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In Defense of the Constitution's Judicial Impeachment Standard

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In Defense of the Constitution's Judicial Impeachment Standard

Doc[to]r Franklin was for retaining the [impeachment] clause. . . . What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character.¹

In May of 1986, Nevada District Chief Judge Harry E. Claiborne of Las Vegas began serving a two-year sentence in an Alabama federal penitentiary for tax fraud, making him the first sitting federal judge in American history to be imprisoned.² Despite the impracticability of fulfilling his judicial duties from prison,³ Claiborne refused to resign, vowing to return to the bench after serving out his sentence.⁴ In fact, he retained his post, and his \$78,700 annual salary, for five months of his prison term.⁵

This situation — apparently both irrational and entirely legal — could develop because the Constitution explicitly provides only one way to remove article III judges⁶ from office: impeachment by the House of Representatives, and conviction by two-thirds of the Senate.⁷ In practice, this legislative impeachment procedure is intricate and

1. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (M. Farrand ed. 1911) [hereinafter M. FARRAND] (from James Madison's notes from the Constitutional Convention debates, July 20, 1787).

2. See, e.g., *Senate Preparing for Trial of Judge*, N.Y. Times, Oct. 5, 1986, at A41, col. 1.

3. Suggestions that Claiborne might somehow continue to hear his docket while serving his sentence were dismissed as "grotesque." See note 213 *infra* and accompanying text.

4. See, e.g., *Judge on Trial in the Senate Asks for 'Spirit of Fair Play'*, N.Y. Times, Oct. 8, 1986, at A14, col. 1.

5. See, e.g., *Claiborne Forfeits Judgeship, Pension in Vote by Senate*, Wall St. J., Oct. 10, 1986, at 17, col. 3.

6. "Article III judges" are those sitting on courts specifically authorized by article III of the Constitution. They are thus afforded the special protections and responsibilities delineated in that article, such as a nondiminishable salary, and life tenure during "good behavior." U.S. CONST. art. III, § 1. These protections are designed to ensure the judges' independence. See notes 107-12 *infra* and accompanying text. The difficult question of which judges qualify as article III judges is beyond the scope of this Note. See generally *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (act conferring federal judicial powers on bankruptcy judges who are not accorded article III protections is unconstitutional); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) (magistrates are not afforded article III protections).

7. The first three articles of the Constitution establish and describe the impeachment process for the President, Vice President, and other Civil Officers (including federal judges, see note 68 *infra* and accompanying text):

Art. I, § 2, cl. 5: "The House of Representatives . . . shall have the sole Power of Impeachment."

Art. I, § 3, cl. 6: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose they shall be on Oath or Affirmation. When the President of the

time-consuming.⁸ In Claiborne's case, the House moved fairly quickly and approved articles of impeachment on August 6, 1986,⁹ just two months after his final appeal¹⁰ was exhausted. A twelve-member Senate Impeachment Committee heard testimony a mere five weeks later, from September 15 to 23,¹¹ yet Claiborne did not officially forfeit his judgeship until his Senate conviction on October 9, 1986.¹² Thus, even when accelerated by the pressing need to remove a convicted felon from the federal bench, the impeachment process lasted four months, prompting cries of impatience.¹³

These cumbersome judicial impeachment provisions¹⁴ are seldom

United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two-thirds of the Members present."

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

Art. II, § 2, cl. 1: "The President . . . shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

Art. II, § 4: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Art. III, § 2, cl. 3: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

8. See Shenon, *Impeachment of Judges: A 'Cumbersome Tool'*, N.Y. Times, Apr. 2, 1986, at A16, col. 3; Nunn, *Judicial Tenure*, 54 CHI.-[KENT L. REV. 29 (1977). Senator Nunn explains that it may take weeks of House and Senate time to impeach an "obscure . . . misbehaving judge." *Id.* at 30. See also note 151 *infra*.

9. H.R. Res. 461, 99th Cong., 2d Sess., S. PUB. NO. 17 (1986).

10. *United States v. Claiborne*, 790 F.2d 1355 (9th Cir. 1986) (affirming the district court's denial of stay of execution of sentence).

11. The Committee was appointed by the presiding officer of the Senate pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, S. Res. 481, 99th Cong., 2d Sess. (1986). 1 *The Impeachment of Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of High Crimes and Misdemeanors: Hearings Before the Senate Impeachment Trial Comm., United States Senate*, 99th Cong., 2d Sess., S. HRG. NO. 812, at 2 (1986) [hereinafter *Claiborne Impeachment Trial Comm. Hearings*].

12. See, e.g., *Senate Convicts Judge of 'High Crimes'*, Wash. Post, Oct. 10, 1986, at A1, col. 3. No court, legislator, or scholar has suggested that Claiborne was not entitled to retain his nominal office and accompanying compensation until he was officially removed from office, either through a formal impeachment process or his own resignation (or death). This fact belies a historical scholarly debate over whether impeachment is the exclusive constitutional measure available to remove an article III judge from office. Compare, e.g., R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 122-80 (1973) (impeachment is not an exclusive remedy), and Note, *Trial of Good Behavior of Federal Judges*, 29 U. VA. L. REV. 876 (1943) (same), with Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108 (1970) (impeachment is exclusive), and Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969) (same). For a detailed discussion of this controversy, see Part II *infra*.

13. "A jury of 100 is totally unworkable," said Senator Howell Heflin in a statement released by his office. Natl. L.J., Oct. 20, 1986, at 8, col. 1. His sentiments were not unique:

Every day that Judge Claiborne continues to collect his salary, Representative Henry J. Hyde told the Senate, "is an insult to every law-abiding citizen in this country" and the prospect of his return to the bench "is an affront to the dignity of the Federal judiciary and an embarrassment to the rule of law."

Judge on Trial in the Senate asks for 'Spirit of Fair Play', N.Y. Times, Oct. 8, 1986, at A14, col. 1.

14. In addition to the constitutional provisions in note 7 *supra*, art. III, § 1 sets the tenure of

invoked. Yet, they are seeing more activity of late than in the preceding half-century.¹⁵ Claiborne was the first of two sitting federal judges to be convicted of a felony. Southern District of Mississippi Chief Judge Walter F. Nixon was convicted of perjury in February 1986¹⁶ and received a five-year prison sentence. He has not yet been imprisoned, pending his appeal.¹⁷

Still a third federal judge, Southern District of Florida Judge Alcee L. Hastings, faces imminent impeachment.¹⁸ Hastings is the first judge to be recommended to the U.S. House for removal by the Judicial Conference of the United States.¹⁹ A resolution calling for the initiation of impeachment proceedings was introduced in the House in April 1987.²⁰ This resolution was based on the Judicial Conference's investigation of the circumstances surrounding Hastings' 1983 criminal trial,²¹ in which he was acquitted of conspiracy, bribery, and obstruction of justice charges, and after which he resumed his judicial duties.²²

The constitutional impeachment language leaves many questions unresolved regarding who may be impeached, and when and why they

federal judges: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior"

15. The last judge to be impeached before this decade was U.S. District Judge Halsted L. Ritter of the Southern District of Florida, in 1936, for improprieties in a receivership case. J. BORKIN, *THE CORRUPT JUDGE*, at 199-200, 243-44 (1962); *Senate Convicts Judge of 'High Crimes'*, Wash. Post, Oct. 10, 1986, at A1, col. 3.

16. Judge Nixon was, however, acquitted of bribery charges. *See U.S. Judge Convicted of Perjury; Cleared of Accepting Illegal Gift*, N.Y. Times, Feb. 10, 1986, at A1, col. 3.

17. *See Federal Judge Sentenced to Five Years for Perjury*, N.Y. Times, Apr. 1, 1986, at A18, col. 6.

18. Ironically, Hastings was the first federal judge to be charged with committing a felony while in office. He was acquitted in 1983 of charges that he conspired to solicit a \$150,000 bribe. *Judge Acquitted in '83 Says Panel Seeks Impeachment*, N.Y. Times, Aug. 27, 1986, at 9, col. 5. Judge Claiborne was the second federal judge to be so charged, and Judge Nixon the third. *Down Home 'Deal' Plagues a U.S. Judge*, Natl. L.J., Feb. 17, 1986, at 1, col. 2.

However, Judge Hastings was not the first sitting article III judge to be criminally prosecuted while in office. In 1973, Seventh Circuit Judge Otto Kerner, Jr. stood trial on criminal charges, but his charges related to activities *before* he became a federal judge. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

19. The complex recommendation procedure involves a Circuit Judicial Council investigating committee certifying to the Judicial Conference that consideration of impeachment may be warranted. The Conference subsequently must certify its concurrence with this conclusion to the House of Representatives. *See* note 242 *infra*. 28 U.S.C. § 331 (1982) establishes the Judicial Conference of the United States to supervise the business of the federal judiciary and to oversee rules of procedure and practice in the federal system. The Conference is composed of the chief judges of all the circuits plus a designated district judge from each circuit, and is presided over by the Chief Justice of the United States.

20. Natl. L.J., Apr. 6, 1987, at 29, col. 3.

21. *Acquitted U.S. Judge Takes His Case to Congress*, Natl. L.J., Feb. 2, 1987, at 5, col. 1.

22. A jury found Hastings not guilty on Feb. 4, 1983. *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1097 (D.C. Cir. 1985). *See also Judge Acquitted in 1983 Says Panel Wants Him Impeached*, N.Y. Times, Aug. 27, 1986, at A14, col. 1. For a more detailed discussion of Judge Hastings' case, see Part III.B *infra*.

may be impeached. The recently escalating use of these usually inactive provisions has reignited a debate regarding their implementation which has lain dormant since articles of impeachment were brought by the U.S. House against President Nixon in 1974.²³ Congress' response has been a cry for legislative action to prevent future "Claibornes," centering on the possibility of a constitutional amendment.²⁴ Congress may be too late, however, to avert such a situation at least once more, given Judge Nixon's pledge not to resign.²⁵

Yet Congress' approach to the current problem overlooks historical prescriptions, looking forward before looking back. The fact that Claiborne can be imprisoned before he is impeached does not reflect poor constitutional drafting requiring remedial attention by modern legislatures. In fact, the call for a constitutional amendment ignores a longstanding interpretation of the Constitution whereby judges must be impeached before they are prosecuted and/or imprisoned. This tradition is firmly grounded in the policy goals behind the impeachment provisions. The sudden eschewal of the impeachment-before-prosecution tradition is arguably the real catalyst behind Claiborne's untenable situation.

This Note explores the traditional interpretation of the Constitution's impeachment provisions in light of the demands of Judges Claiborne's, Nixon's, and Hastings' cases. Part I describes the signals indicating analytical shortcomings, and thus the need for reexamination of the provisions as currently construed. It shows that the troubling results of the recent standard allowing criminal prosecution before impeachment are apparent to both the courts and the Congress. Part II analyzes the meaning and purpose of the constitutional language, and the recent policy challenges to it. This part shows that, in fact, the impeachment provisions were carefully chosen by the Constitution's drafters, who recognized the conflict between preservation of an independent judiciary and the need to expeditiously remove miscreants. The impeachment provisions were *designed* to be cumbersome, in order to protect judicial decisionmaking autonomy. To the Framers, mandating an intricate process for the removal of federal judges seemed a small price to pay to ensure the American populace an independent judiciary.

23. See, e.g., REPORT OF THE HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H. DOC. NO. 1305, 93d Cong., 2d Sess. (1974). See generally P. KURLAND, WATERGATE AND THE CONSTITUTION (1978) (discussing the constitutional issues posed by Watergate); L. JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE (1976).

24. Several proposed amendments have been discussed, and two were the topic of an August 1986 hearing before the Subcommittee on the Constitution of the Senate Judiciary Committee. See notes 52-55 *infra* and accompanying text.

25. See, e.g., *Impeachment of Judges: A 'Cumbersome Tool,'* N.Y. Times, Apr. 2, 1986, at A16, col. 3.

Part III juxtaposes the recent treatment of judges against Part II's constitutional analysis. It reveals that the current prosecution-before-impeachment practice disregards goals of the judicial independence that spawned the constitutional impeachment provisions. This Note shows that, even in the context of today's large complex judiciary, the values protected by the impeachment standard are too important to be sacrificed as they are when the standard is neglected. That is to say, moves to amend the Constitution or alternatively the Senate impeachment procedures²⁶ are overbroad. In the haste to bring an occasional bad judge to trial more efficiently, reformers have forgotten to ask whether the incremental benefits of effectively dismantling the impeachment protections are worth the damage caused to the entire judicial system.

I. THE SUSPECT NATURE OF THE PROSECUTION-BEFORE-IMPEACHMENT STANDARD

Looking only at Judges Claiborne's, Nixon's, and Hastings' trials, it would appear that prosecuting a federal judge before impeaching him is accepted practice in lower federal courts. Actually, the practice developed less than fifteen years ago. In 1973, Seventh Circuit Judge Otto Kerner, Jr. was the first sitting federal judge to be subjected to criminal prosecution.²⁷ In its decision denying Judge Kerner's application to stay his prosecution, *United States v. Isaacs*,²⁸ the Seventh Circuit held that whereas the Constitution did not expressly forbid the criminal prosecution of federal judges, and whereas precedent established that Members of Congress could be criminally prosecuted prior to their expulsion from the Senate, federal judges could be indicted and tried before impeachment.²⁹ *Isaacs* has become the precedential foundation for the modern prosecution-before-impeachment trend. However, the results that follow in the *Hastings*, *Nixon*, and *Claiborne* cases³⁰ raise doubts about this trend's constitutionality, and indicate a

26. In addition to the proposed constitutional amendments, see notes 54-55 *infra* and accompanying text, the Senate impeachment proceeding rules themselves, PROCEDURE AND GUIDELINES FOR IMPEACHMENT TRIALS IN THE UNITED STATES SENATE, S. Res. 439, 99th Cong., 2d Sess. (rev. ed. 1986), have come under scrutiny. See note 52 *infra*. One suggested innovation attempts to render Judge Claiborne's criminal conviction, standing alone, sufficient grounds for impeachment. However, because of Senate "sentiment" that, as a court of impeachment, it should do something more than simply ratify a court conviction, this proposal was rejected. See *Senate Convicts U.S. Judge, Ousting Him from Office*, N.Y. Times, Oct. 10, 1986, at A1, col. 6; see also 1 *Claiborne Impeachment Trial Comm. Hearings*, *supra* note 11, at 45-46.

27. Judge Kerner was convicted of, *inter alia*, conspiracy, tax evasion, and perjury. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

28. 493 F.2d 1124.

29. 493 F.2d at 1142-44.

30. See *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Claiborne*, 727 F.2d 842, 845-46 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984).

need for additional judicial examination.³¹

The most troubling aspect of prosecuting a judge before impeaching her is not the prosecution standing alone, but an important pragmatic consequence: she may be convicted and imprisoned. Because a judge cannot hear her docket from prison, jailing her arguably removes her from office without benefit of the constitutionally mandated impeachment procedure. Though an imprisoned judge may retain her pay and the trappings of office, the loss of her substantive responsibilities — *i.e.*, her decisionmaking powers — deprives her of “holding” her article III “office” just as effectively as an impeachment conviction would. Admittedly, no judge may be appointed to replace her while in prison, but the practical effect on her — the stripping of her judicial authority — is identical to that of impeachment.

Ninth Circuit Judge Kozinski recognized that this dilemma was created by Claiborne’s situation:

In affirming [Claiborne’s conviction], the [court] cited . . . two cases, which dealt with whether Claiborne could be *prosecuted*, concluding that Claiborne could . . . be *imprisoned*. Since prosecution does not remove Claiborne from the District of Nevada or necessarily interfere with performance of judicial function, while imprisonment does, I do not think the issues are identical.³²

The *Claiborne* majority’s failure to address whether an article III judge may be *imprisoned* before impeachment renders the court’s holding a near non sequitur. A law student’s “brief” of *United States v. Claiborne* would be almost comical:

Issue: Does imprisonment of a sitting article III judge amount to an unconstitutional removal from office without impeachment?

Holding: Article III judges may be prosecuted before impeachment.

Early in Claiborne’s proceedings, the Ninth Circuit could have relied completely on *Isaacs*,³³ which did not present the situation of an imprisoned judge, to rule against Claiborne. For example, when he moved to quash his indictment,³⁴ Claiborne did not face imminent imprisonment; thus, his case was very close to Judge Kerner’s. However, the Ninth Circuit issued two more opinions after Claiborne’s conviction, first affirming the District Court’s decision to convict³⁵ and then denying a stay of execution of sentence.³⁶ Neither opinion deals with

31. For a detailed discussion of the *Hastings* and *Claiborne* substantive reasoning, see Part III *infra*.

32. *United States v. Claiborne*, 790 F.2d 1355, 1357 n.2 (9th Cir. 1986) (Kozinski, J., dissenting) (emphasis in original).

33. 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

34. *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984).

35. *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985) (also denying hearing *en banc*), *cert. denied*, 106 S. Ct. 1636 (1986); also see the dissents from denial of *en banc* hearing, 781 F.2d 1325 (9th Cir. 1985); 781 F.2d 1327, 1334 (9th Cir. 1986).

36. *United States v. Claiborne*, 790 F.2d 1355 (9th Cir. 1986).

the question of whether incarceration of an article III judge constitutes removal from office.³⁷ The Supreme Court has never ruled on this issue.³⁸

Thus, without so much as a majority opinion mention of the word "imprison," *Claiborne* stands as "good" case law for the proposition that article III judges may be prosecuted *and imprisoned* before they are removed from office. What prompted the Ninth Circuit to act as if the imprisonment issue did not exist? The answer points to a conundrum that was too late to resolve once *Claiborne* was convicted.

The *Claiborne* decision may actually reflect that the Ninth Circuit faced an impossible political quandary. For them to rule that *Claiborne* had to be impeached before being imprisoned even though a jury had convicted him might look as if they were bestowing preferential treatment upon a felonious colleague.³⁹ Thus, even if a close examination of the constitutional merits of the issue would have required them to reverse *Claiborne's* conviction, they would have been hard-pressed to do so.

This observation is all too poignant, because the political dilemma faced by the *Claiborne* court may be one of the very conflicts that the impeachment provisions were designed to avoid.⁴⁰ As long as the defendant is impeached, and therefore a *former* federal judge by the time she is tried in court, judges will not be required to preside at the trial of their peers.⁴¹ Thus, the dilemma could have been avoided if *Claiborne* had been impeached before he was prosecuted and convicted. Under the current prosecution-before-impeachment standard, judges cannot realistically rule a colleague's imprisonment improper even if they feel it is because it would seem corrupt, no matter how well-founded in doctrine. An interpretation of constitutional language which not only circumvents an important issue (here, imprisonment) but also creates this "catch-22" signals analytical defects.

A common way around this political quandary is for the accused judge to resign before any judicial proceedings. Of the fifty-five judges

37. Nor did Justice Rehnquist address the issue in his one-and-a-half page opinion (sitting alone in his capacity as Ninth Circuit Justice) affirming the denial of *Claiborne's* motion to stay criminal proceedings pending determination of the constitutionality of his prosecution. *Claiborne v. United States*, 465 U.S. 1305 (1984).

38. The Supreme Court has denied *Claiborne* certiorari twice, without opinion. *United States v. Claiborne*, 469 U.S. 829 (1984); *United States v. Claiborne*, 106 S. Ct. 1636 (1986).

39. See *United States v. Claiborne*, 781 F.2d 1327, 1331-32 (9th Cir. 1986) (Reinhardt, J., dissenting from denial of *en banc* hearing).

40. See Part II.B *infra*.

41. This problem is partially resolved by judges' ability to recuse themselves, under 28 U.S.C. § 455 (1982), from cases in which they feel they would not be impartial. However, there is arguably no judge in the federal system who could adjudicate another judge's trial completely without bias, because of the errant judge's tarnishing effect upon the judiciary as a whole. See generally text at notes 191-93 *infra*.

that were investigated by Congress before 1973,⁴² seventeen resigned at some point during the investigation process, but there were an "undetermined number of judges who resigned upon mere threat of inquiry; for them there are no adequate records."⁴³ Eight judges and one United States Supreme Court Justice⁴⁴ have been impeached, and four judges have been convicted.⁴⁵ Eight judges have been censured but not impeached; the rest were absolved of impeachable misconduct.⁴⁶

Before *Isaacs*, the general practice for bringing charges against an article III judge involved the Attorney General, or a district attorney, notifying the Chairman of the House Judiciary Committee of the need for action against the judge.⁴⁷ The House would then decide whether

42. J. BORKIN, *supra* note 15, at 204; for a compilation of the fifty-four judges and one Supreme Court Justice who were the subject of congressional inquiry through 1962, and the circumstances and disposition of each case, see *id.* at 219-58. See also Nunn, *supra* note 8, at 31.

43. J. BORKIN, *supra* note 15, at 204.

44. The eight impeached judges are: Third Circuit Judge Robert W. Archbald, impeached by the House and convicted by the Senate in 1913 for accepting "loans" and a "gift" from litigants before him, and for using his official position to obtain coal leases, *id.* at 221-22; Illinois District Judge George W. English, whose resignation in 1925 terminated his impeachment proceedings on charges of partiality and favoritism in appointing receivers, attorneys, and banks in which to deposit bankruptcy funds, *id.* at 231-32; Tennessee District Judge West H. Humphreys, impeached by the House and convicted by the Senate in 1862, for "[s]upporting the Secession movement, failing to hold court, [and] accepting judicial commission in hostility to the United States," *id.* at 234; California District Judge Harold Louderback, impeached by the House and acquitted by the Senate in 1932, on charges of favoritism in appointment of receivers, and allowing them excessive fees, *id.* at 238; Missouri District Judge James H. Peck, impeached by the House and acquitted by the Senate in 1830 on charges of tyrannous treatment of counsel, *id.* at 240-41; New Hampshire District Judge John Pickering, impeached by the House and removed from the bench by the Senate in 1804 on charges of drunkenness, tyrannous conduct, and disregard for terms of statutes, *id.* at 242-43; Florida District Judge Halsted L. Ritter, impeached by the House and convicted by the Senate in 1936 on charges of bankruptcy irregularities, kickbacks, and income tax evasion, *id.* at 243-44; and Florida District Judge Charles H. Swayne, impeached by the House and acquitted by the Senate in 1905 on charges of bankruptcy irregularities, claiming per diem expenses to which he was not entitled, use of a private railroad car belonging to a railroad in receivership in his court, and nonresidence, *id.* at 248. Associate Supreme Court Justice Samuel Chase was impeached by the House and acquitted by the Senate in 1804-1805, on charges of alleged misconduct at trials dealing with the Sedition Law. *Id.* at 226-27. While there have been several other congressional gestures toward impeaching Supreme Court Justices, none of these has resulted in formal proceedings, a fact leading some commentators to charge that these were more politically than substantively motivated. See also note 135 *infra* and accompanying text.

45. The four were New Hampshire District Judge John Pickering (1804), Tennessee District Judge West H. Humphreys (1862), Third Circuit Judge Robert W. Archbald (1913), and Florida District Judge Halsted L. Ritter (1936). See note 44 *supra*.

46. J. BORKIN, *supra* note 15, at 204.

47. See J. BORKIN, *supra* note 15, at 44 (describing the procedure used to bring charges against Second Circuit Senior Judge Martin T. Manton in January, 1939). See generally Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1 (1970) (describing the procedures used to bring charges against impeached judges). For example, the Florida legislature recommended to the House that charges be brought against Judge Swayne, *id.* at 37; the Interstate Commerce Commission informed the Attorney General, who instigated the House action against Judge Archbald, *id.* at 39; and the President informed the

or not to issue articles of impeachment. If articles were issued, the judge would be tried before the Senate.

It is not clear why, after nearly two centuries of accusing judges in the House of Representatives, prosecutors began to regularly bring charges against judges in courts of law in 1973.⁴⁸ This unexplained retreat from the impeachment-first practice fuels suspicions about the new standard that were initially raised when the Ninth Circuit attempted to brush aside the practical effects of the change. Yet the current congressional response to the new "prosecution first" standard may be the clearest signal that, constitutionally, something is wrong.

Each invocation of the onerous impeachment process⁴⁹ has prompted numerous calls for some type of reform.⁵⁰ The current re-

Attorney General who informed the House of Representatives of the alleged wrongdoings of Judges Pickering and Louderback, *id.* at 26, 44.

Prior to Judge Kerner's case, criminal proceedings had been brought against two active judges. Southern District of New York District Judge Francis Winslow was indicted in 1929, and resigned before trial commenced. Third Circuit Court of Appeals Judge John Warren Davis was indicted and stood trial twice in 1941, but the indictment was dismissed. He ultimately resigned later that same year. *See J. BORKIN, supra* note 15, at 119-20, 255-56. However, neither judge claimed immunity from criminal prosecution prior to impeachment, thus no opinions were written on this issue. *See United States v. Hastings*, 681 F.2d 706, 709 n.7 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

48. There has been growing public demand over the past two decades to make governmental officials, including judges, more accountable for their actions. *See Kaufman, Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 3-4 (1970). This may have partially motivated the judicial proceedings. One state supreme court has attributed this "crisis of confidence" at least in part to the Watergate scandal. *See Matter of Johnson*, 568 P.2d 855, 868 (Wyo. 1977).

49. *See* notes 8 & 13 *supra* and accompanying text.

50. For example, following Judge Ritter's impeachment in 1936, proposed statutes in Congress would have created a new tribunal for the trial and removal of federal judges. S. 4527 and H.R. 2271, 74th Cong., 2d Sess. (1936) both provided for judicial branch determination of an absence of "good behavior" under U.S. CONST. art. III, § 1 in order to trigger removal. Both legislative proposals received considerable support, *see M. OTIS, A PROPOSED TRIBUNAL: IS IT CONSTITUTIONAL?* 13-16 (1939), and prompted a great deal of scholarly writing. *See, e.g., id.*; Ethridge, *The Law of Impeachment*, 8 MISS. L.J. 283 (1936); Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330 (1937); Yankwich, *Impeachment of Civil Officers under the Federal Constitution*, 26 GEO. L.J. 849 (1938).

In the late 1960s, the Senate's rejection of two of President Nixon's Supreme Court nominees focused attention on judicial appointment and removal procedures. There were proposed in Congress "well over two dozen measures designed to place new restrictions on federal judges." Ervin, *supra* note 12, at 122. Senate Bill 1506, and its accompanying bills S. 1507 through S. 1516, 91st Cong., 1st Sess. (1969), introduced by Sen. Joseph Tydings, were given particular attention in the Senate at that time. Known as the Judicial Reform Act, S. 1506 would have created a five-member Commission on Judicial Disabilities and Tenure within the judicial branch to hear complaints about federal judges. If four members of the Commission found the judge's conduct inconsistent with the "good behavior" standard, the Commission would recommend removal to the Judicial Conference. The Conference was empowered by the Act to remove judges, subject to Supreme Court discretionary review of its decisions. *See Ervin, supra* note 12, at 123; *see generally* Comment, *The Limitations of Article III on the Proposed Judicial Removal Machinery: S. 1506*, 118 U. PA. L. REV. 1064 (1970); *see also* R. BERGER, *supra* note 12, at 94.

Following Judge Hastings' trial, Congress again attempted to make judicial discipline more efficient by giving the Judicial Councils more prerogative to discipline their judges for "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1) (1982). Each Judicial Council is composed of a number of the circuit's active

formers' thrust is unusual, however, in that legislative impeachment proposals have usually been for *statutory* supplements to the impeachment removal power.⁵¹ In contrast, recent legislative focus has been primarily on the need to amend the *Constitution*.⁵²

On August 12, 1986, the Subcommittee on the Constitution of the Senate Judiciary Committee held a hearing on two proposed constitutional amendments. Both proposals "provide for automatic removal of federal officers upon conviction of a felony and exhaustion of all direct appeals."⁵³ S.J. Res. 370⁵⁴ provides for automatic forfeiture of office and all prerogatives by any judge convicted of a crime. S.J. Res.

district and circuit judges; is presided over by the chief judge of the circuit; and is charged with "mak[ing] all necessary orders for the effective and expeditious administration of the business of the courts" in its circuit. Act of June 25, 1948, ch. 646, § 332, 62 Stat. 902 (current version at 28 U.S.C. § 332 (1982)). In pursuit of efficiency, therefore, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 331, 332(a), 372(c), 604 (1982) [hereinafter *Judicial Conduct Act*]. See note 242 *infra* and accompanying text. However, the Judicial Conduct Act and its predecessor bills met with scholarly opposition. See, e.g., Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979) [hereinafter Kaufman, *Chilling Independence*]; Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980).

51. See, e.g., S. 1506, 91st Cong., 1st Sess. (1969) (described in note 50, *supra*); H.R. 146, 77th Cong., 1st Sess., 87 CONG. REC. 8167 (1941) (granting removal power to three-member "court of appeals" chosen by the Chief Justice from any three appeals court judges); S. 4527, 74th Cong., 2d Sess., 80 CONG. REC. 5937 (1936) (empowering a new court, composed of the ten chief judges of the circuits, with exclusive jurisdiction over removal cases).

52. In addition to the two amendments discussed at length, see notes 54-55 *infra* and accompanying text, Senator Howell Heflin stated shortly after the Senate voted to impeach Judge Claiborne that he too would introduce a constitutional amendment similar to one he wrote for the Alabama state constitution in 1973 while that state's chief justice. Heflin's amendment would remove Congress from the judicial impeachment procedure altogether. *Will Claiborne's Impeachment Spur Overhaul of Process?*, Natl. L.J., Oct. 20, 1986, at 8, col. 1. Additionally, Rep. Robert Kastenmeier, Chairman of the Courts Subcommittee of the House Judiciary Committee, indicated that the House also plans to hold hearings on the Judicial Conduct Act to consider a constitutional amendment as well as other potential changes. *Id.*

Alternatively, a few senators are proposing modification of Senate rules to expedite impeachment proceedings when the defendant has already been convicted by a court. In fact, there already were some changes made in internal Senate rules to expedite Judge Claiborne's trial. For example, the Senate adopted procedures, available since 1935, S. Res. 18, 74th Cong., 1st Sess., 79 CONG. REC. 8309-10 (1935), under which a twelve-senator committee took evidence and reported their findings to the Senate. By avoiding a full Senate trial, Senate disruption was minimized. S. Res. 481, 99th Cong., 2d Sess., 132 CONG. REC. 11759-60 (daily ed. Aug. 14, 1986); *Senate Convicts U.S. Judge, Ousting Him from Office*, N.Y. Times, Oct. 10, 1986, at A1, col. 12. Claiborne's argument — that the Constitution entitled him to the right to call witnesses before the entire Senate — was rejected. 1 *Claiborne Impeachment Trial Comm. Hearings*, *supra* note 11, at 112-13, 240-43, 272-73; see also *Senate Votes to Bar Witnesses in the Trial of Judge*, N.Y. Times, Oct. 9, 1986, at A31, col. 1; *Effort to Block Vote on Claiborne Rejected*, Wash. Post, Oct. 9, 1986, at A3, col. 1. Another proposed procedural revision, which would have rendered Claiborne's felony conviction itself sufficient grounds for his removal from office, was rejected by the Senate, 46 to 17, with 35 abstentions. See, e.g., *Senate Convicts Judge of 'High Crimes'*, Wash. Post, Oct. 10, 1986, at A1, col. 3.

53. *Hearing on S.J. Res. 364 and S.J. Res. 370 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (Aug. 12, 1986) (statement of then-Subcommittee Chairman Orrin G. Hatch).

54. Introduced June 26, 1986, by Senator Dennis DeConcini, S.J. Res. 370, 99th Cong., 2d Sess., 132 CONG. REC. S8746 (daily ed. June 26, 1986), provides,

364⁵⁵ broadens the class of those to whom forfeiture applies to include any U.S. officer appointed by the President and approved by the Senate. Senator DeConcini, when introducing S.J. Res. 370, was straightforward about its purpose: "The impetus for this resolution clearly stems from the stunning state of events that surround . . . Judge . . . Claiborne."⁵⁶ Senator Thurmond's introductory remarks to S.J. Res. 364 do not mention Claiborne by name, but Claiborne is unmistakably its catalyst as well.⁵⁷

However, the hearing was dominated by testimony urging rejection of the amendments.⁵⁸ Two witnesses, a federal court of appeals judge and a law professor,⁵⁹ urged that the admitted defects in the existing provisions do not warrant the extraordinary remedy of a constitutional amendment.⁶⁰ The fact that the Senators advocate this "extraordinary remedy" is indicative of their awareness of the uniqueness of this problem.

More significantly, advocacy of the amendment answers one question by raising numerous others. First, it indicates that some Members of Congress assume impeachment to be an exclusive constitutional procedure for removing federal judges,⁶¹ an assumption which is historically controversial. If the procedure were not exclu-

ARTICLE

SECTION 1. A judge appointed pursuant to Article III shall, upon conviction of a felony and exhaustion of all direct appeals, forfeit office and benefits thereof.

SECTION 2. The Congress shall have the power by appropriate legislation to set standards and guidelines by which the Supreme Court may discipline judges appointed pursuant to Article III who bring disrepute on the Federal courts or the administration of justice by the courts. Such discipline may include removal from office and diminution of compensation.

55. Introduced June 18, 1986, by then-Senate Judiciary Committee Chairman Strom Thurmond, S.J. Res. 364, 99th Cong., 2d Sess., 132 CONG. REC. S7867 (daily ed. June 18, 1986), provides,

ARTICLE

Any officer of the United States appointed by the President with the advice and consent of the Senate, upon conviction of a felony and exhaustion of all direct appeals, shall forfeit office and all prerogatives, benefits, or compensation thereof.

56. 132 CONG. REC. S8746 (daily ed. June 26, 1986) (statement of Sen. DeConcini).

57. "Under current Constitution[al] law . . . it is possible for certain officers of the United States who are appointed by the President with the advice and consent of the Senate to continue to receive a salary after . . . a [felony] conviction." 132 CONG. REC. S7867 (daily ed. June 18, 1986) (statement of Sen. Thurmond).

58. See the prepared statement of Ninth Circuit Judge J. Clifford Wallace [hereinafter Judge Wallace statement], and the prepared statement of University of Pennsylvania Law School Professor Stephen B. Burbank [hereinafter Professor Burbank statement], at the Hearing on S.J. Res. 364 and S.J. Res. 370 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (Aug. 12, 1986) (unpublished papers on file with the *Michigan Law Review*).

59. U.S. Ninth Circuit Judge J. Clifford Wallace and University of Pennsylvania Law School Professor Stephen B. Burbank.

60. See Professor Burbank statement, *supra* note 58, at 1-2.

61. "My understanding about the need for *constitutional* amendment to effect a change in life tenure [of federal judges] is buttressed by the repeated introduction in both Houses of Congress of amendments to that end." Kurland, *supra* note 12, at 697 (emphasis added).

sive, there would be no need to amend the document to provide for an alternative method.⁶²

Second, and more importantly, given that imprisonment of an article III judge likely constitutes an alternative form of removal,⁶³ the call for an amendment can be seen as an effort to mold the Constitution to the case law rather than vice versa. Though this process may not actively trouble Members of Congress, it must heighten concerns about the prosecution-first standard: If the prosecution-first cases could be reconciled with the Constitution as it stands, an amendment to the document would be redundant.

Finally, consider this last point together with the practical difficulties inherent in the constitutional amendment process. It is very difficult for any amendment to be ratified.⁶⁴ A failed amendment could actually exacerbate the current controversy by drawing attention to the shortcomings of the prosecution-before-impeachment standard, but then leaving the troublesome procedure in place. That is, when Congress leaves us with the admittedly problematic prosecution-before-impeachment standard, what happens next? Once again, we will be left wondering whether Congress is trying to remedy a situation it has not clearly identified. By focusing only on the inefficiency of allowing a jailed article III judge to continue to draw his salary before impeachment, Congress overlooks the fundamental question of whether the Constitution actually mandates (let alone *allows*) such a system. Part II will explore answers found in the Constitution's text, original intent, and modern policy and consequences.

II. THE CONSTITUTIONAL STANDARD: EXCLUSIVITY

A. *The Text*

Nowhere does the Constitution say that impeachment is the only way to remove a federal judge. Ironically, the only mention of the word "impeachment" in article III is in the provision barring jury trials in cases of impeachment.⁶⁵ Yet the exclusivity issue is central to the cases of Judges Claiborne, Hastings, and Nixon, because if im-

62. See Part II *infra*.

63. See text at notes 31-33 *supra* & 213-24 *infra*.

64. Article V of the U.S. Constitution requires ratification by three-fourths of the states for approval of any amendment, after either approval by two-thirds of both houses of Congress, or application for a Constitutional Convention by two-thirds of the states' legislatures. Since the adoption of Article V, only 26 of approximately 5,000 proposed constitutional amendments have been added to the document. Five others were adopted by Congress but not ratified by the states. M. BERRY, *WHY ERA FAILED — POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 6 (1986). Berry's book illustrates that the "deliberately . . . difficult" constitutional amendment process, *id.* at 4, renders passage of an amendment arduous. Thus, it took fifty-seven years from its first introduction in Congress for the thirteenth amendment ending slavery to be ratified, *id.* at 10, and the Equal Rights Amendment was rejected by a slim three state margin (of thirty-eight required) after a decade-long ratification fight.

65. U.S. CONST. art. III, § 2, cl. 3; see note 7 *supra*.

peachment is not the sole constitutional remedy for judicial removal, then it does not matter whether imprisonment is tantamount to removal from office. Imprisonment could be one of several legitimate alternative removal methods to impeachment.

Nonetheless, the "verdict of history"⁶⁶ is that impeachment is the only way to remove article III judges from office, despite the ambiguities and contradictions in the constitutional language.⁶⁷ There has

66. Remarks of University of Pennsylvania Law Professor Stephen B. Burbank at the *Kentucky Law Journal* Federal Judicial Impeachment and Discipline Symposium (Oct. 12, 1987); see also notes 81-86 *infra* and accompanying text.

67. See notes 7 & 14 *supra*. For example, art. II, § 4 provides that "[t]he 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." Art. III, § 1, however, provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior." It is not clear whether a judge clearly guilty of "bad behavior" (assuming the phrase can be defined) may still not have behaved badly enough to be guilty of an impeachable "high crime"; there is a potentially disturbing "hiatus between crimes warranting impeachment and the full reach of that . . . misconduct which ends the judge's right to remain in office." M. OTIS, *supra* note 50, at 37. The intended meaning of "good behavior" is at least facially addressed by Alexander Hamilton in *The Federalist*, to provide for the independence of the judiciary through their "permanency in office." THE FEDERALIST NO. 78, at 539, 546-47 (A. Hamilton) (H. Dawson ed. 1863). However, the Constitutional Convention of 1787 developed "high crimes and misdemeanors" as compromise language. See 1 M. FARRAND, *supra* note 1, at 230; 2 *id.* at 64, 172, 174, 186, 443, 495, 545, 550. Its "meaning" remains a mystery. For reasoning by example that "high crimes and misdemeanors" covers "general office misconduct," see Yankwich, *supra* note 50, at 850-61. It is settled that "high crimes" reach more than only indictable offenses. See *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937); see also ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 MINN. L. REV. 185 (1938) (demonstrating that both Judges Archbald and Ritter were convicted of articles of impeachment which did not amount to indictable offenses). But cf. Judge Claiborne's Motion to Dismiss the Articles of Impeachment on the Grounds that They Do Not State Impeachable Offenses, in 1 *Claiborne Impeachment Trial Comm. Hearings*, *supra* note 11, at 244-51.

Debate on the impeachment process tends to focus on which noncriminal acts are impeachable offenses; and, whether every criminal act is an impeachable offense. See generally C. BLACK, IMPEACHMENT: A HANDBOOK 33-40 (1974); A. SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS 30-49 (1916); R. BERGER, *supra* note 12, at 53-102. The issue arises in the context of presidential as well as judicial impeachments. See, e.g., 116 CONG. REC. 11913 (an "impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history") (remarks of then-Rep. Gerald Ford). Ford's remarks are criticized in Feerick, *supra* note 47, at 57.

Even clear definitions of "high crimes" and "good behavior" would not completely resolve the "hiatus" dilemma, which is usually argued in the context of whether impeachment is the exclusive constitutional judicial removal method. If impeachment is an exclusive remedy, then there is no process by which a judge can be disciplined for mere "bad behavior," because she cannot be impeached for anything short of "high crimes." For the argument that thus construing impeachment as exclusive would render the "good behavior" clause impotent, therefore the existence of separate clauses presupposes the existence of alternatives for removal other than impeachment, see R. BERGER, *supra* note 12, at 122-80; Shartel, *Federal Judges — Appointment, Supervision, and Removal — Some Possibilities Under the Constitution, Part III: Judicial Removal of Unfit District and Circuit Judges*, 28 MICH. L. REV. 870 (1930); Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967) [hereinafter Note, *The Chandler Incident*]; cf. Feerick, *supra* note 47 (arguing that the two standards are different, but that impeachment is nonetheless the sole removal method, and was intended to be used sparingly).

Other scholars and some courts, relying on Alexander Hamilton's Statement, *supra*, assert that "good behavior" only defines judicial tenure, and does not address the issue of what qualifies

never been much doubt that the Framers intended judges to be considered "civil officers"⁶⁸ subject to impeachment under article II, section 4,⁶⁹ but the argument that impeachment should be an exclusive removal method has been the subject of extensive scholarly debate.

The context of this debate is illuminating. To the Framers, impeachment and removal were not always identical. In fact, there were a number of alternative removal methods that the Framers could have adopted, but did not. In English law, impeachment was one of several ways to remove public officials from office, but was differentiated from the others in that it had a unique technical meaning which disqualified defendants from holding future office.⁷⁰ The early eighteenth-century English constitutional system contained procedures allowing for removal of judges by any of the three branches of government. Parliament could remove through their choice of impeachment, bill of attainder, or address to the King. The King initially could remove the judges of the superior courts (Exchequer, King's Bench, and Common Pleas) through language giving the judge tenure *durante bene placito*

as an impeachable offense. See *O'Donoghue v. United States*, 289 U.S. 516, 549 (1933) (good behavior means life or permanent tenure); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (same); A. SIMPSON, *supra*, at 54 (arguing that even if, by constitutional amendment, judges served periodic instead of life terms, this would not alter the standards by which they could be impeached). This approach nonetheless requires the two clauses to be read together to give the document meaning. As put by one scholar in 1914, "The judicial-tenure clause amplifies the removal clause, which proximately precedes it in the Constitution. Each borrows cogency and light from the other." W. BROWN, *IMPEACHMENT — A MONOGRAPH ON THE IMPEACHMENT OF THE FEDERAL JUDICIARY* 10 (1914) (published as S. DOC. NO. 358, 63d Cong., 2d Sess. (1914)). This argument also understands "good behavior" to expect a higher level of conduct than is expected from the ordinary citizen, but does not see a conflict between the two standards. Instead, it sees impeachment as a mechanism by which judges can be removed from office for violations of the "good behavior" standard even if they would not be subject to other sanctions, such as criminal prosecution. See generally M. OTIS, *supra* note 50; Note, *supra* note 50; W. BROWN, *supra*.

68. See CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION* 574-75 (1973). The "civil officers" classification may have been used by the Framers to distinguish American impeachment from English impeachment, under which any person — not only those holding offices of public responsibility — could be impeached. The Framers explicitly rejected this unlimited application of impeachment. W. BROWN, *supra* note 67, at 4-6; P.C. HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at xi, 97 (1984).

69. See THE FEDERALIST NO. 79, at 550 (A. Hamilton) (H. Dawson ed. 1863) ("The precautions for [federal judges'] responsibility are comprised in the Article respecting impeachments. They are liable to be impeached for malconduct, by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified from holding any other."). The argument against inclusion of judicial officers in the "civil officers" language focused on the fact that the impeachment provision is contained in article II, the article regarding the executive branch. See generally M. OTIS, *supra* note 50 at 25; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-6, at 49 n.5 (1978).

70. Shartel, *supra* note 67, at 880-84, 892. Shartel argues that the Framers must have intended "impeachment" to retain its technical meaning, otherwise they would have used the term "remove." Thus, he argues, the Framers did not intend impeachment to be an exclusive method of removal, but meant for other common law remedies, see text at notes 71-72 *infra*, to survive. Shartel, *supra* note 67, at 881-83, 892-93. See also Note, *The Chandler Incident*, *supra* note 67, at 461-62.

(during good pleasure, *i.e.*, at the King's will), though he lost removal power in 1701 under the Act of Settlement, from which time judges were to be appointed *quamdiu se bene gesserint* (during good behavior). Finally, the judiciary itself could oust an errant superior court judge through writ of *scire facias*, and inferior court judges by *quo warranto*. The United States Constitution specifically retained some of these elements, *i.e.*, the impeachment process and the "good behavior" standard, while it overtly rejected the bill of attainder.⁷¹ The full impact of the exclusivity argument can be understood only upon recognition that, to the Framers, removal did not mean only impeachment. Although the consequences of the various removal procedures were the same as applied to an individual judge — being stripped of judicial authority and salary — the circumstances under which each procedure would be appropriate depended on the nature of the allegation against the judge. Consolidating all judicial removals under the impeachment umbrella was a striking departure from English precedent.⁷²

Possibly the most thorough exposition of the constitutional interpretation insisting that impeachment is the only way to remove federal judges was made by Judge Merrill E. Otis in *A Proposed Tribunal: Is It Constitutional?*⁷³ Noting that the Framers gave the House the "sole power of impeachment,"⁷⁴ and the Senate the "sole power to try all impeachments,"⁷⁵ Judge Otis continued,

The Framers certainly would not have been so meticulous in the use of words, so careful to use this particularly strong word in the vesting of the impeachment power, unless they had in mind . . . to make it clear to all forever that, in the American system, no significance should be given to any English precedent, if there were any, whereby the power to charge misconduct for the purpose of obtaining removal of a civil officer from office was held to lodged in any other than that legislative body directly representing the whole people.⁷⁶

The crux of Otis' argument is that the removal power rests solely with the House and the Senate, and cannot be delegated to any other body, administrative or judicial, within the boundaries set by the constitutional text.⁷⁷

71. 2 M. FARRAND, *supra* note 1, at 428-29. For a complete discussion of the early English background, see Shartel, *supra* note 67, at 880-84. See also Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-[KENT L. REV. 1 (1977).

72. Shartel, *supra* note 67, at 880.

73. M. OTIS, *supra* note 50, at 25-31.

74. U.S. CONST. art. I, § 2, cl. 5 (emphasis added).

75. U.S. CONST. art. I, § 3, cl. 6 (emphasis added).

76. M. OTIS, *supra* note 50, at 29-30.

77. *Id.* at 31; see also Kurland, *supra* note 12, at 692 ("The use of the word 'sole' in those two particulars undoubtedly is most significant . . . [T]he conclusion is inescapable that the only way you can try these judges is by the method that the Constitution allows us . . .") (quoting Congressman Celler).

Proponents of the argument that impeachment is *not* an exclusive method for removing federal judges are quick to point out, quite rightly, that Judge Otis argues around the problem. He proves merely that Congress has the sole right to bring and try *impeachments*, but he begs the question of whether impeachment is the "sole" means of removal.⁷⁸ Thus, Otis' logic is not entirely convincing. Though his view enjoys some scholarly support,⁷⁹ most literature endorses an approach allowing for removal other than by impeachment alone.⁸⁰

Yet, as mentioned, Judge Otis still trumps, if only by universal acquiescence to his position.⁸¹ Witness that no one suggested there was any legal way to stop paying Judge Claiborne his \$78,700 annual salary save for impeachment.⁸² Lower court decisions abound with categorical statements that impeachment is the only constitutional method for removing federal judges,⁸³ and a 1970 Supreme Court decision, *Chandler v. Judicial Council of the Tenth Circuit*,⁸⁴ rests on this assumption as well. This constitutional directive is also reflected in the

78. R. BERGER, *supra* note 12, at 136.

79. See, e.g., Kurland, *supra* note 12; Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135; Note, *Constitutional Judicial Tenure Legislation? The Words May Be New, But the Song Sounds the Same*, 8 HASTINGS CONST. L.Q. 843 (1981).

80. See, e.g., A. SIMPSON, *supra* note 67, at 71-77; Shartel, *supra* note 67; Note, *The Chandler Incident*, *supra* note 67; Comment, *Removal of Federal Judges — New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 UCLA L. REV. 1385 (1966) [hereinafter Comment, *Removal*]; Yankwich, *supra* note 50, at 862-67.

81. See Note, *supra* note 50, at 336. Admittedly, both the legislature and the judiciary may have impure motives which prompt their acquiescence to an exclusive impeachment standard. Judges may hold biases in favor of guarding their own life tenures; Congress may want to protect its monopoly on judicial removal.

82. Neither does anyone suggest that Claiborne should repay any salary for the period during which he was imprisoned before his impeachment. In 1983, just one year after it denied Judge Hastings a stay of his criminal prosecution, the Eleventh Circuit specifically addressed this ancillary issue. In *Bergen v. Edenfield*, 701 F.2d 906 (11th Cir. 1983), the court dismissed a suit where plaintiff sought a declaration that a federal judge had vacated his office, and sought return of all compensation received for the period during which his duties were neglected. The dismissal was based partially on the fact that there was "simply no legal basis for th[e] suit." 701 F.2d at 908 ("The only mechanism for removal of a federal judge provided in the Constitution is the impeachment process.").

83. See, e.g., *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1106 (D.C. Cir. 1985) (Edwards, J., concurring) ("The Constitution has long been understood to establish impeachment as the only method available to the coordinate branches for the actual removal of judges from offices.") (emphasis added); *Bergen*, 701 F.2d at 908.

A 1936 ruling on the related issue of judicial review of impeachments also furthers the "exclusivity" interpretation of the impeachment clause. In response to Judge Ritter's challenge to the constitutionality of his Senate impeachment, see *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937), the Court of Claims held that the Senate's art. I, § 3, cl. 6 "sole power to try impeachments" meant that "no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." 84 Ct. Cl. at 296. This reading of the clause to preclude judicial review of impeachments has not since been judicially challenged. For a discussion of why this is sound jurisprudence, see C. BLACK, *supra* note 67, at 53-64. But compare R. BERGER, *supra* note 12, at 103-21 (disagreeing with Black).

84. For an extensive discussion of *Chandler*, 398 U.S. 74 (1970), see notes 216-24 *infra* and accompanying text.

Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,⁸⁵ which Congress carefully structured so as not to disturb its own retention of exclusive power to remove federal judges.⁸⁶ And most recently, the U.S. Court of Appeals for the D.C. Circuit affirmed the Judicial Conference's actions against Judge Hastings explicitly based on the fact that removal power under the Act vests only in Congress, not in the Conference.⁸⁷

Although the textually-based arguments for the exclusivity of impeachment are not satisfying, the structure of the Constitution buttresses the assertion that impeachment is an exclusive removal method. Structural arguments are roughly based on the canon of construction *expressio unius, exclusio alterius*. Rationalizing that the impeachment provision is exclusive because it is the only judicial removal mechanism provided by the Constitution, this theory finds support from a statement by Alexander Hamilton in 1788: "This is the only provision on the point, which is consistent with the necessary independence of the Judicial character"⁸⁸ The *expressio unius* argument presumes that the Constitution is a carefully drafted document.⁸⁹ Constitutional protections were precisely apportioned among governmental branches. They afford each branch exactly the protections necessary for successful execution of that branch's unique functions. Assuming the Framers meant only what they said, it is conclusive that no methods save impeachment are mentioned for the removal of federal judges.⁹⁰

Opponents of this interpretation first point out that the Supreme Court has indicated that canons of construction are not fixed rules of

85. 28 U.S.C. §§ 331, 332(a), 372(c), 604 (1982). See also note 50 *supra* (discussion of the Judicial Conduct Act).

86. The section of the Judicial Conduct Act, establishing disciplinary procedures for federal judges, 28 U.S.C. § 372(b)(6)(B) (1982), explicitly divests the Judicial Councils of any removal powers. See note 242 *infra*.

Although the Ninth Circuit, in Claiborne's appeal, extensively cites legislative history of the Judicial Conduct Act indicating Congress recognized that "federal judges, like other people, are subject to criminal prosecution for their misdeeds," *United States v. Claiborne*, 727 F.2d 842, 846 & n.5 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984), the court's interpretation has two important flaws. First, as noted in the text following note 229 *infra*, this analysis does not resolve the constitutional question as to *when* judges may be prosecuted — before or after impeachment. Second, and more to the court's point, even if the legislative history expressly approved a sequence anticipating the criminal process first, this alone certainly would not render the congressional action constitutional. It is beyond reproach that "the constitution is superior to any ordinary act of the legislature." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

87. See *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 101-03 (D.C. Cir. 1987).

88. THE FEDERALIST NO. 79, at 550 (A. Hamilton) (H. Dawson ed. 1863).

89. "[No] clause in the Constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) at 174; *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840).

90. All judicial removal clauses of the Constitution are reproduced in notes 7 & 14 *supra*.

law.⁹¹ Furthermore, opponents argue, the Framers' silence as to other procedures could be explained by their desire to keep the document generalized. Silence conclusively establishes neither original disapproval of unanticipated developments nor original rejection of alternatives.

However, other indications throughout the Constitution suggest that the Framers assumed impeachment would be the only judicial removal procedure. For example, article I, section 3, clause 7 provides that "[T]he Party convicted [of impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law."⁹² The "party convicted" language arguably presupposes that any disruption of an article III judge's tenure will occur first through impeachment and only subsequently through ordinary criminal prosecution; otherwise, the past tense used — one could read "party *already* convicted," or "a party that has just been convicted" — would have no meaning.⁹³

In fact, as Justice Story pointed out long ago,⁹⁴ the reason for the Framers' inclusion of the "Party convicted" clause in the Constitution may have been only "to preclude the argument that the doctrine of double jeopardy saves the offender from [a] second trial."⁹⁵ Still, it would be difficult to deny that the reference to impeachment first indicates that the Framers presumed it would have preceded criminal proceedings.

The reasons the Framers structured the impeachment power as they did become clear when contrasting the impeachment provisions against the Constitution's provisions for removal of Members of Congress. Members of Congress are not subject to impeachment, but only to expulsion by their peers.⁹⁶ They may be indicted and tried in criminal courts before they are expelled from Congress,⁹⁷ but they are pro-

91. See, e.g., *United States v. Barnes*, 222 U.S. 513, 519 (1912); cf. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 306-07 (1961).

92. See note 7 *supra*.

93. This argument was made by Judges Claiborne, Hastings, and Kerner in their defenses. *United States v. Claiborne*, 727 F.2d 842, 845-46 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

94. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 782 (5th ed. 1905).

95. Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1124 (1974) (quoting then-Solicitor General Robert Bork).

96. The Senate's 1797 finding that it did not have jurisdiction to impeach Senator William Blount for conspiracy, see F. WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 315-17 (1849), has not been challenged. This decision has been construed to mean that a Senator is not an impeachable "civil officer" under art. II, § 4. See, e.g., P.C. HOFFER & N.E.H. HULL, *supra* note 68, at 156-57; R. BERGER, *supra* note 12, at 214-15; Feerick, *supra* note 47, at 25-26.

97. *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

tected by other privileges not available to the judiciary, such as the speech and debate clause.⁹⁸

These different protections are logical when one considers that Members of Congress, unlike article III judges, are overtly political officials. Their ability to make public statements and to have unrestricted access to legislative sessions requires protection, whereas "apolitical" article III judges instead require protection of their impartiality. Thus, Members' protections go to the *exercise* of political office, while it is held, through provisions guarding their speech and debate in Congress. Protecting the *retention* of their offices, which are periodically challenged anyway, would be foolish.⁹⁹ Meanwhile, judges require unfettered exercise of their judgments, through provisions making their removal extremely difficult.¹⁰⁰ If it were easy to remove federal judges, their removal could be triggered by an unpopular decision, resulting in a judiciary by majority rule.

This need for judicial protection also explains why the Constitution grants impeachment powers to Congress. Because legislative power is diffused among its many members, the legislature is theoretically the branch of government best able to winnow out frivolous charges against judges.¹⁰¹ The Constitution therefore mandates that the judiciary answer only to the legislature upon misbehavior, rather than to the executive branch or other members of its own branch.

It may be true that "[t]he question whether the impeachment power is exclusive cannot be resolved by scholarship" and "an authoritative resolution can come only from the Supreme Court."¹⁰² However, as the next section shows, the "verdict of history" requiring impeachment to remove a federal judge did not develop in a vacuum; it was a direct response to the Framers' perceived need for an independent judiciary.

B. *Original Intent*

1. *Judicial Independence*

Scrutinizing original intent may no longer be entirely in vogue in

98. U.S. CONST. art. I, § 6, cl. 1 provides,

The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

99. There are, of course, set procedures to be followed when removing Members of Congress. Cf. *Powell v. McCormack*, 395 U.S. 486 (1969).

100. See generally Part II.B.1 *infra*.

101. See notes 131-34 *infra* and accompanying text. But see notes 135 & 184 *infra* and accompanying text (the legislature's "intrinsic checks" are not real).

102. Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659, 663 (1969).

constitutional analysis.¹⁰³ However, the Framers' approach is relevant here because, unlike many areas of current constitutional controversy, the underlying rationales of the judicial impeachment provisions — separation of powers and judicial independence — have not changed over time.¹⁰⁴ Even the Seventh Circuit, which was the first court to announce that prosecution-before-impeachment was constitutional,¹⁰⁵ spent the better part of a decision less than a decade later exalting judicial independence.¹⁰⁶ Since the framework has not changed, the constitutional history sheds light on the meaning of the vague text.

The debates at the Constitutional Convention make clear that the Framers' primary goal for the judiciary was to preserve its independence.¹⁰⁷ The importance of this objective traces back to the colonists' resentment of the iron-fisted monarchical control of the judges in England. This is evidenced by one of the principal grievances recited in The Declaration of Independence: King George had "made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries."¹⁰⁸ The colonists' dissatisfaction with the English system led them to adopt only those provisions which promulgated the ideal of judicial autonomy.¹⁰⁹

The Federalist Nos. 78 and 79 explain the Constitution's vision of judicial tenure and autonomy.¹¹⁰ Noting that the judiciary is the least

103. See, e.g., Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-97 (1983); Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 378 (1982); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 482-97 (1981).

104. These rationales are nearly universally extolled by politicians and judges as well as scholars. See, e.g., [Georgia Senator Sam] Nunn, *supra* note 8; [then-North Carolina Senator Sam J.] Ervin, *supra* note 12; [then-D.C. Circuit Judge Antonin] Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); [Justice John Paul] Stevens, *Reflections on the Removal of Sitting Judges*, 13 STETSON L. REV. 215 (1984).

105. See *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

106. See *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984).

107. See 1 M. FARRAND, *supra* note 1, at 119, 120, 124; 2 *id.* at 34-36, 41-45, 73-83, 550-52. A proposal that judges be removable "by the Executive on the application [of] the Senate and House of Representatives" was voted down on the grounds that it "weaken[ed] too much the independence of the Judges." 2 *id.* at 428-29. Removal "by address" was also specifically defeated. *Id.* See also notes 70-72 *supra* and accompanying text.

The elaborate impeachment provisions are not the only constitutional manifestations of the judiciary's armor against interference. Art. III, § 1, cl. 2 also guarantees that "[t]he Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." As explained by Alexander Hamilton, "Next to permanency in office, nothing can contribute more to the independence of the Judges, than a fixed provision for their support." THE FEDERALIST NO. 79, at 548 (A. Hamilton) (H. Dawson ed. 1863).

108. See W. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 2 (1913). See generally Stevens, *supra* note 104, at 220 ("[T]he long run advantages of an independent judiciary outweighed the political advantage of giving the prevailing majority practical control over the destiny of judicial officers.").

109. See notes 70-72 *supra* and accompanying text.

110. See notes 7 & 14 *supra*.

potent of the three branches of government,¹¹¹ Alexander Hamilton explained,

[The judiciary] is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as *permanency in office*, this quality . . . [is] an indispensable ingredient in [the] constitution. . . .

The complete independence of the Courts of justice is . . . essential¹¹²

Given this basic premise, the ambiguous textual language¹¹³ must have been intended to make impeachment the exclusive means of disqualifying misbehaving judges from retaining their duties. The cumbersome process¹¹⁴ protects judges from the political backlash of their decisions. If there were an easier alternative removal method, impeachment would never be practiced, and judges would be unprotected. The policy which brought about the impeachment provision thus presupposes its exclusivity for judges. If criminal proceedings are called for, they will certainly take place *after* the judge is impeached, when she is therefore no longer a judge, but an ordinary (unprotected) citizen.

This argument raises an important point which merits elaboration. Designating impeachment an "exclusive" remedy for disciplining federal judges does not mean that an individual who happens to be a federal judge is immune from normal criminal punishment. All it does mean is that, while the individual retains her office, impeachment is the only disciplinary option available. After she is stripped of her duties through an impeachment conviction, she will clearly "nevertheless be liable" to criminal prosecution.¹¹⁵ Thus, calling impeachment an "exclusive" remedy is somewhat misleading in that it is only accurate when thinking about judges *as judges*, not as private citizens once they are no longer in office. A more precise description, then, would be that the needs of judicial independence require an "impeachment *first*," not an "impeachment *only*" standard.

The Framers' recognition of the need to protect the judiciary's independence was all too accurate. Today's judges frequently find that

111. "[T]he Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary, on the contrary, has no influence over either the sword or the purse"

THE FEDERALIST NO. 78, at 539-40 (A. Hamilton) (H. Dawson ed. 1863).

112. *Id.* at 540-41 (emphasis added).

113. See Part II.A *supra*.

114. As described by Lord Bryce, "Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It . . . needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." J. BRYCE, THE AMERICAN COMMONWEALTH 208 (1891).

115. See U.S. CONST. art. I, § 3, cl. 7.

they have to cope with “dramatic litigation in which [they find themselves] confronted with the need to decide an explosive issue” and the attendant “risk[s] of unpopularity.”¹¹⁶ The Constitution’s complex impeachment design, and its requirement of a two-thirds majority of the Senate for conviction, ultimately protects citizens by ensuring their judges do not make political decisions in order to preserve their own tenure in office. This is as important today as it was when the constitutional language was drafted.

This policy of judicial independence is risky because of its all-too-easy disintegration into judicial mayhem. Not only is the policy highly exploitable by unscrupulous judges, but there is also a troublesome inadequacy regarding the removal of intellectually, but not morally, disabled judges. The Constitution’s drafters were aware of the risks of complicating judicial removal, but they saw the approach as the least subject to abuse among their alternatives. As Hamilton put it,

The want of a provision for removing the Judges on account of inability, has been a subject of complaint. But all considerate men will be sensible, that such a provision would either not be practised upon, or would be more liable to abuse, than calculated to answer any good purpose. . . . An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities, than advance the interests of justice, or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.¹¹⁷

The Framers thus anticipated more danger of abuse from politicking than from impediments to removing incompetent judges. This assumption is empirically supported by the fact that a third of those threatened with impeachment have resigned (rather than suffer the entire process), and an “undetermined number . . . resigned upon mere threat of inquiry.”¹¹⁸ Fundamentally, the Framers seem to have decided that, despite hazards, any other rule would encourage the political manipulation to which Claiborne claims he was subjected.¹¹⁹

The potential problem of corruption in the judiciary is more diffi-

116. Stevens, *supra* note 104, at 218.

117. THE FEDERALIST NO. 79, at 550 (A. Hamilton) (H. Dawson ed. 1863). It has been argued that Hamilton’s reference to insanity being a “virtual disqualification” implies that “he must have believed that an insane judge could be removed from the bench other than by impeachment.” Note, *The Chandler Incident*, *supra* note 67, at 463. However, it is equally conceivable that Hamilton believed that an insane judge would either be “physically unable to sit in his official capacity,” *id.* at 464, or, more likely, that insanity would clearly be grounds for impeachment.

118. J. BORKIN, *supra* note 15, at 204. See notes 44-45 *supra* and accompanying text. But see Stolz, *supra* note 102, at 667 (pointing out that the threat of impeachment itself may be a coercive weapon, since there are many potential reasons for resignations besides guilt, e.g., the fact that the “impeachment procedure does not look fair”).

119. See note 200 *infra*.

cult than that of incompetency. One valid criticism of the impeachment process envisions dishonest judges exploiting the impracticability of their removal.¹²⁰ Judges Claiborne, Hastings, and Nixon may be examples of this phenomenon. Even more troubling is the potential horror of the judge who commits a violent crime: there may be problems ensuring the defendant's speedy trial.¹²¹

However, these concerns must be weighed against the "long run advantages of an independent judiciary."¹²² Where one draws the line demarcating "enough" and "too much" judicial independence turns largely on one's view of the honesty of the judiciary. If one believes, as does Justice Stevens, that "virtually all of [the life-tenured federal judges] are rendering judicial service that is entitled to the highest respect,"¹²³ then one is likely comfortable with the odds of the Framers' gamble.¹²⁴ They apparently felt that the overall benefits of ensuring an independent judiciary outweighed the possibility of requiring extraordinary steps, and extra time, to oust the rare miscreant. Even if one believes that judicial corruption will be far more frequent than Justice Stevens supposes, the objective of an independent judiciary may still prevail, because, as noted, impeachment never *immunizes* the individual from criminal proceedings.¹²⁵ Requiring an impeachment-first approach costs society only a delay of the criminal proceedings,¹²⁶ whereas the price of a prosecution-first standard could be to undermine completely the protections from political coercion afforded judges by the impeachment process. One could imagine a new President from one political party summarily disposing of the judicial appointments of her predecessor (from the other political party) by employing the Justice Department to find and bring criminal charges against judges. Ultimately, the Framers decided that it was worth the cost of delaying valid criminal proceedings to avoid the higher costs associated with the filing of frivolous ones.

120. See notes 159-61 *infra* and accompanying text.

121. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI.

122. Stevens, *supra* note 104, at 220.

123. *Id.*

124. It has been persuasively argued that judges, *de facto*, are obliged to live up to more stringent standard of conduct than others, both on and off the bench. Kaufman, *Chilling Independence*, *supra* note 50, at 706-12 (arguing that the extraordinary screening procedures judges undergo before qualifying for judicial appointment, as well as the peer pressure from other judges while in office, guard against judicial abuse of trust). See generally Part II.B.3 *infra*; MODEL CODE OF JUDICIAL CONDUCT (1972).

125. See text at note 115 *supra*.

126. In the fictional extreme case in which a judge committed a crime, such as mass murder, where society's safety mandated her immediate incarceration, common sense would dictate that public safety considerations would overwhelm procedural ones and thus allow her confinement until an undoubtedly hurried Congress could impeach her.

2. Separation of Powers

The issue underlying judicial independence is the separation of powers doctrine.¹²⁷ The impeachment provisions are an exercise in the careful balancing of powers. It provided a way to remove judges, because their absolute independence would have been open to abuse. But it protected the judiciary, which was clearly vulnerable to having its operations disrupted by the other branches of government. In addition to the potential for coercion of judicial decisionmaking,¹²⁸ judicial stability required protection from the political winds of change. Put another way, the Framers wanted to preclude each new President from summarily dismissing his predecessors' judges and appointing his own.¹²⁹ Given this goal, effectively vesting removal powers in Department of Justice prosecutors may be the very worst choice; yet the prosecution-first standard does just that.¹³⁰

The Framers chose a pragmatic compromise by vesting removal responsibilities in Congress. Although the Senate is criticized today as too large to make just decisions¹³¹ and overwhelmingly disinterested in the impeachment process (rendering attendance at impeachment trials abysmal),¹³² Congress is the only governmental branch with any intrinsic checks on frivolous or vindictive accusations. Unlike other branches, the legislature's power does not rest in the hands of one individual, but is diffused across a large, representative body.¹³³ Even if bad faith charges were filed by one Member of Congress, other Members' votes would theoretically blunt their impact, either through rejection of the charges or through failure to obtain the two-thirds Senate majority needed for conviction.

Furthermore, the argument goes, impeachment is a high profile process. Once charges are filed, investigation of their validity and the

127. At least five of *The Federalist* papers, Nos. 47, 48, 49, 50, 51, were devoted to demonstrating that the separation of powers principle was adequately preserved in the Constitution. In No. 47, James Madison observed of the separation of powers doctrine, "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." *THE FEDERALIST* NO. 47, at 334 (J. Madison) (H. Dawson ed. 1863). See generally Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986).

128. See notes 111-16 *supra* and accompanying text.

129. *THE FEDERALIST* NO. 78, at 540 (A. Hamilton) (H. Dawson ed. 1863) (the judicial branch is "in continual jeopardy of being overpowered" by the other branches of government).

130. Though alluded to here, the issue of prosecutorial discretion is beyond the reach of this Note. See generally K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U. L. REV. 174 (1965); Frampton, *Prosecuting Public Officials*, 36 MD. L. REV. 5 (1976).

131. See note 13 *supra*; Comment, *Removal*, *supra* note 80, at 1389.

132. See Comment, *Removal*, *supra* note 80, at 1389; *Will Claiborne's Impeachment Spur Overhaul of Process?*, Natl. L.J., Oct. 20, 1986, at 8, col. 1 (nearly a third of the Senators "never heard a word of the testimony").

133. Kaufman, *Chilling Independence*, *supra* note 50, at 708 ("The federal legislature . . . is not hierarchical . . .").

trials themselves consume a disproportionate block of scarce Senate time. Because Members of Congress continually face reelection contests, and negotiate with other Members, no self-preserving Representative would introduce charges unless she were thoroughly convinced of their legitimacy.¹³⁴ Of course, there is often political hay to be made through the filing of impeachment charges.¹³⁵ Yet neither the executive nor the judicial branch features the dispersion of power among many members that distinguishes the legislature. Thus, while no governmental branch staffed by human beings is politically infallible, the legislature retains an intrinsic check against abuse that does not exist in either of the other branches.

3. *Protection of the Office*

Having said all this, one point must be clarified. It is somewhat inappropriate to be discussing the Framers' intent regarding judicial impeachment. While, as discussed, the original vision of the tenure of the judiciary and its "political" role vis-à-vis the other branches of government were debated at length, judicial *removal* was not of major concern to the Framers.¹³⁶ The impeachment debates at the Constitutional Convention focused mainly on removal of the executive; the impeachment provisions were "intended" to check presidential, not judicial, activity.¹³⁷

This fact does not undermine the foregoing conclusions regarding the importance of judicial independence: Judicial tenure was decidedly for the life of the judge; therefore, any discussion of removal was superfluous. Nevertheless, further analysis of the intended meaning of the judicial impeachment clauses must be made by analogy to executive impeachment.

Consider, for instance, an idea suggested by Max Farrand in *The Framing of the Constitution of the United States*: "[W]hat is perhaps the clearest indication of intention to make the office an *important one* is that the executive was rendered subject to impeachment."¹³⁸ Far-

134. See Stolz, *supra* note 102, at 666-67.

135. For example, then-Republican House Leader Gerald Ford's proposal to impeach Justice William O. Douglas, see R. BERGER, *supra* note 12, at 53, 86, 94, 123; Feerick, *supra* note 47, at 2 & n.5, may be a high water mark in candidness regarding political motivations. Ford asserted at that time that an "impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history," and that conviction results from those "offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office." 116 CONG. REC. 11913 (1970). In fact, Ford almost admitted that his impeachment proposal was in retaliation for the Senate's consecutive rejection of two Nixon nominees to the Supreme Court. *Id.* at 11918. See also note 184 *infra*; Schoenbaum, *supra* note 71, at 5-6 (regarding movement to impeach Chief Justice Earl Warren in the mid-1950s); ten Broek, *supra* note 67.

136. See, e.g., Feerick, *supra* note 47, at 48; R. BERGER, *supra* note 12, at 146-47.

137. R. BERGER, *supra* note 12, at 146-47.

138. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 79 (1913) (emphasis added).

rand's statement points to an important underlying implication: somehow the *office itself*, rather than the person holding the office, required the protection of an impeachment provision. Although Far- rand's point was not made in the context of judicial impeachment, this perceived need for office protection can also be found in the vague "good behavior" and "high crimes and misdemeanors" language, which has been construed to mean that an action need not be indictable to be impeachable.¹³⁹ The potential need to impeach for noncriminal deeds presupposes higher expectations for the conduct of those subject to impeachment than of the average citizen.¹⁴⁰ Efficient government requires a mechanism for rejecting an individual occupying an office, whether the office is judicial or executive.

Requiring a higher standard of conduct for officeholders is admittedly a burden on the individual. The mere appearance of impropriety can lead to unemployment.¹⁴¹ This argument can be countered, however, by the fact that it does not seem intuitively unfair to require those holding society's most responsible positions to meet higher standards commensurate with their privileges.¹⁴²

Examining the reasons that the Framers chose to protect the office at the expense of the individual reinforces the assertion that they carefully chose impeachment as the sole judicial disciplinary method. The "protection of the office" idea assumes that the power of the judiciary

139. See *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937). See generally C. BLACK, *supra* note 67, at 33-40; ten Broek, *supra* note 67 (arguing that neither Judge Ritter nor Judge Archbald, *supra* note 44, were convicted on impeachment for indictable offenses); R. BERGER, *supra* note 12, at 62; Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719, 731 (1970) (noncriminal misconduct was intended to be included "within the catalog of impeachable offenses").

140. Attesting to this is the development of the MODEL CODE OF JUDICIAL CONDUCT (1972). As Judge Irving Kaufman noted at the Second Circuit Judicial Conference, the Code asks judges to submit "to ethical dialogues rather than to penal directives." MacKay, *The Judiciary and Non-Judicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 26 (1970). See also note 124 *supra*.

141. See generally Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983 (1985) (describing the many noncriminal activities for which a judge may be disciplined). Although the defendant is protected by the necessary two-thirds Senate majority for conviction, the defendant does not enjoy customary judicial protections, such as due process, or the rules of evidence, or guilt beyond a reasonable doubt. See, e.g., 114 CONG. REC. 4558 (1968) (remarks of Sen. Tydings on introduction of S.B. 3055); 87 CONG. REC. 8149-50 (1941) (debate on H.R. 146, remarks of Rep. Sumners); Stolz, *supra* note 102, at 667. Theoretically, a defendant may be impeached for simply soiling the office's good name. Yankwich, *supra* note 50, at 867. See generally ten Broek, *supra* note 67.

142. [A] judge may be unfit who, without being guilty of any moral obliquity, does yet, . . . by overlooking the fact that the office he occupies is not a private, personal, lifelong sinecure, but an institution established to achieve the needs of society for justice through law, fail to attain that high standard of "good behavior" which should be the ideal of the judge of an enlightened society. Yankwich, *supra* note 50, at 867. See also Benoit v. Gardner, 351 F.2d 846, 849 (1st Cir. 1965) ("[T]hose appointed to high public office hold special public trust; they cannot properly complain if they are the objects of special scrutiny."); Rogers & Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1024 (1975).

rests, to a large degree, on the public's belief in its authority; as Hamilton noted in *The Federalist*, the judiciary cannot rely on its control of the army (as the President can), nor of the purse (as the Legislature can).¹⁴³ The maintenance of this public confidence requires that the court's dignity, its limited time and energy, and its appearance of (and actual) impartiality be carefully guarded. None may be sacrificed without jeopardizing this indispensable public confidence.¹⁴⁴

Impeachment furthers this end. Criminal prosecution of a sitting judge arguably soils the office as much as the individual. Preserving the integrity of the judiciary thus mandates that impeachment precede any other disciplinary proceedings. It serves to separate the person from the office, preserve the *aura* of the office, and, ultimately, preserve the potency of the judicial branch.

This observation helps to explain the curious irony extant when a provision developed to coerce better-than-average behavior is invoked to delay a criminal prosecution (as with Judges Claiborne and Nixon). Because the abuse of office was seen as doing damage to the office itself, impeachment was required as a separation technique. The office was too precious to be further sullied by being subjected to a criminal prosecution. Any delay in the prosecution of the individual was worth the overall benefit to the office. Impeachment could thus mitigate the damage done to the judiciary as a whole in the unfortunate situation of a miscreant judge.

C. *Modern Policy: The Short-Sighted Efficiency Argument*

The original ideals of preserving judicial independence and integrity remain important today,¹⁴⁵ yet the challenges to these ideals have become more vigorous¹⁴⁶ as the country, and its judicial workload, have grown.¹⁴⁷ Significantly, the most frequent modern challenge to

143. THE FEDERALIST NO. 78 (A. Hamilton). *But cf. Annals of Law, The Tenth Justice I*, NEW YORKER, Aug. 10, 1987, at 29; Scalia, *A Note on the Benzene Case*, REGULATION, July-Aug. 1980, at 25, 28.

144. Lubet, *supra* note 141, at 985-86.

145. *See* note 104 *supra*.

146. As Senator Sam J. Ervin, Jr. wrote in 1970,

To my mind, an independent judiciary is perhaps the most essential characteristic of a free society. . . .

Unfortunately, the events of recent years have created an aura of crisis in many sectors of our society, and in their haste to set right situations deemed disastrous, leaders in all three branches of the government have proposed solutions ultimately inimical to the constitutional safeguards so carefully formulated by the founding fathers.

Ervin, *supra* note 12, at 121-22.

147. For example, there were approximately 18,000 more cases filed in U.S. District Courts in 1977 than in 1972, for a total of 163,492 in 1977, with 169,698 pending at the end of that year. This was despite an overall *decrease* (by two judges) in the number of federal judgeships (excluding senior judges) from 1972 to 1977. Similarly, there were an additional 1000 cases filed in federal Circuit Courts each year during that five-year period, while the number of judges remained constant — 97 judges (to handle over 19,000 cases in 1977). *See* U.S. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS (1977).

the impeachment process is its inefficiency.¹⁴⁸ However, the efficiency argument fails to counter the original concerns that created the Constitution's impeachment provisions.

1. *The Premise*

The argument operates from the premise that the constitutional standard is archaic: it did not anticipate today's plethora of federal judges.¹⁴⁹ Pragmatically, proponents reason, it has become impossible for Congress to discipline each judge individually. There are over 750 federal judges,¹⁵⁰ and every impeachment monopolizes weeks of limited congressional session time.¹⁵¹ If any significant number ever required discipline, the legislature could become paralyzed.¹⁵² Perhaps more importantly, the consequence of this inefficiency is that inadequate judges can retain their positions simply because they are so difficult to remove.¹⁵³

The efficiency proponents rationalize that while one judge may have merited this expenditure of congressional time when there were

148. Today's scholarly criticisms focus mainly on the lack of care with which Senators hear the impeachments and the ineffectiveness of the process in ensuring an honest, competent judiciary. See note 132 *supra* and accompanying text. See also Note, *The Chandler Incident*, *supra* note 67; text at notes 159-61 *infra*. Evidence of political frustration with the procedure is found in the debates of the legislative proposals to modify or eliminate the procedure, see notes 50-51 *supra* and accompanying text, and in current motions for modification, see notes 52-55 *supra* and accompanying text.

149. See, e.g., Nunn, *supra* note 8, at 43-44; *Impeachment of Judges: A 'Cumbersome Tool'*, N.Y. Times, Apr. 2, 1986, at A16, col. 3. See also notes 151-53 *infra* and accompanying text.

150. See U.S. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS (1977).

151. It takes sixteen to seventeen days to try an average impeachment in the Senate, 114 CONG. REC. 4558 (1968) (introduction of S. 3055, remarks of Sen. Tydings); 87 CONG. REC. 8149-50 (1941) (debate on H.R. 146), after the weeks of House of Representatives time needed to draft and approve articles of impeachment, see Nunn, *supra* note 8, at 30.

152. Nunn argues that Congress is already far too busy with pressing matters to spend weeks impeaching one of today's "obscure, yet misbehaving judge[s]." Nunn, *supra* note 8, at 30.

153. See notes 159-61 *infra* and accompanying text. In addition to the problems surrounding removal of misbehaving judges, efficiency proponents point to impeachment's ineffectiveness for removing judges for nonethical reasons, such as senility or incompetency. They argue that this may have been tolerable when Hamilton penned *The Federalist*, but society can no longer afford inefficient judges. Besides, it would be ludicrous to subject an incapacitated judge to the humiliation of an impeachment proceeding.

This argument disregards the key question Hamilton addressed in *The Federalist* No. 79, see text at note 117 *supra*: Who decides when a judge is so disabled that she should be removed? The potential for arbitrary removal of judges by those trying to advance "personal and party attachments and enmities," *id.*, is the very dilemma that prompted the structuring of impeachment provisions. See Part II.B *supra*. The Framers affirmatively chose to err on the side of potential inefficiency, for the greater good of an unthreatened judiciary. As for debilitated judges, there is already an easily invoked alternative to impeachment: they can resign. See J. BORKIN, *supra* note 15, at 204. Finally, the Judicial Conduct Act, *supra* note 50, gives the judiciary limited powers to deal with their disabled or miscreant colleagues short of removal, such as moving them to senior status. As long as these measures do not involuntarily deprive a judge of the essential duties which enable her to be a judge, they should pass constitutional muster. See, e.g., *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 101-03 (D.C. Cir. 1987).

very few judges in the federal system, today's judges clearly do not.¹⁵⁴ The argument goes that since each individual judge no longer has the influence she did when there were fewer judges, the benefits of protecting each judge's independence are diminished because of the limited impact of any one judge's decisions.

This premise is flawed. First, the underlying notion that the Framers did not anticipate the effects of population growth is debatable. Although they did not specifically discuss this at the Constitutional Convention,¹⁵⁵ the Framers had enough foresight to build in flexibility for other variables related to the country's expansion, such as inflation.¹⁵⁶ In fact, as illustrated, the Framers intended impeachment to be inefficient, in order to maintain judicial stability and independence.¹⁵⁷ Fear of society's mutations may have actually been the impetus of the constitutional impeachment provisions.

Furthermore, the Constitution has accommodated growth in many other areas without the need to alter the document or its interpretation, because the principles underlying the language were deemed too valuable to abandon. For example, the constitutional procedure regarding the *appointment* of the expanded judiciary is rarely criticized.¹⁵⁸ It could be suggested that the President should not waste her scarce time appointing article III judges; or that the Senate should no longer be required to approve them; or that less than a two-thirds majority should be required for approval. Some constitutional "relics" endure because the policies that created them have not changed with time. Impeachment falls within this category.

2. *The Theory*

Even granting the premise of the efficiency argument, its theory remains questionable. By undervaluing such intangibles as the independence and integrity of the judiciary, the argument avoids the most difficult conflicts. Consider the efficiency proponents' assertion that impeachment is no longer an effective deterrent to judges contemplating malpractice.¹⁵⁹ They note that impeachment is so impractical that

154. See Nunn, *supra* note 8, at 30-31.

155. See text at note 136 *supra*.

156. As Hamilton noted in *The Federalist*, the Constitutional Convention chose to compensate the judges "at stated times" and in such a way that the compensation "shall not be diminished during their continuance in office," (quoting U.S. CONST. art. III, § 1), in lieu of providing for "permanent" salaries, because "the fluctuations in the value of money, and in the state of a society, rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century be penurious and inadequate." THE FEDERALIST NO. 79, at 549 (A. Hamilton) (H. Dawson ed. 1863) (emphasis in original).

157. See Part II.B *supra*.

158. But see Shartel, *Federal Judges — Appointment, Supervision, and Removal — Some Possibilities Under the Constitution, Part I: Judicial Appointment of District and Circuit Judges*, 28 MICH. L. REV. 485 (1930).

159. This aspect of the efficiency argument seems to be an outgrowth of the frustration at the

it is only employed when demanded by the most egregious judicial sins.¹⁶⁰ Thus, they reason, Thomas Jefferson's celebrated description of impeachment as a "bungling way of removing Judges . . . an impracticable thing — a mere scarecrow,"¹⁶¹ evinces the irony of blindly clinging to this archaic process: rather than designing our laws to induce judges to maintain a *higher* standard of conduct than the average citizen,¹⁶² we instead refuse to relinquish a procedure which effectively encourages federal judges to act illegally. Immunizing judges from criminal prosecution "is counterintuitive. It is fundamental to our system of justice that no one is above the law and that the guilty should be punished."¹⁶³

Here the efficiency argument misses the point. Defenders of the impeachment standard do not assert that the guilty need not be punished, only that punishment should be subsequent to impeachment in order to preserve a procedure that protects society's competing interest in an independent judiciary. It may be true that impeachment is more difficult to achieve than a court conviction. This was, of course, intended to be so. However, once the judge is removed from office, she shall "be liable and subject to Indictment, Trial, Judgment and Pun-

modest number of impeachments generated by the existing system. Yet the statistical analysis carries ambiguous implications. Although 59 may seem a paltry number of judges to be investigated in national history, *see* notes 42-46 *supra* and accompanying text (and adding to Borkin's data the cases of Judges Kerner, Hastings, Claiborne, and Nixon), consider that 18 of the investigated judges relinquished their offices through their own resignations. When added to 9 impeachments, this brings the total number of judges removed to 27, nearly half of those investigated. Moreover, 22 of the 59 investigated were specifically absolved of impeachable conduct. *See* J. BORKIN, *supra* note 15, at 204. The fact that there were few impeachments does not necessarily reflect the ease with which the judiciary can avoid discipline. Note that an "undetermined" number of judges resigned upon the mere threat of inquiry. *Id.* The infrequency of impeachments thus could demonstrate either the effectiveness of the *threat* of impeachment, or even the integrity of the federal judiciary. In this context, 59 could arguably be seen as a large number of judges to be *charged* with violating their public trust. As Judge J. Clifford Wallace remarked before the Senate Judiciary Subcommittee on the Constitution, while defending the Judicial Councils' statistical record of activity in disciplining their judges:

[T]he success of the procedure should not be measured by the number of actions the council is required to take against judges in a given year. The process is working at its best when problem judges are corrected in a quiet and efficient manner. The problem is solved and a good judge is saved. There may not be a headline, but that should not be the mark of success.

Judge Wallace statement, *supra* note 58, at 12.

160. *See* note 114 *supra* ("Impeachment . . . is so heavy it is unfit for ordinary use.").

161. *See* 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 295 (1922). While this Jefferson quote is catchy and famous, it was motivated by a specific factual setting, namely Jefferson's political desire to remove Federalists from the federal bench. *See generally* P.C. HOFFER & N.E.H. HULL, *supra* note 68, at 70-75. In fact, before his Presidency, Jefferson supported the protection of the independence of the judiciary. Kurland, *supra* note 12, at 694. Notably, Jefferson "did think it necessary to resort to constitutional, not merely legislative, changes to effect his objectives." *Id.* at 695.

162. *See* notes 124 & 140-41 *supra* and accompanying text.

163. *United States v. Claiborne*, 790 F.2d 1355, 1359 (9th Cir. 1986) (Kozinski, J., dissenting).

ishment, according to Law."¹⁶⁴

This is not the only area in which our justice system recognizes that competing values demand special procedures as protective exceptions to standard operating procedures. These constitutional protections enable the government to "put a thumb on the scale" on behalf of public policy interests not otherwise adequately weighed. Judge Kozinski, in his dissent from the Ninth Circuit's denial of a stay of Judge Claiborne's sentence, aptly expressed this idea:

[Although Judge Claiborne's claim of immunity] is counterintuitive . . . these principles are not absolute. For example, . . . the Constitution gives Senators and Representatives immunity "for any Speech or Debate in either House." And, on occasion, the prejudicial effect of evidence obtained in violation of a defendant's constitutional rights is so serious that a conviction must be overturned. *These results, and numerous others like them, may offend our sense of justice, but they are thought to serve a purpose higher than the exigencies of a particular case.* The last two centuries of constitutional adjudication should have taught us that intuition is no substitute for legal reasoning . . .¹⁶⁵

Keeping in mind that Judge Claiborne's "counterintuitive" claim only delays his criminal prosecution, this seems a small price to pay for the constitutional protection of the entire judiciary. The efficiency argument defines its way around this problem by virtually stipulating that an independent judiciary is less valuable than an efficient society. Analysis is superfluous after this initial assignation of values.

3. *The Manifestations*

The two proposed constitutional amendments that have been the focus of recent Senate attention¹⁶⁶ crystallize the efficiency proponents' reaction to the *Claiborne* case.¹⁶⁷ As noted, legislative proposals to expedite the impeachment process are not novel in the face of alleged judicial improprieties.¹⁶⁸ These concrete manifestations, like the abstract efficiency argument which underpins them, neglect signifi-

164. U.S. CONST. art. 1, § 3, cl. 7.

165. *Claiborne*, 790 F.2d at 1357 (Kozinski, J., dissenting) (quoting U.S. CONST. art. I, § 6, cl. 1) (emphasis added). In addition to the speech and debate clause mentioned by Judge Kozinski, the Constitution has been interpreted to grant the president immunity from judicial process for official acts, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), but not to grant absolute immunity to all presidential documents from subpoena, *United States v. Nixon*, 418 U.S. 683 (1973); *Nixon v. Administrator of Gen. Services*, 433 U.S. 425 (1977). Judges are absolutely immune from civil suit for official judicial functions or acts. *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967). *But cf. Pulliam v. Allen*, 466 U.S. 522 (1984) (limiting immunity). Judicial immunity extends to prosecutors for official acts as well. *Imbler v. Pachtman*, 424 U.S. 409 (1976). For an extensive compilation of the ways in which American law has seen fit to grant constitutional, statutory, and common-law privileges and immunities, see Burke, *Privileges and Immunities in American Law*, 31 S.D. L. Rev. 1 (1985).

166. See notes 54-55 *supra* and accompanying text.

167. See text at notes 56-57 *supra*.

168. See note 50 *supra* and accompanying text.

cant policy concerns in their attempt to respond rapidly to immediate political pressures.¹⁶⁹

The Subcommittee on the Constitution of the Senate Judiciary Committee held a hearing on the amendments¹⁷⁰ in which two witnesses testified, Ninth Circuit Judge J. Clifford Wallace and University of Pennsylvania Law Professor Stephen B. Burbank.¹⁷¹ Both were highly critical of the amendments, focusing primarily on the fact that the current impeachment procedures are adequate to deal with the rare unlawful judge.¹⁷² They suggested that modification of the congressional impeachment rules could expedite the process somewhat, without sacrificing constitutional intent.¹⁷³ The two witnesses pointed to numerous substantive areas in which the proposed amendments neglected "fundamental principles" the Constitution seeks to protect.¹⁷⁴ Not surprisingly, violation of the principles of judicial independence and the separation of powers was of particular concern.¹⁷⁵

Proponents of the efficiency argument sometimes compare federal impeachment procedures to state judicial removal procedures in order to illustrate the benefits of a more efficient system. Since 1960, nearly every state has broken from the traditional federal impeachment model and has enacted rules (either by statute or constitutional amendment) which create advisory commissions on judicial qualifications to investigate allegations of judicial misconduct.¹⁷⁶ While no

169. Senator Sam J. Ervin, Jr., who served as Chairman of the Senate Judiciary Subcommittee on Separation of Powers during the period that S.B. 1506, *supra* note 50, was debated, voiced the same problems with that bill that are troublesome with today's amendments:

[I]t is not surprising that some deeply concerned persons would emulate the example of Sampson, who, in his blind zeal, destroyed the pillars on which the temple rested. . . . In many instances these [proposals to restrict federal judges] represent a direct assault upon the principle of judicial independence.

Ervin, *supra* note 12, at 122.

170. See note 53 *supra* and accompanying text.

171. Witness List of the Hearing on S.J. Res. 364 and S.J. Res. 370 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. (Aug. 12, 1986) (unpublished) (on file with the *Michigan Law Review*).

172. Professor Burbank statement, *supra* note 58, at 1-2.

173. Judge Wallace statement, *supra* note 58, at 6-8; Professor Burbank statement, *supra* note 58, at 3-7. For a description of proposed changes in Senate rules, see note 52 *supra*.

174. Judge Wallace statement, *supra* note 58, at 3.

175. Judge Wallace statement, *supra* note 58, at 8-10; Professor Burbank statement, *supra* note 58, at 8, 10. These were not the only substantive areas in which the language of the proposed amendments was found dangerous. Judge Wallace criticized the overinclusive wording of the amendment and its potential due process violations. Judge Wallace statement, *supra* note 58, at 4. He focused on the discussed problem of defining "high crimes and misdemeanors," *supra* note 67, noting that not all felonies are so serious that they should automatically mandate forfeiture of office (for example, destruction of a mailbox, 18 U.S.C. § 1705 (1982); or adultery, IDAHO CODE § 18-6601 (1987)). Judge Wallace statement, *supra* note 58, at 4. Furthermore, he saw significant potential for abuse in the amendments' absolutist, inflexible language ("automatic removal after direct appeal [is] completed"). Judge Wallace statement, *supra* note 58, at 3, 9-10 (emphasis added).

176. See Brooks, *Penalizing Judges Who Appeal Disciplinary Sanctions: The Unconstitutionality of "Upping the Ante,"* 69 JUDICATURE 95, 95-96 (Aug.-Sept. 1985). For a compilation and

state commission's power extends as far to actual removal of a judge from office, their recommendations to their state's removal body (usually the state supreme court) carry enormous weight.¹⁷⁷ The federal judicial system, it is suggested, would benefit from an expansion of Judicial Council influence to match that of the state commissions.¹⁷⁸

However, the alternative removal provisions used by states such as recall, executive action, election, bar association action, and judicial action¹⁷⁹ are subject to the selfsame political influences from which the Framers sought to protect the federal judiciary.¹⁸⁰ These state provisions sacrifice judicial independence,¹⁸¹ which is clearly not as important to the states as it was to the writers of the federal Constitution. Indications of this are sprinkled throughout state constitutions: witness the fact that most state judges are appointed for terms and/or must periodically stand for reelection.¹⁸²

A final argument corollary to the efficiency argument denounces the impeachment process as too political.¹⁸³ This approach charges that impeachment's cumbersome inefficiency does not even achieve the desired result of preventing political attacks on the judiciary. Thus, attacks on the efficiency argument overvalue impeachment's purported benefits, because impeachment actually does not protect judges from politics. This argument points to the fact that impeachment proceedings are often brought for political reasons,¹⁸⁴ and the legislature is undeniably prone to political whims, despite intrinsic checks against abuse through its diffused power structure.¹⁸⁵

categorization of alternative judicial removal procedures, see Schoenbaum, *supra* note 71. These state commissions serve similar functions to the advisory and oversight role established for the Judicial Councils under the provisions of the federal Judicial Conduct Act. See note 50 *supra*.

177. See Brooks, *supra* note 176, at 96.

178. See, e.g., Schoenbaum, *supra* note 71.

179. *Id.* at 1-19. Some jurisdictions go so far as to make removal from office a consequence of criminal conviction for certain crimes. See, e.g., TENN. CODE ANN. § 39-5-401 (1982); N.C. GEN. STAT. §§ 14-228 to -230 (1981).

180. See Part II.B *supra*. Some of the state procedures, such as "address" and periodic election, were specifically rejected by the Framers as intrusive into judicial branch autonomy. See notes 107 *supra*.

181. See Brooks, *supra* note 176, at 97.

182. See Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 382 & n.3 (1987).

183. See, e.g., Stolz, *supra* note 102, at 666; Comment, *supra* note 50, at 1064 n.5; ten Broek, *supra* note 67, at 185.

184. See note 135 *supra* and accompanying text. As noted by then-Vice President Jefferson, "history shows, that in England, impeachment has been an engine more of passion than of justice." R. BERGER, *supra* note 12, at 79 n.130. Jefferson's criticism is somewhat ironic, because as President, Jefferson himself used impeachment as a weapon to try to remove Federalists from the courts, beginning with the unsuccessful impeachment of Associate Justice Samuel Chase in 1804. See generally P.C. HOFFER & N.E.H. HULL, *supra* note 68, at 70-75, 231; Kurland, *supra* note 12, at 694-95; Stolz, *supra* note 102, at 666.

185. See note 133 *supra* and accompanying text.

Critics of impeachment on this basis would be more helpful if they could suggest less political alternatives. Suggestions either focus on modification of the existing legislative impeachment proceedings so as to minimize the political nature of the process,¹⁸⁶ or on shifting removal power to a judicial tribunal.¹⁸⁷

Calls for revision of the House and Senate rules do not raise constitutional difficulties, because they implicitly accept the existing machinery. In fact, the only Senate procedural innovation rejected during Judge Claiborne's impeachment arguably was spurned *because* it stimulated the same constitutional problems as the proposed amendments. The innovation in question was the third article of impeachment, which allowed for impeachment conviction solely on the basis of the criminal conviction. Commenting on this article's 46 to 17 defeat, Senator Alan J. Dixon remarked that many Senators did not want "to set the precedent that a conviction would be equivalent to impeachment."¹⁸⁸ Other modernizations of existing procedures have been suggested, including creation of a bipartisan House Committee on Judicial Fitness, with a permanent professional staff; and the use of special masters to conduct evidentiary hearings for the Senate.¹⁸⁹ These alterations may in fact help depoliticize the process, and they do not do violence to the ideal of judicial independence.

Calling for the judiciary to remove its own members is another matter, because the suggestion assumes that the judiciary will somehow be less susceptible to political motivations than the legislature. This assumption is not clearly valid. First, judges may hold biases because a defendant judge tarnishes the judiciary as a whole. This problem is partially dealt with through judges' ability to recuse themselves from cases in which they feel they could not be impartial,¹⁹⁰ but there is arguably no judge in the federal system who could adjudicate another judge's trial without struggling with objectivity. Conversely, the stature of Senators' offices is not diminished by the defendant judge.

Furthermore, suggestions for judicial tribunals invariably call for the tribunal members to be appointed by the Chief Justice of the United States.¹⁹¹ Putting aside the potential for intrusion of the executive branch into these selections (and therefore the tribunal deci-

186. Stolz, *supra* note 102, at 667-70.

187. *E.g.*, Nunn, *supra* note 8; Comment, *supra* note 50 (advocating adoption of then-pending S.B. 1506).

188. *Senate Convicts Judge of 'High Crimes,'* Wash. Post, Oct. 10, 1986, at A1, col. 3. *See also* note 26 *supra*.

189. Stolz, *supra* note 102, at 667-70.

190. *See* 28 U.S.C. § 455 (1982).

191. Comment, *supra* note 50, at 1072; Nunn, *supra* note 8; *see also* notes 50-51 *supra* (describing prior legislative proposals).

sions),¹⁹² the abstract notion of vesting all judicial removal decisions in a small panel of judges, each one appointed by the same person, is, to understate the case, politically charged. Under these proposals, the Chief Justice could wield more power over the makeup of the federal judiciary than the President, who selects judicial nominees. In contrast, vesting removal power in the power-diffused Congress, and requiring a two-thirds majority to convict, softens the impact of any one person.¹⁹³ Obviously, not all frivolous or vindictive accusations will be stopped in the Legislature, but it is the only branch in which these checks are possible. Although giving impeachment powers to the legislature is not a panacea, it is the best option available.

4. Summary

The overall inadequacy of the efficiency argument is perhaps best made in D.C. Circuit Judge Harry Edwards' concurrence in *Hastings v. Judicial Conference of the United States*:

The fact that, in practice, impeachment may be so difficult that unworthy judges are not often removed from office does not give either Congress or the judiciary license to fashion an alternative, more efficient method of dealing with the problem. "Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government."¹⁹⁴

The "primary objectives" that justify maintenance of complex impeachment machinery are concerns of judicial independence and separation of powers. Due to its unsure foundation in premise and policy, the efficiency argument does not acceptably respond to these concerns. The drive to prosecute a federal judge before impeaching her is simply another manifestation of the flawed efficiency argument. This flaw may help to explain why the *Claiborne* majority opinion is so unsatisfying.

III. CLAIBORNE AND HASTINGS REVISITED

A. Claiborne

Judge Claiborne's is the first case to exhibit all the discussed problems with the prosecution-before-impeachment standard, both because he is the first judge to have exhausted all available judicial appeals,¹⁹⁵ and the first to be impeached after conviction. The Ninth

192. See note 200 *infra* (describing then-Chief Justice Burger's involvement in Claiborne's case).

193. See note 133 *supra* and accompanying text.

194. 770 F.2d 1093, 1111 (D.C. Cir. 1985) (quoting *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983)), *cert. denied*, 106 S. Ct. 3262 (1986).

195. Numerous *Claiborne* opinions have been written: *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984) (motion to quash indictment denied); *Claiborne v. United States*, 465 U.S. 1305 (1984) (Rehnquist, J., as Circuit Justice, denying stay of criminal prosecution); *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), *cert. denied*, 106 S. Ct.

Circuit majority relied heavily on precedent set in the cases of Judges Kerner¹⁹⁶ and Hastings¹⁹⁷ to reject Claiborne's substantive constitutional arguments against his being subject to criminal prosecution while a sitting federal judge.¹⁹⁸ This reliance neglected the fact that neither of these judges' cases needed to address the difficult issue of imprisoning a sitting federal judge.¹⁹⁹

Judge Claiborne's fundamental contention was that it is unconstitutional to prosecute — and certainly to imprison — an article III judge before he is removed from office by impeachment.²⁰⁰ He made

1636 (1986) (affirming conviction, denying hearing *en banc*) and three dissents from denial of hearing *en banc*, 781 F.2d 1325, (Ferguson, J., dissenting) (9th Cir. 1985), 781 F.2d 1327, (Reinhardt, J., dissenting), 781 F.2d 1334 (Pregerson, J., dissenting) (9th Cir. 1986); *United States v. Claiborne*, 790 F.2d 1355 (9th Cir. 1986) (denial of stay of execution of sentence).

196. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

197. *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

198. *Claiborne*, 727 F.2d at 844-49; *Claiborne*, 465 U.S. at 1306 (Rehnquist, J., as Circuit Justice); *see also Claiborne*, 790 F.2d at 1356 (Fletcher and Kozinski, JJ., dissenting).

199. *See* notes 27-38 *supra* and accompanying text.

200. Claiborne made numerous additional charges of error regarding his prosecution. *See* 1 *Claiborne Impeachment Trial Comm. Hearings*, *supra* note 11, at 193-271. Most prominent is his allegation that he was vindictively singled out for prosecution by the Department of Justice and the F.B.I. because of decisions he made while on the bench that disappointed the government. *Claiborne*, 765 F.2d at 805; *see also Accused Judge Says Impeachment Imperils Judiciary's Independence*, N.Y. Times, Sept. 24, 1986, at A26, col. 1; *Impeached Judge Ends Testimony Before Panel*, Wash. Post, Sept. 24, 1986, at A10, col. 1; *Claiborne*, 781 F.2d at 1328 (Reinhardt, J., dissenting).

Judge Reinhardt repeated these charges in a dissent he originally filed and published in the advance paperback copies of the Federal Reporter. However, he subsequently vacated his opinion and withdrew it from the bound volume. *Compare* the paperback issue, *United States v. Claiborne*, 790 F.2d 1357, 1358 (9th Cir. 1986) ("This is a most unusual case . . . [O]ver a period of years, [a sitting federal judge has] made allegations that federal law enforcement authorities were out to destroy him, and that they were engaged in a campaign of lawlessness, intimidation and deception."), *with* the bound volume, 790 F.2d at 1358-60 (noting that Judge Reinhardt's opinion "published in the advance sheet at this citation . . . was vacated and withdrawn from the bound volume"). The particular curiosity of a judge vacating a published opinion which recounted charges of executive branch improprieties cannot be missed.

Claiborne's allegations are supported by the fact that every judge who heard his case — both in trial and on appeal — was handpicked for the purpose. 781 F.2d 1327 at 1332. Because his colleagues within his district initially recused themselves, judges were designated by Chief Justice Burger to hear Claiborne's trial and appeal. 781 F.2d at 1329-30. The purpose of recusals is to ensure defendants fair trials by enabling a potentially biased judge to not hear a case. However, Claiborne asserts that because he was the victim of a Justice Department vendetta, the recusals themselves ensured that he would not be tried fairly, 781 F.2d at 1332-33, because the procedure by which his judges were selected was unusual. Normally, the Chief Justice, under 28 U.S.C. § 291 (1982), specially designates a substitute panel of judges upon request ("certificate of necessity") from a Circuit Chief Judge. In Claiborne's case the panel was appointed by Chief Justice Burger nearly a full month before the Ninth Circuit Chief Judge requested it. *See Did Burger Violate Law in Claiborne Case?*, Natl. L.J., Feb. 17, 1986, at 3, col. 1. This led Ninth Circuit Judge Reinhardt, in a dissent that he did not vacate, to conclude that in its attempt to avoid the appearance of granting their District Court colleague beneficial special treatment, the Ninth Circuit's refusal to hear the case

allows the record to rest with the appearance that Judge Claiborne may have been the object of *adverse* special treatment, and, thus, the victim of injustice. . . . There is . . . a rather substantial appearance of injustice when a defendant who claims he is the victim of a vendetta on the part of various branches and agencies of the Department of Justice is deprived

two basic supporting arguments, the first of which, relying on the constitutional language of article I, section 3, clause 7, has already been discussed at length.²⁰¹

Claiborne's second line of reasoning, however, is arguably one on which the continued independence of the judiciary relies. He contended that imprisoning him while he was still an article III judge amounted to depriving him of his office, because it deprived him of his docket and all of his duties. Being so deprived before impeachment not only skirted the constitutionally mandated procedural safeguards for removal, but also created "a constitutional . . . collision between two branches of our government" by compelling a sitting article III judge "to surrender to the custody of the Attorney General, an officer of the executive branch; . . . [to] be confined outside his district, disabled from performing judicial functions."²⁰² If life tenure means anything at all, it is that "a judge has judicial authority unless and until that power is stripped by congressional impeachment."²⁰³ Claiborne's argument was that since the legislature, not the executive, is charged with removing judges, the Attorney General's usurpation of the judicial removal process violates separation of powers principles. And because criminal prosecution necessarily presupposes the potential for imprisonment — a de facto removal from office — prosecution before impeachment must be prohibited.²⁰⁴

However, the court rejected the assertion that "criminal prosecution is the equivalent of removal from office."²⁰⁵ While admitting that "federal judges [can] be removed from office only by impeachment,"²⁰⁶ the court resolutely resisted any suggestion that this principle might also require impeachment before prosecution. It did so by

of the opportunity to be judged by those who would normally preside over his case and instead is tried and convicted before, and has his appeal heard by, judges all of whom are specially selected for their assignments.

781 F.2d 1327, 1132-33 (Reinhardt, J., dissenting) (emphasis in original, citation omitted).

The selective prosecution allegation is but a corollary to Claiborne's constitutional challenges. Nevertheless, Justice Burger's haste, when combined with his well-known ties to the executive branch administration, calls into question *his own* independence vis-à-vis the Justice Department, and further demonstrates the indispensability of a judiciary independent of the executive branch.

201. See notes 92-95 *supra* and accompanying text. The *Claiborne* majority rejected this argument by relying on *Isaacs* and *Hastings* precedent, finding Claiborne's interpretation of the "party convicted" language "tortured," and that U.S. CONST. art. I, § 3 intends only to "assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy." *Claiborne*, 727 F.2d at 845-46 (citing *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), and *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir.) (citing *R. BERGER, supra* note 12, at 78-80), *cert. denied*, 417 U.S. 976 (1974)).

202. *Claiborne*, 790 F.2d 1355, 1360 (Kozinski, J., dissenting).

203. Catz, *Removal of Federal Judges By Imprisonment*, 18 RUTGERS L.J. 103, 109 (1986).

204. 790 F.2d 1355, 1356 (Fletcher, J., dissenting), 1359-60 (Kozinski, J., dissenting).

205. *Claiborne*, 727 F.2d at 846.

206. 727 F.2d at 846 (citing *Black, J.*, in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970)).

analogizing to the criminal prosecution and removal of Senators.²⁰⁷ The court reasoned, citing *Isaacs*, that since the Supreme Court settled that criminal prosecution and conviction of a Senator does not ipso facto "vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment,"²⁰⁸ neither were judges automatically removed "by force alone of the judgment."²⁰⁹

This analogy between judges and Senators is superficial and disregards key protections uniquely conferred on judicial officers. The constitutional provisions for tenure, protection, and removal of Senators are very different from those for article III judges, because the tenure of Members of Congress is not guided by the same concerns for independence and separation of powers that control judicial tenure.²¹⁰ For example, Senators do not enjoy article III life tenure; they may be removed from office by expulsion,²¹¹ or may be defeated at the polls.²¹²

Even if the *Claiborne* majority's defense of the prosecution-before-impeachment standard had been stronger, it still would not have answered the problem of *imprisonment* before impeachment. The logical arguments for equating imprisonment with removal are strong: imprisoning a sitting judge deprives her of her *docket*,²¹³ removes her from her judicial district,²¹⁴ and thus constructively strips her of her *office* without impeachment.²¹⁵

Most importantly, the Supreme Court has addressed the constitutionality of disabling a judge from executing judicial duties without impeachment. In *Chandler v. Judicial Council of the Tenth Circuit*,²¹⁶ the Court left open the question as to whether a Judicial Council order

207. 727 F.2d at 846.

208. *Burton v. United States*, 202 U.S. 344, 369 (1906).

209. *United States v. Isaacs*, 493 F.2d 1124, 1142-44 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Claiborne*, 727 F.2d at 846. *Isaacs* also adds, citing *United States v. Brewster*, 408 U.S. 501 (1972), that the protections granted Members of Congress through the Constitution's speech and debate clause, *see* note 98 *supra*, do not immunize Members from criminal prosecution.

210. Senators are elected by their states' citizens. When a vacancy occurs in the Senate, it is filled by appointment from the Governor of the state in which the vacancy occurs, whereas federal judges are always appointed by the President. U.S. CONST. art. II, § 2, cl. 2.

211. *See* U.S. CONST. art. I, § 5, cl. 1.

212. *See* U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, cl. 1.

213. It has been suggested that a prison sentence could be "tailor[ed] . . . to permit him to perform some judicial functions." *Claiborne*, 790 F.2d at 1360 (Kozinski, J., dissenting). However, as Judge Kozinski elaborated,

The spectacle of a federal judge serving jailtime between sittings is not materially more grotesque than having a judge resume judicial duties after serving a prison sentence. Our sense of discomfort with either of these scenarios stems from the fact that Congress has not chosen to remove Judge Claiborne through the impeachment process.

790 F.2d at 1360 n.4.

214. For example, Claiborne was confined in Alabama and obviously could not perform his judicial duties in his Nevada District. 790 F.2d at 1360 (Kozinski, J., dissenting).

215. *See also* notes 31-32 *supra* and accompanying text.

216. 398 U.S. 74 (1970).

stripping then-Judge Chandler of his docket crosses "the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence."²¹⁷ Chief Justice Burger's majority opinion found the case not ripe for decision,²¹⁸ explicitly leaving open the critical question as to what, if anything, amounts to "removal" of a federal judge from office before impeachment.

However, in order for this question to be meaningful, the Court must have assumed that if alternative *removal* occurred, it would be unconstitutional.²¹⁹ This may be the most important aspect of the *Chandler* majority opinion. By acknowledging that there is a constitutional limit to its intervention in a federal judge's tenure,²²⁰ it implicitly acknowledged that situations exist that would amount to judicial removal without impeachment; and, crucially, that if they occurred, they would be illegal. Otherwise, there would have been no question to leave open.

Strongly worded *Chandler* dissents by Justices Black and Douglas have produced oft-quoted language supporting the conclusion that denying a judge her docket without impeachment is equivalent to unconstitutional removal.²²¹ *Chandler* involved a Judicial Council order that Judge Chandler "'take no action whatsoever in any case or proceeding now or hereafter pending' in his court."²²² Justice Douglas characterized this order as "mov[ing] against the individual with all of the sting and much of the stigma that impeachment carries."²²³ Decrying the dangers of allowing the Judicial Council thus to overstep its jurisdiction, Douglas illustrated the harmful repercussions of so casually dispensing with the independence of the judiciary:

[T]here is no power under our Constitution for one group of federal

217. 398 U.S. at 84.

218. Chandler had not exhausted all avenues of relief through the Council itself. 398 U.S. at 88-89. Justice Douglas, in dissent, notes that Chandler *could not* exhaust all of his options to express his disagreement with the Judicial Council order because to do so would have been strategically harmful because his case was against the Judicial Council itself. His open expression of disagreement would have triggered a provision of the 1948 Act creating the Judicial Councils, 28 U.S.C. § 137 (1982), which expanded the Council's authority "[i]f the district judges in any district are unable to agree." 398 U.S. at 131-32 (Douglas, J., dissenting).

219. 398 U.S. at 84.

220. 398 U.S. at 84.

221. See, e.g., *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1106 & n.10, 1107 (D.C. Cir. 1985) (Edwards, J., concurring); Shipley, *Legislative Control of Judicial Behavior*, 35 LAW & CONTEMP. PROBS. 178, 194, 198 (1970); see also Note, *The Chandler Incident*, *supra* note 67, *passim*; Ervin, *supra* note 12, at 125-26; Stolz, *supra* note 102, *passim*. In fact, the *Claiborne* majority even turns to the *Chandler* dissents in support of the argument that federal judges are not immune from criminal prosecution. *United States v. Claiborne*, 727 F.2d 842, 846 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984).

222. *Chandler*, 398 U.S. at 136 (Douglas, J., dissenting). See also *Chandler v. Judicial Council of the Tenth Circuit*, 382 U.S. 1003, 1004 (1966) (Black, J., dissenting from denial of stay of order).

223. *Chandler*, 398 U.S. at 135.

judges to censor or discipline any federal judge . . . [or] strip him of his power to act as a judge.

....

. . . The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible.²²⁴

Admittedly, the only detailed language delineating the boundaries of constitutional behavior in *Chandler* is in these dissenting opinions. But the majority's opinion is built on an essential idea: that impeachment is the sole constitutional judicial removal method, due to the need for an independent judiciary. Unfortunately, the *Claiborne* court did not heed *Chandler's* message.

The *Claiborne* court also based its rejection of Claiborne's argument on the *Isaacs* and *Hastings* decisions. Though acknowledging the importance of the "salutary principles of separation of powers and judicial independence,"²²⁵ the court nevertheless ignored the danger that "the judiciary would be subject to intolerable pressures from the executive branch if executive officers [a]re permitted to prosecute active federal judges."²²⁶ It dismissed Claiborne's predictions of the prosecution's practical damage, such as biasing an acquitted judge against the executive branch in any subsequent suits, as "overstated."²²⁷ Instead, the court simply restated that "Article III protections . . . should not be expanded to insulate federal judges from punishment for their criminal wrongdoing."²²⁸

Thus the *Claiborne* decision depends heavily on the maxim that "no man . . . is above the law."²²⁹ This reliance is disturbing, because the truism begs the essential question. No one contends that judges are above the law. The really difficult question is *when*, not *whether*, an article III judge may be subjected to the criminal process. The court should be asking *how* the law can best be enforced in order to avoid damaging the constitutional system.

The "immunity" Claiborne asserted is one of process, not unlike numerous other constitutional privileges and immunities for governmental officers,²³⁰ and even for indicted citizens. Constitutional pro-

224. 398 U.S. at 137.

225. *Claiborne*, 727 F.2d at 847.

226. 727 F.2d at 847.

227. 727 F.2d at 848-49.

228. 727 F.2d at 847.

229. 727 F.2d at 845 (quoting *United States v. Hastings*, 681 F.2d 706, 711 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), and *United States v. Isaacs*, 493 F.2d 1124, 11[4]3 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974)). See also 727 F.2d at 847-48, 849.

230. See note 165 *supra* and accompanying text. See also *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (granting the President absolute immunity from civil damages for his official acts); *Butz v. Economou*, 438 U.S. 478 (1978) (absolute immunity attaches to certain "exceptional" functions

ective procedures are as indispensable here as they are, for example, in fourth, fifth, and sixth amendment protections.²³¹ They protect fundamental systemic values which could otherwise be lost in the exigencies of an individual case.

B. *Hastings*

Judge Hastings' case is unusual in that he was tried and acquitted of criminal charges before being impeached.²³² Hastings was found not guilty on charges of bribery, conspiracy, and obstruction of justice in a jury trial in February 1983.²³³ Nevertheless, shortly after his acquittal, the Eleventh Circuit Judicial Council created a special investigative panel under the Judicial Conduct Act²³⁴ to investigate complaints about Hastings. This five-judge special investigative panel spent three years preparing its report.²³⁵ This report led the Eleventh Circuit Judicial Council to file its own report with the United States Judicial Conference concluding that Hastings had "engaged in obstruction of justice" to avoid conviction on conspiracy and bribery charges.²³⁶ On March 17, 1987, the Judicial Conference certified to the House of Representatives its determination that Judge Hastings' impeachment may be warranted.²³⁷ Hastings recently lost his suit in the D.C. Court of Appeals, charging that the panel's activities, and much of the Judicial Conduct Act, were unconstitutional.²³⁸

Hastings' basic argument was that the Act violates separation of powers doctrine because only Congress may discipline judges for misconduct in office.²³⁹ Although that issue is not central here,²⁴⁰ it is worth noting that the Judicial Conduct Act "has not yet been deter-

of public officials); *Ryan v. Bilby*, 764 F.2d 1325 (9th Cir. 1985) (judicial officers and prosecutors are absolutely immune from certain types of suit).

231. *E.g.*, U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures); U.S. CONST. amend. V (self-incrimination and due process protections); U.S. CONST. amend. VI (speedy trial and impartial jury guarantees).

232. See notes 21-22 *supra* and accompanying text.

233. See *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 95 (D.C. Cir. 1987) ("*Hastings II*"); *Judge Acquitted in '83 Says Panel Seeks Impeachment*, N.Y. Times, Aug. 27, 1986, at 9, col. 5.

234. See note 50 *supra*.

235. See generally *Judge Acquitted in '83 Says Panel Seeks Impeachment*, N.Y. Times, Aug. 27, 1986, at 9, col. 5; *Hastings Challenges Panel Findings*, Natl. L.J., Sept. 8, 1986, at 10, col. 1.

236. *Hastings II*, 829 F.2d at 97.

237. 829 F.2d at 97.

238. 829 F.2d at 94. This is actually the second time Hastings challenged the constitutionality of the Judicial Conduct Act. The first challenge was dismissed as premature, pending the results of the Eleventh Circuit's Investigating Committee. *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985) ("*Hastings I*").

239. *Hastings II*, 829 F.2d at 97-98.

240. For a thorough examination of this question, see Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985).

mined authoritatively [to be constitutional] and is not beyond question."²⁴¹ However, the Act is carefully structured so that Congress retains all ultimate *removal* power, thus avoiding any direct constitutional confrontation with Congress' impeachment authority.²⁴²

Yet Hastings' proceedings clearly illustrate another important point, namely the inevitable practical problems encountered when a judge is criminally tried before being impeached. This time the difficulties are the converse of those in *Claiborne*; the operative issue here is how a judicial *acquittal* may be used.

The *Claiborne* case presented the procedural difficulties surrounding impeachment after conviction. As articulated by Representative Rodino, these included:

Is the Senate obliged to litigate the . . . charges de novo? Alternatively, should the Senate accept the fact of the conviction itself as sufficient evidence of misconduct? Should the Senate preclude the relitigation of facts . . . necessarily determined in the prior criminal proceeding? . . . [I]nstead of relitigating those facts, [may the Senate] satisf[y] itself that there was a substantial record . . . and that Judge Claiborne was afforded substantive and procedural due process . . . ?²⁴³

Representative Hyde further elaborated,

How do you reconcile the proposition that we should credit the record made in the U.S. courts with the doctrine of separation of powers and with the constitutional provision [granting] the Senate . . . the sole power to try impeachment[s]? How can we then either be bound by or depend

241. *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting). The first D.C. Circuit *Hastings* decision acknowledged that not every Judicial Council action was necessarily constitutional. *Hastings I*, 770 F.2d at 1099 ("[T]he precise limits to the powers that could constitutionally be exercised by the judicial councils and the Judicial Conference have yet to be judicially defined.").

242. In fact, it is only upon this basis that the second *Hastings* decision affirmed the constitutionality of the Judicial Conduct Act. The D.C. Circuit Court explained that "because . . . the duty placed on the Conference [is] discretionary rather than mandatory, [it] thus blunt[s] any concern with its effect on the separation of powers." *Hastings II*, 829 F.2d at 95. In other words, if the judiciary could independently force a judge's impeachment without an express congressional directive, this would amount to unconstitutional judicial intrusion into the impeachment authority.

28 U.S.C. § 372(c)(7)(B) (1982) requires that findings by any circuit Judicial Council that "might constitute one or more grounds for impeachment under article I of the Constitution" must be transferred to the U.S. Judicial Conference. If the Judicial Conference determines that consideration of impeachment is warranted, it then hands the case over to the U.S. House of Representatives "for whatever action the House of Representatives considers to be necessary." 28 U.S.C. § 372(c)(8) (1982). *Hastings II* makes clear that it is the discretionary language of the Judicial Conduct Act that keeps the Act constitutional: if the Act vested too much power over the legislature's impeachment proceedings in the judiciary, it would violate separation of powers principles. *Hastings II*, 829 F.2d at 101-03.

That said, there is a powerful argument that the Judicial Conduct Act does vest too much removal power in the judiciary. Because the language "seemingly permits a council to order, for example, that no further cases be assigned a fifty-year-old judge for a temporary and certain period of forty years," it may enable the judiciary effectively to remove a judge in circumvention of the impeachment process. See Note, *supra* note 240, at 1132.

243. 1 *Claiborne Impeachment Trial Comm. Hearings*, *supra* note 11, at 43.

on the record in the criminal court?²⁴⁴

These issues also arose in Judge Hastings' case. But they were further complicated by the fact that the trial court acquitted him, so the very fact of his acquittal gave his impeachment scenario an invidious tint: the Judicial Council looks as if it attempted to overrule a jury. It did not try to mask this objective by asserting that Hastings' criminal trial had somehow soiled his office²⁴⁵ or that his judicial performance was otherwise substandard. Instead the Council charged that Hastings' criminal defense was an obstruction of justice. The Council sought to impeach him for "guilt" the jury somehow missed.

If Hastings had been impeached before his criminal trial, some may have charged that it would have seemed unfair to him, because of his acquittal. However, if he had been impeached first, the described dilemma would have been avoided. As the situation now stands, the Council's actions appear somewhat vindictive, and Judge Hastings himself is no better off than if he had been impeached before his acquittal: he still faces impeachment.²⁴⁶

This constitutional predicament may once again be best captured by Judge Edwards, here concurring with the dismissal (for lack of ripeness) of Hastings' first challenge to the Judicial Conference's actions:

Although I have no reason to doubt the integrity of members of the federal judiciary, I am willing to assume that there may be a few corrupt judges, who dishonor their title and role in our society. This does not change my view, however, that the Constitution specifies only one procedure for disciplining them — impeachment.²⁴⁷

CONCLUSION

Until recently, impeachment was assumed to be the exclusive constitutional remedy for disciplining sitting article III judges, but this did not preclude their criminal prosecution once removed from office. A modern prosecution-before-impeachment approach, exemplified by the recent criminal convictions of Judges Claiborne and Nixon, raises a troublesome repercussion: criminal prosecutions presume the possibility of conviction and imprisonment, yet imprisoning a sitting federal judge logically removes her from her judicial responsibilities. This results in two problems: tax dollars must continue to pay large salaries to inoperative judges; and the protections afforded the entire judiciary by the impeachment process are circumvented.

Impeachment is a constitutional safeguard that protects the inde-

244. 1 *id.* at 45.

245. See Part II.B.3 *supra*.

246. See *Hastings II*, 829 F.2d at 97; *Congress Releases Hastings Report*, Natl. L.J., Oct. 19, 1987, at 3, col. 1.

247. *Hastings I*, 770 F.2d at 1111 (Edwards, J., concurring).

pendence and impartiality of the judiciary. It is one of many special procedures in the Constitution for the protection of our system of government. These procedures always have costs, but their expense only reflects the value of the societal benefits preserved.

The need to protect the independence and integrity of the judiciary and to preserve the separation of powers has not changed over the last two centuries. In fact, the importance of such protection is acknowledged even by those who seek to weaken it. Gerald McDowell, the Justice Department attorney who oversaw the Claiborne and Nixon prosecutions, summarizes the problem — and, ironically, its only constitutional resolution — all too well:

It should be difficult . . . to impeach a Federal judge. I'm outraged in the particular[s] [of the Claiborne and Nixon cases]. But if I were a philosopher, I'd say its a reasonable price to pay. It's not a terrible abuse when you consider that the judges who are honest have a sense of independence.²⁴⁸

— *Melissa H. Maxman*

248. Shenon, *Impeachment of Judges: A 'Cumbersome Tool,'* N.Y. Times, Apr. 2, 1986, at A16, col. 3.