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Indictment of Federal Judges: Chilling Judicial Independence

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NOTES

INDICTMENT OF FEDERAL JUDGES: CHILLING JUDICIAL INDEPENDENCE

INTRODUCTION

In the past decade federal grand juries have criminally indicted[1] two article III federal judges for impeachable offenses.[2] These events are unprecedented in the history of the American Republic,[3] and bring into clear contrast the impeachment[4] and criminal processes. The indictments pose the issue of whether an article III federal judge[5] may be indicted, tried, judged, and punished according to law[6] on charges of official misconduct[7] prior to impeach-

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1. On December 15, 1971, a federal grand jury returned a nineteen count indictment against the Honorable Otto Kerner, Jr., then a judge on the United States Seventh Circuit Court of Appeals. United States v. Isaacs, 493 F.2d 1124, 1131 (7th Cir. 1974). On December 29, 1981, a four count indictment was returned against the Honorable Alcee L. Hastings, United States District Judge for the Southern District of Florida. United States v. Hastings, 681 F.2d 706, 707 (11th Cir. 1982).

2. The indictment against Judge Kerner alleged that he accepted bribes while Governor of Illinois in return for financial interests in certain horse racing businesses, and that he commited perjury during the ensuing investigation. 493 F.2d at 1131. The indictment against Judge Hastings alleged a scheme to solicit a bribe in return for a favorable decision from the bench. 681 F.2d at 707. A fundamental distinction between these two cases is that Judge Kerner was alleged to have committed the crimes *before* he assumed the federal bench. It is unclear if a judge may be impeached for offenses committed prior to appointment.

3. Although Judges Kerner and Hastings are the only article III judges to be criminally prosecuted for arguably impeachable offenses while on the bench, numerous federal judges have resigned during investigation by the House Judiciary Committee or have been cleared of criminal charges. *See* J. BORKIN, THE CORRUPT JUDGE 198-204 (1962). Martin T. Manton, Senior Judge of the United States Second Circuit Court of Appeals, was the first federal judge criminally indicted for corruption in office. The prosecution of Judge Manton commenced after his resignation. *Id.* at 25-94.

Judge Francis Winslow was charged with indiscretions by a grand jury on the day the House investigation was to begin. Whether a charge of "indiscretions" amounts to an indictment is not apparent from the record. Judge Winslow subsequently resigned before trial was commenced. *Id.* at 256. Judge Warren Davis was indicted and tried after he retired from the bench. Acquitted at trial, Davis resigned under threat of impeachment. *Id.* at 116, 119.

4. Eight United States article III judges have been impeached. Four were convicted: Robert W. Archbald (Comm. Ct., 1913); Halsted L. Ritter (S.D. Fla., 1936); West H. Humphreys (D. Tenn., 1862); John Pickering (D.N.H., 1804). The other judges include: Samuel Chase (U.S. Sup. Ct., 1805) (acquitted); Harold Louderback (N.D. Fla., 1932) (acquitted); Charles H. Swayne, (N.D. Fla., 1905) (acquitted); James H. Peck (D. Mo., 1830) (acquitted). *Id.* at 198-204.

5. The judicial power of the United States is vested in the Supreme Court and lower courts. U.S. CONST. art. III, § 1. All federal judges established under article III hold their offices during good behavior. *Id.*

6. Although the appellate court affirmed the trial court's order denying Judge Hastings' motion to quash the indictment for lack of jurisdiction, it declined to decide whether the government would be able to imprison an article III judge while still in office. 681 F.2d at 712 n.19. In dictum, the Eleventh Circuit questioned whether the executive branch may in

ment and conviction by the Senate of the United States.[8] The recent indictment of the Honorable Alcee L. Hastings presents the jurisdictional dispute in its most justiciable form.[9]

Three days after Judge Hastings rendered a decision adverse to the government, a federal grand jury was convened to hear evidence of alleged judicial improprieties unlawfully affecting the contested decision.[10] On December 29, 1981, the grand jury issued an indictment against Judge Hastings. Count I alleged that the promise of a bribe affected a judicial decision, and count II accused the judge of obstructing justice by releasing prematurely the content of the forthcoming decision.[11] Judge Hastings was subsequently tried and ac-

effect remove a federal judge from office through criminal conviction. *Id.* It does not seem tenable, however, to differentiate among the authority to indict, try, convict, and sentence.

7. It should be noted that federal judges can be prosecuted for offenses arising from their judicial activity only if those offenses are proscribed by federal statute. State laws cannot regulate the official behavior of federal officials. Conversely, the states may prosecute offenses which do not arise from the judicial activity of federal judges. A federal judge, for example, may be indicted and convicted for robbery because robbery is not malfeasance related to the office. Further, a state prosecution would not implicate the vexing separation of powers issues raised by federal prosecution of judges for offenses arising from judicial activity.

8. The impeachable offenses are "Treason, Bribery, and other High Crimes and Misdemeanors." U.S. CONST. art. II, § 4. *See infra* note 78 and accompanying text. "Impeachment," unless otherwise specified, will be used throughout this note to mean the full process by which Congress determines the suitability of a judge to remain in office. Impeachment so defined includes investigation by the House Judiciary Committee upon receipt of complaints or information, debate and charging the official (the actual impeachment), trial in the Senate, acquittal or conviction, and the fixing of penalties. The penalties that the Senate may impose are removal and disqualification from all subsequent positions of public trust and confidence. *See generally* C. BLACK, IMPEACHMENT: A HANDBOOK (1974).

9. Judge Kerner raised the issue of jurisdiction only upon appeal. In a split decision, the specially appointed appellate tribunal ruled that whether a sitting article III judge may be criminally indicted was a question of subject matter jurisdiction that is not waived by failure to raise the issue at trial. *Issacs,* 493 F.2d at 1141. *But see id.* at 1167 (Johnson, J., dissenting). Judge Hastings, however, refused *ab initio* to recognize the trial court's jurisdiction. His failure to enter a plea prompted the Court to enter a plea of not guilty on his behalf. Brief for Appellant at 3, United States v. Hastings, 681 F.2d 706 (11th Cir. 1982).

10. In May of 1981, Judge Hastings issued a final order in United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981), restoring to the defendants certain property which he had initially declared forfeited under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 (1976). After the initial order, the defendants had filed a timely motion for reconsideration. While that motion was pending, the United States Fifth Circuit Court of Appeals decided a case which appeared to reject Judge Hastings' interpretation of RICO. *See* United States v. Martino, 648 F.2d 367 (5th Cir. 1981). In his final order, Judge Hastings expressed disagreement with the appellate decisions, but indicated that he was bound to follow the precedent. *Romano,* 523 F. Supp. at 1215.

On or about October 9, 1981, the executive branch began proceedings before a federal grand jury which resulted in indictments against Judge Hastings and an alleged accomplice and co-conspirator, Washington attorney William Borders. Memorandum of Law in Support of Motion to Quash Indictment and Dismiss Proceedings for Lack of Jurisdiction, *Hastings,* No. 81-576-CR-ETG, (S.D. Fla. Feb. 4, 1983). *See also* Miami Herald, Feb. 5, 1983, at A1, col. 1.

11. Judge Hastings was specifically charged with conspiracy to solicit and accept bribes in return for unlawful interferences in governmental activities, and obstruction of the administration of justice. The former offense is prohibited by 18 U.S.C. § 371 (1976), and the latter is a violation of *id.* §§ 2, 1503. *Hastings,* 681 F.2d at 707.

quitted of these charges;[12] however, the ramifications of the case go far beyond the exoneration of a federal judge. The case presents a dramatic and extraordinary attempt by the executive branch of the federal government[13] to try an article III life-tenured judge for malfeasance in the exercise of judicial power.

The executive argues that a federal judge is subject to federal law no less than any other citizen and therefore may be indicted and criminally sanctioned if found guilty.[14] The executive asserts its right to enforce federal laws and views impeachment as a discretionary tool of Congress which does not preempt or forestall criminal proceedings.[15] This position implies that a federal judicial privilege of impeachment prior to criminal prosecution is without precedent or historical authority and contradicts the fundamental principle of equality before the law.

The prosecution of an article III judge while in office may be characterized alternatively as an attempt by the executive branch to extend its powers in disregard of constitutional provisions.[16] The Constitution provides the congressional impeachment forum for trial of breaches of public trust and confidence by article III judges.[17] Moreover, specific constitutional provisions have been interpreted to mandate impeachment as the exclusive method for removing an article III judge.[18] Although indictment is not literally impeachment, a criminal conviction may in fact effect a removal.[19] The executive branch's power to indict federal judges for official misconduct may erode the constitutional guarantee of an independent federal judiciary.[20] For these reasons, it is urged that the Constitution authorizes indictment for official misconduct only after impeachment conviction.

This note will address the above arguments. The inquiry is limited to a narrow, yet significant issue: whether an article III judge may be indicted for

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12. On February 4, 1983 a jury of six men and six women acquitted Judge Hastings of all charges. *Hastings*, No. 81-576-CR-ETG. *See also* Miami Herald, Feb. 5, 1983, at A1, col. 1.

13. The executive power of the United States is vested in the President. U.S. CONST. art. II, § 1. The United States Attorney General is a cabinet post within the executive department. The Attorney General and the United States District Attorneys are appointed by the President with the advice and consent of the Senate.

14. Brief for Appellee at 17, *Hastings*, 681 F.2d 706; Brief in Opposition to Defendant Hastings' Motion to Quash Indictment and Dismiss for Lack of Jurisdiction, No. 81-576-CR-ETG.

15. Brief for Appellee at 26-30, *Hastings*, 681 F.2d 706. Although the prosecution claimed the authority to indict, it eschewed any power to remove Judge Hastings from office. Brief for Appellee at 16-48.

16. *See generally* Brief of Amicus Curiae ACLU-Florida, *Hastings*, 681 F.2d 706; Brief for Appellee at 16-48.

17. *See* U.S. CONST. art. II, § 4. During the first 190 years of the republic no attempt was made to prosecute an article III judge for official misconduct while in office. *See supra* note 3.

18. *See* Brief of Amicus Curiae ACLU-Florida at 6-11; Brief for Appellee at 18-26, *Hastings*, 681 F.2d 706. The Constitution provides that all federal judges will hold their offices during good behavior. U.S. CONST. art. III, § 1. Impeachment shall be by the Senate and effect removal from office. *Id.* art. I, § 3. The implication of this provision is that impeachment is the proper forum for charges of treason, bribery and other high crimes and misdemeanors against federal judges. *See id.* art. II, § 4.

19. Brief for Appellant at 10-15, *Hastings*, 681 F.2d 706.

20. *Id.* at 46-48.

crimes pertaining to official conduct prior to conviction upon impeachment by Congress. Judicial tenure will not shield a federal judge from indictment while in office for crimes not pertaining to official duties. If article III judges are to be afforded privileges not available to other federal civil officers, this result must follow from the unique role of the federal judiciary.

Because the English judicial tradition has had a significant impact on the posture of the federal judiciary, this note will first trace the historical development of judicial tenure and immunity in England and the role and function of English impeachments. Against this historical background, the unique American coupling of the separation of powers and checks and balances doctrines will be examined as it relates to the tenure, impeachment, and removal provisions of the Constitution.

THE ENGLISH CONSTITUTIONAL BACKGROUND

The development of English constitutional law prior to the eighteenth century represents a two-fold attack on the crown's prerogatives.[21] The king's judges increasingly asserted the independence of the law and their right to judge free of royal intrusion or retaliation.[22] The crown's Parliament, during the same period, developed the mechanism of impeachment to reach corrupt royal ministers and to influence the crown's policies.[23]

The Tenure of English Judges

Prior to the Act of Settlement in 1700, the vast majority of English judges held their offices at the king's pleasure (*durante beneplacito regis*).[24] In effect, judges formed an integral part of the king's administrative machinery. The king appointed judges and paid their salaries. Judges were removable at the king's pleasure.[25] This arrangement obviously led to abuse when a judge's ruling could affect the king's interests.[26]

English judges were drawn from the professional barristers of the Inns of Court.[27] Judges were thus typically men of experience, influence, and ambition whose interests were affected by the will of the crown.[28] Judges of the sixteenth

21. The 17th and early 18th centuries have, however, been identified as the great period of English impeachments. Between 1621 and 1715 there were 50 cases of impeachment. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 382 (1936). Since that period there have only been four impeachments. *Id.* at 384. This latter period is the critical one in terms of the American constitutional experience because it was sufficiently contemporaneous with the Revolution for its lessons and procedures to have an impact on the framers.

22. *See infra* notes 33-41 and accompanying text.

23. *See infra* notes 42-54 and accompanying text.

24. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 143-47 (1979). *See generally* Havighurst, *The Judiciary and Politics in the Reign of Charles II* (pts. 1 & 2), 66 LAW Q. REV. 62, 62-78, 229-52 (1950); Rubini, *The Precarious Independence of the Judiciary, 1688-1701*, 83 LAW Q. REV. 343, 343-45 (1967).

25. J. BAKER, *supra* note 24, at 144.

26. Baker, *Independence of the Judiciary*, 94 SELDON SOC'Y 137, 138 (1977). *See generally* 2 W. HOLDSWORTH, *supra* note 21, at 556-65.

27. J. BAKER, *supra* note 24, at 112; 2 W. HOLDSWORTH, *supra* note 21, at 556.

28. J. BAKER, *supra* note 24, at 112.

through seventeenth centuries have been attacked as agents of the king and participants in the worst official outrages.[29] Especially in criminal matters, intervention by highly placed persons would likely produce light sentences or quashed indictments.[30] The record, however, appears to demonstrate judicial favoritism more akin to the royal prerogative not to prosecute than to blatant corruption.[31] It has been suggested that this practice actually furthered justice and equity and did not represent evidence of corruption.[32] Regardless of interpretation, before 1700, judges were often influenced by the desires of the crown.

The crown, however, was not always able to intimidate its judicial officials. An increasing sense of judicial professionalism buttressed by natural law jurisprudence led to periodic conflicts during the turbulent seventeenth century.[33] In 1616, the crown asked each of its judges whether a suit would be stayed if the king so desired.[34] All responded affirmatively except Chief Justice Coke who answered that he would follow his judicial conscience and fairly apply the law.[35] Shortly thereafter Coke was removed from office without explanation.[36] Conflict persisted throughout the century between the crown and its judiciary[37] culminating during the reign of James II. Within a four-year period, this monarch removed twelve judges for refusing to recognize his asserted right to abrogate laws.[38]

With the aid of Parliament, the English judiciary nevertheless prevailed. In 1700, the Act of Settlement was passed to require the crown to appoint judges *quandiu se bene gesserit* (so long as well-behaved).[39] The Act also permitted the crown to remove a judge only upon the request of both chambers of Parliament.[40] Thus, the Act of Settlement is a historical landmark which dramatically furthered the movement toward an independent English judiciary. The final step in securing the English judiciary's independence occurred in 1760 when Parliament declared that a judge's right to office would not be voided by the death of the appointing sovereign.[41]

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29. Baker, *supra* note 26, at 137-42. The trials of Sir Thomas More and Queen Anne are often cited as examples of judicial partiality. *Id.* at 138.

30. *Id.* at 141.

31. *Id.* at 141-42.

32. *Id.*

33. *Id.* at 137-42.

34. J. BAKER, *supra* note 24, at 144.

35. *Id.* at 144-45.

36. *Id.*

37. *Id.* at 145-46.

38. *Id.* at 145.

39. Rubini, *supra* note 24, at 343. Although William III appointed all his judges in this manner in the aftermath of the Revolution of 1688, this tenure was not mandated by statute until 1700. *Id.* at 343-45. *See also* J. BAKER, *supra* note 24, at 145 & n.20.

40. Rubini, *supra* note 24, at 345. The Act of Settlement also terminated a practice developed during the reign of Charles II whereby judges appointed *quandiu se bene gesserit* were permitted to collect salary and retain title but were barred from hearing cases. The abrogation of this practice affirmed the principle that a judge is a judge only so long as he exercises judicial powers. *Id.* at 344.

41. J. BAKER, *supra* note 24, at 146.

Accountability of English Judges

The principle of judicial independence not only created conflict with the king, but it led Coke to develop the doctrine of absolute judicial immunity from civil or criminal prosecution for official misconduct.[42] For Coke, this doctrine followed from both the principle of judicial independence and the need to protect the record of the case. Judicial error should be corrected by appeal to a superior court, not by attacking collaterally the judgment in a suit against the offending judge. To prevent such collateral attack, Coke advocated judicial immunity for all acts involved in the exercise of the judicial authority.[43] In *Floyd v. Barker*,[44] Coke wrote that no judge appointed by the crown was answerable before another judge for his judicial conduct.[45] He feared that losing parties would perpetually challenge the record by dragging judges from one forum to the next.[46] No question would ever be definitively decided and no judge safe from recriminations.[47] Since Coke's pronouncements, not a single indictment has been brought against a judge of an English Superior Court.[48]

In 1673, Chief Justice Vaughan followed Coke in mandating that complaints of judicial corruption be made to Parliament.[49] The 1815 case of *Taafe v. Downes*[50] demonstrates that this position was fully accepted by the nineteenth century. Three justices writing separately for the court reaffirmed that judges are immune from prosecution and are answerable only before the king's court for alleged judicial misconduct.[51] One justice noted that criminal prosecution would offend a judge's constitutional status and subject him to harassment and degradation.[52] Another justice stressed that the doctrine of judicial immunity is of constitutional magnitude and benefits the people by guaranteeing judicial independence.[53] The English common law thus offered judges of record complete immunity from criminal and civil action *before other judges* for charges of official corruption. The appropriate and exclusive forum for the investigation of the judge *qua* judge was the High Court of Parliament,[54] the House of Lords.

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42. *See generally* 6 W. HOLDSWORTH, *supra* note 21, at 237-40.

43. Floyd v. Barker, 77 Eng. Rep. 1305 (1608). *See generally* Note, *The Special Status of the Judiciary: Absolute Judicial Immunity and the Need for Only Qualified Protection* (Mar. 3, 1982) (unpublished note available from the University of Florida Law Review).

44. 77 Eng. Rep. 1305 (1608).

45. *Id.* at 1307. A sitting judge nevertheless could be examined by the king in the court of Parliament. *Id.*

46. *Id.* at 1306-07.

47. *Id.*

48. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 53, 65 (1973); 14 ANNALS OF CONG. 343 (1805).

49. Bushell's Case, 124 Eng. Rep. 1006, 1006-08 (1677). *See also* R. BERGER, *supra* note 48, at 65.

50. *See* Calder v. Halket, 3 Moore 28, 35-73, 13 Eng. Rep. 12, 15-34 (1839); *Taaffe v. Downes* (published as an extensive note to the *Calder* decision).

51. *Id.* at 18, 23, 28.

52. *Id.* at 18 (opinion of Mayne, J.).

53. *Id.* at 23-24 (opinion of Fox, J.).

54. *Id.* at 31. 14 ANNALS OF CONG. 343, 343 (1805) ("This is the great protection and se-

English Impeachments

Under the English impeachment mechanism, criminal prosecutions were brought by the House of Commons[55] and tried before the House of Lords. This method of impeachment developed on a dual foundation. First, the members of Commons wished to bring to justice ministers and officials of the crown who escaped indictment either through compassion or prosecutorial discretion. Because peers and other highly placed personages had the privilege of trial before the Lords as a result of their station, the cooperation of the Lords was necessary for conviction. Second, the Lords were needed as political allies in the assault upon the crown's officials.[56]

In impeachment proceedings at common law, Parliament determined guilt or innocence and actually imposed criminal sanctions of fine and imprisonment upon the convicted.[57] Removal from office was an incident of conviction and followed as a matter of course from the penal sanctions available to Parliament.[58] Although technically Parliament could impeach, try and convict an errant *official*, impeachment represented an important political check on the crown's powers. The king was above the law and could do no wrong, but his senior ministers might be tried by Parliament for "high crimes and misdemeanors."[59]

English impeachments thus may be viewed as a method of influencing royal policy as well as bringing the force of laws to bear on corrupt ministers

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curity that judges of courts of record have, that they are accountable for their official conduct only to the legislature, and are punishable at law only for such acts as would be indictable offenses, independent of their official character.").

55. 1 W. HOLDSWORTH, *supra* note 21, at 380.

56. *See id.* at 381.

57. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 159-71 (1970).

58. 1 W. HOLDSWORTH, *supra* note 21, at 379-81.

59. *Id.* at 381-83. Although the term "impeachment" emerged gradually in the 14th and 15th centuries, C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 6 (1974), the expression "crimes and misdemeanors" can be traced directly to the impeachment trial of the Earl of Suffolk in 1376. R. BERGER, *supra* note 48, at 61. The expression "high crimes and misdemeanors" developed as a term of art signifying a category of political offenses or crimes against the public as a ground for impeachment. The adjective "high" thus refers to political offenses which violate the public interest and impede the functioning of government.

Blackstone, for example, distinguished high misdemeanors from misdemeanors, identifying the former as violations of public trust and employment as opposed to private wrongs. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61-62. Blackstone's discussion of treason further clarifies this distinction. Petty treasons became recognized as breaches of a duty of faith and loyalty; a servant thus committed a petty treason by not obeying a master. "High treason", however, connoted a breach of trust and loyalty owed to the king. *Id.* at 75. Bribery is also a "high crime," and was originally considered a species of treason because it corrupts the administration of the state. R. BERGER, *supra* note 48, at 62.

Because of the latent political character of high crimes and misdemeanors, and their subtle, multifarious nature, these offenses are impossible to codify fully. *See* THE FEDERALIST No. 65, at 396-97 (A. Hamilton) (C. Rossiter ed. 1961). They belong to the category of crimes that are clearly damaging to the nation in retrospect, but are virtually impossible to define and proscribe in advance. R. BERGER, *supra* note 48, at 7-52. Thus, although one may be impeached for an indictable offense, indictability is not the test of the adequacy of an impeachment charge. *Id.* at 59-67.

protected by the king and favored in the law courts. In addition, English impeachments are tied to the doctrine of a mixed constitution which provides that the various class interests in society should have a voice in and an impact on government.[60] Although government should be structured to address the interests of each class, the privileged classes reserved the right to try their own.[61] In short, only peers will judge peers.[62]

The notion of trial by peers has two frequently confused meanings. As applied to commoners in England, trial by peers came to be identified with trial by jury.[63] The English understanding of that term as it related to peers, however, is trial by those of equal station.[64] Since 1341, by law no peer or official could be made to answer any charges except before the peers in Parliament.[65] Criminal indictments of peers were removable to Parliament and tried before the House of Lords by writ of certiorari.[66] Trial by peers signifies that one should not be judged by those of a lower station; justice was thought to require an understanding of an alleged offense's context and a jury not tainted by class animosities or jealousies. Impeachments therefore became trials of great men and public officials[67] in the House of Lords on petition from the Commons.[68]

The American framers were thus presented with a three-fold English legacy. First, the tenure of English judges was during good behavior and removal power had been transferred from the crown to Parliament.[69] Second, English judges of record were exempt from civil and criminal prosecution for acts performed in their official capacity.[70] Finally, impeachment had developed as the proper criminal forum to try men of station and government position for indictable offenses as well as political malfeasance.[71] The following section will examine how these principles, tempered by American colonial experience, were incorporated into the American Constitution.

THE AMERICAN INCORPORATION

The American Constitution's structure exhibits a commitment to the distinct doctrines of separation of powers and checks and balances.[72] The

60. M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 98-118 (1969).
61. 1 W. HOLDSWORTH, *supra* note 21, at 381.
62. *Id.* at 385-91.
63. *Id.* at 386.
64. *Id.* at 385-91.
65. *See* 15 EDW. 3, St. I; 1 W. HOLDSWORTH, *supra* note 21, at 387.
66. 1 W. HOLDSWORTH, *supra* note 21, at 390.
67. *See id.* at 380.
68. 2 J. STORY, *supra* note 57, at 161.
69. *See supra* notes 24-41 and accompanying text.
70. *See supra* notes 42-54 and accompanying text.
71. *See supra* notes 55-59 and accompanying text.
72. *See generally* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (1958). For a lucid exposition of the doctrine of separation of powers and its historical development, see M. VILE, *supra* note 60.

The notion of an independent judiciary as a separate branch of government did not develop until the 18th century. *See* M. VILE, *supra* note 60, at 21-52. Under the Articles of Confederation, which contained no explicit reference to the judicial power or jurisdiction of the

separation of powers doctrine, articulated by Montesquieu,[73] is evidenced in the Constitution's first three articles fixing the term, method of appointment, and powers of each coordinate branch of government.[74] The purely American addition of the checks and balances doctrine,[75] however, provides that each

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Confederacy, an elaborate procedure of dispute resolution was available on petition to the United States Congress. The parties then could agree upon the judge. If no agreement was reached, a procedure to establish a panel was mandated. Congress would select the panel, but the parties had a right to strike members from the panel. ARTICLES OF CONFEDERATION, art. IX. *See* 1 B. POORE, THE FEDERAL AND STATE CONSTITUTION 9-12 (1924). *See also* THE FEDERALIST Nos. 15-17, 21, 22 (A. Hamilton); *id.* Nos. 18-20 (J. Madison). The experience under the Articles of Confederation clearly impressed itself upon the framers' minds. *See* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 42-53 (1913). *See generally* M. JENSEN, THE ARTICLES OF CONFEDERATION (1966).

An explicit and fundamental intention of the Constitution's framers was to establish an independent federal judiciary. At the federal convention, the first set of principles enunciated as a framework for the Constitution specifically recited the need for an independent judicial branch or department within the federal government. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-23 (M. Farrand ed. 1966). Without a federal judiciary, the national government had been forced to rely upon state courts to protect federal interests. Not only did this raise immediate questions of varying and possibly contradictory interpretation, but to entrust the state courts with such responsibility might seriously undermine federal power. State judges could be influenced by the conditions, sentiments, and political climate of their respective states and subject to direct pressure from state legislatures and executive departments. It was thus axiomatic to the framers that the national government required a federal judiciary. THE FEDERALIST No. 78, at 356-57 (A. Hamilton) (Hallowell ed. 1857). *See also id.* Nos. 79-83.

73. C. MONTESQUIEU, THE SPIRIT OF THE LAWS, Book XI, § 6 (1748). Liberty, according to Montesquieu, is threatened whenever two or more of the basic governmental powers are found in one body. The rule-making, rule-interpreting, and rule-executing powers must remain distinct and exercised by different branches of government. If the legislative department executes its own laws, then there will be no impediment to arbitrary application against political opponents. Should the executive gain the power to interpret the law, then no one is free from politically discriminatory interpretation of the law. The citizens' liberty thus requires an institutionally enforced separation of the fundamental government powers. *Id.*

Constitutionalism is a broader theory than the doctrine of separation of powers. It provides that government may be limited and that thoughtful arrangement of official functions and activities will protect the citizens' liberty. Constitutionalism thus stresses the form or structure of government as the guarantee of liberty rather than the good intentions, compassion or conscience of the actors. M. VILE, *supra* note 60, at 1-20.

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

74. *See, e.g.*, U.S. CONST. art. I, § 2. Members of the House of Representatives are chosen "every second year by the People of the several States." *Id.* Senators are elected to office for six years. *Id.* § 3. The powers of the legislative branch are fully delineated in article I, § 8. The President and Vice President have four-year terms, and their salaries shall not be reduced. *Id.* art. II, § 1. Executive powers are specified in article II, § 2. United States judges are appointed "during good behavior" and their salaries may not be reduced. *Id.* art. III, § 1. The "judicial power" of the United States is specified in the subsequent section. *Id.* § 2.

75. *See* M. VILE, *supra* note 60, at 119-75. The multifaceted doctrine of separation of

branch or department is not completely independent of the others. Instead, each branch is given powers affecting the other branches in order to prevent encroachments and overreaching.[76] This interplay of the separation of powers and checks and balances doctrines is most apparent in the provisions pertaining to impeachments.[77]

The United States Constitution: Impeachment

The Constitution grants Congress the power to remove the President, Vice-President, and all civil officers prior to the end of their tenure "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[78] The framers thus followed the English preference for legislative removal power. Rather than mere "address," however, the accused official is entitled to trial, that is, impeachment before Congress.[79] The formalities of

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powers involves the notions that government may be divided into elementary powers or activities, that these activities must be exercised independently of each other, and that no one person may hold simultaneous positions in different departments. *Id.* at 1-20. Although state constitutions pre-dating the federal convention typically mandated a strict separation of powers, experience soon revealed that complete separation was a practical impossibility. Moreover, absent periodic revolutions by the people to readjust powers, the pure separation of powers doctrine offers no mechanism to prevent executive or legislative encroachments. Thus the need for mutual checks and balances arises to impede overreaching and avoid powerlessness. *Id.* at 199-75. "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *See* THE FEDERALIST No. 51, *supra* note 73, at 321-22.

76. *See, e.g.,* U.S. CONST. art. II, § 3. The President has the right to convene both houses on extraordinary occasions. *Id.* The President has veto power over laws passed by a simple majority of Congress, but a presidential veto may be overturned by a two-thirds vote of both Houses of Congress. *Id.* art. I, § 7.

77. *E.g.,* The House of Representatives "shall have the sole power of impeachment." *Id.* art. I, § 2, cl. 5.

78. *Id.* art. II, § 4. *Id.* art. I, § 3 provides:

> The Senate shall have the sole Power to try all Impeachments . . . When President of the 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. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

"The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." *Id.* art. II, § 2. "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." *Id.* art. III, § 2.

79. *See supra* note 77. The Constitution does not provide for removal at the will of the legislature. *Compare* U.S. CONST. art. I, § 3 *with* Act of Settlement (1700), 12 & 13, Will III, ch. 2, § 3. "That after the said limitation shall take effect as aforesaid, judges commissions be made *quandiu se bene gesserit* [so long as well-behaved], and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them." *Id.* (entitled "An Act for the future limitation of the crown, and better securing the rights and liberties of the subject").

the impeachment process protect against hasty removal and offer the accused party a forum for hearing and defense.[80]

Further mirroring the English model, the Constitution grants the Senate the sole power to try impeachments but only upon charges from the House of Representatives.[81] In this manner, the accusor is prevented from judging the accusations.[82] Conviction before the Senate requires a two-thirds vote of the members present.[83] The sanctions available to the Senate upon conviction are limited to removal from office and permanent disqualification from federal office. Article one, section three expressly states: "Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[84] The American Constitution thus departs from the English criminal model of impeachment as a proceeding by explicitly recognizing impeachment's political function and restricting impeachment sanctions to those of a political nature.[85]

Because of the quasi-political character of impeachment proceedings, the Senate is deemed the proper trier of fact. Charges of high crimes and misdemeanors[86] are best tried by a sizable body conversant with the intricacies of political life.[87] The citizens' representatives are therefore charged with the duty of trying allegations of official corruption and violations of public trust

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80. *See generally* 2 J. STORY, *supra* note 57, at 159-72, 215-79. "The model from which the national court of impeachments is borrowed, is, doubtless, that of Great Britain." *Id.* at 216.

81. *See* Note, *The Chandler Incident and Problems of Judicial Removal,* 19 STAN. L. REV. 448, 461, n.8 (1981). The Constitution speaks in judicial language when discussing impeachments: the Senate is to *try* all impeachments while under special *oath;* a vote of two-thirds is necessary for *conviction. See supra* note 78. The Senate takes on a "judicial character as a court for the trial of impeachments." THE FEDERALIST No. 65, *supra* note 59, at 396.

82. *See* THE FEDERALIST No. 66, at 402 (A. Hamilton) (C. Rossiter ed. 1961).

83. U.S. CONST. art. I, § 3. In England, conviction by the Lords upon impeachment from the Commons is by majority vote. 2 J. STORY, *supra* note 57, at 247.

84. U.S. CONST. art. I, § 3.

85. THE FEDERALIST No. 65, *supra* note 59, at 396. "[Impeachments] are of a nature which may with peculiar propriety by denominated political, as they relate chiefly in injuries done immediately to the society itself." *Id.*

86. *Id. See supra* note 59.

87. 2 J. STORY, *supra* note 57, at 220-21, 269. "The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential, and the most distinguished characters of the community, forbids the commitment to the trust to a small number of persons." *Id.* at 228 (opposing trial before the Supreme Court). Public life is a privileged domain with unique virtues, vices, and dangers. For the Greeks and Romans, it was a domain wherein the highest virtues were demonstrated to the benefit of the commonwealth. The rewards of such virtue were fame, public recognition, and near immortality. *See* H. ARENDT, THE HUMAN CONDITION 1-73, 75-243 (1958). Hamilton considered the ultimate happiness of the individual to be a function of participation in the public life of the community. F. MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 52-57 (1979).

The public domain is a dangerous realm of sudden reversals, calamitous occurrences, and unpredictable fortune. Politics witness noble sentiment and collective effort, as well as plots, intrigues, conspiracies, and petty ruthlessness. To encourage the best and brightest to enter public life and to permit them to remain, the republic must afford its servants sufficient protections against infamy. The institutional safeguards of the impeachment process provide this protection. The Senate as the nation's pre-eminent political body, presumed to be

and confidence.[88] Thus, the legacy of trial by peers is preserved in the American model, although American peers are not a nobility of birth but are instead those elected or appointed to public office.[89]

A party convicted on impeachment charges may be criminally prosecuted after removal from office.[90] This provision further emphasizes the political, rather than criminal, nature of impeachment proceedings.[91] In addition, because the President or executive officials may be subjected to impeachment proceedings, the Constitution deprives the President of the power to grant pardons for impeachment convictions.[92]

Impeachment, thus, is the power of Congress to remove and disqualify members of the other government branches. Abuse of this power is forestalled by the bicameral nature and formal character of the proceedings, the political wisdom and experience of the Senate, and the requirement of a two-thirds vote for conviction. When the President is impeached, the power of Congress is further restrained by the requirement that the Chief Justice of the Supreme Court preside over the impeachment proceedings.[93]

Impeachment of Federal Judges: The Constitutional Dilemma

It is axiomatic that article III judges are subject to congressional impeachment as civil officers of the United States.[94] Moreover, the Constitution ex-

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familiar with the nuances and subtleties associated with public position, judges whether the public's trust has been compromised.

88. 2 J. STORY, *supra* note 57, at 220-21. Impeachment provisions of the federal Constitution are designed to vindicate the public interest. At the same time, they are intended to protect the reputation and public life of the accused. *Id.* at 229. For Hamilton and Madison, impeachments affect "the political reputation and existence of every man engaged in the administration of public affairs." THE FEDERALIST No. 65, *supra* note 59, at 397. Moreover, conviction upon impeachment divests a person of his "fame and his most valuable rights as a citizen." *Id.* at 399.

89. 2 J. STORY, *supra* note 57, at 220.

> So far as [impeachments] are of a judicial character, it is obviously more safe to the public to confide them to the Senate, than to a mere court of law. The Senate may be presumed to always contain a number of distinguished lawyers, and probably some persons, who have held judicial stations.

Id. For Hamilton and Madison, the Senate was the repository of the collective political wisdom and experience of the nation. *See* THE FEDERALIST Nos. 62-64 (A. Hamilton).

90. U.S. CONST. art. I, § 3, cl. 7.

91. *See supra* notes 84-88 and accompanying text. This savings clause has also been interpreted as avoiding any plea of double jeopardy at future trial. United States v. Hastings, 681 F.2d 706, 710 (11th Cir. 1982). *See* R. BERGER, *supra* note 48, at 62.

92. *See supra* note 78. The crown was also deprived of the right to pardon impeachment convictions. Act of Settlement (1700), 12 & 13, Will III, ch. 2, § 3.

93. *See supra* note 78. A separate constitutional provision, art. I, § 5, cl. 2, allows each House of Congress to expell one of its own members for misconduct upon a two-thirds vote.

94. *See* 2 J. STORY, *supra* note 57, at 258. Although impeachment provisions extend to all civil officers, they are aimed primarily at the executive branch. The constitutional provision granting tenure during good behavior was intended to protect judicial integrity. The professionalism of the bar, the appointment process, and the dignity of the office itself provide additional assurance.

pressly indicates that the criminal indictment, trial, and sanction may occur after impeachment conviction by the Senate. So limiting the legislative role in impeachment to removal from office reflects the unique American constitutional framework of checks and balances in a tripartite separation of government. The English common law impeachment process had permitted the legislature to remove from office and criminally sanction errant officials. By limiting Congress' impeachment role to investigation of official misconduct and removal from office, the American Constitution prevents legislative usurpation of the judicial criminal justice process.[95] The English impeachment model establishes Parliament's broad powers to charge, try, and punish any subject of the realm[96] as a parallel counter-weight to the king and his courts. From the American perspective, this commingling of legislative and judicial functions raises the spectre of abuse and overreaching. The Constitution specifically prohibits Congress from issuing bills of attainder. Consistent with American jurisprudence, the framers limited impeachment sanctions to removal and permanent disqualification.

In the case of Executive or primarily administrative officials, the Constitution may permit indictment prior to impeachment; however, the opposite result obtains for article III judges. Article III judges have a salient function and unique historical lineage that distinguishes them from other civil officers and supports interpreting the Constitution to *require* impeachment conviction before trial upon indictment for activity relating to judicial office. Federal judges form the core of an independent branch of the government which is the final protector of the Constitution and the citizens' liberty.[97] To further the

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95. The United States Constitution departs from the English tradition by divorcing impeachment proceedings from criminal process. Indictment arguably must precede impeachment so that matters of fact can be determined and pre-trial publicity and unnecessary exposure can be avoided. An impeachment proceeding could conceivably jeopardize a fair trial. Moreover, given the political nature of impeachment, it is arguable that the impeachment process is reserved for offenses which are not indictable, yet constitute a significant breach of public trust. *See generally* R. BERGER, *supra* note 48, at 53-102.

96. An English peer could be criminally indicted but then had a right to remove the indictment to the House of Lords. Common law suggests then that federal judges have a right to impeachment before Congress but they may also be subject to grand jury indictment. There is no provision in the Constitution paralleling the English right to remove the indictment to Parliament. Moreover, an English judge's right to be tried by Parliament, stemmed from the concept of trial by peers. *See supra* notes 63-68 and accompanying text. The American constitutional scheme, however, completely rejects the English doctrine of a mixed constitution and personal station or status. M. VILE, *supra* note 60, at 98-118. The "vertical" conceptions of the English Constitution were replaced with an American "horizontal" political equality. The American Constitution specifically eschews hereditary or politically created castes with special privileges. U.S. CONST. art. I, § 9. Because American federal judges are not nobility, the common law right of criminal prosecution before Parliament does not translate to an equivalent right in the United States. Judicial immunity was of constitutional stature at common law, but is without American constitutional equivalent. The common law thus does not answer whether a criminal prosecution for conduct relating to the judicial office would usurp the extraordinary congressional power to impeach.

97. The Constitution and the laws of the United States are the "supreme Law of the Land," binding judges in every state. U.S. CONST. art. VI, cl. 2. The federal judiciary is accordingly the ultimate protector of the Constitution and the liberties of the citizens of the

establishment of an independent judiciary,[98] the privilege of absolute civil immunity from collateral attack for official acts is a well-established doctrine.[99] The sole remedy for wrongful judicial action lies in appeal to a superior court. Historically, the individual federal judge was only subject to sanction through the impeachment process.

Do the same principles apply to criminal charges brought again *federal* judges alleging malfeasance in the exercise of judicial duties?[100] On one hand,

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United States. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The independence of the federal judiciary is essential for the exercise of this trust and responsibility.

98. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

> The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

Id. at 347. *See* Pierson v. Ray, 386 U.S. 547 (1967).

99. There is a distinction between the independence of judges and the independence of the judiciary. Immunity from action or prosecution protects judges from harrassment and ensures against the judicial bias that could arise if judges surmised that their personal fortunes were attached to decisions. *See Bradley,* 80 U.S. (13 Wall.) at 347. The independence of the judiciary. Immunity from action or prosecution protects judges from harassment and hold office "during good behavior" without reduction of salary and the authority of judges to declare acts unconstitutional. *See* U.S. CONST. art. III, § 1.

The distinction between the common law principle of independent judges and the constitutional principle of an independent judiciary collapses upon further analysis. Judicial immunity was a principle of constitutional stature in English law. *See supra* notes 42-54 and accompanying text. In addition, judicial immunity protects the record which is the very foundation of an independent judiciary. *Id.*

100. State court judges are criminally liable for acts under color of their office although civilly immune from the same. Dennis v. Sparks, 449 U.S. 24 (1980); O'Shea v. Littleton, 414 U.S. 488 (1974); Pierson v. Ray, 386 U.S. 547 (1967). The Supreme Court has suggested in dicta that no immunity exists for criminal acts of federal judicial officers. Chandler v. Judicial Council, 398 U.S. 74, 140 (1970). Justice Douglas in dissent noted that "[I]f [federal judges] break a law, they can be prosecuted." *Id.* at 140 (Douglas, J., dissenting). Similarly, Justice Black in dissent stated that "judges, like other people, can be tried, convicted, and punished for crimes . . . ." *Id.* at 141-42 (Black, J., dissenting). *See also* United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 975 (1974).

In dicta, several other federal courts have asserted that judges are immune from civil rights damage actions, but not immune from criminal liability. Doe v. Lake County, Indiana, 399 F. Supp. 553 (N.D. Ind. 1975); Strawbridge v. Bednarik, 460 F. Supp. 1171 (E.D. Pa. 1978) (state judge); Shore v. Howard, 414 F. Supp. 379 (N.D. Tex. 1976) (state judge). State judges were thus rendered liable to criminal action in the protection of constitutionally protected civil rights. It would be unfortunate if this dicta were applied to federal judges who have a special constitutional role. The question is not whether federal article III judges are immune from criminal acts, but whether their constitutionally unique function and duties require the protection of the impeachment process prior to indictment. *See infra* note 112 and accompanying text.

See generally Feldthusen, *Judicial Immunity: In Search of an Appropriate Unity Formula,* 95 U. NEW BRUNSWICK L. REV. 73 (1978); Katz, *Immunity of State Judges Under the Federal Civil Rights Act*: Pierson v. Ray, *Reconsidered,* 65 NW. U.L. REV. 615 (1970); Richards, *Judicial Immunity: Developments in Federal Law,* 33 BAYLOR L. REV. 351 (1981); Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Immunity,* 64 VA. L. REV. 833 (1978); Way, *A*

the general Republican maxim of equality before the law and the public's interest in an honest judiciary strongly militate against extending criminal immunity for official acts to federal judges. Nonetheless, the principles underlying the grant of civil immunity apply to criminal prosecutions. Protection of the record,[101] termination of vexatious suits by an interested party (here the prosecuting branch of the government),[102] and preservation of the dignity and

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Call for Limits to Judicial Immunity: Must Judges Be Kings in Their Courts, 64 JUDICATURE 390 (1981).

101. In the Hastings matter, the government has appealed the judge's final order entered October 6, 1981 in United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981), *appeal docketed* No. 81-6139 (11th Cir. Nov. 14, 1981). The government also filed a petition for writ of mandamus to the United States District Court for the Southern District of Florida challenging Judge Hastings' judicial power to issue the *Romano* final order. *In re* The United States of America, No. 82-5114 (11th Cir. Jan. 18, 1982). The government, in effect, has subjected the *Romano* decision to a collateral attack based upon jurisdiction and at the same time appealed the merits of the ruling. The government thus sought to avoid the judge's ruling by attacking the judge as well as contesting the merits of the decision.

102. Virtually half the actions that come before a federal district judge involve the government as a party. *See Annual Report of the Director of the Administrative Office of the United States Courts* (1981). Each United States attorney is charged with the prosecution of all offenses against the United States. Government Employees and Organization Act, 28 U.S.C. § 547(1) (1976). This includes charges pertaining to the obstruction of justice and conspiracy. Thus, United States attorneys are in a position to investigate and prosecute members of the federal bench before whom they appear. The tremendous power and discretion of the executive branch to prosecute and the fact that federal judges are called upon to rule against these attorneys daily, raise the spectre of a chilling effect on judicial independence.

The rule of judicial immunity is designed to isolate the judicial officer from the aggrieved litigant. To the extent that the judge perceives a personal interest at stake, judicial impartiality and objectivity is reduced. "The policy behind the rule [of judicial immunity] is to insure that [judicial] officers will act upon their convictions free from any apprehension of possible consequences." Drexeler v. Walters, 290 F. Supp. 150, 154 (D. Minn. 1968).

Thus, if judicial immunity protects judges from the monetary damages that could arise from civil actions brought by interested parties, there is a strong argument that immunity should apply to criminal actions brought by the executive branch against the judicial office which threatens that officer with severe sanctions and loss of liberty. The question is whether on balance the chilling effect on the judiciary or the compelling state interest in the prosecution of crime is of greater moment. The appropriate balance is difficult to discern, for the citizens' interest in both the integrity of public officials and an independent judiciary are compelling. *See* Scott v. Stansfield, 3 L.R.-Ex. 220, 223 (1868), *cited in* Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 350 (1872) (judicial immunity is not for protection of a malicious or corrupt judge, but is for the benefit of the public).

The government has recognized the potential for conflict. Justice Department policy provides that actions against federal judges should be prosecuted by the Public Integrity Section of the Justice Department and not the local United States attorney. *See* Brief in Opposition to Defendant Hastings' Motion to Quash Indictment and Dismiss for Lack of Jurisdiction, *Hastings,* No. 81-576-CR-ETG. The government has thus prudently attempted to shift the prosecution from the politically-appointed United States district attorney to the professional staff of the Public Integrity Section. This policy diminishes the threat of vindictive investigation and prosecution and avoids local difficulties should the indicted judge eventually return to the bench. It does not address the problems of professional ambition and political influence. Should the executive branch be in a position to engage in plea bargaining with a federal article III judge for "voluntary" retirement or resignation in exchange for an agreement not to prosecute?

bearing of the office[103] are all well-served by judicial immunity from criminal prosecution for official acts. Moreover, these rationales provided the foundation for the English development of judicial immunity from prosecution for official acts.[104] Because these concerns bear directly on the establishment and maintenance of an independent judiciary, the English recognized their *constitutional* stature.[105]

Incorporating this English constitutional law establishing an independent judiciary into the American Constitution, the impeachment forum emerges as the only forum for the trial of allegations of judicial improprieties suggesting corruption or high crimes and misdemeanors.[107] The House Managers interpreted the Constitution this way at the impeachment trial of Judge Chase in 1805:

> So far as the offense committed is injurious to society, only in consequence of the power reposed in the officer being abused in the exercise of his official functions, it is inquirable into only by impeachment and punishable only by removal from office, and disqualification to hold any office .... [A]nd even treason and bribery can only be inquired into by impeachment.[108]

So interpreted, the Constitution balances society's competing interests in maintaining an independent federal judiciary and punishing criminal malfeasance. Federal judges are shielded from criminal prosecution prior to impeachment, but upon removal from office, the former judge becomes subject to criminal liability. There is no absolute immunity from criminal prosecution

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103. The judiciary as "the least dangerous branch" is purposefully isolated from the sword and the purse. THE FEDERALIST No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). Its power and influence is thus a function of its reputation and the stature of its members. Although nothing is more damaging to the judiciary than a corrupt member, charges against the judiciary affect its prestige and undermine its influence. While the public has an interest in the conviction and removal of corrupt judges, it also has an interest in preventing damaging attacks on judicial officers which, *eu ipso,* can inflict irreparable harm.

All indictments must be made by a grand jury. U.S. CONST. amend. V. This affords an initial protection for all citizens. The actual protection afforded by a grand jury, however, has been repeatedly questioned, especially in the context of quasi-political allegations of conspiracy. *See, e.g.,* Tigar & Levy, *Indictment of Federal Grand Juries,* N.Y. Times, Jan. 8, 1972, at 29, col. 1. Moreover, a greater concern is whether the protection offered by grand juries is sufficient to protect the interests of an independent judiciary, not only the judge as citizen. Whether the protection of the grand jury is sufficient to dispell the "chilling effect" of the threat of prosecution is also subject to question. *See supra* note 102, *See generally* Hawkins v. Superior Court, 22 Cal. 3d 584, 590, 580 P.2d 916, 919, 150 Cal. Rptr. 435, 438 (1978) (quoting United States District Judge William Compell, a former prosecutor: " 'Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything before any grand jury.' ").

104. *See supra* notes 42-48 and accompanying text.

105. *See supra* note 99.

106. 77 Eng. Rep. 1305 (1608).

107. *See supra* notes 42-54 and accompanying text.

108. 14 ANNALS OF CONG. 331-32 (1805). The remarks concerning the extent of punishment apply solely to the Senate's penal powers. The Constitution specifically provides that a party convicted in impeachment proceedings can be subjected to investigation and sanction in criminal proceedings. U.S. CONST. art. I, § 7.

analogous to full immunity. The office is, however, protected while the individual judge is ultimately amenable to criminal prosecution and punishment.[109] This solution permits the incorporation into the American triparite system of government the full range of constitutional privileges afforded English superior judges. A federal III judge should first be tried for official malfeasance by the legislative branch of government. The sanctions available to Congress are removal and permanent disqualification from office. The imposition of criminal sanctions, if warranted, occurs through employment of the established judicial machinery once the judge has become an ordinary citizen.

The risk that a judge guilty of crimes might escape prosecution or employ impeachment as a technical barrier to indictment exists, but is not great.[110] First, in impeachment proceedings, criminal behavior need not be charged or proved; impeachment will lie for egregious, though non-criminal, misbehavior in office. Second, the requisite standard of proof in impeachment trials is lower than that in criminal proceedings. An impeachment conviction requires a two-thirds vote of the Senators in attendance on a clear and convincing standard.[111] This standard is significantly less demanding than that of guilt beyond a reasonable doubt which a *unanimous* criminal jury must find in order to convict. The primary public concern is to oust from office judges guilty of violating the public's trust and confidence — whether such breach is criminal or not. Impeachment addresses this need.

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109. Under this interpretation of the Constitution, federal judges are not absolutely immune from criminal prosecution. That judges would remain ultimately liable for criminal acts committed in the course of judicial duties is consistent with the dictum of case law. *See supra* note 100. The Constitution mandates impeachment as preliminary requirement to the criminal prosecution of a judge for offenses connected to the office. In this sense, impeachment would function as a grand jury of peers reminiscent of English impeachment practices. *See supra* notes 60-68 and accompanying text. Moreover, the legislature would mediate the conflict between the executive and judiciary. *See supra* note 102.

110. This viewpoint may underestimate the difficulties of the impeachment process. The House Judiciary Committee conducts the preliminary investigation and reports to the full House. Trial is then arranged before the Senate which must hear testimony, decide matters of law, and render judgment. *See* 2 J. STORY, *supra* note 57, at 273-79. The conduct at Senate trials is not always exemplary. *See generally* J. BORKIN, *supra* note 3. In addition, other authorities view the impeachment of district and circuit judges as below the dignity of Congress. *See* R. BERGER, *supra* note 48, at 3 ("Once employed to topple giants . . . impeachment in this country has sunk to the ouster of dreary little judges for squalid misconduct.").

Despite the gravity of the proceedings, political considerations will always intervene. The possibility of an impeachment vote in a House Committee being "exchanged" for a vote on public works project in a distant state or a failure to impeach because of political embarrassment during an election year is most unsettling. Nor is appellate review available. However, criminal charges against judges for the exercise of judicial duties can raise suspicions about the executive branch's political motives. Judges Hastings and Kerner were democratic appointees indicted during Republican control of the executive branch. Given the political taint attaching to the indictment of a federal judge for his judicial acts, should the impeachment forum be ruled out as too political?

111. *See* COMMITTEE ON THE JUDICIARY, JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980, S. REP. No. 362, 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4315 (adopting the "clear and convincing" test) [hereinafter cited as S. REP.]. A vote of only half the House is required to impeach.

The enactment of the Judicial Conduct and Disability Act of 1980[112] substantially alleviates the disruptive effect an impeachment might have on Congress. In 1805, Congress would have had little difficulty interrupting its business to try an impeachment, but the modern Congress cannot be expected to halt pressing national business to try an errant judge. The Act provides for preliminary action by the appropriate judicial council[113] which has the authority to remove cases from a suspected judge and recommend impeachment to the Judicial Conference.[114] This is the most expedient approach to judicial misconduct.[115] Upon receipt of a complaint, the judicial council investigates the accused judge and, as peers, is in the best position to determine probable cause for impeachment.[116] The process of judicial councils screening and investigating complaints of judicial misbehavior, referral to the Judicial Conference,[117] impeachment by Congress, and executive prosecution after removal is a smooth, efficient statutory and constitutional method for disciplining federal judges while preserving an independent judiciary.

CONCLUSION

The indictment of an article III federal judge is a shocking event that

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112. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (JCDA), 28 U.S.C. § 372 (1976 & Supp. V 1981).

113. Each circuit court of appeals has a judicial council that is comprised of the chief judge of the circuit and a certain number of circuit and district judges fixed by a majority vote of all the active judges of the circuit. *Id.* § 332. Each council is authorized, *inter alia,* to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit . . ." and to hold hearings, take sworn testimony and issue subpoenas. *Id.* § 332(d)(1).

114. *Id.* § 372.

115. *See* S. REP., *supra* note 111, at 4317-18.

> The procedure is a supplement to, but not a substitute for, the seldom used process of impeachment by Congress of a member of the judiciary as set forth in Article I of the Constitution of the United States and is designed to deal with those matters which do not rise to the level of impeachable offenses.

Id. at 4317.

116. *Id.* at 4316 (suggesting that the "judges of the circuit are best able to determine what procedures should be used to handle disability and disciplinary matters . . .").

117. 28 U.S.C. § 372 (1976 & Supp. V 1981). The Act specifies that any person may file a complaint alleging prejudicial conduct. *Id.* § 372(c)(1) (Supp. IV 1980). This presumably includes a United States attorney. Of course, the judicial councils are not equipped to make full criminal investigations. Such investigations remain the responsibility of the executive branch. The investigative and judicial mechanisms of the councils function as a supplement to the professional activities of the Justice Department.

The JCDA attempts to strike a balance "between the need for judicial independence and the need for accountability." S. REP., *supra* not 111, at 4321. It establishes a procedure within the judiciary to permit the investigation of complaints and protection of judicial integrity and reputation. The accused judge is entitled to notice of all complaints and may appear before all investigatory panels "to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing . . . ." 28 U.S.C. § 372(c)(11) (Supp. IV 1980). "All papers, documents, and records of proceedings related to investigations . . . shall be confidential . . . ." *Id.* § 372(c)(14).

raises innumerable concerns. The accused is not only a citizen but a judicial officer entrusted with duties and responsibilities which demand absolute independence from threat, intimidation, and harrassment. Because article III judges are the final guardians of our liberties,[118] they must be protected not merely as citizens, but as judges. This note concludes that the procedures of the criminal justice system, which guard the civil rights of the Republic's citizens, are insufficient protection for federal article III judges.[119]

The constitutional impeachment process, combined with the common law immunity of judges for offenses committed within the scope of judicial acts, permits the balancing of two compelling public interests: individual accountability and independence of the judicial office. Given the often adversarial relationship between government prosecutors and the judiciary, the most well-intentioned executive officials may be prone to perceive judicial error, mistake, or indiscretion as criminal conduct subject to indictment.[120] Even if rarely actualized, this now publicized threat of prosecution may chill judicial independence.[121] This is especially true at the district level where judges work alone.[122] Impeachment, supplemented with the recent legislative grant of power to the judicial councils and Judicial Conference, offers a procedure for disciplining that rare errant judge and eliminates any chilling effect.

Impeachment is not without drawbacks. It is cumbersome and latently political. In addition, problems may arise in securing competent evidence and witnesses through the prolonged process of House investigation, House impeachment, and finally Senate trial. Although impeachment will provide

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118. Justice Powell has described federal justices as forming the " 'thin black line' which has stood resolutely between human liberty and the awesome power of government." Powell, *Are the Federal Courts Becoming Bureaucracies,* 68 A.B.A. J. 1370, 1372 (1982).

119. A wrong indictment at any citizen, much less a public official is irreparably damaging. *In re* Fried, 161 F.2d 453, 458-59 (2d Cir. 1947) (Frank, J., concurring) ("[A] wrongful indictment is no laughing matter; often it works a grievous irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation and still suspects guilt, even after acquittal."). The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 provides accused judges with full confrontation rights. Its proceedings and records are, however, confidential. *See supra* note 117.

120. This argument also cuts the other way. The conscientious prosecutor, aware of the implications of an indictment against a sitting federal judge, should not act until his case is refined and polished. Is the federal judge thus afforded a higher standard of protection than the average citizen? Additionally, one would hope that citizens on the grand jury would carefully scrutinize the evidence before indicting a federal judge. But federal presence may be unpopular locally. *See generally* J. BASS, UNLIKELY HEROES (1981). The presumed caution exercised by prosecutors in seeking indictments against article III judges, however, does not prevent the chilling effect on the judiciary created by the right to prosecute a federal judge prior to impeachment.

121. *See generally* Kaufman, *Chilling Judicial Independence,* 55 YALE L.J. 681 (1979) (opposing vesting removal power in the judiciary).

122. The executive branch, regardless of the evidence, would likely never seek an indictment against a Supreme Court Justice but would turn instead to the impeachment process. The indictability of sitting federal judges thus primarily concerns district judges, who are most vulnerable due to their isolation.

a full public airing of the charges and evidence,[123] it may simultaneously prejudice a future trial. Nonetheless, the compelling interest is institutional: the maintenance of an independent federal judiciary. Upon complaint of judicial misconduct, an article III judge should have the right to impeachment by Congress prior to criminal trial.

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123. Impeachable offenses "(1) are extremely serious, (2) in some way corrupt or subvert the political and governmental process, and (3) are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books." C. BLACK, *supra* note 8, at 37.