeanor in office.” This phrase, included in the Federal Constitution, was deleted from the Illinois’ 1970 Constitution because it could be interpreted to mean that impeachment could be sought for some minor offense.

The report of the Bar Association discussed the standards for impeachment and said:

“Not every violation of the Code of Judicial Conduct warrants impeachment. Impeachment should be reserved for egregious violations. Less serious ethical infractions should result in discipline by the Courts Commission.”

It is the conclusion of the Committee that legislative impeachment should be limited to extraordinary cases of judicial misconduct involving serious violations of the law or serious breaches of trust.

II.

The Committee recessed from April 29th through May 5th to allow its investigators ample time to find the documents and witnesses necessary to a full investigation. On May 5th the hearings reconvened with three full days of testimony, concluding with the testimony of Justice Heiple for nearly six hours. Thereafter a brief from counsel for Justice Heiple was accepted.

The several areas of inquiry and the Committee’s conclusions from the evidence adduced are as follows.

A. Traffic Violations

Four traffic stops of Justice Heiple and the conduct of the Justice in each of them were considered. Three of the stops were for exceeding the speed limit and in each instance no citation was issued. In one instance, the automobile the Justice was driving bore Supreme Court license plates. In the other two instances, Justice Heiple, when asked for his driver’s license and proof of insurance, displayed his court

credentials in a manner calculated to insure that the officer knew he was a Supreme Court Justice.

The fourth stop in Pekin, Illinois on January 27, 1996 was marked by a complex interaction between the Justice and several officers, which resulted in the arrest of the Justice and the charging of him with four violations:

- (a) speeding;
- (b) failure to yield to an emergency vehicle;
- (c) resisting a peace officer; and
- (d) two counts of disobedience to a police officer.

Justice Heiple pled guilty to the charges of speeding and disobedience to a peace officer, was fined as to each and paid the fine in the total amount of \$346.00. The other charges against Justice Heiple were dismissed.

The circumstances surrounding these four traffic stops were investigated by the Judicial Inquiry Board and a resultant complaint was filed with the Illinois Courts Commission containing allegations of Justice Heiple's conduct. Justice Heiple filed a response indicating his election not to refute the charges and the order of the Courts Commission deemed them admitted.

Based upon these facts admitted by Justice Heiple, the Commission determined that Justice Heiple violated supreme Court Rules 61 and 62(A) (155 Ill. 2d Rules 61, 62(A)). The Commission further determined that Justice Heiple's conduct was prejudicial to the administration of justice and brought the judicial office into disrepute. Based on these findings the Courts Commission entered an order censuring Justice Heiple.

It is the conclusion of the Committee that Justice Heiple, during the traffic stops, used his position on the Court to influence the officers detaining him to treat him with leniency. His conduct showed a disregard for his obligation as a citizen to respond to the directions given him by the police and to the flashing lights and siren of a pursuing patrol car. His conduct during the confrontation with the Pekin police was arrogant and overbearing. However inappropriate, this conduct does not rise to the level of an impeachable offense.

B. Justice Heiple's Discussion Of The Pekin Incident With The Court

At the Court's first meeting, after the Pekin incident, Justice Heiple told the justices of the Court the story of his arrest and the circumstances surrounding it. He gave his detailed version of the facts and indicated he had been roughed up by the police. At a later time

when the event had escalated into a case before the Courts Commission, Justice Heiple should have considered that this might disqualify any Justice on the Court from sitting on his matter before the Courts Commission, and should have brought about a serious discussion of some alternate proceeding to resolve the accusations against him.

The Courts Commission complaint against Justice Heiple was filed on January 23, 1997. Thereafter, Justice Freeman raised with the Court the need to meet to discuss the issues being raised about the conduct of Justice Heiple, and in particular whether the Courts Commission under the Chairmanship of Justice Harrison could any longer be considered an appropriate forum for the resolution of the charges against Justice Heiple. Justice Freeman reminded the Court of an earlier appointment of a special commission created by the Supreme Court to investigate charges of impropriety against two Supreme Court Justices.

The vote of four Justices is required to convene such a meeting. Justice Heiple would not and did not vote for such a meeting, nor did three other justices, and the requested meeting did not occur. It would appear to have been a better course had Justice Heiple voted for a meeting to discuss alternatives to the Courts Commission's resolution of the matter, but this internal administrative decision does not rise to the level of impeachable conduct.

C. Election Of The Chief Justice

As the Supreme Court went into session the second Monday of September 1996, on the 9th of September 1996, Justice Freeman raised the question whether the Court should elect the Chief Judge in September, rather than wait until November as was the custom. It was Justice Freeman's intent to consider whether an earlier election might serve to avoid an anticipated letter writing campaign against the selection of Justice Heiple. Justice Freeman asked Justice Heiple about the rumors of an investigation. Justice Heiple acknowledged that he had heard similar rumors. Later during the fourth week of September the election for Chief Justice was advanced. While the Justices were discussing Justice Heiple's nomination and before the vote, Justice Freeman again inquired of Justice Heiple, in the presence of other members of the Court, about the rumors that Justice Heiple was being investigated by the Judicial Inquiry Board.. Instead of answering Justice Freeman's question directly, Justice Heiple just shrugged off the question indicating he didn't think anything would come of the investigation. In fact, Justice Heiple had been notified of

the opening of a Judicial Inquiry Board file, on September 13, 1996, had acknowledged this fact in writing on September 20, 1996 and was scheduled to appear before the Board on October 11, 1996. The record is clear that this specific information was withheld from the Justices of the Supreme Court at the time they voted to make Justice Heiple Chief of the Court. It is the conclusion of the Committee that a concern for comity, cooperation and trust among the Justices should have led Justice Heiple to inform the Court of these facts, but his failure to do so does not rise to the level of an impeachable offense.

D. Election Of Justice Harrison To The Courts Commission

On the second Monday of January 1997 at a meeting of the Court, Chief Justice Heiple announced that he had resigned as Chairman of the Illinois Courts Commission. There was conflicting testimony whether Justice Harrison asked for the position or whether Justice Heiple asked him to take it. Justice Freeman thought he should have been asked to take the position since he was the next in line to be Chief Justice. Nevertheless, the full Court voted for Justice Harrison who became Chairman of the Illinois Courts Commission by Order dated January 13, 1997. While some of the Justices may have been aware of the earlier rumors of an investigation, as of January 13th 1997 Justice Heiple had still not informed the Court of the pending Judicial Inquiry Board matter.

In the event that Judicial Inquiry Board filed a complaint against Justice Heiple, the newly elected Chairman of the Courts Commission would preside over the hearing. Thus, at the time of the election of the Chairman, the Chief Justice should have informed the Court of the open Judicial Inquiry Board file involving him and should have recused himself from voting on the Harrison appointment. While the Committee is highly critical of this conduct, if finds that it does not rise to the level of an impeachable offense.

E. Appointment of Justice Holdridge As Court Administrator

Before the convening of the January 1997 term, Justice Heiple notified the Court of his plan to appoint sitting Justice William Holdridge of the Third Judicial District as Court Administrator. A vigorous dissent was voiced by three of the Justices on the grounds that the Illinois Constitution Article 6, Section 13 prohibits a sitting judge from holding another office under the state. Justice Heiple requested a memorandum from the research section of the Court which concluded that the appointment of Judge Holdridge did not violate the Constitution.

With four Justices indicating their approval of the appointment, one or more of the remaining Justices asked that the order not be filed until they could write dissents. Justice Heiple ignored this request and the three dissents to the appointment were filed at a later date. The Committee notes, again, Justice Heiple's lack of attention to collegiality on the Court. The Committee, properly, declines to question the Court's interpretation of the Constitution on this issue.

F. Reduction Of The Salary of Bonita Welch

Bonita Welch was the law clerk to Justice Tobias Barry for 12 years. Justice Barry was Justice Heiple's opponent for the Supreme Court in a hotly contested election in 1990.

Ms. Welch subsequently applied for transfer into a vacancy in the legal research staff. The Justices of the Third District granted her request, determined, as was within their authority, that she would receive a salary at the mid-range of the grade for that position and she entered upon duty as a legal research clerk.

When her employment was brought to Justice Heiple's attention at \$39,464, the mid point level, he ordered her salary reduced to an entry level salary of \$32,571, despite her twelve years of experience. In explanation, he said, ". . . a research clerk claiming twelve years of experience really has about one year of experience repeated twelve times." In so doing he exceeded his authority under Illinois Supreme Court Job Classification and Compensation Rules, specifically Rule 5 (D)(1).

Testimony differs on this matter. Two witnesses testified that Justice Heiple ordered the reduction in salary. Justice Heiple said he was merely giving his opinion. Bonita Welch testified that Justice Heiple was motivated by hostility to her former judge employer, Justice Barry. Justice Heiple testified that he had no personal animus against Bonita Welch, and that he acted only on the general principle that her experience did not justify more than entry level compensation.

G. Failure to Disclose Loans

The Committee investigated the allegation that Justice Heiple failed to include in the Statement of Economic Interest he is required by law to file with the State, two loan transactions entered into during the years 1991 and 1995.

The first of these loans, from the AmCore Bank, was to Justice Heiple's wife and was in the amount of \$85,000.00. It was made on July 24, 1991 and paid off in full on July 26, 1991.

The second loan was from the Commerce Bank, was dated April 20, 1995 and was in the amount of \$225,000.00. It was to Justice Heiple and was paid off in full on May 5, 1995.

The form of filing a Statement of Economic Interest requires that loans made within the reporting year must be revealed whether or not they have been repaid at the time of filing. Justice Heiple admitted that he did not report either of these loans and was unaware of the requirement that repaid loans be reported until media inquiries called it to his attention. There is no evidence that this was an intentional attempt to conceal information required to be included in his Economic Interest Statements. On the day of the commencement of the hearings before this Committee, Justice Heiple filed amended Statements of Economic Interest reporting the two loans, bringing him into compliance.

H. Office Rental

An allegation was explored that Justice Heiple's rental of his judicial office in Peoria in a building owned by a bank in which his wife was a director and the owner of a number of shares, constituted an impropriety. The Committee's investigation established that the rental was at a fair market value and was consistent with similar space in the building. Mrs. Heiple's shares in the bank were purchased to qualify her to sit as a director and constituted a small fraction of one percent of the outstanding shares. Among other things, 39 ILCS 505/11.1 makes it unlawful for an elected official to enter into a contract using State funds with an entity in which that person's spouse has more than a 7.5% ownership interest. Since Mrs. Heiple's ownership interest in the bank was 0.01% of the outstanding stock, the Committee concludes that Justice Heiple's office rental does not constitute a criminal act nor, given its fair market value, an impropriety.

I. Jury Summons

While not a subject discussed at the hearing, the Committee investigated an allegation in the media that Justice Heiple had improperly avoided jury duty. Investigators for the Committee ascertained that Justice Heiple was summoned for jury duty in the Circuit Court of Tazewell County. He was required by law to serve unless excused, and his status as a Supreme Court Justice did not exempt him from jury duty.

Justice Heiple asked to be excused because of illness in his family and was excused. The jury clerk described the matter as routine. This evidence does not support a conclusion of improper conduct.

CONCLUSION

The Committee recognizes that the Illinois Constitution provides a means separate from impeachment for disciplining judges or removing them from office. The Illinois House of Representatives through this Committee, however, has the constitutional authority to intervene in the affairs of the judicial branch by way of conducting investigations and determining whether the facts found justify presenting to the Illinois Senate Articles of Impeachment.

Bearing in mind that only two impeachment proceedings have taken place since Illinois became a state, the Committee recognizes that the standard for determining whether judicial conduct is impeachable has historically been one that required criminal conduct or non-criminal conduct of such gravity as to demonstrate the unfitness of the judge to continue in office. Only then is the legislature entitled to exercise its extraordinary Constitutional power to remove an elected judge.

This Committee is sensitive to the future consequences of its decision today. To impeach on any basis less than the most serious misconduct is to establish a precedent susceptible to future abuse of the legislative authority and unwarranted attempts to breach the doctrine of Separation of Powers.

The Committee is sensitive to the constitutional imperative that it should not consider the judicial decisions of a judge, however it may disagree with them, in the determination it makes.

The Committee has heard evidence of a number of instances of personal conduct of Justice Heiple and has afforded Justice Heiple the opportunity to testify concerning them. This he has done at considerable length.

It is the conclusion of the Committee that Justice Heiple's conduct during his confrontation with the Pekin police was inappropriate and improper. While the Committee is highly critical of this conduct, it has been dealt with by the Illinois Courts Commission and in any event does not rise to the level of justifying impeachment.

In Justice Heiple's activities on the administrative side of the affairs of the Court, he did not live up to his obligation to his fellow Justices to deal with them candidly and to cooperate with them in the discussion of serious problems for the Court occasioned by his conduct. Nonetheless, this conduct does not justify impeachment.

Further, the activities of Justice Heiple other than during the traffic stops has not yet been considered by the Illinois Courts Commission which has the Constitutional jurisdiction and prerogative to investigate and enter appropriate orders.

The Illinois House of Representatives and this Committee may consider the totality of Justice Heiple's conduct, even if his acts when viewed separately do not support the conclusion that impeachment is appropriate. There is no question that Justice Heiple's lapses in memory while testifying, poor judgment and repeated instances of arrogant behavior have diminished the public's respect for the Supreme Court. Nonetheless, the standard for impeaching a judge because his or her conduct brings the court into disrepute must be based on egregious conduct. It is clear that Justice Heiple's conduct does not meet the criminal standard such as treason, bribery, sale of office. A Justice may be impeached for noncriminal conduct. But that conduct must be of a magnitude of gravity comparable to the criminal standard. In the opinion of the Committee, Justice Heiple's transgressions do not meet that standard. The Committee's conclusions must be supported by clear and convincing evidence. Bearing this standard in mind the Committee finds the testimony it has heard has failed to show that Justice Heiple engaged in impeachable conduct. Breaches of comity, common sense collegiality, while unfortunate, are not sufficiently grave to justify impeachment.

In no way should the Committee's failure to find grounds for impeachment lead to the conclusion that the Committee condones Justice Heiple's behavior. On the contrary, the Committee is severely critical of Justice Heiple's arrogance, his failure to deal with his colleagues with candor and trust, and his imperious internal administration of the Courts.

Since the Committee's decision has far reaching consequences affecting the future of judicial independence in Illinois and across the country, the standard this Committee adopts for impeachment takes on lasting significance. To impeach for anything less than the most serious offenses would send a chilling message to once and future judges.

The Committee is mindful that a Supreme Court Justice is an elected official. To remove an elected office holder is to vitiate the judgment and the vote of the electorate. That action is justified only in the case of extreme instances of misconduct.

It is the conclusion of the Committee that the conduct of Justice Heiple evidenced by this hearing, while mean spirited and demeaning to the Court, an unbecoming a Justice of the Illinois Supreme Court,

does not justify the recommendation to the Illinois Senate of Articles of Impeachment.

The Committee therefore recommends that no Articles of Impeachment be referred to the Illinois Senate.

CERTIFICATION OF JUSTICE JAMES D. HEIPLE REPORT

We, the undersigned declare that we have read the contents of the attached report on Justice James D. Heiple and agree with the contents therein.

Dated this 15th day of May, 1997.

Barbara F. Currie, Chairperson

Jack Kubik, Chairperson

Judy Erwin, Member

Verna Clayton, Member

Arline Fantin, Member

Brent Hassert, Member

Lovana Jones, Member

Carolyn Krause, Member

Doug Scott, Member

Dan Rutherford, Member

DISSENT

I respectfully dissent from the majority opinion in this matter, and recommend that the General Assembly impeach Supreme Court Justice James D. Heiple.

I. INTRODUCTION

According to Article IV, Section 14 of the 1970 Constitution of the State of Illinois:

“The House of Representatives has the sole power to conduct legislative investigations to determine the existence of cause for impeachment and, by the vote of a majority of the members elected, to impeach Executive and Judicial officers . . .”

Although the ability of the House to impeach is clear, the grounds for doing so are not. In the federal constitution, for example, officials may impeach for “High Crimes and Misdemeanors.” (U.S. Constitution, Article II, Section 4). However, in the drafting of the 1970 Illinois Constitution, any references to standards have been removed, thus leaving the House to determine what conduct constitutes an impeachable offense.

In this proceeding, the Committee has received guidance from the Chicago Bar Association ("CBA"), which filed a written report (Ex. 4). In this report, the CBA lists four general grounds upon which they believe impeachment may be proper. The CBA was correct in pointing out that only two (egregious violations of the Code of Judicial Conduct and abuse of power) appear to be relevant in the matter before the Committee (Ex. 4 at 1-2.)

Also of help is the Constitutional authority of the Illinois Courts Commission (Ill. Const., Art. 6, sec. 15). The Illinois Courts Commission is responsible for sanctioning judges against whom a complaint is brought by the Judicial Inquiry Board ("JIB"). The Courts Commission's authority, however, contrary to impeachment proceedings, is limited in the instances in which it may discipline.

In this matter, the clear and convincing evidence demonstrates that Justice Heiple has both committed serious violations of the Code of Judicial Conduct, and has abused his power as a judge. For the reasons set forth below, and his impeachment by the House of Representatives should be recommended by the Committee.

II. INCIDENTS GIVING RISE TO FINDING OF ABUSE OF POWER AND BREACH OF THE PUBLIC TRUST

A. Traffic Incidents

Many of the details of four traffic incidents involving Justice Heiple have been well documented. They were the subject of a Judicial Inquiry Board investigation and a Complaint, Hearing and Order before the Illinois Courts Commission (Exs. 7, 8, 14). Justice Heiple was censured by the Courts Commission for his conduct with respect to these incidents (Ex. 14, p. 8).

For purposes of brevity, the details will not be summarily listed, as they are delineated in the Courts Commission Complaint, (Exhibit 7), were not challenged by Justice Heiple's Answer to the Complaint (Exhibit 8), and were adopted by the Courts Commission as their findings of fact in their Order (Exhibit 14). We should do the same, the testimony of Justice Heiple before the Committee notwithstanding.

The incidents themselves were:

1. A January 27, 1996 arrest by the Pekin Police (Ex.7, nos. 3-12);
2. January 8, 1996 Tazewell County traffic stop (Ex.7, nos. 13-15);
3. A November 24, 1995 Creve Coeur traffic stop (Ex.7, nos.

16-18); and

4. A November 14, 1992 Mason City traffic stop (Ex.7, nos. 19-24).

In three of these incidents, Justice Heiple, when pulled over, produced his Supreme Court identification card instead of his driver's license (Ex.7, nos. 14, 17, 22). While the record clearly indicated that, for a variety of reasons, the police officers involved chose not to issue citations, it is clear that Justice Heiple attempted to use his status to avoid citations.

Justice Heiple's explanation for his actions contradicts the testimony of the police officers. Justice Heiple stated that, when he pulled out his wallet, his Supreme Court identification card was visible, but that he did not intentionally display the card (Tr. at 864). This testimony is contradicted not only by the Courts Commission's findings (Ex. 14), but also by the police officers who testified that Justice Heiple overtly displayed his license (Tr. at 213, 228, 244).

In two of these incidents, Justice Heiple pull over as soon as possible after the police officer pulled in behind him and activated his emergency lights (Ex.7, nos. 4, 20-21). And in the Pekin incident, Justice Heiple drove off, disobeying instructions from the police officer, and went to his home, despite the officer flashing his emergency lights behind him (Ex.7, nos. 6-7). Justice Heiple's explanation for failing to pull over was that, in both the incident in Pekin and the Mason City incident, where he did not pull over for five miles (Ex.7, no. 21), Justice Heiple stated that he did not believe the lights were meant for him (Tr. at 844, 873-4). This explanation neither comports with law or common sense, as drivers are taught to, and, in fact, legally required to, pull over for emergency vehicles approaching from the rear, whether they think they are meant to be pulled over or not. This is also part of the Vehicle Code (625 ILCS 11-204).

In the Pekin incident, Justice Heiple obstructed and disobeyed the officers not only by driving away from the scene and by not pulling over immediately, but also by attempting to enter his house when told not, and by resisting arrest (Ex.7, nos. 6-11). His manner in dealing with the officers was belligerent, and on one occasion he asked the officers, "Do you know who I am?" (Ex.7, no. 11). He also told the officers on the scene, "Oh shut up, do you know who you are talking to?" (Ex.7, no. 10).

In at least some respects, it is understandable that Justice Heiple would be aggravated by the situation. It was late, cold, snowy, windy and there were many squad cars and officers present (Ex.13, p.2, Tr.

at 839-40, 848). But Justice Heiple, as with any other citizen, does not have the authority to decide which instructions from police officers to obey. Indeed, if it were otherwise, the entire system of laws might fail. As a symbol of the rule of law in this State, his failure to accede to the directions of police and his willingness to use his position in an attempt to avoid punishment should not be tolerated. The Courts Commission found that Justice Heiple's "conduct was prejudicial to the administration of justice and brought the judicial office into disrepute." (Ex. 14 at 8).

Before the Courts Commission, Justice Heiple filed an Answer (Ex.8) in which he chose "not to refute the factual allegations contained in the Complaint filed against him by the Judicial Inquiry Board." During his testimony, Justice Heiple stated that this tacit admission was a "tactical error" (Tr. at 954). Based on the testimony from the police officers and Justice Heiple, it is reasonable to conclude, as did the Courts Commission, that the incidents described in the Courts Commission Complaint are an accurate representation of the traffic incidents.

The Courts Commission further went on to say:

The present matter involves a pattern of incidents on multiple occasions. In addition, the judge who engaged in the misconduct in this case is a member of the highest court in Illinois. Because of the Respondent's office and his position of leadership in the judiciary, he had a special obligation to comport himself properly and to set an example for others. Under these circumstances, Respondent's misconduct was particularly damaging to the integrity of the court system. (Ex. 14 at 8.)

B. Interference With Salary Decision Regarding Bonita Welch

In early 1994, a matter arose concerning a person named Bonita Welch, who had previously been employed as a law clerk to Third District Judge Tobias Barry. Judge Barry was defeated by Justice Heiple in the 1990 campaign for Supreme Court (Tr. at 542, 944). When Judge Barry retired in 1994, Ms. Welch sought employment with the Third District as a Research Attorney.

The Third District Judges met, and offered Ms. Welch a position as Research Attorney at an annual salary of \$39,464, which is the mid-point for salary range for the position of Research Attorney. That decision was perfectly in line with the "Illinois Supreme Court Job Classification and Compensation Rules" that were in effect at the time (Ex. 276, Rule 5 (D)(1)). The judges who made this decision believed

they were perfectly in their right to make this offer (Tr. at 621-5), which was accepted. Ms. Welch began work on February 16, 1994 (Tr. at 542).

On that same day, Judge Barry sent a letter to Mr. William Smith, who was Assistant Director of the Administrative Services of the Illinois Courts (Ex. 21, p.1). Judge Barry requested that Ms. Welch's salary be increased from \$39,464 to \$40,295, which had been her salary when working for him (Ex. 21, p.1). This request would be in line with rule 5(D)(1) of the job classification rules, which states that requests for hires above the midpoint must be approved by the Supreme Court.

Judge Kent Slater, who participated in the decision to hire Ms. Welch, testified that he received a call from Mr. Bob Davidson, the Director of the Administrative Office of the Illinois Courts (Tr. at 626). Mr. Davidson told Judge Slater that "there was problem with the compensation level that was provided for Ms. Welch and that I should contact Judge Heiple." (Tr. at 626)

Judge Slater then called Justice Heiple on February 21, and was told that Justice Heiple would not approve of Ms. Welch's salary in excess of the minimum salary (Tr. at 635). Judge Slater then sent a letter to Justice Heiple arguing the case for hiring Ms. Welch at the original midpoint salary (Ex. 21, pp.2-3). Justice Heiple responded two days later with a letter reiterating his position that he would not approve a Research Attorney being hired at anything other than the minimum salary (Ex. 21, p. 7). Ms. Welch's salary was then reduced, even though such an intervention had never previously occurred (Tr. at 635-6), and even though the rules supported the midpoint salary originally offered. Judge Slater testified that the other judges went along with the decision, and stated "we just knew that we had been overruled." (Tr. at 654).

Justice Heiple's testimony with respect to the matter is simply not credible in light of the other evidence. He testified that his first involvement with the case was the phone call from Judge Slater. (Tr. at 1073). However, Mr. Davidson testified that, on February 21st and before Judge Slater's call to Justice Heiple, Justice Heiple had told him to reduce Ms. Welch's to the minimum level. (Tr. at 681-2). This is corroborated by Mr. Davidson's February 21st Order reducing Ms. Welch's salary to the minimum level (Exc. 21, p. 6).

Mr. Davidson and Judge Slater both testified that, on February 21st, Justice Heiple had a problem with Ms. Welch's salary, which caused Judge Slater to call Justice Heiple (Tr. at 627-8). After this telephone call, Judge Slater sent his letter making his case for hiring Ms. Welch

at the midpoint level. In that letter, Judge Slater specifically referred to the salaries of the other research attorneys in the Third District, including Ms. Lynn Harrington, who despite having been hired in December, 1993 (two months before the letter) was making more than the other two attorneys listed, and thus, could not have been hired at the minimum amount (Ex. 21, at 2).

Justice Heiple's explanation for not catching this discrepancy is that he did not pay much attention to the letter (Tr. at 1077), even though his response letter (Ex. 221 at 7) makes reference to Judge Slater's letter, and to specific points made by Judge Slater.

When subsequently made aware of Ms. Harrington's salary, Justice Heiple testified that he made no effort to lower her salary, in spite of his letter's pronouncement that all new hires should be paid the minimum amount (Tr. at 1077-8, Ex. 21 at 7). He testified that he subsequently suggested making Ms. Welch whole, but took no action to see that this happened (Tr. at 1079-80). To date, Ms. Welch has not been paid what she was originally offered, commensurate with the desire of the Third District Judges and the Supreme Court Rules (Tr. at 549-50).

One more note needs to be made about credibility. Justice Heiple testified that Judge Slater told him that to hire Ms. Welch above the minimum would cause problems with the other employees (Tr. at 1086). This is not supported by any evidence, and directly contradicts every piece of testimony and every exhibit, including Exhibit 32, which shows that research attorneys were hired at many different salaries during the relevant time period.

The only reasonable conclusion to be drawn is that Justice Heiple intervened in this matter, where no other Supreme Court justices have intervened in similar situations, in direct contravention of Supreme Court Rules, the practice of the Third District, and the desires of the judges of the Third District. While the motivation may not be clear, it is clear that Ms. Welch was treated differently and unfairly compared to other employees, and that this different treatment was the direct result of actions by Justice Heiple.

Justice Heiple's actions with respect to Ms. Welch constitute an abuse of his judicial power which must be addressed by the House of Representatives in conjunction with the other matters discussed herein.

C. Withholding of Information and Failure to Recuse

The Committee investigated the circumstances surrounding the appointment of Justice Moses Harrison to the position as head of the Courts Commission, the constitutionally-created group designed to

hear complaints against judges, and sanction them, if necessary. While the evidence did not indicate any overt plan to install Justice Harrison in an effort to help Justice Heiple's case before the Courts Commission, it nevertheless showed that Justice Heiple withheld important information from his colleagues. Then, when Justices raised questions about the appointment, Justice Heiple participated in blocking attempts to meet on the matter.

Justice Heiple not only withheld important information with respect to the appointment of Justice Harrison, but also nominated and voted for Justice Harrison to be on the Courts Commission. In a somewhat related matter, Justice Heiple withheld information from fellow Justices prior to their electing him Chief Justice in September of 1996. These matters not only interfered with the efficient operation of the Illinois Supreme Court, but also creates the appearance of severe impropriety and breach of the public trust in the judicial integrity.

The Pekin traffic stop and arrest in January, 1996 triggered several events. Justice Heiple testified that he told his fellow justices about the events in January of 1996, although he later revised that statement to say he told them in March (Tr. at 1087-88). All of the testimony indicates that Justice Heiple told his fellow justices about the events in Pekin during a meeting where all Justices were present.

Later that year, the Court considered who would succeed Chief Justice Bilandic as Chief Justice, beginning in January, 1997. Justice Freeman suggested voting on that decision in September rather than November, as is customary, in a specific effort to short-circuit public controversy surrounding Justice Heiple (Tr. at 452-4, 441-2).

At two separate meetings of the Justices in September, 1996, Justice Heiple was asked about the Pekin matter and investigators from the Judicial Inquiry Board ("JIB"). On both occasions, Justice Heiple dismissed the matter, indicating that nothing would come of the case (Tr. at 775). The timing is significant, because in between the two meetings, Justice Heiple was formally notified by the Judicial Inquiry Board that he was to testify before them in October concerning the Pekin incident (Ex. 6).

It is inconceivable that Justice Heiple could have believed that this requested appearance was so insignificant as to warrant withholding of the information from his fellow justices, especially in the face of a direct question about the Pekin case. Testimony from three other Supreme Court Justices was clear that information about Justice Heiple's requested appearance before the Board was something that they wanted to know and, in some cases, was something that might

have changed their mind about electing Justice Heiple as Chief Justice (Tr. at 434-05, 732-3).

It makes perfect sense that, if the Justices were electing the Chief Justice early in an effort to stem public controversy, information about the Judicial Inquiry Board's investigation would have been important to them.

After assuming his duties as Chief Justice in January, Justice Heiple was required to resign from two committees: the Attorney's Registration and Disciplinary Commission ("ARDC") and the Courts Commission (Tr. at 379, 941). Justice Harrison testified that Justice Heiple came to him and asked him if he would take over the position as head of the Courts Commission. Justice Freeman, however, testified that, when the matter was presented to the Justices, Justice Heiple stated that Justice Harrison requested the Courts Commission post (Tr. at 379). Justice Miller could not remember how the matter was presented to the other Justices (Tr. at 791-2).

At no time in this process did Justice Heiple reveal that he had testified before the Judicial Inquiry Board, or that the investigation was still open. The evidence suggests that Justice Heiple was told that he would be notified if the file were closed (Ex. 6) and no such notification was ever given. Justice Heiple claims that he did not recall being told this by the Judicial Inquiry Board (Tr. at 901).

All of this significant, because, when the Judicial Inquiry Board finished its investigation and filed a complaint with the Courts Commission against Justice Heiple, Justice Harrison by virtue of his appointment to that Commission, was forced to judge a matter affecting the person who nominated him and voted for him to fill that very position. Despite the fact that other Justices would have liked to have been apprised of the Judicial Inquiry Board investigation, and that, in at least one case it may have changed the opinion of a Justice with respect to the Courts Commission appointment (Tr. at 735), Justice Heiple withheld this information.

Subsequently, when Justices Freeman and Miller learned of the Courts Commission hearing, they independently sought to have a meeting of all the Justices to discuss the matter (Ex. 22, Tr. at 788). Justice Freeman's letter to his colleagues (Ex. 22) sets out that he believes the Courts Commission matter raised questions about the "public's perception of the Commission's composition and its trust in the process" (Ex. 22 at 1).

No meeting was held because only three Justices agreed to a meeting; however, the troubling part is that Justice Heiple took part in the decision not to hold a meeting. Again, this is a decision as to

whether the full Supreme Court should have met to discuss his pending matter before the Courts Commission, his nomination of Justice Harrison to be on the Commission, and the effect of Justice Harrison being required to hear his case. Justice Heiple's participation in all of these decisions cannot be sloughed off, as it directly pertains to the integrity of the Court, and the Courts Commission.

Justice Heiple's participation in all of these matters delineated in this section constitutes a serious breach of the public trust, for obvious reasons. As Justice Miller testified in response to questions about the importance of candor on the Court, specifically these incidents:

Q. And he did not in any way affirmatively answer the question that he had, in fact, received notice and was, in fact, scheduled to give testimony?

A. No, he did not.

Q. You think it would have been appropriate to give that information?

A. Certainly. Yes, I think it was important. In candor to the court, I think you should tell the court that.

Q. In your opinion, do each of the justices owe their brothers on the court candor?

A. Absolutely.

Q. What is that?

A. Well, you can't function without candor among your colleagues. You have to have trust and confidence in the people you're working with, trust and confidence in what they say is true, and that they'll tell you everything that's relevant to the situation. I mean, we discuss opinions. We have to have confidence that people aren't holding back and they're telling us everything they know about the situation so we can base our judgment on the information we hear.

Q. If a fellow justice is not candid or misleads one of his fellow justices, does that undermine your job as a Supreme Court Judge?

A. Well, yes, I would think so, and it would certainly undermine my confidence, if a person made any misrepresentations, it would undermine my confidence in that person. (Tr. at 733-4).

Not only his fellow justices, but the public has the right to expect that important judicial decisions are made with full knowledge of all pertinent information, and that individual justices are not withholding information for their own personal gain. That happened in this matter and it cannot be countenanced.

III. MATTERS HEARD BUT NOT WARRANTING FURTHER ACTION

In addition to the incidents outlined above, a number of matters were brought to the attention of the Committee. Neither individually, collectively, nor in conjunction with the previously articulated incidents, do these matters warrant further consideration.

A. Bank Loans Omitted From Economic Interest Statements

Both testimony (Tr. at 88, 113-4) and the statutes (Ill. Const., Art. 13, Sec. 2; S.Ct. Rule 68; 5 ILCS 420/4A-101) are clear that members of the judiciary are to file statements of economic interest with the Clerk of the Supreme Court and the Secretary of State.

Justice Heiple filed statements which did not include two bank loans that had been made by Justice Heiple and his wife that had been paid back in a very short time frame, with market rate interest (Ex. 15, Tr. at 889, Tr. at 114). The existence of the loans was verified by testimony of Justice Heiple (Tr. at 890) and W. Wayne Sittler (Tr. at 523-4), an official of the Commerce Bank in Peoria, as well as the loan documents themselves (Ex. 20).

While failure to report these loans is a technical violation of the aforementioned statutes, Justice Heiple's testimony was credible that he believed that he did not have to report these loans since they were paid back within the time period covered by the reports (Tr. at 894). When he was apprised of his error, he corrected the mistake. Since reports are full of other items which were reported, it makes no sense that the omission of the loans could have been anything other than an oversight.

B. Failure to Comply with Jury Duty

The allegation that Justice Heiple avoided jury duty was investigated prior to the hearing and the findings indicate he was excused by the jury commission for an illness in his family in the normal course of business.

C. Office Lease with Bank With Whom Justice Heiple's Wife Was A Director

Justice Heiple leased his district office space in Pekin from a bank for which his wife was a director (Ex. 19, Tr. at 894), potentially in violation of 30 ILCS 505/11 1. However, the evidence showed that, although Justice Heiple signed the leases (Ex. 19) and knew that his wife was a director of the landlord bank, the shares owned by Mrs.

Heiple amounted to far less than the threshold amount necessary to trigger the statute.

D. Appointment of William Holdridge As Administrative Director of the Administrative Office of the Illinois Courts

The appointment of William Holdridge to perform the duties of Administrative Director of the Administrative Office of Illinois Courts, while perhaps badly handled was nonetheless done by a majority of the Supreme Court. This Committee cannot and should not substitute its own judgment for that of a majority of the Court.

The testimony is clear that Justice Heiple notified the other justices of his intent to name Justice Holdridge to the position, and that subsequently, a discussion was held by the justices with respect to this nomination. (Tr. at 737-43). Some of the justices were under the impression that there would be a subsequent discussion; however, Justice Heiple ordered Clerk Hornyak to enter the Order "after hours" on January 17, 1997 (Tr. at 108-12).

While much of the discussion could be had with respect to Justice Heiple's actions in this matter, and while others, including three Supreme Court Justices, may disagree with the handling of the matter and the legal propriety of the Order, the fact remains that four Justices were in agreement, and could rightfully enter the Order. Our judgment cannot supersede theirs.

IV. DISCUSSION

The tenets of separation of powers between the judicial, executive and legislative branches of government are very important. In fact, as the Chicago Bar Association Report states:

"It is the role of the legislature in our system of government to be the voice of the people. The majority rules in the legislature, and it should. But it is the role of the judiciary to be the voice of the law and of the Constitution and not necessarily of the majority." (Ex. 4 at 9-10)

This dissent is not about decisions. Indeed, the circumstances surrounding Justice Heiple's involvement in a highly-publicized, unpopular decision is not and should never be allowed to be the basis for impeachment. The testimony adduced concerning the so-called "Baby Richard" case indicates that Justice Heiple wrote on behalf of a unanimous court, and that his authorship of that opinion was by chance. In fact, had he not had to recuse himself from a separate case and trade opinions, a different justice would have written the "Baby Richard" opinion. (Tr. at 909-11). Regardless of what anyone thinks

of that decision, or of any other opinion of the Court, it is clear that such rulings can play no part in this or similar proceedings.

As pointed out in the CBA Report, the “framers of the United States Constitution went to great lengths to institute a system which would preserve judicial independence.” (Ex. 4, at 10). That principle is as important today as it was when the U.S. Constitution was ratified in 1789 or when the latest Illinois Constitution was ratified in 1970.

But judicial independence also mandates that we have a judiciary that is responsible, upholds both the letter and spirit of the law, and the high regard for justice which justifies their independence. It is in this regard that Justice Heiple has failed in his responsibilities.

The Illinois Supreme Court Rules set forth the Code of Judicial Conduct, as described through the Canons of Judicial Conduct (S.Ct. Rules 61-68). Canon 1 (S.Ct. Rule 61) reads:

A Judge should uphold the Integrity and Independence of the Judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 (S.Ct. Rule 62) reads in applicable part:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.

A. A judge should respect and comply with the law and should conduct himself or herself at all time in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3 (S.Ct. Rule 63) reads in applicable part:

B. Administrative Responsibilities

(1) A judge should diligently discharge the judge’s administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials

(4) A judge should not make unnecessary appointments. A judge should exercise the power of appointment on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

A judge who violates these canons of ethics, according to Supreme Court Rule 71, is subject to discipline by the Illinois Courts Commission, which has the authority to remove judges from office,

among other sanctions (Illinois State Constitution Article 6, Section 15). Thus, it is quite appropriate to assume that impeachment should be possible under similar circumstances. If not, we are saying that judges have greater authority than the Legislature to remove judges. Since both have Constitutional backing, such a position does not seem logical.

When Justice Heiple's actions as set out above are examined in light of these Canons, it is abundantly clear that his conduct runs counter to those Canons cited above. By his conduct, Justice Heiple put himself and his interests above the law, above the Court, and above the citizens of this State, who have the right to expect that all judges, let alone Supreme Court Justices will uphold these canons.

Canon 1 contains the admonition that "(a) judge . . . should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." Was this standard met when Justice Heiple repeatedly used his Supreme Court identification to attempt to avoid tickets? Was it upheld when Justice Heiple, on three separate occasions failed to pull over when directed? Or when he disobeyed direct instructions from police officers? Or when he resisted arrest? Or when he told officers "Oh shut up . . . don't you know who I am"?

Not only is Canon 1 violated by this conduct, but so is Canon 2, which states in part that "A judge should avoid impropriety and the appearance of impropriety." When Justice Heiple withheld information from his fellow Justices concerning his appearance before the Judicial Inquiry Board, he prevented the other justices from performing their job with the best possible information. Canon 2's admonition against the appearance of impropriety is not met when Justice Heiple nominated and voted for the person who would possibly be a judge in his case before the Courts Commission, withheld information about the case, then helped to block a full Court meeting about the matter once other justices discovered that the Courts Commission was to proceed.

The appearance of impropriety is also strong when, at the time of the vote to name Justice Heiple the Chief, information about the pending JIB matter was withheld. This is wrong, and also runs afoul of Canon 3, in that it prevented the Supreme Court from doing the best job it could with respect to the selection of a Chief and in dealing with the issue of the Courts Commission.

In the matter of Bonita Welch, Justice Heiple acted outside his authority, outside the Supreme Court's personnel rules, and deprived a

court employee of salary which had been legitimately agreed to by proper authorities. Despite Justice Heiple's testimony concerning his desire that Ms. Welch be compensated and made whole as originally agreed, the fact is this has not happened, some three years after the fact. Justice Heiple's explanations on this point are simply not credible which leads to the conclusion that his actions were for the reasons articulated by Ms. Welch. That would be improper in any circumstance, but in the case of a Supreme Court Justice, it also violates Canons 2 and 3 and is completely unacceptable.

Individually, perhaps none of these incidents would warrant removal from the bench. But it is clear to me that the Legislature (and for that matter the Courts Commission) should and do have the ability to remove a judge for a pattern of behavior that evidences the abuse of power and breach of the public trust that is evident in this case.

In fact, in the decision to remove from the bench Judge Keith by the Courts Commission (which was headed at the time by Justice Heiple), the Commission stated:

One or two of the matters brought to our attention might have been overlooked or disregarded as a bad day for the judge or an aberration or a temporary lapse . . . Considered in isolation, specific incidents of a judge's misconduct might have warranted only reprimand or censure. Considered as a whole however, the Judge's misconduct indicates a person who should not occupy the position of a judge. (Tr. at 1003-4).

On questioning from Judge McGarr, Justice Heiple stated the following:

Q. I point that out only to suggest or ask whether that stands for the proposition that in considering an issue of impeachment, this committee is empowered and indeed would be wise to consider not only individual incidences but courses of conduct. Do you agree to that?

A. I presume so, Sir. (Tr. At 1004).

The Post-Hearing Memorandum filed on behalf of Justice Heiple (Ex. 30) states that a decision to impeach in this case would be akin to "blowing the judicial branch out of the water" (Ex. 30 at 2), and that the judiciary would, as a result, be robbed of its independence (Ex. 30 at 2), and that the judiciary would, as a result, be robbed of its independence (Ex. 30 at 2). And this brief goes on to further state that the exercise of impeachment powers for a course of conduct would be a "grave abuse of those constitutional powers." (Ex. 2 at 25). I respectfully disagree.

With respect to the first argument, that judges will be constantly looking over their shoulder because of “minor” indiscretions, aside from disagreeing with use of the word “minor,” the conclusion is not well taken. In this case, we have a Supreme Court Justice who has displayed a pattern of not just violating traffic laws, but of using his position to avoid the consequences, and of failing to adhere to those instructions of law enforcement officers that every citizen must obey.

We have a Supreme Court Justice who not only refused to recuse himself from a decision impacting the selection of a person who would shortly thereafter rule on his case, but who helped to block an attempt even to discuss the issue, and who most importantly, withheld information and misrepresented his circumstances to his fellow justices to further his personal ends.

And we have a Supreme Court Justice who intervened to reduce the salary of an employee who had been aligned with a political rival in contradiction to the very personnel rules approved by the Supreme Court, and whose explanation of these circumstances is directly contradicted by two witnesses and indirectly contradicted by a series of documents.

It not only strikes me that this patter of behavior is not likely to happen again, but that if it does, the justice who acts in this manner should also be held accountable for his or her actions.

Justice Heiple’s Post-Hearing Memorandum also makes the argument that an impeachment in this case would “dilute the force of the Constitution’s impeachment clause.” (Ex. 30 at 26). Again, I disagree. Simply because impeachment in Illinois has been used once, or because it was used for conduct different or arguably worse than these matters does not mean that it is improper to proceed in this case. If we do not proceed, we run the risk of weakening the bench, by destroying the integrity of the judiciary as set forth through the Canons. That is a far worse consequence.

V. CONCLUSION

For all of the reasons listed above, I respectfully dissent from the majority report in this matter, and would recommend that the House of Representatives proceed with the impeachment of Justice James D. Heiple

Respectfully submitted,
Douglas P. Scott
Committee Member

DISSENT

Representative Carolyn H. Krause, dissents from the Majority Report of the Special Investigative Committee of the 90th General Assembly.

I respectfully dissent from the Majority Report of the Special Investigative Committee of the 90th General Assembly. I have reviewed the transcript of the proceedings, exhibits and the memoranda.

The key issue in this hearing for me, was to define standards for impeachment and thereafter to determine whether or not the facts in this case met those standards.

The Illinois Constitution gives exclusive authority to the Illinois House of Representatives to conduct investigations to determine existence of grounds of cause for impeachment. The Constitution does not give any grounds for impeachment, nor does it define impeachment. The Chicago Bar Association (CBA) presented to the committee a "Report of the Chicago Bar Association of the Illinois House of Representatives Special Investigative Committee on the Propose Impeachment of Chief Justice James D. Heiple." I relied on their memorandum, both as to the burden of proof, as well as the standard to be used to determine the grounds for impeachment.

The CBA Report defined four (4) different standards for impeachment. If any one of the standards applied, impeachment proceedings should go forward. The grounds of systemic nonfeasance and willful malfeasance as defined therein do not apply.

The standard of egregious violations of the Code of Judicial Conduct does apply. As stated in the CBA Report, "This refers to ethical violations that would also warrant a judge's removal from the bench by the Illinois Courts Commission." (Page 1)

The fourth ground that could be considered for impeachment would be "abuse of power" but is not discussed herein.

I firmly believe that the standard of whether or not there were "egregious violations of the Code of Judicial Conduct" is the standard to be applied in this case. As stated in the CBA Report:

"(I)t would certainly seem that if this Committee and subsequently the Illinois House of Representatives were to find a judge had committed a serious violation of ethical canons, that violation would constitute an impeachable offense." (Page 13)

In addition, it is important to look at the cumulative or totality of the facts to determine if the standard is met, and taken together the offenses must be serious and clear.

Quoting from Judge McGarr's cross examination of Justice Heiple, it is clear that the cumulative affect of one's action can be taken into consideration in determining whether the standards for impeachment were met.

"Q. The statement attributed to you and I quote is, "One or two of the matters brought to our attention might have been overlooked or disregarded as a bad day for a judge or an aberration or a temporary lapse, Heiple said. Considered in isolation however, specific incidents of a judge's misconduct might have warranted only reprimand or censure. Considered as a whole however, the judge's misconduct indicates a person who should not occupy the position of a judge." (Tr. at 1003-04).

The Code of Judicial Conduct found in the Supreme Court Rules, states in part, in the preamble:

". . . judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system . . . The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges . . . The text of the canons and the rules is authoritative. . . The text of the rules is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text of the rules and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system."

I believe that a judge is held to a high standard of conduct and that the facts in this case must be applied to this high standard.

In *Matter of Cieminski*, 270 N.W. 2d 321 (1978), the Court stated:

"It necessarily follows that judges must be and are held to higher standards than laymen. Judges hold a unique position of administering justice. They symbolize the law and justice and, consequently, their action and behavior will reflect favorably or unfavorably on the integrity of the judiciary and the high respect required in the administration of justice. The following comment attribute to a former judge, who heard it from his predecessor, is appropriate here. "It is not merely sufficient to

do justice but the public and society must have a good cause and reason to believe that justice, in fact, is being done.” Whatever the source of this statement, it has merit. We are also convinced that the Canons of the Code of Judicial Conduct were designed and adopted to accomplish this, as well as to require that the judge not only act impartially but also that the litigants and society believe that the judge did, in fact, act impartially. Any action or behavior of a judge which will destroy the public confidence in the integrity and impartiality of the judiciary will tend to cause disrespect for the law itself.” (270 N.W. 2d at 327)

In the Report issued to the House of Representatives of the Commonwealth of Pennsylvania concerning the investigation into the conduct of Supreme Court Justice Rolf Larsen (May 6, 1994) the committee stated:

“1. Because the House has the sole power of impeachment, it has broad discretion to consider a variety of serious misconduct as grounds for impeachment. If the misconduct may bring the courts into disrepute, undermine public confidence in the integrity or impartiality of the court system or bring into serious question a justice’s fitness to remain in office, it may be considered.

2. Impeachable misconduct is not limited to criminal offenses, but it must be serious and substantial in nature, and reasonably related to the judicial office of the subject.

3. The House of Representatives may consider a person’s misconduct in the aggregate in considering whether he or she is liable to impeachment.

Three of the Rules of the Code of Judicial Conduct of Illinois apply herein:

Rule 61:

“A Judge Should Uphold the Integrity and Independence of the Judiciary. A judge should . . . personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.”

Justice Heiple received a letter dated September 13, 1996, from the Judiciary Inquiry Board (JIB) requesting him to appear before the JIB and to testify about matters involving his conduct. On October 11, 1996 Justice Heiple appeared and was advised, in person (and had prior knowledge through JIB’s Rules of Procedure), that the matter would be under advisement and that Justice Heiple would be informed in writing if the Board voted to close the complaint filed without further action. Justice Charles Freeman, during the latter part of

September, 1996 specifically asked Justice Heiple whether he had any knowledge concerning allegations of a hearing before the JIB. (Tr.. At 373) Justice Ben Miller corroborated this testimony (Tr.. At 731). Justice Heiple shrugged and indicated he had not. (Tr.. at 732). The Justices were about to vote to elect Justice Heiple as Chief Justice to be effective in January, 1997. In addition, Justice Heiple did not disclose information concerning a lawsuit filed by Bonita Welch alleging discrimination against the Supreme Court and Justice Heiple.

Justice Heiple had a duty to affirmatively disclose the information he had to the other justices. His failure to do so at the very time that decisions ere being made concerning his assuming the position of chief justice, constituted serious violations of the canons.

With respect to a series of traffic violations for speeding, the record is clear from the JIB complaint. (Ex. 7). Not only did Justice Heiple admit to speeding on four separate occasions but, (i) he twice avoided police attempts to stop within a reasonable amount of time; (ii) he attempted to avoid issuance of citations by displaying his Supreme Court credentials; (iii) he used abusive language and resisted arrest on January 27, 1996, and (iv) when stopped for traveling 73 m.p.h. in a 45 m.p.h. zone on November 24, 1995 and asked to justify the excessive speed, he stated that "I thought I was home free." (Tr.. At 227).

Conduct as described herein breaches the public confidence in the judiciary, affects the integrity of the court, and harms the trust that the public must have in the courts.

Rule 62:

"A Judge Should Avoid Impropriety and Appearances of Impropriety in All of the Judge's Activities. (A) A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

On January 13, 1997, Justice Heiple announced that Justice Harrison would serve as chair of the Illinois Courts Commission and the other justices voted their support. (Tr. at 734)

Justice Heiple again failed to advise the other justices of the JIB inquiry. (Tr. at 152 and Tr. at 735) Accordingly, he participated in the selection of the judge that would hear his case and deprived the Court of any timely opportunity to consider an alternative dispute resolution mechanism such as the Greenberg Commission.

As stated in the JIB motion requesting the recusal and substitution of Justice Harrison:

“For all of the same reasons that a judge is not permitted to sit in judgment on his or her own case, so too is a judge barred from selecting, or participating in the selection of the judge who will judge his case. Preserving the integrity of the judicial process demands that neutral fact-finders and decision makers be selected free from the self-interested influence of one of the parties. In particular, when a member of the judiciary is selected to judge the case of another judge who knows that his own conduct is likely to be reviewed by the very judge he is electing, the entire process is infected by the specter of partiality and self-interest. In such a case, there is ample cause to remove the selected judge and replace him with another judge selected without the taint of influence from any interested party. That is the case here. It appears that Respondent, (Justice Heiple) without disclosing to anyone that he was under investigation and that he himself might be required to appear as a party before the Illinois Courts Commission, participated in (or even directed) the selection of Justice Harrison. Those actions created an impermissible appearance of impropriety that can only be remedied by removing Justice Harrison as a member of the Courts Commission panel that is reviewing the instant case.”

In February, 1997, subsequent to the JIB filing of the JIB complaint, Justice Freeman requested a conference of all Supreme Court Justices to discuss the issues concerning the Courts Commission, i.e., whether Justice Harrison should step aside as chair of the Courts Commission. Three Justices voted for the meeting; Justices Harrison and Heiple voted “no,” one other justice voted “no” and one did not vote. Justice Freeman stated that Justices Harrison and Heiple “sit squarely in the middle of this controversy” I had anticipated their recusal on this issue.”

Justice Heiple, at the time when charges had formally been filed, again participated in a vote related to the chairmanship of the Courts Commission.

Rule 63:

“A Judge Should Perform the Duties of Judicial Office Impartially and Diligently. B (1) A judge should diligently discharge the judge’s administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.”

The largest divergence on the facts between Justice Heiple and other witnesses occurs with respect to the determination of Bonita Welch’s salary. Justice Heiple dismisses the incident by stating his “misunderstanding” that Justice Slater wanted his opinion concerning

the right thing to do. (Tr. at 949-50) Judge Slater believed that Justice Heiple ordered the salary reduction (being \$7,000.00 per year) and that he (Judge Slater) was not in a position to argue with him or question his decision. (Tr. at 628) Similarly, Mr. Davison stated that Justice Heiple advised him that Bonita Welch could be “put on at the minimum” salary for research attorney. (Tr. at 682-3)

Regardless of motive, Justice Heiple’s testimony is not credible. The balance of the testimony regarding Bonita Welch’s salary suggests that Justice Heiple interfered and abused his implied powers. I cannot attribute any other explanation to a scenario in which all of the six Appellate Court Judges in the Third District agree to employ Bonita Welch, set her salary at a level consistent with the Court’s Administrative Rules and merely inquired as to the possibility of a slightly higher amount.

Events surrounding the hiring of Judge Holdridge as Director of the Administrative Office of the Illinois Courts evoked considerable discussion. Although the conduct is not evidence of a clear ethical violation, nevertheless the handling of the matter is troubling.

Among other things, the Supreme Court is governed by the “rule of four” (Tr. at 418) and Justice Heiple had the four votes. Notwithstanding, “four votes are never enough in an administrative matter when there are three people who feel strongly the other way or two people or even one with a good reason it had never happened before.” (Tr. at 418-419) In addition, the Preamble to the Code of Judicial conduct, cited above, states that:

“Intrinsic to all provisions of the code are precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust” and that “The Judge is a highly visible symbol of government.”

Justice Heiple elected to ignore both Court tradition and the request of three Justices to continue their dialogue on an important constitutional question and rushed to hire an individual who, on the surface, does not appear to have possessed credentials so impeccable and necessary for the office as to exclude consideration of other candidates. (Tr. at 420) The entry of his Order at the end of the day on Friday, January 17, 1997 after being notified that a Justice wanted to include a dissent showed a disregard for other Justices and is totally unacceptable. As stated by Justice Miller: “Chief Justice Heiple’s actions of the last week suggest an attempt to stifle dissent and to disenfranchise duly elected members of this court.” (Ex. 11)

Accordingly, I believe Justice Heiple demonstrated extremely bad judgment, at best, and thrust upon the Court unnecessary public

scrutiny and controversy. That he has since seen the errors of his ways does not undo the damage to the public trust.

The highest standard of conduct must be applied to a judge and his actions must be measured against those high standards. A judge is placed in a unique position in our society; his integrity and actions as a public official must be above reproach. The Judicial Canons are the standard to be used.

Quoting from Justice McMorrow's dissent in the appointment of Judge Holdridge as Director of the Administrative Office of the Illinois Courts, she stated: "I believe that judges must be held to the highest possible standards of professional conduct. When we fail to meet those standards we not only do ourselves a disservice, but more importantly, we damage the honor of the courts we represent." (Ex. 11)

We must regain public trust in our judiciary; we must re-establish the confidence of the citizens in the courts, and we must honor the dignity and the integrity of the law and our Judges.

Justice Freeman, in writing to his colleagues urging dialogue states (Ex. 22):

"In the words of the late Thurgood Marshall, I would remind all of us that we must never forget that the only real source of power that we as judges can tap is the respect of the people."

The strength of our public institutions and the basis of our democracy are through the people.

In examining the facts of this case, I believe that the cumulative effect of Justice Heiple's action can lead to no other conclusion but his conduct constitutes egregious violations of the Judicial Code of Ethics and therefore articles of impeachment should proceed.

Carolyn H. Krause