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## Impeachment of Judges and "Good Behavior" Tenure\*

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Once employed to topple giants—Strafford, Clarendon, Warren Hastings—impeachment has sunk in this country to the ouster of dreary little judges for squalid misconduct.<sup>1</sup> Did the Framers intend that the legislative wheels of a great nation must grind to a halt so that Congress, and Congress alone, could determine whether such men must go?<sup>2</sup> Steeped in English history,<sup>3</sup> the Framers knew, to borrow from Bryce, that impeachment was so heavy a "piece of artillery" as to "be unfit for ordinary use."<sup>4</sup> Was the provision of artillery to deal with Presidential usurpation intended to forbid use of a pistol to lay low a thief?<sup>5</sup>

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1. See J. BORKIN, *THE CORRUPT JUDGE* (1962); see pp. 1514-16 *infra*.

2. In the First Congress Vining declared that impeachment is "insufficient to secure the public safety," pointing to the ongoing trial of Warren Hastings: "With what difficulty was that prosecution carried on! What a length of time did it take to determine!" 1 ANNALS OF CONG. 373 (1789) (Gales & Seaton ed. 1836; print bearing running-page title "History of Congress"). Subsequently he termed impeachment "circuitous," "dilatatory and inefficient," "what delays and uncertainties," *id.* at 465, 571. To the same effect Madison, Boudinot, Hartley and Sylvester, *id.* at 497, 375, 480, 562.

"Impeachment trials have averaged from sixteen to seventeen days, and the case of Judge Archbald ran for six weeks . . ." J. BORKIN, *supra* note 1, at 195. The trial of Justice Samuel Chase ran for about a month and the printed account occupies almost 600 pages. 14 ANNALS OF CONG. 80 (8th Cong., 2d Sess. 1805).

After the trial of district judge Halsted Ritter, Congressman Reed said that Senators should not thus "be required to set aside their legislative duties, paralyzing for weeks the lawmaking function . . ." 81 CONG. REC. 6175 (1937). In the midst of World War II, Professor J.W. Moore wrote, "it is absurd to think that large national interests during the war . . . must wait upon the trial of Judge X." Moore, *Judicial Trial and Removal of Federal Judges*: H.R. 146, 20 TEXAS L. REV. 352, 356 (1942). See also pp. 1515-16 *infra*.

3. H. COLBURN, *THE LAMP OF EXPERIENCE* 19, 25, 156, 183, 185 (1965).

4. 1 BRYCE, *AMERICAN COMMONWEALTH* 233 (1908). "It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." *Ibid.* Woodrow Wilson said of the impeachment process, "it requires something like passion to set them a-going; and nothing short of the grossest offenses against the plain law of the land will suffice to give them speed and effectiveness. Indignation so great as to overgrow party interest may secure a conviction; nothing less can." W. WILSON, *CONGRESSIONAL GOVERNMENT* 275-76 (1901).

5. Coincident with the impeachment of Justice Chase there was talk of impeaching district judge Richard Peters who sat with him on Circuit and who wrote, "I never sat with him without pain, and he was forever getting into some intemperate and

The claim that impeachment is the exclusive means for removal of judges rests on three propositions. First, the express provision for impeachment in the Constitution bars all alternatives; second, judges enjoy "absolute independence," not only from Congress and the Executive, but from other judges as well; third, the Article III provision that judges "shall hold their offices during good behavior" affords them special insulation from removal except by impeachment. Contemporary interest is heightened by Congressman Gerald Ford's proposal, in which 109 other Representatives joined, to impeach Justice William O. Douglas for "high crimes and misdemeanors." Apparently aware that the alleged misconduct may fall short of "high crimes and misdemeanors," Congressman Ford maintains that impeachment comprehends departures from "good behavior."<sup>6</sup> If judges are removable only by impeachment, as Justice Douglas asserted in his *Chandler* dissents,<sup>7</sup> and if "high crimes and misdemeanors" does not include all "misbehavior," it follows that judges guilty of misbehavior not amounting to impeachable misconduct are sealed into office, notwithstanding the teaching of the common law that tenure "during good behavior" is terminated by bad behavior. Three major questions emerge. First, does impeachment furnish the exclusive mode for removal of judges; second, do impeachable offenses—"high crimes and misdemeanors"—embrace all infractions of "good behavior"; and third, if they do not, what alternative method of removal for nonincluded infractions is available? These are problems that have yet to receive a satisfactory resolution;<sup>8</sup> bald assertion has too often substituted for analysis, proceeding from assumptions that are at war with the intention of the Framers. Hopefully, a re-examination of the historical and textual materials may throw fresh light on the issues.

It will serve to clarify analysis if we bear in mind the differences in provenance, objectives and procedures between "high crimes and mis-

unnecessary squabble." 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 281 (1937). When this proposal came to Peters' ears, he wrote, "I think they are charging a cannon to shoot a mosquito." *Id.* at 289 n.1.

6. 116 CONG. REC. H3113-14 (daily ed. April 15, 1970); Viorst, *Bill Douglas Has Never Stopped Fighting the Bullies of Yakima*, N.Y. Times, June 14, 1970, § 6 (Magazine), at 8, 32.

7. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting) [hereinafter cited as *Chandler II*]; *Chandler v. Judicial Council of the Tenth Circuit*, 382 U.S. 1003, 1005-06 (1966) (Black, J., dissenting, with Douglas, J., concurring) [hereinafter cited as *Chandler I*].

8. Professor Kurland states with respect to removal of judges, "There is more literature than learning." Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 668 (1969). Professor Stolz refers to the opposing views of Professor Burke Shartel and Judge Merrill Otis as "some distinguished though partisan scholarship of about thirty years ago." Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659, 660 (1969).

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demeanors" and "good behavior." The former phrase is found in Article II, § 4, the Executive Article of the Constitution: "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." Elsewhere I have shown that "high crimes and misdemeanors" fell into recognizable categories at common law, that the Framers adopted the phrase in its "limited," "technical meaning," and contemplated that it would be employed only for "great offenses."<sup>9</sup> At common law, impeachment was a criminal proceeding, brought by the House of Commons before the House of Lords (under the "course of Parliament" as distinguished from the general criminal law) which resulted both in removal from office and in severe penalties. Generally speaking, it was employed to remove offenders whom the King refused or neglected to remove. The provision for judicial tenure "during good behavior" is located in Article III, § 1, the Judicial Article. Derelictions from "good behavior" were reachable in the English courts by a proceeding to forfeit the office. It was brought by one who appointed to either private or public office, or by his agent, and its sole object was to remove the misbehaving appointee. As will appear, the standard of "misbehavior" was broader than that of "high crimes and misdemeanors." In sum, at common law there was a civil forfeiture proceeding for "misbehavior" brought in a court, and a criminal impeachment proceeding brought by and in the Parliament. Never, so far as I could discover, did an English impeachment charge a breach of "good behavior"; instead the stock charges were "high treason and other high crimes and misdemeanors." The intermixture of these quite distinct common law procedures and doctrines has bred confusion in the United States.

### I. Good Behavior

#### A. *Its Common Law Connotations*

Only judges "hold their offices during good behavior"; no other

9. Berger, *Impeachment for "High Crimes and Misdemeanors,"* in *The Henry M. Hart, Jr. Memorial Festschrift*, 44 S. CAL. L. REV. — (1971) [hereinafter cited as Berger, *Festschrift*]. In that article I conclude that at common law impeachment did not require an offense punishable under the general criminal law, that several provisions in our Constitution indicate it was not designed to be a criminal proceeding, and that the phrase "high crimes and misdemeanors" was deemed by the Framers to have a limited, technical meaning rather than to confer unlimited power to impeach. *See also* pp. 1511, 1512-13 *infra*. The categories of "high crimes and misdemeanors," roughly, were misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and advice of pernicious measures. Berger, *Festschrift*, *ibid*.

officer has such tenure. The President and Vice President are elected for a term; and civil officers, who with the President and Vice President are the subjects of impeachment, are appointed for indeterminate terms. "Good behavior" is commonly associated with the Act of Settlement (1700)<sup>10</sup> which granted judges tenure *quamdiu se bene gesserint*, that is, for so long as they conduct themselves well, and provided for termination by the Crown upon the Address (formal request) of both Houses of Parliament.<sup>11</sup> The origin of "good behavior," however, long antedates the Act. Judge St. George Tucker, a pioneer commentator on the Constitution, noted in 1803 that

these words (by a long train of decisions in England even as far back as the reign of Edward the third) in all commissions and grants, public and private, imported an office or estate, for the life of the grantee, determinable only by his death, or breach of good behaviour.<sup>12</sup>

So it had been indicated by Coke;<sup>13</sup> and in 1693 Chief Justice Holt understood Coke to refer to "an estate for life determinable upon misbehaviour," and declared that "'during good behaviour' is during life; it is so long as he doth behave himself well . . ."<sup>14</sup> In the Pennsylvania Ratification Convention, Chief Justice McKean explained that "the judges may continue for life, if they shall so long behave themselves well";<sup>15</sup> and citations can be multiplied. When Hamilton stated that "good behavior" was copied from the English model he stated the obvious.<sup>16</sup>

It only confuses matters to set life tenure apart from tenure "during good behavior," as Dean Kramer and Professor Barron have done, and to read various shorthand references to judicial tenure as "life tenure," which "taken at face value . . . appear to preclude judicial removal," that is, removal by judges.<sup>17</sup> For at common law "life tenure" itself

10. John Taylor of Caroline stated of "good behavior" tenure, "It was invented in England to counteract the influence of the crown over the judges." Quoted in Carpenter, *Repeal of the Judiciary Act of 1801*, 9 AM. POL. SCI. REV. 519, 525 (1915). See also Ross, "Good Behavior" of Federal Judges, 12 U. KAN. CITY L. REV. 119 (1944); Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior,"* 35 GEO. WASH. L. REV. 455, 456 (1967).

11. The Act of Settlement, 12 & 13 Will. 3, c. 2, § 3. For further discussion of the Act, see pp. 1500-01 *infra*.

12. ST. G. TUCKER, in 1 W. BLACKSTONE, COMMENTARIES App. 353 (Tucker ed. 1803).

13. COKE ON LITTLETON 42a.

14. *Harcourt v. Fox*, 1 Show. K.B. 426, 506, 536, 89 Eng. Rep. 680, 720, 736 (1693).

15. 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE CONSTITUTION 539 (2d ed. 1836).

16. THE FEDERALIST No. 65, at 425; No. 78, at 511 (Mod. Lib. ed.) (A. Hamilton).

17. Kramer & Barron, *supra* note 10, at 455.

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was conditioned on "good behavior," and was determined by the grantee's misbehavior.<sup>18</sup> "Good behavior," said Coke, "is no more than the law would have implied, if the office had been granted for life."<sup>19</sup> Bacon's Abridgment explains more fully,

If an office be granted to a Man to have and enjoy so long as he shall behave himself well in it; the Grantee hath an Estate of Freehold in the Office; for since nothing but his Misbehaviour can determine his Interest, no Man can prefix a shorter term than his Life; since it must be by his own Act (which the Law does not presume to foresee) which only can make his Estate of shorter Continuance than his Life.

And, Bacon continues, under "a Grant to a Man for so long Time as he shall behave himself well . . . his Misbehaviour in each Case determines his Interest."<sup>20</sup>

### B. *Scire Facias* to Determine Misbehavior: The Judicial Role

When an office held "during good behavior" is terminated by the grantee's misbehavior, there must be an "incident" power "to carry the law into execution" if "good behavior" is not to be an impotent formula.<sup>21</sup> English law provided a proceeding to forfeit the office by a writ of *scire facias*.<sup>22</sup> An act "contrary to what belongs to his office," resulted in forfeiture of the office, as appears in the Abridgments of Viner and Bacon, and in the Digest of Comyns,<sup>23</sup> which faithfully reflect the cases.<sup>24</sup> The writ of *scire facias*, said Blackstone, was the remedy

18. Kramer & Barron, *id.* at 455, notice "some cases" which utter such learning but apparently regard them as one of two conflicting lines of authority.

19. 4 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 117; *cf.* *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

20. 3 M. BACON, A NEW ABRIDGMENT OF THE LAWS OF ENGLAND "Offices and Officers" (H) 733 (1st ed. 1740).

21. Speaking in *Rex v. Richardson*, 1 Burr, 517, 539, 97 Eng. Rep. 426, 438 (1758), of the power to remove an officer unfit for office, Lord Mansfield declared, "It is necessary to the good order and government of corporate bodies, that there should be such a power . . . Unless the power is incident, franchises or offices might be forfeited for offenses; and yet there would be no means to carry the law into execution." To the same effect, Lord Bruce's Case, 2 Str. 819, 820, 93 Eng. Rep. 870 (1728). In 1862, the English Crown law officers rendered an opinion with reference to judicial "good behavior" tenure that "when a public office is held during good behaviour, a power [of removal for misbehaviour] must exist somewhere; and when it is put in force, the tenure of the office is not thereby abridged, but it is forfeited and declared vacant for non-performance of the condition on which it was originally conferred." Quoted in I A. Todd, PARLIAMENTARY GOVERNMENT 192 (Walpole ed. 1892).

22. 3 M. BACON, *supra* note 20, at (M) 742-43; 4 J. COMYNS, A DIGEST OF THE LAWS OF ENGLAND "Officer" (K) 259 (1766); and *see* note 26 *infra*. The writ of *quo warranto* has replaced *scire facias*. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 887-88 (1950).

23. 16 C. VINER, GENERAL ABRIDGMENT OF LAW AND EQUITY "Officers and Offices" (N) 122 (1743); 3 M. BACON, *supra* note 20, at (M) 741; 4 J. COMYNS, *supra* note 22, at (K) 255.

24. "[E]very voluntary act done by an officer contrary to that which belongs to his

to repeal a patent in case of forfeiture.<sup>25</sup> It is true that this procedure found employment with respect to lesser officials, rising no higher than a Recorder, a lesser judge;<sup>26</sup> and Judge Merrill Otis correctly stated that there is no English case wherein a judge comparable to a federal judge was removed in a judicial proceeding.<sup>27</sup> Since there was admittedly an established judicial procedure to forfeit an office upon "misbehavior," the Otis argument is merely that there is no precise precedent for application of that procedure to judges. That argument does not vitiate the "judicial power," for that power, as will appear, turns on quite other considerations; at most the argument goes to the absence of a special *remedy*, and this despite the historical growth of the common law by application of a principle to analogous circumstances when the situation presented itself. There was little or no occasion to remove judges by *scire facias* because for the most part they were appointed "at pleasure,"<sup>28</sup> and could be unceremoniously removed, as James' dismissal of Coke testifies.<sup>29</sup> When rare "good behavior" appointees were threatened by arbitrary royal removal, they insisted on the protection of *scire facias* where the issue of misbehavior could be tried judicially.

Among the exceptional judicial appointments for "good behavior" was that of the Chief Baron of the Exchequer.<sup>30</sup> In 1628 the post was occupied by Sir John Walter; and Charles I

was dissatisfied with his opinion in the case of parliament men imprisoned for seditious speeches in parliament, and ordered him to surrender his patent [of appointment]. He refused to do so, on the ground that his grant was for good behavior, and that he ought not to be removed without a proceeding on a *scire facias* to determine "whether he did *bene se gerere* or not," as Whitelocke says.<sup>31</sup>

office is a forfeiture of his office . . ." Earl of Pembroke v. Sir H. Barkeley, Popham 116, 118, 79 Eng. Rep. 1223, 1224 (1597); Earl of Shrewsbury's Case, 9 Co.Rep. 46b, 50a, 77 Eng. Rep. 798, 804 (1611); Regina v. Bailiffs of Ipswich, 2 Salk. 435, 91 Eng. Rep. 378 (1707).

25. 3 W. BLACKSTONE, COMMENTARIES \* 260-61.

26. The cases are set forth in Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, in SUPREME COURT REVIEW 135, 153-54 (P. Kurland ed. 1969).

27. Otis, *A Proposed Tribunal: Is It Constitutional?* 7 U. KAN. CITY L. REV. 3, 49 (1938). Shartel, *supra* note 22, at 882 mistakenly cites 4 E. COKE, *supra* note 19, at 117 for the proposition that judges "holding 'during good behavior' . . . were removable on *scire facias* . . ." All that appears at the cited page is that the Chief Baron of the Exchequer has "good behavior" tenure in contrast to other judges who held "at pleasure."

28. See McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 218 (1913); 7 E. FOSS, THE JUDGES OF ENGLAND 4 (1864); cf. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 503-10 (1924).

29. See 5 W. HOLDSWORTH, *supra* note 28, at 430-40 (2d ed. 1937).

30. 4 E. COKE, *supra* note 19, at 117.

31. McIlwain, *supra* note 28, at 221; 6 E. FOSS, *supra* note 28, at 372 (1857); cf. Vandamm v. Deconell, W. Jones 228, 82 Eng. Rep. 120 (1631).

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Thus a highly placed judge affirmed that his office could be forfeited for misbehavior in a *scire facias* proceeding. At a time when impeachments were humming around the heads of Charles' ministers,<sup>32</sup> Chief Baron Walter wisely preferred trial by judges to the political ordeal of impeachment. In 1672, Charles II, following the example of his father, tried to dismiss Sir John Archer, a Justice of Common Pleas, a court which ranked with King's Bench. Justice Archer also "refused to surrender his patent without a *scire facias*."<sup>33</sup> Both the Walter and Archer cases were cited in 1692 before Chief Justice Holt and his associate Justices by Serjeant Levinz, who had himself been a Justice; and Holt made the significant remark that "our places as Judges are so settled, only determinable upon misbehaviour."<sup>34</sup>

That *scire facias* could be employed for removal of a judge was again indicated in an opinion rendered in 1753 by Attorney General Dudley Ryder and Solicitor General William Murray, both later to be Chief Justices, Murray to become better known as Lord Mansfield. Governor Clinton of New York had improvidently made a grant to Chief Justice de Lancey of a commission for "good behavior" instead of the customary "at pleasure" appointment, and subsequently the two were at odds. Ryder and Murray stated, "We think the Governor should not have granted this commission different from the usage; but as the power given by the commission is general, we apprehend the grant is good in point of law, and cannot be revoked without misbehaviour."<sup>35</sup> Ryder and Murray were too practiced to employ "revoked" for the technical term "impeached"; and it is highly improbable that they confused "misbehaviour," the classic *scire facias* formula, with impeachment, which proceeds for "high crimes and misdemeanors." Indeed, advice that it required nothing less than a full dress impeachment by Parlia-

32. *E.g.*, from the impeachment of Lord Chancellor Bacon in 1620 to that of the Duke of Buckingham in 1626. See A. SIMPSON, *A TREATISE ON FEDERAL IMPEACHMENTS* 91-95 (1916).

33. "Justice Archer was amoved from sitting in the Court of Common Pleas, *pro quibusdam causis mihi incognitis*; but the judge having his patent to be judge *quamdiu se bene gesserint*, refused to surrender his patent without a *scire facias*, and continued justice of that Court, though prohibited to sit there . . ." T. Raym. 217, 83 Eng. Rep. 113 (1674). See also McIlwain, *supra* note 28, at 223; 7 E. Foss, *supra* note 28, at 52-53.

34. *Harcourt v. Fox*, 1 Show. K.B. 426, 506, 514, 535, 89 Eng. Rep. 680, 720, 722, 724, 734 (1692-1693). This was a suit to restore to office a Clerk of the Peace who held for so long as he "shall well demean himself in his said office," *id.* at 426, 680; *cf. id.* at 536, 736, and who had been summarily dismissed. Holt, C.J., held that such persons were "removable" upon "misbehaviour," *id.* at 536, 738, and that "misbehaviour should forfeit their places," *id.* at 536, 736. For this *scire facias*, not impeachment, was the remedy, so that Holt's remark apparently refers back to the Walter and Archer refusals to surrender office without a *scire facias*.

35. 5 *DICTIONARY OF AMERICAN BIOGRAPHY*, "James de Lancey" 212 (1930); *OPINIONS OF EMINENT LAWYERS* 491 (G. Chalmers, 1st Amer. ed. 1858); see note 89 *infra*.

ment to undo a mistaken appointment in a Colony of the far-flung Empire would have been grossly unpalatable. This view of the law was later summarized by Lord Chancellor Erskine when, in the course of a debate in the House of Lords in 1806 upon whether to employ an Address for the removal of Justice Luke Fox of Common Pleas in Ireland, he inquired,

Were their Lordships afraid to trust the ordinary tribunals upon this occasion, to let the guilt or innocence of the honorable judge be decided . . . upon a *scire facias* to repeal the patent by which he held his office?<sup>36</sup>

In his *Life of Erskine*, Lord Campbell, himself a Lord Chancellor, who did not shrink from pointing out errors in the views of his predecessors, quoted this passage without comment,<sup>37</sup> from which we may infer that he deemed Erskine to state the law. Eminent scholars, among them Holdsworth, consider that removal of judges by *scire facias* remains available in England.<sup>38</sup> *Scire facias* may consequently be regarded as

36. 7 PARL. DEB. 751, 770 (1806). Thus a great judge preferred to have the misconduct of a judge tried by judges. A similar choice was made by Denman, later Lord Justice Denman, in 1830 when, arguing in behalf of Sir Jonah Barrington, a judge of the court of admiralty of Ireland, to avert removal by Address, he stated, "a *scire facias* could have been sued out to abrogate the patent of office." 24 PARL. DEB. 966 (Hansard, New Ser. 1830).

In *Floyd v. Barker*, 12 Co. 23, 77 Eng. Rep. 1305 (Star Chamber, 1608), a suit against a judge for acts performed in his judicial capacity, Coke delivered himself of an overbroad dictum that for such acts a judge could not be tried before "any other judge" but only before the King. But this dictum exerted no influence on the views of the judges and jurists mentioned above as to the availability of *scire facias*.

37. 6 J. CAMPBELL, LIVES OF THE CHANCELLORS 559-60 (1848-1850).

38. Holdsworth appears in 6 HALSBURY, LAWS OF ENGLAND 609 (1932); he is credited with the chapter on constitutional law. See also R. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 289 n.1 (5th ed. 1967); H. BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO THE COMMON LAW, 789, 791 (1866); McIlwain, *supra* note 28, at 225; 2 W. ANSON (Part I), LAW AND CUSTOM OF THE CONSTITUTION 235 (4th ed. 1935); 1 A. TODD, *supra* note 21, at 192-93; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 146 (1929); cf. note 128 *infra*.

The arguments for judicial forfeiture proceedings have been deemed "inconclusive . . . since no cases involving an attempted use of such process have arisen in England since the Act of Settlement . . ." Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330, 335 (1937). But since provision in that Act for removal by Address, there also has been but one such attempt, in 1830. H. WADE, ADMINISTRATIVE LAW 281 (2d ed. 1967).

A number of expressions are contrary to those of Holdsworth *et al.* So 8 HALSBURY, *supra* at 590 (1933), stated that judges holding during good behavior are "only removable on an address . . ." This chapter on "Courts" by Messrs. Inskip and Bridgman takes no account of Holdsworth's statement to the contrary in volume 6, *supra*. So too, F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 313 (1913), states that the provision of the Act of Settlement bars removal except upon "conviction for some offense, or on the address of both houses." In his preface to this work, H.A.L. FISHER, *id.* at vi, states it is an early work which "does not claim to be based upon original research; for much of his information [Maitland] was confessedly content to draw upon the classical text-books . . ." For reasons hereinafter set out, I consider that the majority view stands more firmly. Pp. 1500-01 *infra*.



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an established medium for the determination that an office held "during good behavior" was terminated by misbehavior; and leading judges had recognized its availability for the trial of judicial misbehavior.

When the Framers employed "good behavior," a common law term of settled meaning, with no indication that they were employing it in a new and different sense, it might be presumed that they implicitly adopted the judicial enforcement machinery that traditionally went with it.<sup>39</sup> For as Madison explained in the Virginia Ratification Convention, "where a technical word was used all the incidents belonging to it necessarily attended it," an explanation in which John Marshall, Judge Pendleton and Edmund Randolph concurred.<sup>40</sup> Minimally, if "good behavior" would be ineffectual without *scire facias* to try misbehavior, it may be posited that the Framers would not have excluded the writ's employment. For this we have the test laid down by Chief Justice Marshall who, be it remembered, had himself been a vigorous participant in the Virginia Ratification Convention. He said in the *Dartmouth College Case*,

It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed . . . . It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it . . . .<sup>41</sup>

It is not easy to attribute to the Framers an exclusory purpose that would deprive "good behavior" of meaning.

Thus far I have considered the matter in the narrow compass to which prior discussions have been confined. But it is a mistake to stop with the inquiry whether or not *scire facias* was available at common law for the enforcement of "good behavior" against judges. When the Constitution limited judicial tenure to "during good behavior," the Framers self-evidently did not intend that a judge who behaved badly and thus violated the condition of his tenure should be continued in office. So much the common law teaches us with respect to "good behavior" tenure in general; indeed it represents plain common sense.<sup>42</sup>

39. Cf. notes 21 *supra* and 261 *infra*. Cf. *United States v. Wilson*, 32 U.S. (7 Peters) 150, 160 (1833), where Chief Justice Marshall stated respecting a "pardon," "As this power has been exercised from time immemorial by the executive of that nation . . . to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used . . . ."

40. 3 J. ELLIOT, *supra* note 15, at 531, 546, 558-59, 573. The issue was whether the provision for jury trial carried with it as an incident the right to challenge jurors.

41. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819).

42. Justice Frankfurter reminded us to read all enactments "with the saving grace of

If, as I propose to demonstrate, impeachment for "high crimes and misdemeanors" did not embrace removal for "misbehavior" which fell short of "high crimes and misdemeanors,"<sup>43</sup> some other means of removal must be available,<sup>44</sup> unless we attribute to the Framers the Dickensian design of maintaining a "misbehaving" judge in office.

There are no "dead" words in the Constitution, said Hatton Sumners, Chairman of the House Judiciary Committee,<sup>45</sup> in championing removal by judges of judges who misbehaved. That every word in the Constitution must be given effect is the rule.<sup>46</sup> To give meaning to a tenure limited to "good behavior" there must be a means of termination for misbehavior. In this view, it is of no moment that no express provision was made. For, in the words of Justice Story, "The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also . . ."<sup>47</sup> Were it therefore assumed that *scire facias* was not and is not available for the removal of judges, it would be open to Congress, under the "necessary and proper" clause, to provide a *remedy* for effectuation of the Constitutional design.

Given common law judicial determinations of forfeitures upon breach of condition subsequent, the most that can be claimed by Otis and his followers is that the common law provided no *remedy* for forfeiture of *judicial* office—an omission that, as has been noted, was fortuitous,<sup>48</sup> and that is curable under the principle of common law growth

common sense," *Bell v. United States*, 349 U.S. 81, 83 (1955); and *United States v. Cook*, 384 U.S. 257, 262 (1966), stated that the canon that penal statutes should be strictly construed "is not an inexorable command to override common sense . . ."

43. Pp. 1511, 1512-13 *infra*.

44. See note 21 *supra*.

45. 81 CONG. REC. 6164 (1937). Speaking to the "Judicial Good Behavior Bill" in 1937, Sumners said, "If the Senate cannot make vital the 'good behavior' provision in the judicial tenure clause, and clearly it cannot do it, what agency of government can do it? The historical background precludes any notion that the President can effectuate those words, because those words went into the framework of the English constitution, from which we appropriated them, in order to prevent the Executive from having anything to do with it. So by process of elimination we come to a court as the only agency of government that can keep those words from being dead words in the Constitution." *Ibid.*

46. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). "No word in the instrument . . . can be rejected as superfluous or unmeaning . . ." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840) (per Taney, C.J.).

47. *Prigg v. Commonwealth of Pennsylvania*, 41 U.S. (16 Pet.) 539, 619, 615 (1812). The classic expression is that of Marshall, C.J.: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Moreover, "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation . . ." *Jarrott v. Moberly*, 103 U.S. 580, 586 (1880).

48. See pp. 1479-80 *supra*.

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by analogy. Remedies were not frozen by the Constitution to those extant in 1788. Marshall laid claim in *Marbury v. Madison* to the common law power to fashion a remedy for every right.<sup>49</sup> And Congress, over the years, has provided an array of remedies unknown to the common law; and were a new remedy required, it is open to Congress to provide it.

Enabling legislation may also be viewed as an additional grant of *subject matter* jurisdiction—forfeitures of judicial office—which is quite different from an attempt to expand the Article III “judicial power.” In a grudging concession, Judge Otis stated, “It can well be argued that an action to forfeit the office of a judge for misconduct . . . is a true ‘case’ or ‘controversy.’”<sup>50</sup> Certainly the contrary cannot be maintained. A grant “during good behavior” is simply an estate on a condition subsequent, which is defeated or forfeited by nonperformance of the condition.<sup>51</sup> Thereupon the grantor is free to claim the forfeited estate; and if the grantee controverts the charge of “misbehavior” there is a “case or controversy,” a “real dispute between the plaintiff and defendant.”<sup>52</sup> Existence of an exact precedent for the particular dispute, *e.g.*, forfeiture of judicial office, is not the test of Article III “judicial power.” Were that the test many unprecedented “disputes” could never have been adjudicated. Instead, “judicial power” is activated when an actual dispute between adverse parties is presented.

In sum, since the judicial power to declare a forfeiture on breach of a condition subsequent existed at the adoption of the Constitution, and since a dispute whether the condition was breached constitutes a “case or controversy,” I consider that it falls within the “judicial power.” Consequently, legislation that would set up a special court within the judiciary branch to adjudicate disputes whether a judge breached the “good behavior” condition would merely entail a grant of fresh *subject matter* jurisdiction, or, on the dubious assumption that forfeitures of

49. 5 U.S. (1 Cranch) 137, 163 (1803). That we are merely dealing with the question of “remedy” is confirmed in 3 W. BLACKSTONE, COMMENTARIES \*260-61: “where the patentee hath done an act that amounts to a forfeiture of the grant . . . the remedy to repeal the patent is by a writ of *scire facias* . . .” See also note 22 *supra*.

50. Otis, *supra* note 27, at 36.

51. 2 W. BLACKSTONE, COMMENTARIES \*155; *cf. id.* at \*152-53. Blackstone refers to “all forfeitures which are given by law [see note 169 *infra*.] of life estates . . . for any acts done by the tenant himself, that are incompatible with the estate which he holds” and instances “a grant . . . to a man of an office . . .” *id.* at \*153. See also 1 A. TODD quotation, *supra* note 21.

52. *Lord v. Veazie*, 49 U.S. (8 How.) 251, 254 (1850) (per Taney, C.J.). There is a “controversy” where there is “a dispute between parties who face each other in an adversary proceeding. . . . [parties who] had taken adverse positions with respect to their existing obligations.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937).

judicial office were unavailable at common law, the creation of a new *remedy*.

The exercise of the "judicial power" is required because it was the design of the Framers to limit Presidential and Congressional interference with the judiciary.<sup>53</sup> Outside the impeachment clause, Congress enjoys no "judicial" power to remove a judge from office.<sup>54</sup> Given a "case or controversy" the Congressional grant of fresh subject matter jurisdiction or the creation of a new remedy would not represent a delegation of Congressional power. Instead, such a grant would constitute action to supplement the "judicial power" under the "necessary and proper" clause or under the power of Congress to regulate the jurisdiction of the inferior courts.<sup>55</sup>

Since the unavailability of impeachment to enforce "good behavior" is pivotal to this reading, it is necessary to examine the two competing claims: (1) impeachment is the exclusive means provided by the Con-

53. See p. 1526 *infra*. In 1783 a petition was filed with the Virginia Council of State, an executive body, to remove a justice of the peace, J.P. Posey, from office for "misdemeanors, disgraceful to the Character . . . [of] a Justice of the peace." The Council declined to act, saying that "the Law authorizing the Executive to enquire into the Conduct of a Magistrate and determine whether he has or has not committed a certain fact is repugnant to the Act of Government, contrary to the fundamental principles of our constitution and directly opposite to the general tenor of our Laws." 3 JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA 222 (W. Hall ed. 1952). For this citation I am indebted to an unpublished Senior Thesis submitted in 1969 by Timothy S. Perry to the Woodrow Wilson School of Public and International Affairs, Princeton University.

54. See notes 123, 141, 144, and pp. 1503, 1526 *infra*. The impeachment power is manifestly "judicial." Art. I, § 3 (6) empowers the Senate to "try all impeachments"; Art. III, § 4 provides for removal on "impeachment for, and conviction of, treason" etc.; Art. I, § 3 (7) provides that "Judgment in cases of impeachment"; Art. III, § 2 (3) refers to "The trial of all crimes, except in the case of impeachment"; all of which plainly imply a judicial trial. Such was the view spread before the Senate by Jefferson's Manual. T. JEFFERSON, MANUAL OF PARLIAMENTARY PRACTICE, reprinted in SENATE MANUAL 63-169 (55th Cong. 1899) at 149-53. The record of the Blount impeachment (1797) recites that "the Senate formed itself into a High Court of Impeachment, in the manner directed by the Constitution." F. WHARTON, STATE TRIALS OF THE UNITED STATES 257 (1849).

Judge Otis had an "easy answer" to Shartel's view that impeachment constitutes the "only way in which Congress" may remove. Impeachment, said Otis, was not "legislative" but "judicial." Otis, *supra* note 27 at 27-28. The decisive fact, however, is that this is the only grant of power to Congress to interfere with the "good behavior" tenure. It is the limited grant, underscored by rejection of removal by Address, not the nature of the granted power, which is conclusive.

55. Article I, § 8 (18) empowers Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." For the power of Congress over the jurisdiction of the inferior federal courts, see *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850).

I have been asked whether the "good behavior" clause constitutes a grant of power, either to Congress or to the courts. In my judgment, it constitutes no grant to either, but merely describes the *duration* of the granted tenure. When the condition subsequent of the grant is breached, and the breach is disputed, there exists Article III "judicial power" to determine the "case," subject to a Congressional grant of *subject matter* jurisdiction. At common law, tenure "during good behavior" did not allow arbitrary dismissal but required a formal trial, and in adopting the common law phrase, the Framers must be taken to have the same trial in view.

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stitution for removal of judges, and (2) impeachment for “high crimes and misdemeanors” embraces infractions of “good behavior” so that an alternative remedy is superfluous. Of these in turn.

### II. The “Impeachment is Exclusive” Argument

The government which has a right to do an act . . . must . . . be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.<sup>56</sup>

As Chief Justice Marshall’s remarks in *McCulloch v. Maryland* indicate, those who would dispute the availability of an “appropriate means” for the removal of a judge guilty of bad behavior must “take upon themselves” the burden of proof. And, as a guide to consideration of the “exclusivist” argument, I suggest another Marshall statement in the same case: “Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers . . . the intention of impeding their exercise by withholding a choice of means?”<sup>57</sup> In terms of “good behavior,” a power to declare that the tenure was terminated by bad behavior is reasonably implied, and “what is reasonably implied is as much a part of [the Constitution] as what is expressed.”<sup>58</sup> Where are “the words [which] imperiously require” that impeachment be the sole means for removal of judges, once it is accepted that impeachment cannot reach all breaches of “good behavior”?

#### A. *The Constitutional Text*

No express terms making impeachment the exclusive means of removal are contained in the Constitution. Judge Otis sought to locate them in the Article I, § 2 provision granting the House “the sole power of impeachment,” and the Article I, § 3 provision giving the Senate “the sole power to try all impeachments.” He labored mightily to prove that “sole” means “sole,”<sup>59</sup> a proposition no one would deny, but he

56. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409-10 (1819).

57. *Id.* at 408.

58. *Dillon v. Gloss*, 256 U.S. 368, 373 (1921): “That the Constitution contains no express provision on the subject is not itself controlling; for with the Constitution . . . what is reasonably implied is as much a part of it as what is expressed.”

59. Otis, *supra* note 27, at 24-28. Professor Kurland quotes, presumably with approval, Congressman Celler’s deduction from the “sole power” provisions: “The use of the word ‘sole’ in those two particulars undoubtedly is most significant . . . . [T]he conclusion is

merely proved that *no other body* can bring or try *impeachments*. His deduction from "sole" that "the House of Representatives has the sole power to charge civil officers of the United States with misconduct for the purpose of securing their removal"<sup>60</sup> begs the question: *is* impeachment the "sole" means of removal? The fact that Congress has the sole right to bring and try *impeachments* does not answer the question whether there are *other methods* of removal. Judge Otis himself read into "the sole power to charge civil officers . . . with misconduct" a "necessarily implied exception to the otherwise all exclusive meaning of the word 'sole' . . . . *It does not exclude another method of removing those civil officers whose appointment is at the absolute or conditional pleasure of the officer appointing them.*"<sup>61</sup> This "necessarily implied exception" is merely an accommodation to an uncomfortable datum—the First Congress' rejection of impeachment as the exclusive means for removal of executive civil officers; it is an abandonment of an interpretive canon run over by a brute fact. Common sense counsels against freezing countless officials into lifetime appointments, for it would be utterly impracticable to require Congressional trials for such a multitude.<sup>62</sup> But common sense may also be revolted by insistence that trials of judicial misconduct, though much fewer in number, must, come what may, be conducted by Congress alone. For Congress has more pressing and important tasks, which it alone can and must perform, and which should not be deferred while it sits in judgment for from three to six weeks on charges of judicial misconduct. Weighed against the crucial and tormenting national interests which occupy the Congressional stage, such issues are really too picayune.<sup>63</sup> We are no less free than Judge Otis to read another "necessarily implied exception" into the allegedly exclusive word "sole," for such a reading does not turn on the demands of remorseless logic but on practical considerations to which others may attach more weight than did Judge Otis.

inescapable that the only way you can try these judges is by the method that the Constitution allows us . . . ." Kurland, *supra* note 8, at 692.

60. Otis, *supra* note 27, at 24. The naming of the Senate as "sole" tribunal is perhaps explicable by the fact that, as Madison said, selection of the tribunal "was among the most puzzling articles of a republican Constitution . . . . The diversified expedients adopted in the Constitutions of the several States prove how much the compilers were embarrassed on this subject." Quoted in G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 142 (1969). In the Convention, the shift from a tribunal of judges to the Senate was long debated and accomplished late in the Convention. See p. 1496 *infra*.

61. Otis, *supra* note 27, at 24.

62. See note 85 *infra*.

63. See notes 2, 4 *supra*, and p. 1515 *infra*; cf. note 5 *supra*.

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### B. *Expressio Unius, Exclusio Est Alterius*

A second "exclusive" argument drawn from the face of the Constitution reflects the maxim *expressio unius, exclusio est alterius*, and was given its most noted formulation by Hamilton in Federalist No. 79:

The precautions for their [judges'] responsibility, are comprised in the article respecting impeachments . . . . This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.<sup>64</sup>

That view has recently been espoused by Justices Black and Douglas in notable dissents.<sup>65</sup> To one who for the first time encounters the argument that the express provision for impeachment excludes all other means of removal, it comes as a surprise that a canon of construction should be exalted to an impassable Constitutional bar.<sup>66</sup> Such canons, the Supreme Court has repeatedly indicated, merely express rules (and not "inescapable" rules) of construction, not of law.<sup>67</sup> "Nothing," said a great judge, Learned Hand, "is so likely to lead us astray as an abject reliance upon canons of any sort; so much the whole history of verbal interpretation teaches, if it teaches anything."<sup>68</sup>

Indeed Hamilton himself refused to regard the maxim as conclusive where its application "would be unnatural and unreasonable":

Is it natural to suppose that a command to do one thing, is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain, that an injunction of the trial by jury in certain cases [criminal] is an interdiction of it in others.<sup>69</sup>

In this he was echoed by the Ratification Conventions, where a vigorous campaign was waged for an express provision for jury trial in civil cases

64. THE FEDERALIST No. 79, *supra* note 16, at 513-14.

65. Chandler II, 398 U.S. at 136 (1970), Douglas, J., dissenting; Black, J., dissenting, *id.* at 141-42.

66. Black and Douglas ally it to a theory of "absolute independence," of which more anon.

67. United States v. Barnes, 222 U.S. 513, 519 (1912); Jarecki v. G.D. Searle & Co., 357 U.S. 303, 307 (1961).

68. Van Vranken v. Helvering, 115 F.2d 709, 711 (2d Cir. 1940); *cf.* United States v. Universal C.I.T. Credit Corp., 344 U.S. 213, 221 (1952): rules of construction "do not solve the special difficulties in construing a particular statute."

69. THE FEDERALIST No. 83, *supra* note 16, at 540. As Elias Boudinot said in the First Congress: "it is nowhere said that officers shall never be removed but by impeachment; but it says they shall be removed on impeachment." 1 ANNALS OF CONG., *supra* note 2, at 468.

on the ground that otherwise it was likely to be barred by the express provision for jury trial in criminal cases. The doubters were reassured by Marshall, Pendleton, Edmund Randolph, C. C. Pinckney and James Wilson.<sup>70</sup> Wilson stated in Pennsylvania, "It is very true that trial by jury is not mentioned in civil cases . . . it is very improper to infer from hence that it was not meant to exist under this government."<sup>71</sup> Manifestly *exclusio unius* was no fetish for the Founders. And even with the "necessary independency" of the judiciary in mind, Hamilton made yet another breach in the maxim: insanity of judges, he said, "without any formal or express provision, may be safely pronounced to be a virtual disqualification,"<sup>72</sup> and presumably therefore, should justify removal. Thus he himself read an exception into the provision for impeachment, if that be the "only provision" for removal.

That practical considerations weighed more heavily with the Founders than an interpretive canon was immediately demonstrated by the First Congress which rejected the Hamiltonian "only provision" argument as an alleged bar to Presidential removal of executive officers. "Show me," said Smith in the House, "where it is said that the President shall remove from office . . . as the Constitution has not given the President the power of removability, it meant he should not have that power,"<sup>73</sup> a persuasive argument under the widely held doctrine of enumerated powers.<sup>74</sup> And he continued, "this inference is supported by that clause . . . which provides that all civil officers . . . shall be removed from office on impeachment . . ." <sup>75</sup> Although this view was strenuously maintained by a number of other Members, including Gerry, himself a Framer,<sup>76</sup> it was overcome by the argument of Madison and others that such a restrictive reading would be destructive of good government,<sup>77</sup> that, as Sedgwick said, impeachment was a "tardy,

70. Pendleton, 3 J. ELLIOT, *supra* note 15, at 546; Randolph, *id.* at 573; Pinckney, 4 J. ELLIOT 307; *cf.* Marshall, *id.* at 561.

71. 2 J. ELLIOT, *supra* note 15, at 488.

72. THE FEDERALIST No. 79, *supra* note 16, at 514.

73. 1 ANNALS OF CONG., *supra* note 2, at 457. Compare Justice Black's nothing in the Constitution "gives any indication that any judge was ever to be . . . removed from office except" by impeachment. Chandler II, 398 U.S. at 142 (1970).

74. The debaters were reminded of the rule by Lee: "This Government is invested with powers for enumerated purposes only, and cannot exercise any others whatever." 1 ANNALS OF CONG., *supra* note 2, at 524. For other citations see R. BERGER, CONGRESS V. THE SUPREME COURT 13-14, 377 n.52 (1969).

75. 1 ANNALS OF CONG., *supra* note 2, at 457.

76. Huntington, *id.* at 459; Gerry, *id.* at 473, 536.

77. Madison, *id.* at 496. Sylvester said the doctrine was "big with mischief, and likely to drive the whole Government into confusion." *Id.* at 562. Hartley said the exclusivist argument "would be attended with very inconvenient and mischievous circumstances." *Id.* at 480.



tedious, desultory road" for the accomplishment of needed removals.<sup>78</sup>

The Madison view prevailed,<sup>79</sup> ostensibly on the theory that the power of removal was a necessary correlative of the power of appointment, though many argued that the Senate therefore should participate in removals as in appointments.<sup>80</sup> Impeachment, however, Madison explained, had a special purpose; it was designed to reach a bad officer sheltered by the President, who "could be removed even against the will of the President; so that the declaration in the Constitution was intended as a *supplemental security* for the good behavior of the public officers."<sup>81</sup> This point was made again and again. Impeachment, said Boudinot, enables the House "to pull down an improper officer, although he should be supported by all the power of the Executive."<sup>82</sup> "Favoritism," said Baldwin, also a Framers, could not protect a man from the power of the House "in despite of the President" to "drag him from his place."<sup>83</sup> The point bears emphasis because it reveals first, that the Founders had learned from English history of the need for power to remove evil favorites, Presidential no less than royal, and that impeachment was in essence not an exclusive medium of removal but a breach in the separation of powers for the purpose of "supplemental security," "an exception to a principle."<sup>84</sup>

The implication of removal power drawn from the Presidential power of appointment seems to me a weaker argument for breaching exclusivity than that which associates "good behavior" tenure with its traditional termination by *scire facias*. Despite the emphasis on the relation between the power of appointment and that of removal, the motive power, in my opinion, was furnished by the exigencies of government. It simply made no sense to freeze hundreds of "civil officers" into what in effect would become life tenure, terminable only by the arduous impeachment procedure.<sup>85</sup> There were, however, other re-

78. *Id.* at 460; see also Vining's remark, quoted *supra* note 2. For similar remarks by Madison, Boudinot, Hartley and Sylvester, *id.* at 497, 375, 480, 562.

79. As Chief Justice Taft said, "Hamilton changed his view of this matter," quoting, "This mode of construing the Constitution has indeed been recognized by Congress in formal acts upon full consideration and debate; of which the power of removal from office is an important instance," citing 7 J.C. HAMILTON, WORKS OF HAMILTON 80-81, in *Myers v. United States*, 272 U.S. 52, 137, 139 (1926).

80. Bland, 1 ANNALS OF CONG., *supra* note 2, at 374; Livermore, *id.* at 381, 478; White, *id.* at 456, 467; Page, *id.* at 491. Smith quoted Hamilton's statement in *Federalist No. 77* that "The consent of [the Senate] would be necessary to displace as well as appoint," *id.* at 456, but here too the First Congress rejected Hamilton's interpretation.

81. *Id.* at 372 (emphasis added); *similiter* Vining, *id.* at 373; Bland, *id.* at 374.

82. *Id.* at 468; *similiter* Livermore, *id.* at 478.

83. *Id.* at 558; Lawrence, *id.* at 482.

84. Boudinot, *id.* at 527.

85. Boudinot rejected "perpetuity in office," *id.* at 469. Sylvester said, if impeachment

marks in the First Congress noting the special position of judges; but before examining the bearing of those remarks on the intention of the Founders, it will serve chronological coherence to examine that intention first.

### C. *The Intention of the Framers*

A search for the intention of the Framers may seem gratuitous in light of Professor Kurland's statement that "it has been made pellucidly clear by Martha Ziskind that the intention was to make impeachment the sole means of removal of federal judicial officers."<sup>86</sup> But in my opinion, her demonstration does not stand up. Referring to Shartel's view that the Constitution does not bar judicial removal of judges by *scire facias*, she put her case in a nutshell:

The clearest rejection of Shartel's argument lies in the fact that no colonial or state constitution provided for such a use for the *scire facias*, nor was a proposal made to include it during the Constitutional Convention. Even in the unreformed common law, there was a distinction between precedents and fossils.<sup>87</sup>

Erskine, Holdsworth and others regarded *scire facias* as vital rather than fossilized;<sup>88</sup> and, as we shall see, at least two of the states she cites provided for removal by courts for misbehavior, which was the purpose of the *scire facias* proceeding.

The reason why "no colonial constitution" provided for removal of judges by *scire facias* can be simply stated: almost without exception judicial appointments in the Colonies were made at the King's pleasure, terminable at his will.<sup>89</sup> On one occasion in New York, a good behavior

is "the only way of removing officers, they have all of them an inheritance in office." *Id.* at 562; and see Benson, *id.* at 373.

86. Kurland, *supra* note 8, at 668.

87. Ziskind, *supra* note 26, at 138.

88. See pp. 1480-82, and note 38 *supra*.

89. S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 135, 178 (1965); B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 105-06 (1967); G. WOOD, *supra* note 60, at 106. The English Board of Trade explained that an independent colonial judiciary would be "subversive of that Policy by which alone Colonies can be kept in a just dependence upon the Government of the Mother Country." Quoted in Klein, *Prelude to Revolution in New York: Jury Trials & Judicial Tenure*, 17 *WM. & MARY Q. (Ser. 3)* 439, 448 (1960). The "King in Council, disturbed with the growing colonial movement for judicial independence, had ordered the issuance of new instructions absolutely forbidding governors to grant judicial offices during good behavior . . ." *Id.* at 452. I am indebted for this and other Colonial citations to Professor Stanley N. Katz.

The background of the instructions appears in 9 *ARCHIVES OF THE STATE OF NEW JERSEY* (First Series 1885). Governors were cautioned that judicial "Commissions are granted during Pleasure only, agreeable to what has been the ancient Practice and usage in our said Colonies . . ." *Id.* at 321-26, 329-30. See also p. 1481 *supra*. Cf. Ziskind, *supra* note 26, at 138.

appointment was made in violation of instructions, and when the advice of the Attorney General and Solicitor General in England was sought as to the manner of dismissal, they regretfully pointed out that a forfeiture proceeding (by scire facias) would be required<sup>90</sup>—a proceeding, we may be sure, that would be brought in the name of the King, not of the Colony. Indeed, one of the grievances recited in the Declaration of Independence was that the King "made judges dependent on his Will alone for the tenure of their offices," recognition of Colonial powerlessness to interfere with their tenure. This branch of the Ziskind argument, it may be added, could with equal logic be made against the power to impeach, for impeachment of judges was likewise not a feature of Colonial practice.

In a lively, oft cited passage, John Adams painted the astonishment of his colleagues in 1774 when he suggested impeachment of judges who accepted Lieutenant Governor Hutchinson's substitution of royal salaries for the existing payment by legislative appropriations. Adams admitted that the thing was "without precedent . . . in this Province" but said that there were precedents in England, pointing to the State Trials on his shelves.<sup>91</sup> In later years he was to claim that his was the only copy of the set in Boston, indeed, "that there was not another copy . . . of those works in the United States."<sup>92</sup> It was not, however, ignorance of impeachments<sup>93</sup> but rather lack of power to impeach that accounts for the nonuse and the absence of Colonial precedents. Given

90. P. 1481 *supra*. In 1760, a similar "good behavior" appointment was made in New Jersey, when R.H. Morris was made Chief Justice. Later the Attorney General of England declared the appointment invalid because the Governor was limited to "at pleasure" appointments. 9 ARCHIVES, *supra* note 89, at 207-09, 216, 349-51, 380-81 (1885).

91. 2 J. ADAMS, THE WORKS OF JOHN ADAMS (C.F. Adams ed. 1850) 329-30; Johnson, "William Cushing," in 1 JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 57, 58 (L. Friedman & S. Israel ed. 1969).

92. 10 J. ADAMS, *supra* note 91, at 239.

93. Adams overlooked that Josiah Quincy, Jr. had published a letter in the Boston Gazette January 4, 1768, wherein he directed attention to the scope of impeachment in England and to the impeachments of leading figures across the centuries, drawing on Selden's Jud. Parl., Rushworth's Collections, and the Lord's Journal. QUINCY'S MASSACHUSETTS REPORTS 1761-1772 (1865) at 580-84. Several Colonial libraries in New York had various collections of the State Trials, P. HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK 188, 193, 196 (1939); and RUSHWORTH'S HISTORICAL COLLECTIONS (1721), which reported a number of noted impeachments—including that of the Earl of Stratford, reported in 775 folio pages of volume 8—were liberally sprinkled throughout the libraries of the Thirteen Colonies. For citations see H. COLBURN, *supra* note 3, Index "Rushworth."

In 1734 William Smith rendered an opinion to the New York Assembly in which he quoted Article 3 of the Clarendon impeachment. J. SMITH, CASES AND MATERIALS ON DEVELOPMENT OF LEGAL INSTITUTIONS 440, 442 (1965). State Trials were referred to in the 1736 Zenger proceedings. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 28, 46, 49, 72 (S.N. Katz ed. 1963). References, Professor Katz tells us, were to the second edition of 1730, the Emlyn edition, *id.* at 215. In 1737, a letter to the Pennsylvania Gazette analyzed the case of the Seven Bishops, reported in the State Trials, *id.* at 193.

the "English point of view that the judges needed protection from the caprice and parsimony of colonial assemblies,"<sup>94</sup> it is hardly to be presumed that the Crown would countenance impeachment of a royal appointee. Appreciation of the lack of power to impeach royal appointees bobs up in the Colonial records. So, the South Carolina House rejected a suggestion by the Council to impeach Chief Justice Nicholas Trott, stating that the "governor and council . . . were not a House of Lords nor a proper jurisdiction before whom any impeachment will lie."<sup>95</sup> Something of the sort also emerged in Pennsylvania in 1706 when the unicameral assembly brought impeachment charges against the agent of the Proprietor and the Governor refused to try him, insisting that the parliament of England had a "transcendent power and original jurisdiction in itself" whereas the assembly had no power except as it was specifically granted in the charter.<sup>96</sup> Adams harbored no illusions as to the efficacy of an impeachment by the assembly; he freely acknowledged that there was no precedent in the province, that the Council would refuse to act on the impeachment, but urged nevertheless that the impeachment be set afoot to reap the political benefit of the consequences. Events confirmed his judgment. The House impeached, the "Council would do nothing," and he recorded that the "royal government was from that moment laid prostrate in the dust." How could an impeachment be effective when, as Adams himself recognized, the Governor was "possessed of an absolute negative on all acts of the legislature,"<sup>97</sup> and when disallowance by the Privy Council

94. S. MORISON, *supra* note 89, at 179. When the Pennsylvania Assembly sought to punish one Moore for an indignity to a *prior* Assembly, a matter of its own privilege, they were advised in 1759 that the English Attorney General Pratt and Solicitor General Yorke considered that "this unusual power could not be tolerated in the inferior assemblies in the Colonies." M. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 220 n.34 (1943); *cf.* note 89 *supra*.

95. Quoted in M. CLARKE, *supra* note 94, at 42. John Adams, however, recorded in his 1774 diary that when asked "whence can we pretend to derive such a power?" he replied, "From our charter, which gives us in words as express, as clear, and as strong as the language affords all the rights and privileges of Englishmen . . ." 2 J. ADAMS, *supra* note 91, at 329. Only eyes aglow with revolutionary fervor could discern in a Crown charter a grant of power to remove Crown appointees.

96. M. CLARKE, *supra* note 94, at 40-41. In January 1736, Lewis Morris wrote to James Alexander relative to Alexander's disbarment by Chief Justice de Lancy in the Zenger trial: "The thing is ridiculous, but your misfortune is . . . it is difficult to attack a court otherwise than by Impeachment, or Act of Assembly; which, as we stand in New York, is hardly to be come at." Vol. 2, Rutherford ms. N.Y. Hist. Soc. 171.

97. 2 J. ADAMS, *supra* note 91, at 330, 331; 10 Adams, *supra* note 91, at 236-38, 241. So far as the Convention Record reveals, the Colonial experience ultimately did not exercise as much influence as the English practice. When removal by Address was proposed, references were made, not to the four early State constitutions which provided for such removal, p. 1495 *infra*, but to the English Act of Settlement. 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION* 428-29 (revised ed. 1937). So too, when Vice President Jefferson was preparing his Manual of Parliamentary Practice for the Senate some ten years later,

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loomed ahead?<sup>98</sup> Against this background it is little wonder that the several State constitutions went off in different directions.

As Mrs. Ziskind notes, the State constitutions drafted after 1776 exhibited "no uniform pattern";<sup>99</sup> but they can be categorized.

(1) Removal by Address<sup>100</sup> without regard to misbehavior: Maryland, Massachusetts, New Hampshire and South Carolina. A variant was supplied by the Georgia provision that every officer shall be liable to be called to account by the house of the assembly. Maryland also provided for removal for misbehavior on conviction in a court of law, which may allude either to a criminal prosecution for misconduct or to a civil removal proceeding.

(2) Impeachment: Delaware, New Jersey, New York, Pennsylvania, Vermont and Virginia. Alternatives were provided by Delaware, conviction of misbehavior at common law; New Jersey and Pennsylvania, removal for maladministration; Vermont, removal of lesser judges for maladministration. In Virginia the impeached judges were to be tried by the Court of Appeals.

(3) North Carolina provided for prosecution on the impeachment of the General Assembly or presentment for maladministration, *i.e.*, a judicial criminal proceeding.<sup>101</sup>

This distribution hardly supports Mrs. Ziskind's statement that "In all but a few states, judges held office during good behavior and could be removed only by impeachment."<sup>102</sup> The States were pretty evenly divided between impeachment and removal by Address: four States provided for Address, and a fifth, Georgia, provided for a variant; six states provided for impeachment, and four of these supplied an alternative, removal for misbehavior or maladministration, suggesting that impeachment may have been reserved for special cases.<sup>103</sup> The Delaware and Maryland provisions for court removal upon misbehavior preclude an inference that there was total ignorance of judicial forfeiture. If

"he went back to the [English] prototype, not contenting himself with such modifications of the historic practices as had been made in particular American legislative bodies . . ."

§ D. MALONE, *JEFFERSON AND HIS TIME* 454 (1962).

98. S. MORISON, *supra* note 89, at 135.

99. Ziskind, *supra* note 26, at 139.

100. In England an Address was a formal request made by both Houses of Parliament to the King, asking him to perform some act. By the Act of Settlement (1700), English judges were made removable by the Crown only upon an Address by both Houses. P. 1500 *infra*.

101. The various provisions are digested in Ziskind, *supra* note 26, at 139-147.

102. *Id.* at 152.

103. The Pennsylvania constitution provided for impeachment of an officer "either when in office, or *after* . . . removal for maladministration." Ziskind, *id.* at 141 (emphasis added), as did Vermont. 2 B. POORE, *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS* 1863 (1877).

the writ of scire facias was not expressly mentioned, it is not the function of a Constitution to detail the relevant writs.<sup>104</sup>

Why then was no similar alternative incorporated in the Constitution? For Mrs. Ziskind the fact that no "proposal [was] made to include" scire facias apparently constitutes a conclusive constitutional bar. The test rather is that of Chief Justice Marshall who required a showing that had "this particular case" been suggested—removal by scire facias to effectuate "good behavior"—the Framers would have rejected it.<sup>105</sup> And if "misbehavior" does not in fact constitute impeachable misconduct, and if we cannot attribute to the Framers an intention to maintain judges in office notwithstanding their "misbehavior," the means are available, under orthodox rules of construction, to effectuate the manifest purpose of "during good behavior."<sup>106</sup>

Viewed from the vantage ground of the Framers, who were hard pressed to complete their extraordinary labors, the various State remedial provisions must have seemed a tangled thicket.<sup>107</sup> Then too, removal of judges was of very minor concern to the Framers. We have become so wrapped up in the impeachment of judges that the place of their impeachment in the minds of the Framers has become distorted. The Framers were almost entirely troubled by transgressions of the President and his cabinet; the misbehavior of judges was all but unmentioned. The Framers began with and long debated the impeachment of the President; at first the judges were to constitute the impeachment tribunal;<sup>108</sup> transferral of that function was vigorously debated and was only accomplished at the last minute, September 8th.<sup>109</sup> Late in the day, on August 20th, the Committee of Five was directed to report "a mode of trying the supreme Judges in cases of impeachment," and it reported back on August 22d that "The Judges of the Supreme Court shall be triable by the Senate . . ."<sup>110</sup> Although provision for the establishment of inferior court judges had been made,<sup>111</sup> no mention was made of *their* impeachment, suggesting that no con-

104. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 430 (1968): the constitution makers "did not regard themselves as framers of detailed codes. To them the statement of a bare principle was sufficient, and they were content to put it spaciouly, if somewhat ambiguously, in order to allow for its expansion as the need might arise."

105. P. 1483 *supra*.

106. Pp. 1484-86 *supra*.

107. See Madison, *supra* note 60.

108. President: 1 M. FARRAND, *supra* note 97, at 78, 85, 91, 230; 2 *id.* at 61, 64-69, 116, 172, 185, 186, 495, 499. Judges: 1 *id.* at 223-24, 231, 244; 2 *id.* at 186.

109. 2 *id.* at 42, 423, 500, 522-23, 551.

110. 2 *id.* at 337, 367.

111. June 11th, 1 *id.* at 124-25.

sideration had been given to the impeachment of lesser judges. When they were at last caught up, it was as an unarticulated afterthought, tucked away in a last minute insertion, "civil officers," which itself was added without comment to the Executive Department Article II provision for impeachment of the President.<sup>112</sup> Remarking on the absence of a provision for removal in the Judiciary Article, Mrs. Ziskind states, "There is a legitimate textual question whether judges were included in the impeachment provisions of Article II."<sup>113</sup> This "legitimate textual question" plus the fact that no word was said about the impeachment of lesser judges cautions against attribution to the Framers of an undebatable intention to bar removal of judges save by impeachment.

The almost absent-minded last minute inclusion of judges in "civil officers" undercuts the assumption that the Framers had conceived removal of judges by impeachment in special terms because of the "good behavior" provision. Even more plainly the Records of the Convention preclude the notion that "The constitutional antecedent of the phrase 'good behaviour' is the impeachment clause. Presumably 'good behaviour' was the term chosen because by that wording the tenure of Article III judges was wedded to the strictures of the impeachment clause."<sup>114</sup> Judicial tenure "during good behavior" appeared at the very outset of the Convention, May 29th, in the Virginia Plan submitted by Randolph; and it was likewise contained in the substitute New Jersey Plan offered two weeks later by Patterson,<sup>115</sup> long before the request was made for a tribunal to try impeachments of Justices. In truth, the paramount concern with removal of the President had all but crowded out thought of removal of Justices until the tardy reference to a Committee of the tribunal for their trial. Instead, therefore, of a considered "wedding" of impeachment to judicial "good behavior," the records reflect a hurried cleanup job in the course of which, hopefully, judges and justices were caught up and lumped with "other civil officers" who had no "good behavior" tenure.

112. September 8th, 2 *id.* at 552.

113. Ziskind, *supra* note 26, at 151. The "question" is pointed up by the Virginia Plan proposal for inclusion of "impeachments of any national Officer" in the "jurisdiction of the national Judiciary," while the Patterson-New Jersey Plan proposed inclusion of "federal officers," 1 M. FARRAND, *supra* note 97, at 22, 244. See also 2 *id.* at 186. Presumably such jurisdiction would not include trial of themselves, for impeachment of Justices (not inferior judges) was mooted much later. P. 1496 *supra*.

114. Kramer & Barron, *supra* note 10, at 460-61. They state also that "the judges were deliberately tied to the impeachment clause" because "They alone are to serve 'during good Behaviour.'" *Id.* at 460.

115. 1 M. FARRAND, *supra* note 97, at 21, 244.

One man, Rufus King, did attempt to link "good behavior" with impeachability:

the Judiciary hold their places not for a limited time, but during good behaviour. It is necessary therefore that a forum should be established for trying misbehaviour. Was the Executive to hold his place during good behaviour? . . . He ought not to be impeachable unless he hold his office during good behavior . . . .<sup>116</sup>

King's attempt to make "good behavior" tenure the test of impeachability did not meet with favor, and the Convention provided for impeachment of "President, Vice President and other Civil Officers," none of whom had such tenure. Thus the Convention itself rejected the inference that "good behavior" is necessarily wedded to impeachability. And in the upshot the "forum" was not to "try misbehavior" but "high crimes and misdemeanors," a quite different standard, as will appear.

Nevertheless the notion that there was a special relation between "good behavior" tenure and impeachment turned up in the First Congress "removal" debate. Although insistence that impeachment was the sole means for the removal of "civil officers" in the Executive branch was overridden, several speakers distinguished the case for removal of judges on the ground that they had tenure "during good behavior."<sup>117</sup> Viewed against the above historical background, and the proof yet to come that "high crimes and misdemeanors" was not meant to comprehend infractions of "good behavior," such remarks were simply mistaken and entitled to no more respect than would be statements that "bribery" comprehends payments to judges by those who had no pending cases. Since the Framers demonstrably resorted to common law terms of accepted meaning with a *limiting* purpose in mind,<sup>118</sup> something more than bare assertions in the halls of Congress should be required to alter that meaning.

Moreover these were tangential remarks in a debate devoted to the *President's* power to remove *executive* officers. At issue was whether

116. 2 *id.* at 66-67. In 1802 Gouverneur Morris said, "Misbehaviour is not a term known in our law; the idea is expressed by the word misdemeanor; which word is in the clause respecting impeachments. Taking, therefore, the two together . . . the Constitution says: 'The judges shall hold their offices so long as they demean themselves well; but if they shall misdeem, if they shall, on impeachment, be convicted of misdemeanor, they shall be removed.'" 11 ANNALS OF CONG. 90 (1802), quoted in Kurland, *supra* note 8, at 676. Morris was mistaken in stating that "Misbehavior is not a term known to our law"; as misbehavior was expressly made triable in the early Delaware and Maryland constitutions, p. 1495 *supra*, and the Framers opted for "high crimes and misdemeanors" instead because it was a phrase of limited meaning. P. 1512 *infra*. For the relation of "misdemean" and "high misdemeanor" see pp. 1509-10 *infra*.

117. Thatcher, 1 ANNALS OF CONG., *supra* note 2, at 376; White, *id.* at 465-66.

118. See p. 1512 *infra*.



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the President could remove those appointed by him, and the operative considerations were laid bare by Roger Sherman, himself a Framer:

I consider it an established principle, that the power which appoints can also remove, unless there are express exceptions made. Now the power which appoints the judges cannot displace them, because there is a constitutional restriction [“good behavior”] in their favor.<sup>119</sup>

Stone chimed in that “good behavior” limited “the exercise of the power *which appoints*. It is thus in the case of judges.”<sup>120</sup> That was the view of Baldwin, likewise a Framer: “The judges are appointed by the President but they are only removable by impeachment. The President has no agency in the removal.”<sup>121</sup> The governing principle was underlined by Boudinot who, anticipating Shartel, stated that impeachment was one of the “exceptions to a principle,” to the separation of powers.<sup>122</sup> But for that exception Congress also was blocked from removal of Executive officers and of judges as well.<sup>123</sup>

The First Congress itself furnished us with the best of reasons for not attaching overmuch weight to the several utterances by its Members: when it came face to face with a problem affecting judges, its action repudiated their “exclusive” remarks. In the Act of 1790 the First Congress provided that upon conviction in court for bribery a judge shall be “forever disqualified to hold any office.”<sup>124</sup> Since the impeachment clause provides for disqualification upon impeachment and conviction, the Act is unconstitutional if the clause indeed provides the “exclusive” method of disqualification. The First Congress will scarcely be charged with misconstruing the Constitution; hence the 1790 statute must be regarded as a construction that the impeachment clause does not constitute the “only” means for the disqualification of judges. As with “disqualification” so with “removal,” for the two stand on a par in the impeachment provision.<sup>125</sup> And the statute also illustrates the familiar proposition that broad dicta (here by only a few individuals) respecting a situation not presented for determination cannot be con-

119. 1 ANNALS OF CONG., *supra* note 2, at 491.

120. *Id.* at 492.

121. *Id.* at 557.

122. *Id.* at 527; *cf.* Stone, *id.* at 564-65.

123. Lawrence: the provision that “the Judges should continue during good behavior . . . was to render them independent of the Legislature.” *Id.* at 377. Smith said, “It would be improper that [judges] should depend on this House for the degree of permanency which is essential to secure the integrity of judges.” *Id.* at 508.

124. Act of 1790, ch. 9, § 21, 1 Stat. 117.

125. Article I, § 3 (7): “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold” any office.

clusive when the situation is actually presented.<sup>126</sup> What the First Congress *did* when it had to deal with "disqualification" of judges thus speaks against reliance upon some earlier utterances by a few of its Members when the removal of judges was not involved.

In evaluating a nonexclusive interpretation of the impeachment provisions we can profit from the parallel English experience. The Act of Settlement (1700) provided for judicial tenure during "good behavior," but judges could be removed by the Crown upon an Address by both Houses of Parliament.<sup>127</sup> The decided preponderance of authority, Lord Chancellor Erskine, Holdsworth and others, consider that this provision did not exclude other means of removal, *i.e.*, by impeachment, *scire facias* or criminal conviction.<sup>128</sup> That Act was designed to curb *royal* interference with judges, not to restrict Parliament;<sup>129</sup> and as McIlwain pointed out, neither the Act of Settlement, which provides

126. When some of Chief Justice Marshall's own remarks in *Marbury v. Madison* were later pressed upon him, he said, "It is a maxim not to be disregarded, that general expressions, in every opinion . . . ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of the maxim is obvious. The question actually before the Court is investigated with great care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

127. The Act of Settlement, 12 & 13 Will. 3, c. 2, § 3 (1700), is entitled "An Act for further limitation of the Crown" and provides that "Judges Commissions be made *Quamdiu se bene gesserint*; . . . but upon the Address of both Houses of Parliament, it may be lawful to remove them." The Address is not conditioned upon misbehavior, and the "but" phrase may be read as "notwithstanding" the commission during good behavior judges may be removed upon Address. The implication of "but" as "notwithstanding" is heightened by 1 Geo. 3, c. 23 (1760) which insured the continuation of judicial tenure despite the demise of the Crown, "Provided always . . . that it may be lawful for his Majesty . . . to remove any Judge or Judges upon the address of both Houses of Parliament." A respected authority states that the removal by address "is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof"; the power "may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held." A. TODD, *supra* note 21, at 193.

128. P. 1482 *supra*. Edmund Burke stated in the Commons, "it is in our choice by an address to remove an improper judge; by impeachment before the peers to pursue to destruction a corrupt judge . . ." Quoted in A. TODD, *supra* note 21, at 194. Not long after, in 1791, a pamphleteer, supposedly a barrister, Spenser Percival, extolled the advantages of impeachment and saw "no reason for abolishing this mode of trial." Quoted in 4 J. HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 69-70 n.†, 253 n.‡ (1796). In 1806, Lord Grenville urged that if the Commons "think the charges are matter of high crime . . . it is their duty to impeach." 7 PARL. DEN. 758 (1806). The "right to impeach [judges] . . . according to ancient law and usage, is a matter of right to those who may suffer from their corruptions or oppressions . . ." *Taaf v. Downs*, 3 Moo.P.C. 35, 68n., 13 Eng. Rep. 15, 31 n. (1813). A recent English writer states that "the power to remove after an address is additional to the common law. It is a principle of construction that judicial process is not abolished except by clear words . . ." R. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 289 n.1 (5th ed. 1967).

129. J. STORY, COMMENTARIES ON THE CONSTITUTION § 1623 (5th ed. 1905), stated that "The object of the act of Parliament was to secure the judges from removal at the mere pleasure of the crown; but not to render them independent of the action of Parliament." See also McIlwain, *supra* note 28, at 226.

that the King "may remove," nor any other Act "forces the king to remove or even gives the houses authority to force him to comply with their request for removal."<sup>130</sup> It follows that were the Act given "exclusive" effect, and were the King to refuse to remove a corrupt judge upon an Address, Parliament would be powerless to remove him. Since it was precisely this power to remove those whom the King sought to shelter for which Parliament had fought, to give the Act "exclusive" effect would be to erect surrender of a hard won power upon an artificial canon of construction.

Reason and the great weight of authority seem to me to run counter to an "exclusive" reading of the Act of Settlement. The argument for exclusivity of that Act is in pertinent detail much stronger than can be made under our Constitution. In that Act, the "good behavior" and removal provisions are contained in the very same section, whereas in the Constitution the "good behavior" and impeachment provisions were spatially and temporally separated. "Good behavior" appeared from the outset and was embodied in Article III, while the separate provision for impeachment must be located in the belated insertion of "civil officers" in Article II. No indication is found in the Convention records that the insertion was in any way associated with the earlier provision for "good behavior" tenure.<sup>131</sup> Instead, when we come to examine the relation between "good behavior" and "high crimes and misdemeanors" more closely we shall discover weighty reasons against the attribution of such an intention to the Framers.

For Judge Otis, the Framers' rejection of removal by Address was all but conclusive proof that there was an intention to bar other means of removal as well.<sup>132</sup> But special considerations led to rejection of removal by Address. Both in England and in the newly independent States removal by Address was untrammelled;<sup>133</sup> and its adoption would have

130. The point was nicely made in Pennsylvania when the House sent up an Address to Governor McKean (formerly Chief Justice) who refused to remove. When a committee urged that the term in the constitution "'may remove' meant 'must remove,' he replied that he would have them know that 'may' sometimes meant 'won't.'" W. LLOYD, *THE EARLY COURTS OF PENNSYLVANIA* 147 (1910).

131. P. 1497 *supra*.

132. Otis, *supra* note 27, at 29-30.

133. For England, note 127 *supra*. Section 30 of the Maryland Constitution (1776), provided "Judges shall be removed for misbehavior, on conviction in a court of law, and may be removed by the Governor [without reference to misbehavior], upon the address of the General Assembly . . ." 1 B. POORE, *supra* note 103, at 819. Chapter III, Article I of the Massachusetts Constitution (1780) provided, "All judicial officers . . . shall hold their offices during good behavior . . . *Provided, nevertheless, The governor . . . may remove them upon the address of both houses of the legislature.*" *Id.* at 963. The New Hampshire provisions (1784) were identical with those of Massachusetts. 2 *id.* at 1290. Inferably the several "Provided, nevertheless" constituted a gloss upon the English

placed judges at the utter mercy of Congress. Gouverneur Morris justly objected that the Address was "fundamentally wrong" and "arbitrary" because it contemplated removal "without a trial."<sup>134</sup> The Framers were aware of and condemned the sorry spectacle of legislative chastisement of State judges who had dared to question the constitutionality of legislation.<sup>135</sup> To leave the judiciary at the unbridled pleasure of Congress would have defeated the Framers' purpose to curb legislative excesses by judicial review.<sup>136</sup> Legislative interference was confined to trial by impeachment, under a standard ("high crimes and misdemeanors") of narrow, technical meaning, and even then a two-thirds vote was required for conviction. Nor would impeachment, said James Wilson, be used to remove judges who had declared statutes unconstitutional.<sup>137</sup> Judges who would be at the mercy of "every gust of fashion which might prevail in the two branches of our Government" could not be trusted to exhibit the fortitude needed to set aside an Act of Congress.<sup>138</sup> None of the factors which led the Framers to block legislative retaliation against judges by Address had any applicability to removal of judges by judges. Judges enjoyed a respect withheld from the legislature,<sup>139</sup> and could be counted on to weigh the misconduct of a judge as dispassionately as that of an ordinary citizen.

#### D. *The Argument for Absolute Independence*

To buttress their view that impeachment is the sole avenue for removal of judges, Justices Black and Douglas assert that the solicitude of the Founders for judicial independence was all-encompassing, that it included independence even from judicial control and demanded nothing other than "the admittedly difficult method of impeach-

statute. Section XX of the South Carolina Constitution (1776) provided judges were to be commissioned "during good behavior, but shall be removed on the address of the general assembly and legislative council," 2 *id.* at 1619, following in the footsteps of the Act of Settlement.

134. 2 M. FARRAND, *supra* note 97, at 428. Randolph also opposed the Address "as weakening too much the independence of the Judges," *id.* at 429; and Rutledge regarded it as an "insuperable objection" that "the supreme Court is to judge between the U.S. and particular States," *id.* at 428, again going to independence of the Congress.

135. R. BERGER, *CONGRESS V. THE SUPREME COURT* 117-18, 38-39 (1969).

136. *Id.* at 13-16, and *passim*.

137. 2 J. ELLIOT, *supra* note 15, at 478. This was likewise the view of Gerry, 1 *ANNALS OF CONG.*, *supra* note 2, at 537. In New Hampshire, the court had declared the "Ten Pound Act" unconstitutional, and although the legislature by a 44 to 14 vote then declared the act constitutional, the representatives overwhelmingly approved a committee report that the judges were "not Impeachable for Maladministration as their conduct [was] justified by the constitution" of New Hampshire. 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 969-70 (1953).

138. Wilson, 2 M. FARRAND, *supra* note 97, at 429; *cf.* THE FEDERALIST No. 78, *supra* note 16, at 509.

139. *See* note 155 *infra*.

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ment."<sup>140</sup> All the remarks in the several Conventions that bear on judicial independence, so far as I could find, referred to freedom from legislative and executive encroachments.<sup>141</sup> No one suggested that judges must be immune from traditional judicial control which, minimally, included Attachments that King's Bench had long issued against lesser judges for misconduct and oppression.<sup>142</sup> To the contrary, Justice Wilson, a leading Framers, stated in his 1791 Lectures,

The independency of each power consists in this, that its proceedings . . . should be free from the remotest influence, direct or indirect, of either of the other two powers. But further than this, the independency of each power ought not to extend.<sup>143</sup>

This was the view of judicial independence taken by Judge St. George Tucker in 1803,<sup>144</sup> and it may be discerned in Jefferson's recognition that judges can remove judges.<sup>145</sup>

The emphasis of Justices Black and Douglas upon the exclusivity

140. Chandler II, 398 U.S. at 136-41 (1970) Douglas, J., dissenting; Black, J., dissenting, *id.* at 142. This is also the view of Professor Kurland: "certainly there is no point in tinkering with the independence of federal judges by subjecting their tenure to control of other federal judges appointed by the same defective process. Without their independence, the federal judges will have lost all that separates them from total subordination to the political processes from which they ought to be aloof." Kurland, *supra* note 8, at 667. As if impeachment has not been shot through with political partisanship! See note 148, and pp. 1504-05 *infra*. I have treated the matter more extensively in Berger, *Festschrift*, *supra* note 9.

141. The materials are collected in R. BERGER, CONGRESS V. THE SUPREME COURT 117-19 (1969). In THE FEDERALIST No. 78, *supra* note 16, at 503, Hamilton stated, "The standard of good behaviour" is an "excellent barrier to the encroachments and oppressions of the representative body." See also note 123 *supra*, and note 144 *infra*. It was from the State legislatures that threats to the judiciary had come. R. BERGER, *supra* at 33, 42-43, 117.

142. By virtue of its "general Superintendency over all inferior Courts," King's Bench could punish judges of lesser courts by Attachment for Contempt "for acting unjustly, oppressively, or irregularly," "for any practice contrary to the plain rules of natural Justice . . . as for denying a Defendant a Copy of the Declaration against him . . . or for compelling a Defendant to give exorbitant bail." 2 W. HAWKINS, PLEAS OF THE CROWN ch. 22, §§ 25-26 at 149-50 (1716); and "putting the Subject to unnecessary Vexation by colour of a judicial Proceeding wholly unwarranted by Law." *Id.* at § 25. So too, § M. BACON, *supra* note 20, at (N) 744, states, "the Court of Kings Bench, by the Plenitude of its Power, exercises a Superintendency over all inferior Courts, and may grant an Attachment against the Judges of such Courts for oppressive, unjust or irregular Practice, contrary to the obvious Rules of Natural Justice."

143. 1 J. WILSON, THE WORKS OF JAMES WILSON (R. McCloskey ed. 1967) 299.

144. "That absolute independence of the judiciary, for which we contend is not, then, incompatible with the strictest responsibility . . . but such an independence of the other *coordinate* branches of the government as seems absolutely necessary to secure them the free exercise of their constitutional functions, without the hope of pleasing or the fear of offending. And as from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches who have the custody of the purse and sword." St. G. TUCKER, *supra* note 12, at App. 359.

145. Writing in 1816, Jefferson lamented that judges had been made "independent of the nation itself. They are irremovable, *but by their own body*, for any depravities of conduct . . ." Quoted in Ross, *supra* note 10, at 123-24 (emphasis added). In 1825, Rawle wrote that in England "Judges are liable to trial for every offense before their brethren . . ." W. RAWLE, A VIEW OF THE CONSTITUTION 214 (2d ed. 1829).

of impeachment suggests a preference for Congressional over judicial trial, surely a strange preference in a Justice. Congressional trial suffers from serious defects. Fresh illustration of the political partisanship that has characterized impeachment has just been furnished by Congressman Gerald Ford's proposal to impeach Justice Douglas.<sup>146</sup> As Macaulay said of the Hastings impeachment:

Whatever confidence may be placed in the decision of the Peers on an appeal arising out of ordinary litigation, it is certain that no man has the least confidence in their impartiality, when a great public functionary, charged with a great state crime, is brought to their bar. They are all politicians. There is hardly one among them whose vote on an impeachment may not confidently be predicted before a witness has been examined.<sup>147</sup>

That statement was amply verified in the impeachments of Justice Samuel Chase and President Andrew Johnson; and impeachment has continued to be colored by political partisanship.<sup>148</sup>

Justice Douglas states, however, that "Our tradition even bars political impeachments as evidenced by the highly partisan, but unsuccessful, effort to oust Justice Samuel Chase of this Court in 1805."<sup>149</sup> Chase's acquittal was no less partisan than his impeachment. At that time the "national judiciary, one hundred per cent Federalist, amounted to an arm of that party."<sup>150</sup> Chase, after the fashion of his Federalist brethren, made intemperate attacks on the Jeffersonian administration in harangues to a Grand Jury.<sup>151</sup> Not unnaturally the incensed Jeffersonians took out after Chase. The Federalists "supported Chase completely in every test," and with the aid of a group of Jeffersonians whom John Randolph, leader of the impeachment, had alienated, saved Chase from

146. In a comment on this proposal, Milton Viorst states, "the 110 sponsors of the anti-Douglas resolution are all conservative Republicans and Dixiecrats. This seems persuasive evidence in support of the hypothesis which virtually everyone in Washington accepts: that the undertaking seeks not simply to impeach William Orville Douglas but to discredit the liberalism . . . inherent in the domestic programs of Democratic Administrations since the New Deal." Viorst, *supra* note 6, at 32. Representative Ford all but conceded that his Resolution was in retaliation for the Senate's rejection of two of President Nixon's nominees to the Supreme Court. 116 CONG. REC. H3118-19 (daily ed. April 15, 1970).

147. Quoted in Dougherty, *Inherent Limitations Upon Impeachment*, 23 YALE L.J. 60, 69 (1913).

148. I have shown this in some detail in Berger, *Festschrift, supra* note 9. See Ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 MINN. L. REV. 185 (1939); Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 35-36 (1927).

149. Chandler II, 398 U.S. at 136 (1970) (Douglas, J., dissenting).

150. 4 D. MALONE, JEFFERSON AND HIS TIME 458 (1970).

151. 1 C. WARREN, *supra* note 5, at 274-76. For example, Chief Justice Dana of Massachusetts, "in a charge to the Grand Jury denounced the Vice President [Jefferson] and the minority in Congress as 'apostles of atheism and anarchy, bloodshed and plunder.'" *Id.* at 275.

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retribution he richly deserved.<sup>152</sup> So too, the bitterly partisan impeachment of Johnson narrowly failed, and partisanship has continued to dominate impeachments.<sup>153</sup>

Apart from partisanship there is the glaring inadequacy of a tribunal at which attendance is so sporadic that never more than a handful of Senators are present at any given time; and they simply cannot find time to study and digest the bulky record.<sup>154</sup> Contrast with this the constant attendance of judges schooled to listen to evidence and to grasp complex issues, trained (one hopes) in more dispassionate judgment than a politician. In comparing legislative with judicial trial, it may be noted that the Founders had more confidence in the judiciary than in the legislature.<sup>155</sup> Then too, a number of the prior State con-

152. 4 D. MALONE, *supra* note 150, at 479-80. There was at least one solid ground for conviction of Chase, as I propose to show in a chapter of my forthcoming book.

153. See note 148 *supra*.

154. After the 1936 impeachment of Judge Halsted Ritter, Congressman Robsion said, "Any one who has been a Member of that body knows it is humanly impossible to have all of the Senators present all the time for a period of 10 days, 2 weeks or more, sitting as a jury. If they did, momentous and pressing interests of the Nation . . . would suffer." 81 CONG. REC. 6183 (1937). See also Hatton Sumners, *id.* at 6165. "It is absurd," wrote Professor Moore in the midst of World War II, "to think that large interests during the war, for example, must wait upon the trial of Judge X. . . . As a matter of fact, the Senate continues with the nation's business at the expense of Judge X. Senators troop in to answer the roll call when lack of a quorum is suggested and then troop out to the attendance of larger affairs." Moore, *supra* note 2, at 356-57. For other examples of sparse Senatorial attendance see Potts, *supra* note 148, at 34-35; see note 194 *infra*.

After the Ritter impeachment, Congressman Reed stated, "The Senate is composed of busy men, who cannot and will not divest themselves of the time they must necessarily devote to their lawmaking activities and concentrate, analyze and digest the intricate testimony . . ." 81 CONG. REC. 6175 (1937).

155. Said Madison in the Virginia Ratification Convention, "Were I to select a power which might be given with confidence, it would be the judicial power." 3 J. ELLIOT, *supra* note 15, at 535. When Jefferson welcomed the "check" which a Bill of Rights "puts into the hands of the judiciary," he added, "This is a body, which if rendered independent & kept strictly to their own department merits great confidence for their learning & integrity." 5 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 81 (P. Ford ed. 1895). Contrast Madison's remarks in the First Congress that the legislative power is the "most likely to be abused," 1 ANNALS OF CONG. 454 (1789) (Gales & Seaton ed. 1834; print bearing running-page title "Gales & Seaton's History of Debates in Congress"). Smith said that legislative "power is perhaps more liable to abuse than the judicial." *Id.* at 848. See also Madison, 2 M. FARRAND, *supra* note 97, at 74: the legislature "was the real source of danger"; and see R. BERGER, CONGRESS V. THE SUPREME COURT 8-13, 132-37. In the Federal Convention Wilson said, "The English courts are hitherto pure, just and incorrupt, while their legislature are base and venal." 1 M. FARRAND, *supra* note 97, at 261. In 1803 St. George Tucker praised "that preeminent integrity, which amidst surrounding corruption, beams with genuine luster from the English courts of judicature . . ." ST. G. TUCKER, *supra* note 12, at App. 356. At another point, Tucker said, "in a republic . . . the violence and malignity of party spirit, as well in the legislature, as in the executive, requires not less the intervention of a calm, temperate, upright and independent judiciary, to prevent that violence and malignity from exerting itself . . ." *Id.* at 355. Again, he said, "The judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority . . . and the shafts of faction and violence." *Id.* at 357.

Finally, when Chief Baron Walter and Justice Archer were threatened by the King's arbitrary conduct, they did not invoke the protection of impeachment but of scire

stitutions contained provisions for removal of judges by judges, including the Virginia provision for the trial of judges on impeachment by the Court of Appeals.<sup>156</sup>

What Justice Black mildly refers to as the "admittedly difficult method of impeachment," amounts in the words of Senator McAdoo, spoken after participating in the trial of Judge Ritter, to a "practical certainty that in a large majority of cases misconduct will never be visited with impeachment," "a standing invitation for judges to abuse their authority with impunity . . ." <sup>157</sup> No student who takes the time to study the path of impeachment will quarrel with McAdoo's assessment.<sup>158</sup> Against generally acknowledged present deficiencies of the impeachment process,<sup>159</sup> Justice Douglas would pit fears of judicial visitorial powers over judges: "The power [of other judges] to keep a particular judge from sitting on a racial case, a church-and-state case . . . a union case may have profound consequences."<sup>160</sup> To a Negro seeking civil rights, the possibility (to follow in the path of hypothesis) that a fair-minded Southern district judge may repeatedly be reversed by a racist Court of Appeals is no less serious. I would hazard that judges would find reviewing judges no less fair in judicial removal cases than they have proved in racial cases.

Perhaps we have come to rely unduly on the professionalism which tends to school and temper judgment and to teach judges to discount personal biases. But if we can safely trust the life and property of a citizen to judicial determination, if we rely on the courts to rise above personal bias on racial issues that wrack the nation,<sup>161</sup> we should trust them no less when they come to determine the far less momentous issue whether a judge is unfit for office. Our trust should extend to confidence that courts will not suddenly yield to personal bias when they are called upon to decide whether a judge has been guilty of misbehavior, or whether by reason of insanity, senility, or other disability, he

facias. Pp. 1480-81 *supra*. And in commending to Parliament remission of a judge's trial to the courts, Lord Chancellor Erskine hardly considered that he would be less fairly tried. P. 1482 *supra*.

156. P. 1495 *supra*.

157. 80 CONG. REC. 5934 (1936). See also note 195 *infra*.

158. See pp. 1514-17 *infra*.

159. Potts, *supra* note 148, at 31-36; Shartel, *supra* note 22, at 870-73. Impeachment, Professor Stolz concedes, "has a deservedly bad reputation." Stolz, *supra* note 8, at 660.

160. Chandler II, 398 U.S. at 155 (Douglas, J., dissenting). In 1937, Hatton Sumners stated, "I never heard it said until today . . . that three judges of the circuit court of appeals trying a district judge might stultify themselves in order to convict an honest man and remove him from office." 81 CONG. REC. 6184 (1937).

161. It has been stated by President Kingman Brewster of Yale University that he was "skeptical of the ability of black revolutionaries to achieve fair trial anywhere in the United States." N.Y. Times, April 25, 1970, at 1, col. 1.



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has become incapable of performing his functions adequately. Courts no less than politicians can perceive that the integrity of the judicial process is best preserved by judges who can and will adequately serve the public interest. Should a convincing showing be made that in removing a judge the visitorial court was motivated by racial-religious-economic biases rather than a genuine need to cleanse the bench of a senile, corrupt or negligent placeman, that court may be reversed on appeal by the Supreme Court.<sup>162</sup> And there remains impeachment, for oppression or abuse of power is a recognized impeachable offense, as Madison's statement in this very context further attests: "the wanton removal of meritorious officers would subject [the President] to impeachment and removal . . . ."<sup>163</sup>

### III. Impeachment for "Misbehavior"

By a seemingly logical progression Congressman Ford has concluded that impeachment was designed to enforce "good behavior." Starting with "during good behaviour," he said, "it is implicit in this that when behaviour ceases to be good, the right to hold judicial office ceases also." So much is unexceptionable, as is his second step. "Naturally, there must be orderly procedure for determining whether or not a Federal judge's behaviour is good." Consequently, he concludes, the Founding Fathers "vested this ultimate power . . . in the Congress" in the "seldom-used procedure, called impeachment."<sup>164</sup> Thereby he assumed the answer, an answer contradicted by history. But in justice to Congressman Ford, he was not breaking virgin soil; his view lurks in Rufus King's remark that impeachment was the "forum . . . established for trying misbehavior."<sup>165</sup> The Framers, however, went on to limit impeachment to the commission of "high crimes and misdemeanors," a standard of quite different origin and dimensions. The Ford-King view was given its most ringing affirmation by Judge Merrill Otis, in his heated defense of the "exclusivity" of impeachment. Confronted with the fact that "good behavior" might be an impotent provision if unenforceable, with the "hiatus" between "good behavior" and "high crimes and misdemeanors," Judge Otis boldly asserted that

162. It is open to Congress to provide for an appeal to the Supreme Court from a judgment by a special court for removal of judges. *See generally* pp. 1526-28 *infra*.

163. 1 ANNALS OF CONG., *supra* note 2, at 498; Berger, *Festschrift*, *supra* note 9.

164. 116 CONG. REC. H3113 (daily ed. April 15, 1970).

165. P. 1498 *supra*.

"a judge may be impeached for any misbehavior or misconduct which terminates his right to continue in office."<sup>166</sup>

At common law, tenure "during good behavior," as we have seen, was terminated by "misbehavior." The early law does not define "misbehavior" in so many words; rather it lays down the several grounds for forfeiture of an office; but these, a study of Bacon's Abridgment discloses, are interrelated if not equivalent and we are justified in concluding that the several grounds of forfeiture serve to identify the various forms of "misbehavior."<sup>167</sup> For example it was held in the *Earl of Pembroke's Case* (1597) that "every voluntary act done by an officer contrary to that which belongs to his office is a forfeiture of his office . . ." Coke specified three causes for "forfeiture or seizure of offices, as for abusing, not using or refusing." As abuse of office, he instanced an escape voluntarily suffered by a gaolor; non-use was exemplified by non-attendance when the office concerned the administration of justice.<sup>168</sup> By 1716, Hawkins could state that

in the grant of every Office whatsoever, there is this Condition implied by Common Reason, that the Grantee ought to execute it diligently and faithfully.<sup>169</sup>

His view of the scope of forfeiture was broad indeed:

it would be endless to enumerate all the particular instances, wherein an officer may be discharged or fined; and it also seems needless to endeavour it because they are generally so obvious to Common Sense, as to need no Explication . . . .

And he emphasized that forfeiture for neglect of duty was for the pro-

166. Otis, *supra* note 27, at 33.

167. Compare 3 M. BACON, *supra* note 20 at (H) 733 "Of the Nature of Offices as to their Duration and Continuance" with (M) 741, "Of the Forfeitures of an Office"; and 4 J. COMYNS, *supra* note 22, at (B 7) 242 with (K 2) 255. Cf. 2 W. ANSON (Part I), *supra* note 38, at 235: "Misbehaviour appears to mean misconduct in the performance of official duties, refusal or deliberate neglect to attend to them . . . ."

168. Popham 116, 118, 79 Eng. Rep. 1223, 1224 (1597); *Earl of Shrewsbury's Case*, 9 Co. Rep. 46b, 50a, 77 Eng. Rep. 798, 804 (1611). See also *Regina v. Ballivos* (Serjeant Whitacre's Case) 2 Ld. Raym. 1232, 1237, 92 Eng. Rep. 313, 316 (1705); 16 C. VINER, *supra* note 23, at 121-24; 4 J. COMYNS, *supra* note 22, at 255; 3 M. BACON, *supra* note 20, at 741.

169. 1 W. HAWKINS, *supra* note 142, ch. 66, § 1, at 167. 3 M. BACON, *supra* note 20, at 745, also states that "the particular Instances wherein a Man may be said to act contrary to the Duty of his office, tho various, are yet so generally obvious, that it seems needless to endeavour to enumerate them." Blackstone states, "if a grant be made to a man of an office, generally, without adding other words, the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor . . . to oust him . . ." 2 W. BLACKSTONE, COMMENTARIES \*152-53.

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tection of the public, to make possible a replacement who would adequately perform the duties of the office.<sup>170</sup>

"Misdemean" and "misbehave" were sometimes interchangeable terms, but it does not follow that "misbehavior" was equated with "high misdemeanor." To "misdemean," states the Oxford English Dictionary, meant "To misbehave, misconduct one's self," and it cites a 1736 example, "Sir Luke Fitzgerald misdemeaned himself before the board by uncivil words." An appointment for so long as he "shall well demean himself" in his office was considered in *Harcourt v. Fox* (1692). Serjeant Levinz construed the statute to mean "during good behavior; and that is an estate for life, unless his misbehaviour in his office" made him removable for "misdemeanour." Chief Justice Holt was of this opinion, saying, "*during life, and during good demeanour, are therefore synonymous phrases,*" and that the statute was designed to put the clerk "out of fear of losing [his office] for anything but his own misbehaviour in it."<sup>171</sup>

The interchangeability of "misbehavior" and "misdemeanor" for purposes of forfeiture of an office does not, however, prove that "misbehavior" and "high crimes and misdemeanors" are equivalents for purposes of impeachment. Rather, it illustrates the familiar fact that the same word may have different meanings in different contexts.<sup>172</sup> "High misdemeanors" was employed in impeachment proceedings long before there was such a crime as a "misdemeanor"; and impeachment was not based on "misdemeanors" but on "high misdemeanors," a quite different breed of cat.<sup>173</sup> And if I may be suffered to repeat, in no

170. I W. HAWKINS, *supra* note 142, ch. 66, § 2, at 168, and § 1, at 167-68. Hawkins was to be found in Colonial libraries. H. COLBOURN, *supra* note 3, at 204, 211, 223.

171. *Harcourt v. Fox*, 1 Show. K.B. 426, 510, 534, 536, 89 Eng. Rep. 680, 720, 721-22, 734, 736 (1692-1693). Cf. 1 W. & M., c. 21, § VI (1688): "if any Clerk of the peace . . . shall misdemean himself in the Execution of the said office, and thereupon a Complaint and Charge in Writing of such Misdemeanour shall be exhibited against him to the Justices . . . [they may] . . . discharge him from the said office."

172. *Lamar v. United States*, 240 U.S. 60, 65 (1916) (per Holmes, J.); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

173. That "high crimes and misdemeanors" means "and high misdemeanors" may be gathered from Blackstone's statement that the principal "high misdemeanor" is "the maladministration of such high officers," "usually punished by the method of parliamentary impeachment." 4 W. BLACKSTONE, COMMENTARIES \*121. In the impeachment of Chief Justice Scroggs, he was initially charged only with "high misdemeanors." 8 HOWELL'S STATE TRIALS 163 (Cobbetts Collection 1809). For references to "high misdemeanor" in the Federal Convention, see 2 M. FARRAND, *supra* note 97, at 348, 443. Senator William Blount was expelled from the Senate in 1797 because of "a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator . . ." F. WHARTON, *supra* note 54, at 202.

"High crimes and misdemeanors" is met in 1388 in the impeachment of the Earl of Suffolk, 1 HOWELL, *supra* note 173, at 90, 91, 101, 102. At that time there was no such

case, so far as I could find, was an impeachment grounded upon a breach of "good behavior"; in every case the charge was "high treason" and (in some cases or) "high crimes and misdemeanors."

Certain categories of "high crimes and misdemeanors" superficially may seem coterminous with "misbehavior," *e.g.*, abuse of official power, neglect of duty. But a gap yawns between the "non-attendance" instanced by Coke as an example of "non-use" or neglect, and the neglect that was punished by impeachment, *e.g.*, the neglect of an admiral to safeguard the seas<sup>174</sup> or of a Commissioner of the Navy adequately to prepare against a Dutch invasion.<sup>175</sup> Moreover, the impeachable "neglect" and "abuse of office" comprehended in "high crimes and misdemeanors" was, in the view of the Founders, limited to "great offenders";<sup>176</sup> impeachment of all petty officers was emphatically excluded. Maclaine's remarks in the North Carolina Ratification Convention are illustrative:

it was mentioned by one gentleman, that petty officers might be impeached. It appears to me . . . the most horrid ignorance to suppose that every officer, however trifling his office, is to be impeached for every petty offense . . . I hope every gentleman . . . must see plainly that impeachments cannot extend to inferior officers of the United States.

general crime as a "misdemeanor"; lesser crimes were prosecuted as "trespasses" well into the 16th Century, and only then were "trespasses" replaced as a category of crimes by "misdemeanors." 3 W. HOLDSWORTH, *supra* note 28, at 318 n.1 (4th ed. 1935); 4 W. HOLDSWORTH, *id.* at 512-13 (1924); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 459 (5th ed. 1956). This derivation from tort led J. STEPHEN, THE CRIMINAL LAW OF ENGLAND 60 (1863) to emphasize that "prosecutions for misdemeanor are to the Crown what actions for wrongs are to private persons." "High misdemeanors," on the other hand, were from the outset, and remained, "political crimes" against the state, *e.g.* Treason, bribery.

174. Impeachment of Duke of Buckingham, 2 HOWELL, *supra* note 173, at 1307, 1310, Art. IV (1626).

175. Impeachment of Peter Pett, 6 HOWELL, *supra* note 173, at 865, 867, Art. V (1668).

176. For the almost exclusive concern with the President, see note 108 *supra*; for "favorites" or officers sheltered by the President, see p. 1491 *supra*. Gouverneur Morris stated in the Convention that "certain great officers of State; a minister of finance, of war, of foreign affairs, etc. . . will be amenable by impeachment to the public justice." 2 M. FARRAND, *supra* note 97, at 53-54. In the North Carolina Ratification Convention, Iredell said, "The power of impeachment is given by this Constitution, to bring great offenders to punishment . . . the occasion for its exercise will arise from acts of great injury to the community . . ." 4 J. ELLIOT, *supra* note 15, at 113. And Governor Johnston said impeachment was designed to reach "men who were in very high offices . . ." *Id.* at 37. In the Federal Convention, Mason said that the President as well as his coadjutors should be punished "when great crimes were committed." 2 M. FARRAND, *supra* note 97, at 65. Historically, said Lewis Mayers, 7 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 600 (1932), impeachment "has been reserved almost exclusively for high officers of state . . ." Cf. 1 W. HOLDSWORTH, *supra* note 28, at 380-82 (3d ed. 1922); 2 R. WOODDESON, LAWS OF ENGLAND 601 (1792) ("abuse of high offices of trust"). As Solicitor General, later Lord Chancellor, Somers said in 1691, "The power of impeachment ought to be, like Goliath's sword, kept in the temple, and not used but on great occasions." 5 NEW PARL. HIST. 678 (1691).

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That extension, he continued, would be "a departure from the usual and well-known practice both in England and America";<sup>177</sup> and in truth both the English and the Framers were almost entirely concerned with "great offenders," high Ministers and the President, and "great offenses." Is it conceivable that the President would be impeachable for "non-attendance"? The Records of the Convention furnish a conclusive answer. When the Convention took up "the trial of impeachments against the President, for Treason and bribery," Mason pointed out that this was too narrow, that it could not reach "attempts to subvert the Constitution," "great and dangerous offenses." Such was the origin of "high crimes and misdemeanors."<sup>178</sup>

Congressman Ford recognizes that removal of the President "would indeed require crimes of the magnitude of treason and bribery," but concludes that "from our history of impeachments: a higher standard is expected of Federal judges than of any other 'civil officers' of the United States."<sup>179</sup> It is the records of the several Conventions rather than the "guilty" or "not guilty" verdicts of the Senate that constitute the index of Constitutional interpretation.<sup>180</sup> Of a special concern that judges be held to "higher standards," that is, be impeachable for lesser "high crimes and misdemeanors" than the President or other civil officers, there is not a trace. Instead of such a special concern there is a "legitimate textual question" whether the last minute, unexplained insertion of "other civil officers" in the Executive Article comprehends judges, who are the object of Article III.<sup>181</sup> If the Framers intended to make judges impeachable for lesser crimes than the President and other civil officers, they chose a singularly inept way of articulating their intention, for they employed one and the same phrase, "high crimes and misdemeanors" for "President, Vice President and other civil officers" without naming judges at all, and without the slightest intimation that "high crimes and misdemeanors" was to have two different meanings, one for judges and one for the President and other civil officers. One who would give those words two entirely different mean-

177. 4 J. ELLIOT, *supra* note 15, at 43-44. Maclaine: "no petty officer was ever impeachable," *id.* at 46; *see id.* at 37. Impeachment was devised to reach "the highest and most powerful offenders." 4 J. HATSELL, *supra* note 128, at 63.

178. 2 M. FARRAND, *supra* note 97, at 550. *See also* pp. 1512-13 *infra*. The Founders' concern with "great offenses" is set forth in greater detail in Berger, *Festschrift*, *supra* note 9.

179. 116 CONG. REC. H3114 (daily ed. April 15, 1970).

180. Consider how close to inclusion in "our history of impeachment" was the shameful impeachment of President Andrew Johnson, "one of the most disgraceful episodes in our history." S. MORISON, *supra* note 89, at 721.

181. P. 1497 *supra*.

ings, turning on the person to whom they are applied, must demonstrate that such was the manifest intention of the Framers, a demonstration that has yet to be made. And since the "independence" of judges against legislative encroachments had been a particular object of the Founders' solicitude, it would indeed be anomalous if Congress, under the Ford construction, would have more freedom to impeach judges than "other civil officers," and this by resort to "good behavior" which was designed to afford special protection to judges.

There is yet another and weighty argument against the Otis-Ford extension of impeachment to departures from "good behavior." In adopting "high crimes and misdemeanors," the Framers departed from the provisions of the seven State constitutions that provided for impeachment, five of which made "maladministration" a ground for impeachment, while New York proceeded for "malconduct," and North Carolina for "misbehavior."<sup>182</sup> Plainly the wedding of "maladministration" and "misbehavior" to impeachment in the State Constitutions held no charms for the Framers. In fact, "maladministration" was rejected because, said Madison, "So vague a term will be equivalent to a tenure during pleasure of the Senate," and in its stead "high crimes and misdemeanors," borrowed from English, not State impeachment provisions was substituted by the Framers with knowledge that these were words of "limited," "technical meaning."<sup>183</sup> Against this background, how can we attribute to the Framers an intention to include in "high crimes and misdemeanors" impeachment for "misbehavior," a standard even more uncertain and indefinite than the discarded "mal-

182. Maladministration: Delaware (1776) Art. 23, 1 B. POORE, *supra* note 103, at 276-77; North Carolina (1776) Art. 23, 2 *id.* at 1413; Pennsylvania (1776) Sec. 22, *id.* at 1545; Vermont (1777) Art. 20, *id.* at 1863; Virginia (1777), *id.* at 1912.

New York (1777) Art. 33, *id.* at 1337; New Jersey (1776) Art. 12, *id.* at 1312. The New York provisions, the prototype of the Article II separation of removal from subsequent indictment and criminal punishment, provided for impeachment for malconduct but "indictment for crimes and misdemeanors." Art. 34, *id.* at 1337. Like the other States, New York did not employ "high crimes and misdemeanors."

183. 2 M. FARRAND, *supra* note 97, at 550. Earlier the Convention, in another context, had rejected "high misdemeanors" because it "had a technical meaning too limited," *id.* at 443. Hence we may conclude that the Framers adopted the phrase for purposes of impeachment precisely because it had that technical, limited meaning. It was this meaning which is to be given to the constitutional phrase, subject to the further limitation that impeachment was to be confined to "great offenses." P. 1511 *supra*. Berger, *Festschrift*, *supra* note 9.

I cannot therefore concur in Professor Kurland's statement that "the content of ['good behavior'] is "either (1) to be derived from the definition of high crimes and misdemeanors, or (2) to be left to the decision of the Senate when sitting as a court of impeachment." Kurland, *supra* note 8, at 697. The content of "good behavior" at common law had no association with "high crimes and misdemeanors." See pp. 1477, 1508-10 *supra*. Nor may the Senate exceed the "limits" contemplated by the Framers. Berger, *Festschrift*, *supra* note 9.

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administration">184 To open up "high crimes and misdemeanors" for "misbehavior" would thwart the manifest purpose of the Framers to limit the scope of impeachments and to exclude "maladministration," and by the same token "misbehavior," which did not amount to "high crimes and misdemeanors."

There is, however, no evidence that the Framers intended to immunize judges whose misbehavior did not ascend to "high crimes and misdemeanors." Nor is there any evidence that they employed "good behavior" in other than its accepted sense—a tenure terminated by misbehavior. Unless, therefore, we are to conclude that the Framers intended that judges whose tenure had been terminated by misbehavior were nevertheless to continue in office, there must be, as at common law, a means of effectuating the termination. And since impeachment cannot serve as the means, the argument for its exclusivity fails. Finally, "good behavior" was employed to guard against legislative and executive tampering with the judiciary, not to insulate judges from removal when they misbehaved. Judicial independence, in short, rises no higher than the "good behavior" tenure in which it is expressed. And the separation of powers only guarantees, it does not alter, the tenure secured by "good behavior"; much less does it exclude the *judiciary* from removing a judge who has misbehaved.

### IV. Two Arguments Made for the Status Quo

#### A. Professor Kurland

Those who would improve the removal process, Professor Kurland

184. Nathan Dane concluded that "good behavior" and its "opposite . . . 'misbehaviour,'" were "equally uncertain and indefinite." 7 N. DANE, DIGEST OF AMERICAN LAW 366 (1824).

A word about the "dilemma" with which Judge Otis sought to saddle proponents of the view that "good behavior" was enforceable by traditional means without regard to the provision for impeachment:

The proponents of the 'hiatus' theory are confronted with this dilemma: Either they must limit the jurisdiction of the court contemplated by THE SCHEME to those cases of alleged misbehavior *for which, they say, impeachment will not lie*, or they must say that the provision of the Constitution that 'The House of Representatives . . . shall have the sole power of impeachment' and its companion 'The Senate shall have the sole power to try all impeachments' are sufficiently complied with if exactly the same powers are vested elsewhere and called by different names.

Otis, *supra* note 27, at 33. His reference to "exactly the same powers" is in error because a forfeiture of office for misbehavior does not *disqualify* the officer ever to hold another federal office. Nor is removal for "misbehavior" a "different name" for "exactly the same powers" expressed in the impeachment provisions. Impeachment is confined to "high crimes and misdemeanors" and Parliament never confused the two. Otis overlooked what was perceived in the First Congress, that impeachment is a form of "supplemental security" in the event that the "executive" branch, and by the same token if the "judicial" branch, neglects to remove an unfit officer. P. 1491 *supra*.

suggests, are overlooking the "essential problem"—the "process that has made federal judicial appointments prime patronage plums to be awarded by Senators in acknowledgement of party or personal loyalty." The cure, he states, is to entrust judicial functions "only to those who are equal to their demands."<sup>185</sup> This is the counsel of perfection, as he himself recognizes: "The basic difficulty is to secure recognition of the necessity for merit appointments. How this sense of responsibility is to be secured is a question that has not yet been answered. Nor is it realistic to expect such improvement" at this time.<sup>186</sup> No unanswerable problems are posed by the case for removal by judges on grounds of judicial "misbehavior"; and rejection of the exclusivist interpretation is therefore preferable to reliance upon a Utopian appointment process.

Another Kurland objection is that there is an "absence of a weighty demonstration of the need for legislation providing for removal of federal judges by means other than impeachment—a case that has not been made and, I think, cannot be made."<sup>187</sup> If this be so, the protracted controversy about the exclusivity of impeachment has indeed been much ado about nothing. True, in the 182 years since adoption of the Constitution only nine judges have been impeached and only four convicted and removed. That, however, does not tell the whole story. Of the fifty-five judges who were investigated by the House,

eight [and one Justice] were impeached, eight were censured but not impeached, seventeen others resigned at one stage or another in the conduct of the investigation, while the rest were absolved of *impeachable* misconduct. Added to this are the undetermined number of judges who resigned upon the mere threat of inquiry; for them there are no adequate records.<sup>188</sup>

This was after sifting "the hundreds of complaints that have been regis-

185. Kurland, *supra* note 8, at 666.

186. *Id.* at 667. There is at least a doubt whether any appointment process would screen out the corrupt judge. J. BORKIN, *supra* note 1, at 11, concludes, "Nor is there a discernible type of corrupt judge. A study of thirty-two of the Federal judges against whom there was a considerable body of adverse evidence and who were subjects of Congressional investigation, impeachment proceedings, or criminal action indicates that they were recruited from the most diverse of environments . . . . Many were honor graduates and became trustees of universities; one was an authority on Oriental languages; another was the brother of one of America's most distinguished historians; one entered politics as a reform candidate; and another was the daily associate of gangsters and 'ward' politicians."

187. Kurland, *supra* note 8, at 697.

188. J. BORKIN, *supra* note 1, at 204 (emphasis added). For list of convictions, acquittals, investigations, see *id.* at 219-58. See also 80 CONG. REC. 5934 (1936), 81 CONG. REC. 6175, 6178 (1937).



tered" over the years.<sup>189</sup> That the adequacy of the sifting leaves something to be desired is revealed by the House's own records. To cite only a few instances involving district judges for whom a Committee of the House recommended impeachment but where the House took no action: Aleck Borman, used court money; Philip K. Lawrence, corrupt, malicious and dangerous abuses, intemperate use of ardent spirits.<sup>190</sup> Augustus Ricks was charged with appropriating moneys of the United States to his own use; the Committee recommended censure but the House took no action.<sup>191</sup> Grover M. Moscowitz was charged with favoritism towards former law partners in awarding receiverships and allowing excessive fees; the Committee "frowned" upon his actions but made no recommendation.<sup>192</sup>

Assuming that the House is persuaded of the necessity to proceed, it may yet draw back from taking the time of the entire Senate to try a "crooked judge"; in the words of the veteran Hatton Sumners, Chairman of the House Judiciary Committee and participant in two of the nine impeachments,<sup>193</sup> to do so would take "the time of the entire Senate . . . away from all of the other business of a great nation, and make them sit there for days and days . . . . [W]e know they will not try district judges, and we can hardly ask them to do so."<sup>194</sup> On the other side of the Capitol Senator McAdoo stated after the conviction of Judge Halsted Ritter, "the nature of the process is such that, as evidenced in the recent proceedings, it seriously interrupts for long periods the necessary transaction of important legislative business, places an almost intolerable burden of hearing and weighing testimony upon

189. 81 CONG. REC. 6178 (1937) (statement by Congressman Hobbs).

190. J. BORKIN, *supra* note 1, at 224, 237.

191. *Id.* at 243.

192. *Id.* at 239. The pervasiveness of such practices led Senator McAdoo, who had served as Chairman of a Senate Subcommittee to investigate receivership and bankruptcy proceedings and thus learned of judicial misbehavior at first hand, to sponsor a bill for judicial trial of judicial misbehavior. McAdoo became convinced that "District Courts . . . in the management of insolvent properties and corporations, have been, in instance after instance, revealed as too frequently taking action, the effect of which has been to deprive creditors and investors of a proportionate share of the assets to which they are entitled, for the benefit of lawyers and receivers and other court officials. Favoritism and influence have too frequently ruled the selection of receivers and trustees appointed by the courts, and the integrity and ability of these officers of the courts have too frequently been disregarded for other considerations." 80 CONG. REC. 5933 (1936).

193. J. BORKIN, *supra* note 1, at 197; Sumners was also associated with investigations of other judges. *Ibid.*

194. 81 CONG. REC. 6165 (1937). Sumners knew whereof he spoke. He had participated in the impeachment of Judge Louderback and said, that it was "the greatest farce ever presented. At one time only three senators were present and for ten days we presented evidence to what was practically an empty chamber." *Time Mag.*, Mar. 16, 1936, at 18, quoted in Note, *Removal of Federal Judges: A Proposed Plan*, 31 ILL. L. REV. 631, 634 (1937). *Cf.* note 2 *supra*.

Senators already charged heavily with other responsibilities, and for this reason alone is always resorted to with extreme reluctance, even in cases of flagrant misconduct." As a result, he said, "the practical certainty that in a large majority of cases misconduct will never be visited with impeachment is a standing invitation for judges to abuse their authority with impunity and without fear of removal."<sup>195</sup>

McAdoo's remarks were beautifully illustrated by the subsequent case of District Judge Albert W. Johnson of Pennsylvania. His noisome practices extended over a twenty year period of judicial service; complaints about his official conduct started soon after he took the oath of office; and criticism erupted in the press in 1931.<sup>196</sup> Johnson was under almost continuous investigation; a judge of his own Circuit Court of Appeals went to Washington to obtain relief.<sup>197</sup> Hatton Sumners gave point to Congressional reluctance to impeach, saying, "If the people of the district are satisfied with Judge Johnson, I am."<sup>198</sup> At last Johnson was indicted, but acquitted, and when impeachment threatened he resigned.<sup>199</sup>

195. 80 CONG. REC. 5934 (1936). Woodrow Wilson said, "judging by our past experiences, impeachment may be said to be little more than an empty menace. The House of Representatives is a tardy Grand Jury, and the Senate an uncertain court." W. WILSON, *supra* note 4, at 276. Borkin's study left him with the inescapable feeling "that Congress is sometimes willing to suffer a misbehaving judge rather than stop the legislative activities of the United States." J. BORKIN, *supra* note 1, at 195.

In the North Carolina Ratification Convention, Iredell stated that "A man in public office who knows there is no tribunal to punish him, may be ready to deviate from his duty." 4 J. ELLIOT, *supra* note 15, at 32.

196. J. BORKIN, *supra* note 1, at 143.

197. Judge Biggs testified that he talked to "Chairman Hatton Sumners of the House Judiciary Committee, and to then Representative Estes Kefauver." *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong. 2d Sess., 19 (1966) [hereinafter cited as *Hearings*].

198. J. BORKIN, *supra* note 1, at 145.

199. *Id.* at 185, 182. The object of his favors, his co-conspirator son, was convicted, but two of the witnesses who had themselves been convicted, refused to repeat the testimony they had given before the Grand Jury, thereby contributing to Johnson's acquittal. *Id.* at 185.

Another illustration involved the relation between the aged Third Circuit Judge Joseph Buffington and his confrere, Judge John Warren Davis. In 1937, Judge Biggs testified, Buffington was 86 years old, blind, had great difficulty hearing and did not employ a law clerk. *Hearings, supra* note 197, at 15. Judge Davis was then Senior Judge and "was writing and selling the opinions Judge Buffington was signing." J. BORKIN, *supra* note 1, at 101; *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 533 (3d Cir. 1948). The situation led the other circuit judges, testified Judge Biggs, to insist that Buffington and Davis should not sit together. *Hearings, supra* at 21. Twice Judge Biggs called the matter to the attention of the Assistant to the Attorney General. Subsequently "a letter was written by Judge William Clark at the suggestion of Judge Maris and myself [Biggs] to Mr. Edgar Hoover, and I think that brought the FBI into the situation." *Ibid.*

Thereafter Attorney General Biddle asked Congress to impeach Judge Davis, but Davis balked the impeachment by resigning and waiving his pension rights. J. BORKIN, *supra* note 1, at 120. Tactfully Judge Biggs testified that "we persuaded these elderly gentlemen to retire," but "to put it quite frankly, it takes a good deal of effort and quite a long time." *Hearings, supra* at 15-16. He said that there "is not the slightest doubt" that "the present machinery for the removal of unfit judges is inadequate." *Id.* at 16. See

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Here is a case that is documented; how many were not? How many cases of censurable conduct which rendered a judge unfit for office were screened out because of doubts whether they amounted to "high crimes and misdemeanors"? The testimony of an experienced Congressman, Hatton Sumners, who learned at first hand of the "burden" which impeachment places upon Congress, who sought only to disencumber Congress of that burden to free it for weightier and more pressing tasks, and who did not seek to encroach on the judiciary but to ask it to undertake its own housecleaning, should weigh heavily for the practical need, to borrow Senator McAdoo's phrase, of a "more certain, prompt, and effective method for dealing with" judicial abuses.<sup>200</sup>

### B. Professor Stolz

Conceding that impeachment has a "deservedly bad reputation," Professor Stolz challenges the assumption that it is an "unworkable process" and suggests that it "be modernized to meet current needs" rather than resort to an alternative method of removal that "runs a substantial risk of being held unconstitutional."<sup>201</sup> He would restructure impeachment by "(1) Creation of a bipartisan House Committee on Judicial Fitness [for investigation and recommendations to the House]; (2) creation of a permanent professional staff as an adjunct to the Committee; (3) use of a master or masters to conduct formal evidentiary hearings for the Senate and to prepare proposed findings of fact and conclusions of law which would be the basis of argument and decision in the Senate." This, he believes, "would be created without raising any new constitutional problems."<sup>202</sup>

To the contrary, he would substitute a serious constitutional doubt for what appears to be no real constitutional problem. Delegation of investigatory functions by the House to a Committee which would re-

also the comments on the acquittal of Judge Lauderback in an impeachment upon the complaint of the San Francisco Bar Association, though a majority of the Senate voted him guilty. Note, *Removal of Federal Judges: A Proposed Plan*, 31 ILL. L. REV. 631, 634 (1937).

200. 80 CONG. REC. 5934 (1936). In 1878, Justice Miller said, it "must be confessed that the means provided by the system of organic law for removing a judge, who for any reason is found to be unfit for his office, is very unsatisfactory . . . [and] after the experience of nearly a century . . . must be pronounced inadequate." 2 N.Y. STATE BAR ASS'N REP. 40 (1878), quoted in Note, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 U.C.L.A. L. REV. 1385 (1966).

201. Stolz, *supra* note 8, at 660, 664.

202. *Id.* at 667. The suggestion that the Senate should entrust the hearing of evidence to a Committee which would act as a master had been mooted by several Congressmen in the House after the Halsted Ritter impeachment proceedings. 81 CONG. REC. 6163, 6172, 6178 (1937).

port to the House and which the House could reject or adopt has historical precedent. The House of Commons often referred charges to a Committee for investigation, and then debated the Committee report and voted for or against lodging articles of impeachment.<sup>203</sup> But delegation of the hearing function by the Senate is something else again.

As Hamilton remarked, the role of the Commons as prosecutor while the Lords sat in judgment was the "model" of the parallel distribution of functions between the House of Representatives and the Senate.<sup>204</sup> Although the Lords referred sundry matters to committees, the function of hearing and trial was never delegated, and with good reason. The notable impeachments were chiefly treason trials involving peers, and the trial of a great nobleman "for blood" could scarcely be shunted to a Committee, let alone to a "Master." Conviction would be followed by death, fine or imprisonment, and although the governing law was the "course of parliament" rather than ordinary criminal law, English impeachment was therefore clearly criminal in nature.<sup>205</sup> Said Blackstone, "The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords."<sup>206</sup> Such trial was a substitute for trial by jury in which reference to a Master—an instrument of Chancery, not an adjunct of a criminal trial—found no place. In the case of capital offenses and treason trials we have unmistakable evidence that trial was to be by the full House of Lords. A resolution by the Lords in 1689 recites, "That it is the ancient right of the Peers of England to be tried, only in full Parliament, for any capital offenses."<sup>207</sup> In 1695 the Trial of Treasons Act provided "That upon the trial of any Peer or Peeress [for treason] . . . all the Peers who have a Right to sit and vote in parliament shall be duly summoned . . . and that every Peer, so summoned and appearing at such trial, shall vote in the Trial of such Peer or Peeress so to be tried . . ."<sup>208</sup> Although impeachments for "high crimes and misdemeanors" did not involve "capital offenses" they were nonetheless criminal proceedings; and there is evidence that these too were to be heard by all the Lords. On June 23, 1701, the Lords resolved that "the Lords who absented themselves from the trial of Lord Orford [impeached for "high crimes and misdemeanors"], and shall not make a

203. See 4 J. HATSELL, *supra* note 128, at 99, 110, 111, 113, 118, 121, 122, 128, 132.

204. THE FEDERALIST No. 65, *supra* note 16, at 425.

205. Berger, *Festschrift*, *supra* note 9.

206. 4 W. BLACKSTONE, COMMENTARIES \*260.

207. Quoted in 4 J. HATSELL, *supra* note 128, at 277-78.

208. Trials of Treason Act, 7 Will. 3, c. 3, § 11.

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just excuse for the same, are guilty of a great and wilful neglect of their duty."<sup>209</sup> So too, the impeachment of Lord Chancellor Macclesfield for "high crimes and misdemeanors" in 1725 was before "the Lords being seated in their House . . ."<sup>210</sup> No trace of a reference to a Committee of the Lords for hearing of the evidence turned up in my search of impeachment proceedings. The reason appears in a statement made by the Managers of the Lords at a conference between members of the Lords and the Commons (reported January 18, 1691) that

In the case of impeachments, which are the groans of the people . . . and carry with them a greater supposition of guilt than any other accusation, there all the Lords must judge.<sup>211</sup>

If the American impeachment process is also criminal, the English practice furnishes the standard, since almost the entire process was lifted bodily from the English practice.<sup>212</sup> The American process, I have elsewhere shown, however, is not criminal,<sup>213</sup> but the English procedure nonetheless furnished the model, as is confirmed by the Manual of Parliamentary Practice prepared for the Senate by Vice President Jefferson. Citing and in part quoting Wooddeson, Jefferson stated,

This trial . . . differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments prevailed. . . . The judgment, therefore, is to be such as is warranted by legal principles or precedents.<sup>214</sup>

Jefferson mistakenly conceived the American impeachment to be criminal in nature, but nonetheless it was a proceeding of so high and serious a nature as to call for adoption of the earlier procedure. Impeachment, said Hamilton, was "designed as a method of NATIONAL INQUEST into the conduct of public men"; and it could result in a

209. Quoted in 4 J. HATSELL, *supra* note 128, at 279, 420.

210. 16 HOWELL, *supra* note 173, at 767.

211. 4 J. HATSELL, *supra* note 128, at 343, 333, 342. Lord Grenville stated in the House of Lords, "When you are called upon to arraign an individual, and that individual a judge, everyone must be anxious that the attendance should be as full as possible." 7 PARL. DEB. 762 (1806). And see T. PLUCKNETT, *supra* note 173, at 232; *cf.* 1 W. HOLDSWORTH, *supra* note 28, at 389 (7th ed. 1956).

212. The formula "treason, bribery, high crimes and misdemeanors," was, but for the word "bribery," borrowed from English law. Hamilton refers to the English "model from which the idea of this institution has been borrowed." THE FEDERALIST No. 65, *supra* note 16, at 425; and he stated that the "experience of Great Britain affords an illustrious comment on the excellence" of "good behavior" tenure. *Id.* No. 78, at 511. The division of prosecuting functions between House and Senate was patently modelled on the division of functions between Commons and Lords. *Id.* No. 65, at 425.

213. Berger, *Festschrift*, *supra* note 9.

214. 2 R. WOODDESON, *supra* note 176, at 611; JEFFERSON'S MANUAL, *supra* note 54, at 153.

sentence of doom "to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country." The trial was confided to the Senate rather than the Supreme Court because "The awful discretion which a court of impeachment must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons."<sup>215</sup> Impeachment, it cannot be unduly emphasized, was chiefly designed for the President and his high ministers, as a "bridle" on the Executive;<sup>216</sup> and the Framers would have been aghast had it been proposed that the trial, hearing and sifting of the evidence on the impeachment of the President or of the Secretary of Foreign Affairs should be remitted to a Master, and that it would suffice for the Senate to vote on his findings and conclusions. Impeachment was of a piece, and there is no historical warrant for breaking it into two modes, one for the President and another for inferior federal judges.

With the seven-year-long impeachment of Warren Hastings fresh in their memory,<sup>217</sup> the Senate, in the 1797 impeachment of Senator Blount,<sup>218</sup> embraced the Lords' practice of sitting as a body—a practice from which, despite the onerous burdens it imposes, it has never departed, and which constitutes a constitutional interpretation entirely in harmony with the constitutional design. And if an analogous proposal to lighten the burdens of the Supreme Court may furnish a guide, a shift of the Senate's hearing function to a Master is of doubtful constitutionality. At the time of the Court-Packing Plan, Chief Justice Hughes, writing on behalf of Justice Van Devanter, Brandeis and himself, and expressing confidence that his statement was "in accord with the view" of the other Justices, advised the Senate,

I understand that it has been suggested that with more Justices the Court could hear cases in divisions. . . . I may also call attention to the provisions of article III, section 1, of the Constitution that the judicial power of the United States shall be vested "in one Supreme Court" . . . . The Constitution does not appear to authorize two or more supreme courts, or two or more parts of a Supreme Court functioning in effect as separate courts.<sup>219</sup>

215. THE FEDERALIST No. 65, *supra* note 16, at 426.

216. *Id.* at 425.

217. George Mason referred to the Hastings trial in the Federal Convention. 2 M. FARLAND, *supra* note 97, at 550. Vining referred to it in the First Congress, 1 ANNALS OF CONG., *supra* note 2, at 373. The impeachment was instituted in April, 1786. 4 J. HATSELL, *supra* note 128, at 241 n.\*. It took nearly seven years to try. Potts, *supra* note 148, at 33.

218. F. WHARTON, *supra* note 54, at 200, 257.

219. Quoted in S. REP. No. 711, 75th Cong., 1st Sess. 40 (1937).

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It is food for thought that Hughes did not suggest that the Court could meet its problems by a wholesale delegation of its hearing function to Masters.<sup>220</sup> Although the Stolz proposal has some superficially attractive aspects, it therefore raises disturbing constitutional issues in its turn.

### V. Insanity, Senility, and Disability

Despite his assertion that impeachment was "the only provision" for removal of judges, Hamilton, as we have seen, felt constrained to recognize that "insanity, without any formal or express provision may be safely pronounced to be a virtual disqualification."<sup>221</sup> Either this means that insanity is a "high crime and misdemeanor," a solecism if impeachable conduct be criminal, for a madman is not held responsible for his acts,<sup>222</sup> or the removal power must be sought elsewhere. Removal of an insane judge by resort to "during good behavior" does not require us to ignore the absence, as in impeachment, of an element of the offense—"criminal" intent. Minimally "during good behavior" must premise that the appointee is *capable* of behaving well. One who is confined in a strait-jacket, for example, is incapable of "behaving" at all within the meaning of "good behavior" in office. In Hawkins' words, the grant of an office implies that the grantee "ought to execute it diligently and faithfully,"<sup>223</sup> a condition impossible of fulfillment by a lunatic, so that his tenure is terminated by his insanity.

Inability or senility are not, in my judgment, distinguishable for removal purposes from insanity. Bacon's Abridgment states that an officer may be removed for "insufficiency," "an original Incapacity which creates the Forfeiture of an Office . . ."<sup>224</sup> Shartel quotes the statement of an English writer that "good behavior" imports an estate determinable by "incapacity from mental or bodily infirmity, or breach of good behavior," but questions whether disability is a ground of for-

220. In the general practice, references to masters have not been favored. Justice Field said that a court "cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers." *Kimberly v. Arms*, 129 U.S. 512, 524 (1889). Under the more liberal present practice, which empowers courts to appoint masters to assist the jury in those exceptional cases where the issues are too complicated for the jury adequately to handle alone, the Supreme Court said that "it will indeed be a rare case in which" the burden of such a showing "can be met." *Dairy Queen v. Wood*, 369 U.S. 469, 478 (1962).

221. THE FEDERALIST No. 79, *supra* note 16, at 514.

222. The point was made in the First Congress by Jackson, 1 ANNALS OF CONG., *supra* note 2, at 488, and noted by Henry Adams, 2 H. ADAMS, A HISTORY OF THE UNITED STATES 157 (1962 reprint).

223. P. 1508 *supra*.

224. 3 M. BACON, *supra* note 20, at (M) 742.

feiture.<sup>225</sup> He recognizes that "There are certain venerable lines of authority which, if pursued to their logical conclusion might involve this result." For example, "the grant of an office to a person not competent or qualified was said to be void. . . . Also, a judicial office could not be granted in reversion because though never so fit, the grantee might become unfit before the grant was to take effect."<sup>226</sup> But Shartel does not pursue the logic of such learning because "the lack of authority in the old books and decisions recognizing disability as a ground of removal, has a strong negative significance. Indeed English decisions have often asserted . . . that a good-behavior tenure is forfeitable *only* for misbehavior."<sup>227</sup> On this analysis his entire argument for removal by *scire facias* falls, for these are precisely the arguments levelled against him by his critics.

For my part, I prefer the hard common sense of Elias Boudinot in the First Congress "removal" debate:

It was asked, if ever we knew a person removed from office by reason of sickness or ignorance. If there never was such a case, it is, perhaps, nevertheless proper that they should be removed for those reasons; and we shall do well to establish the principle.

Suppose your Secretary of Foreign Affairs, rendered incapable of thought or action by a paralytic stroke: I ask whether there would be any propriety in keeping such a person in office, and whether the *salus populi*, the first object of republican governments, does not absolutely demand his dismissal.<sup>228</sup>

And if no supervening disability cases are met in the old decisions, the cases for removal for original "insufficiency" furnish an analogy from which a healthy common law development may proceed. The law would indeed be an ass if it required removal of one who was insane or incompetent *ab initio* but would prevent removal where incompetence subsequently developed.

A last Shartel argument is that "the basic common law conception of an office as property is utterly irreconcilable with the notion that such an office is subject to termination on account of supervening disability."<sup>229</sup> He himself noted, however, that "a judicial office could

225. Shartel, *supra* note 22, at 903.

226. *Ibid.* The authorities are quoted *id.* n.90.

227. *Id.* at 903-04.

228. The question had been asked by Smith, 1 ANNALS OF CONG., *supra* note 2, at 457; and Boudinot replied, *id.* at 469. For similar sentiments see Hartley, *id.* at 480; Sedgwick, *id.* at 460.

229. Shartel, *supra* note 22, at 904.



not be granted in reversion because . . . the grantee might become unfit before the grant was to take effect,"<sup>230</sup> evidence that there could be no "property" in a judicial office. And by the time Hawkins came to state the law, the "basic common law conception of an office as property" was, in the case of public office at least, tempered by recognition that an implied condition of the grant was that the grantee would "execute it diligently and faithfully."<sup>231</sup> One "who neglects a publick Office," stated Hawkins, "should rather be immediately displaced than, the publick be in danger of suffering that damage, which cannot but be expected some time or other from his negligence."<sup>232</sup> In a word, the public interest in adequate performance of official duty had become a paramount consideration. In the United States, the notion of property in a public office did not take hold. "Never let it be said," Hartley stated in the First Congress, "that he has an estate in his office when he is found unfit to perform his duties."<sup>233</sup> And the Supreme Court declared that the "nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."<sup>234</sup> Implications drawn from the early common law conception of property in an office, therefore, have no place in assessing constitutional power to remove a judge.

Consideration of removal for misbehavior must take into account Professor Kurland's statement that "for every inebriate, senile or malfeasant judge . . . there are several dullards and sluggards immune from removal whatever new standards and machinery are offered."<sup>235</sup> If "dullards" be equated with "ignorant" appointees, the common law runs to the contrary. Forfeiture of an office would lie for "insufficiency," that is, states Bacon's Abridgment, "original incapacity," citing the appointment of one "who is ignorant and unskilfull."<sup>236</sup> *Vynter's Case* is illustrative. A patent to fill the office of coroner and attorney of the king had issued "during good behavior." The Justices found that the office requires "a discreet, learned, and expert person," that "it is impossible that any one can properly use and exercise these offices, unless he shall have been educated in the same," that Vynter "never was

230. *Id.* at 903 n.90. To the same effect, Auditor Curle's Case, 11 Co. Rep. 2b, 4a, 77 Eng. Rep. 1147, 1149 (1610); *Veale v. Priour*, Hardres 351, 357, 145 Eng. Rep. 492, 496 (1664); 2 W. BLACKSTONE, COMMENTARIES \*36.

231. P. 1508 *supra*.

232. 1 W. HAWKINS, *supra* note 142, ch. 66, § 1 at 168.

233. 1 ANNALS OF CONG., *supra* note 2, at 480.

234. *Taylor & Marshall v. Beckham*, 178 U.S. 548, 577 (1900).

235. Kurland, *supra* note 8, at 666.

236. 3 M. BACON, *supra* note 20, at (M) 742.

educated in those offices" and "is altogether unfit to . . . exercise the said offices," and that the grant was "void in law." This was rehearsed before the King and ratified by him.<sup>237</sup> There are other cases.<sup>238</sup> As to "sluggards," from Coke onwards an office was forfeited for "neglect," and "non-attendance"; and Hawkins refers to the duty "diligently and faithfully" to perform the functions of the office.

Against the spectres raised by Justice Douglas of the consequences that may ensue if judges may be removed by other judges for "inefficiency," there is the present reality known to the bar of judges who neglect their duties.<sup>239</sup> Should an "ignorant" or "incompetent" or lazy judge be shielded because "absolute independence" bars the idea that "judges can be made accountable for their efficiency or lack of it to judges just over them in the federal judicial system"?<sup>240</sup> Who is better equipped to make that judgment; and what if every other agency is precluded from taking that action? Can we defer treatment of public ills because of fears that there may be side-effects? With Serjeant Hawkins, I would hold that one "who neglects a publick office . . . should rather be immediately displaced than, the publick be in danger of suffering that damage, which cannot but be expected some Time or Other from his Negligence."<sup>241</sup> Even the Founders, so fearful of the greedy expansiveness of power,<sup>242</sup> yet knew that there was no escape

237. *Vynter's Case* (undated) is set out in a memorandum to 2 Dyer 150b-151a, 73 Eng. Rep. 328 (1557), and apparently antedates the reign of William & Mary.

238. *Sutton The Chancellor of Gloucester's Case*, Godb. 390, 78 Eng. Rep. 230 (1625). Sutton, put out of his place for insufficiency, argued that the bishop had appointed him after examination and "if his sufficiency should be afterwards reexamined, it would be very perilous" Justice Doddrig held, "If an office of skill be granted to one for life who hath no skill to execute the office, the grant is void . . ." To the same effect, *John Dorrington's Case*, Hardres 129, 145 Eng. Rep. 415 (1655-60). In the First Congress, Sedgwick pointed to the dire consequences if the President could not remove "A Secretary in whom he discovers a great deal of ignorance, or a total incapacity to conduct the business." 1 ANNALS OF CONG., *supra* note 2, at 522.

239. In his testimony Judge Biggs adverted to the "very substantial problem, as to what can be done in respect to the judge who seems to be so constituted that he is either unable or unwilling to carry his caseload. . . . [T]here are very few such judges, but they present problems which are more or less constantly recurring . . ." *Hearings*, *supra* note 197, at 12.

240. *Chandler I*, 382 U.S. at 1006 (1966) (Black & Douglas, JJ., dissenting). By 1970, the indignation of Justice Douglas had mounted so that he called upon the Court to "put an end to the monstrous practices that seem about to overtake us . . ." *Chandler II*, 398 U.S. at 141 (1970).

In the First Congress Sedgwick asked incredulously, suppose a man "acquires vicious habits, an incurable indolence, or total neglect of the duties of his office, which forbode mischief to the public welfare, is there no way to arrest the threatened danger? . . . Must the tardy, tedious, desultory road, by way of impeachment be travelled to overtake" this man? 1 ANNALS OF CONG., *supra* note 2, at 460.

241. See note 169 *supra*.

242. Professor Bailyn has shown that the Colonists feared that liberty was the necessary victim of the aggressiveness of power, with "its endlessly propulsive tendency to expand itself beyond legitimate boundaries." B. BAILYN, *supra* note 89, at 56-57. Cf. R. BERGER, *CONGRESS V. THE SUPREME COURT* 8-14 (1969).

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from the delegation of power notwithstanding the possibility that it might be abused.<sup>243</sup> Fear of abuses having little or no experiential footing must not serve as an excuse for doing nothing.

The argument that judges are protected for the protection of the public<sup>244</sup> must not be pressed so far as to absolve them of responsibility, to the public detriment.<sup>245</sup> Absolutes are out of favor in every realm of human endeavor. Nor were the Founders absolutists: on the very issue of the independence of each department James Wilson said, "this position, like every other, has its limitations."<sup>246</sup> We should be slow to attribute to the Founders an intention to create an inflexible shield for judges under the guise of "absolute independence" which they never conceived.

## VI. Some Doctrinal Considerations

Messrs. Kramer and Barron ask whether "the article III provision that judges are to serve 'during good behavior' . . . is . . . a means of prohibiting Congress and the Executive from tampering in any way

243. Edward Rutledge remarked in the South Carolina Convention, "The very idea of power included a possibility of doing harm," and arguments resting on abuse of power "tend to the destruction of all confidence—the withholding of all power—the annihilation of all government." 4 J. ELLIOT, *supra* note 15, at 276. In the Massachusetts Convention, Bowdoin said, "A possibility of abuse . . . is by itself no sufficient reason for withholding the delegation. If it were a sufficient one, no power could be delegated . . ." 2 *id.* at 85. To the same effect, Stillman, *id.* at 166. In North Carolina, Iredell said, "No power of any kind or degree, can be given but what may be abused; we have, therefore, only to consider whether any particular power is absolutely necessary. If it be, the power must be given, and we must run the risk of abuse . . ." 4 *id.* at 95.

244. Kurland, *supra* note 8, at 698.

245. Lord Eldon stated that, "He knew as well as any man, the importance of preserving the independence of the judges; but there was something equally dangerous with a condition of dependence, and that was, that they should be placed above all law and all controul." 7 PARL. DEB. 766 (1806). Lord Chancellor Erskine "joined with peculiar fervor with the noble and learned lord [Eldon], in the sentiment, that judges should not be placed above the law, and be permitted to trample on the right of the subject." *Id.* at 768. In this country, Judge St. George Tucker stressed that "absolute independence of the judiciary . . . is not . . . incompatible with the strictest responsibility." Note 144 *supra*. If impeachment is indeed a delusive guarantee of that "strictest responsibility," as noted jurists, statesmen and scholars have declared (Justice Miller and Judge Biggs, notes 200 and 199 *supra*; Woodrow Wilson, note 195 *supra*; Hatton Sumners and Senator McAdoo, pp. 1515-16 *supra*), we are amply justified in embracing the alternative, judicial removal of judges, particularly if Congress, the Constitutional arbiter of impeachment, presses it upon us.

246. 1 J. WILSON, *supra* note 143, at 299. Despite their devotion to the separation of powers, the Framers recognized that a certain amount of "blending" was inescapable. In THE FEDERALIST No. 48, *supra* note 16, at 321, Madison stated that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." To the same effect, J. WILSON, *supra* at 299; Davie, 4 J. ELLIOT, *supra* note 15, at 121. See also Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012-14 (1924).

with life tenure."<sup>247</sup> Historically "good behavior" tenure was designed to put English judges beyond the royal pleasure.<sup>248</sup> By rejecting removal by the President on the Address of both Houses,<sup>249</sup> while granting power to House and Senate to remove by impeachment, the Framers excluded all other means of *executive or legislative* interference with the "good behavior" tenure of judges.<sup>250</sup> That tenure is protected by the separation of powers, to which impeachment is an exception.<sup>251</sup> And it follows, to answer another Kramer-Barron question, that Congress cannot "remove for service which is not good behavior,"<sup>252</sup> for its power is confined to impeachment for "treason, bribery and other high crimes and misdemeanors." But it does not follow that Congress may not employ its powers under the "necessary and proper" clause to effectuate a manifest Constitutional end and, if need be, to supplement the *judicial* powers for that purpose.<sup>253</sup> Removal by judges, even if facilitated by enabling legislation which confers subject matter jurisdiction or fashions a new remedy, is not the same thing as removal by Congress. And it bears repetition that a Congressional enlargement of judicial subject matter jurisdiction does not constitute a grant of *power*, for "judicial power" flows from Article III and it embraces resolution of forfeiture disputes.

At common law the grantor (with respect to public office, the King) could bring an action to oust an unfit officer.<sup>254</sup> Federal judges are appointed by the President, but it would raise separation of powers problems were he, or the Attorney General on behalf of the Executive branch, to initiate a removal action.<sup>255</sup> Such problems are avoided by the Tydings bill, S. 1506,<sup>256</sup> which would establish a Commission of judges to investigate complaints of unfitness, and if it finds cause to believe that the accused judge's conduct was inconsistent with "good

247. Kramer & Barron, *supra* note 10, at 455.

248. P. 1500 *supra*.

249. See pp. 1501-02 *supra*.

250. See notes 123, 141, 144, and p. 1503 *supra*.

251. P. 1491 *supra*.

252. Kramer & Barron, *supra* note 10, at 457.

253. Pp. 1483-86 *supra*.

254. "This may be brought either on the part of the king in order to resume the thing granted," or by some aggrieved subject. 3 W. BLACKSTONE, COMMENTARIES \*261. See also 4 J. COMYNS, *supra* note 22, at 259. J. KENYON, THE STUART CONSTITUTION 1603-1688, at 90 (1966) is therefore mistaken in saying that "The holder [of a patent during good behavior] could sue out a writ of *scire facias* demanding that the king show cause . . ."

255. The Hatton Sumners Bill, H.R. 146, 75th Cong., 1st Sess. (1941) provided a variant: upon a resolution of the House, the Chief Justice was to convene a special court of appeals before whom the Attorney General would institute a civil action against the accused judge. For analysis of the bill, see Moore, *supra* note 2, at 352-54.

256. 91st Cong., 1st Sess. (March 12, 1969).

behavior," it is to conduct a hearing. But this procedure is open to the objection that has been levelled at the joinder of investigatory and adjudicatory functions in one administrative agency, where investigation has been found to conduce to prejudgment of the case.<sup>257</sup> The function of investigation ought to be completely divorced from the function of hearing and judging; and I suggest that it ought to be removed from such a Commission and lodged in a branch of the Administrative Office of the Courts or some special branch of the Judiciary Department. And instead of an adjudicatory Commission I would prefer a special court, resembling the Emergency Court of Appeals which heard Office of Price Administration cases during World War II. It might include a mixture of circuit and district judges with perhaps one Supreme Court Justice in order to secure a cross section of judicial opinion. If a member of that court happened to be a fellow judge of the accused judge, he would withdraw, to be replaced by a judge appointed in such manner as Congress should designate. Thus personal bias for or against the accused would as far as possible be eliminated. The sole function of the special court would be to hear and determine the charges of misbehavior filed by the investigatory-accusatory branch of the Judiciary Department; and upon a finding of "misbehavior" a judgment would issue removing the offending judge, a forfeiture of the office.

In his advocacy of judicial removal of judges, Shartel stops short of removal of Supreme Court Justices on the ground that "there is no agency in the judiciary branch to remove the Justices of the Supreme Court," though he ventures that "perhaps Congress could confer statutory authority on the Supreme Court as a whole to remove its own offending members."<sup>258</sup> If a forfeiture action is judicial in nature, as seems plain, this would be to add to the original jurisdiction of the Court, which lies beyond the power of Congress.<sup>259</sup> Once it is granted that tenure "during good behavior" premises termination by bad behavior, an implied power exists to make the termination effective. Congress may confer jurisdiction of the "subject matter" on a special court, which would have "judicial power" by virtue of the existence of a dispute, and which would be established within the judiciary branch. The

257. See Berger, *Removal of Judicial Functions From Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 MICH. L. REV. 199, 206-11 (1960). And see remarks of Commissioner Philip Elman of the FTC, *Wall Street Journal*, August 12, 1970, at 12, col. 4.

258. Shartel, *supra* note 22, at 897 n.73.

259. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76 (1803).

special court, composed of circuit and district judges, with the possible inclusion of a Supreme Court Justice, would be removed from feelings of delicacy towards a fellow Justice, of "club spirit" or of possible animosity engendered by accumulated differences and irritations. It would be unbecoming for a Justice to complain of trial before such a court when his fellow citizens are daily being tried for life or deprivation of property before a solitary district judge. In any event, this is a question of mechanics for Congress, not of power.

There remains the question asked by Messrs. Kramer and Barron, whether the "good behavior" provision constitutes "a grant of power to Congress to prescribe the behavior which is less than good."<sup>200</sup> That provision, as was earlier noted, does not constitute "a grant of power"; it merely describes the duration of judicial tenure. Such power as Congress has in the premises derives from the "necessary and proper" clause, and from its power over the jurisdiction of the lower federal courts; and those powers cannot be exercised in derogation of the common law meaning of "good behavior." The Framers employed common law terms because they had recognized meaning,<sup>201</sup> because they posited "limits," as we have seen in the case of "high crimes and misdemeanors."<sup>202</sup> Who would maintain, for example, that the impeachment for "bribery" provision authorizes Congress to define "bribery" in a manner that departs sharply from its common law meaning—receipt of payment to influence judicial conduct in a pending proceeding?<sup>203</sup> Similarly, Congress may not give to "good behavior" a meaning utterly opposed to its common law meaning, for that would set the Constitutional protection afforded by "good behavior" tenure at naught. It can, however, codify and illuminate that meaning so long as it remains faithful to the nature of "good behavior" at common law. Such codification, indeed, could serve a number of useful purposes: it would advise every judge what constitutes removable cause; it would

260. Kramer & Barron, *supra* note 10, at 455.

261. Use of a technical term "fully ascertained by the common or civil law," said Justice Bushrod Washington, would require reference to that law "for its precise meaning." *United States v. Jones*, 26 F. Cas. 653, 655 (No. 15,494) (C.C. Pa. 1813). Of "robbery" Chief Justice Marshall said, "It must be understood in the sense in which it is recognized and defined at common law." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818). So too, "the word 'jury' and the words 'trial by jury' were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . ." *Thompson v. Utah*, 170 U.S. 343, 344 (1898). See note 39 *supra*.

262. P. 1512 *supra*.

263. The essence of "bribery" is payment "to influence his behaviour in office." 1 W. RUSSELL, *CRIMES AND MISDEMEANORS* 239 (1819); and see 4 J. COMYNS, *supra* note 22, at 253.

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guide the special court in ascertaining whether an accused judge had violated “good behavior.” As applied to judges, the definitions of “good behavior” by Bacon and Hawkins may be overbroad,<sup>264</sup> and because judicial removal of judges has been so controversial it may be useful to tighten and clarify the definition. If my analysis is valid, insanity, disability including senility, alcoholism, ignorance, and sustained neglect of duty might be included in such a definition. The fact that the definition will be applied by judges should be regarded as additional protection for, rather than a threat to, an accused judge; and it is to be hoped that borderline cases would be resolved in favor of the judge. As with all legislation, experience in the course of time may persuade Congress to amplify or qualify its enabling legislation.

### VII. Conclusion

In sum, judicial tenure “during good behavior” was terminated at common law by bad behavior and, since impeachable offenses, *i.e.*, “high crimes and misdemeanors,” are not identical with all breaches of “good behavior” but merely overlap in the case of “great offenses,” there exists an implied power to remove judges whose “misbehavior” falls short of “high crimes and misdemeanors.”<sup>265</sup> Traditionally forfeiture upon breach of a condition subsequent was a judicial function, and a forfeiture of judicial office therefore falls within the Article III “judicial power.” Congress may add the forfeiture of a judicial office for misbehavior to the forfeiture jurisdiction or, if necessary, it may under the “necessary and proper” clause provide a new remedy for forfeiture of judicial office in order to effectuate the implied power to remove a judge whose tenure was terminated by his misbehavior.

The argument that the impeachment provisions bar the way would sacrifice a necessary power to a canon of construction. With Chief Justice Marshall, I should want nothing less than an express prohibition to preclude beneficial exercise of an implied power.<sup>266</sup> Those who would deny to Congress the right to select the means for the termina-

264. See p. 1508, and note 169 *supra*.

265. That power extends to serious offenses which also constitute “misbehavior” notwithstanding they are comprehended by “high crimes and misdemeanors.” Of course, it is open to Congress to impeach for such offenses whenever it desires.

266. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819): the Constitution does not “prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers.” To make impeachment the exclusive means of removal, said Elias Boudinot in the First Congress, “would be derogatory to the powers of Government, and subversive of the rights of the people.” 1 ANNALS OF CONG., *supra* note 2, at 468.

tion which is implicit in the Constitutional text—"during good behavior"—have the burden of establishing the preclusion. The several "exclusivist" arguments do not sustain the burden. Having rejected the argument that an express provision for jury trial in criminal cases barred such trial in civil cases, the Framers would hardly have maintained that an express provision for impeachment excluded all other means of removal, particularly when that would make it impossible to reach a judge who had breached "good behavior" but could not be impeached for a "high crime and misdemeanor." The argument of "absolute independence" seeks to override the plain implications of the "good behavior" provision by a concept that found no expression either in the Constitution or in the several Conventions.

Rarely is it given to a man to brush the accumulated dust of generations from the Constitution and to perceive afresh its rational design.<sup>267</sup> Such a man was Burke Shartel, who first saw the claim for exclusivity of impeachment in all its nakedness and furnished an analytical structure for judicial removal of judges that in bold outline still stands up. His analysis is not scornfully to be dismissed as did Congressman Celler when it was made the basis of legislation offered in the House: "It scarcely can be believed that the framers intended vesting Congress with an important power [to pass enabling legislation] and then so skillfully concealed it it could not be discovered save after 150 years."<sup>268</sup> The difference between "good behavior" and "high crimes and misdemeanors" was "skillfully concealed" only from those who did not pause to turn the pages of history, and to ask: what becomes of "good behavior" if impeachment is restricted to "high crimes and misdemeanors." On Celler's reasoning the Copernican view of the

267. In an article, "Back to the Constitution," Justice Jackson, then Solicitor General, compared the recent emergence of the constitutional text from beneath a *laissez faire* gloss to the rediscovery of an Old Master after the retouching brushwork of succeeding generations had been removed. 25 A.B.A.J. 745 (1939).

268. 81 CONG. REC. 6171 (1937). Apparently Professor Kurland shares this view, for he quotes Celler. Kurland, *supra* note 8, at 691. Judge Otis, *supra* note 27, at 44, labels Shartel "the Galileo who discovered THE SCHEME . . . which theretofore, like the moons of Jupiter, had been unseen and unsuspected by the most discerning." "THE SCHEME" had been embodied in a bill to facilitate judicial removal of judges, introduced by Hatton Sumners and Senator McAdoo. *Id.* at 4, 10. Otis describes Sumners as a "distinguished statesman" "to whose enlightened leadership the American people more than once has been indebted." *Id.* at 10. Nevertheless Sumners was gulled by THE SCHEME, which is profusely sprinkled in caps throughout Otis' pages. *Id.* at 4, 9, 10, 12, 13, 17, 20, 22, 29, 30, 33, 34, 35, 37, 42, 43, 44.

Having traced almost every footprint of Otis and Shartel I must dissent from Professor Stolz's coupling of their articles as "some distinguished though partisan scholarship." Stolz *supra* note 8, at 660. Otis' article, to my mind, does not represent "distinguished scholarship" but rather an hysterical piece of special pleading richly spiced with circular reasoning, and vulnerable at every joint. And it is a misnomer to label Shartel's study as "partisan scholarship," for it lacks the "character of blind or unreasonable adherence to a party"; and indeed there was no "party" until Shartel, like Galileo, saw what was hidden from the undiscerning.



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universe must be discarded because for several millennia astronomers were lost in the Ptolemaic spheres within spheres; and Columbus should never have set forth in the Santa Maria because, as men believed for centuries, it would fall off the edge of the world. Even in our tradition bound law, when it was pressed upon Chief Justice Holt that the novelty of the claim argued against it, he replied, "that is an argument when it is founded upon reason, but it is none, when it is against reason."<sup>269</sup> It is never too late to heed the voice of reason, and if "reason" negates the exclusivist argument, it must prevail.

It is open to Congress, and I consider it highly desirable, to enact legislation under its "necessary and proper" power which would give effect to the implications of "good behavior," and confirm and facilitate judicial removal of judges for "misbehavior." This is an issue that has perennially troubled the Congress<sup>270</sup> and which can be set at rest once and for all by an enactment which can be presented to the Supreme Court. At worst the constitutionality of removability by judges is doubtful, and the last word on constitutional doubts is for the Court. Such judicial resolution is best initiated by legislation. On many aspects of legislation the Congress must indulge in initial Constitutional construction, knowing, as the very First Congress recognized,<sup>271</sup> that it is subject to correction by the Court. If there be indeed a constitutional doubt, the part of wisdom is to act on the counsel of Jefferson:

it is not right for those who are only to act in a preliminary form, to let their own doubts preclude the judgment of the court of ultimate decision.<sup>272</sup>

269. *Ashby v. White*, 2 Ld. Raym. 938, 957, 92 Eng. Rep. 126, 138 (1703). Compare the startling reversal in *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938) of a century-long course of judicial interpretation inaugurated by *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

270. For citations to various bills, see Ross, *supra* note 10; Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330 (1937); Moore, *supra* note 2. There is pending in Congress a bill introduced by Senator Tydings, the Judicial Reform Act, S. 1506, 91st Cong., 1st Sess. (1969).

271. "Without such a power," said Sylvester, "we could pass no law whatever"; "the Judiciary will be better able to decide the question of Constitutionality in this way than any other. If we are wrong, they can correct our error . . ." 1 ANNALS OF CONG., *supra* note 2, at 562. For additional citations, see R. BERGER, CONGRESS V. THE SUPREME COURT 147 (1969).

272. Letter to James Monroe, September 7, 1797. Quoted in 3 D. MALONE, *supra* note 97, at 386; 7 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 173 (P. Ford ed. 1895).

With Professor Moore, given the fact that the Supreme Court leans to sustaining the constitutionality of a statute, I consider that "Congress cannot legitimately refuse to enact beneficial legislation because a constitutional objection lurks in the background. Were it so timorous legislation would be at a standstill. Legislation does not have to be constitutional beyond every reasonable doubt before enactment is proper. The final answer to the constitutional issue of this legislation can only be given by the Supreme Court after enactment of the measure . . ." Moore, *supra* note 2, at 356. Professor Kurland, a vigorous proponent of the "exclusivist" view, states respecting disputed points, "it must be conceded that a determination by Congress that legislation on one or both of these latter points is constitutional should weigh heavily in favor of its validity if the issue comes to judicial scrutiny." Kurland, *supra* note 8, at 697.

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