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NOTES

THE TRIAL OF PRESIDENTIAL IMPEACHMENTS:
SHOULD THE GHOST BE LAID TO REST?

I. Introduction

The Constitution of the United States provides four methods for the removal of a President from office: (1) If the President is serving his first term in office, he may be removed through defeat at the polls when he seeks reelection; (2) If the President is serving his second term, he will automatically be removed at the end of that term by the operation of the twenty-second amendment; (3) If the chief executive becomes disabled, he may be replaced through the procedures set forth in the recently adopted twenty-fifth amendment; and (4) The President may be impeached and removed from office upon conviction for "Treason, Bribery, or other high Crimes and Misdemeanors." Of these four methods, only the last has not been the subject of intensive study and controversy during recent years. This concern, currently evidenced in the debate over reform of the electoral college which chooses the President, reflects a widespread realization of the importance of the chief executive in our present federal governmental structure. The power and responsibilities of the nation's highest elective office have grown enormously since 1787, and many of the procedures then set down for the election and removal of presidents now appear inadequate and outdated. Probably the most dangerously inadequate of all these provisions, and perhaps the only ones which were already outdated at the time of their adoption, are those relating to the impeachment of a President. This Note will examine some of the defects, both substantive and procedural, of those provisions, and suggest a method of reform.

II. The Grounds for Impeachment

The substantive grounds which the Constitution provides for the impeachment of the chief executive and other civil officers of the United States, although brief, are far from clear. Article II, section 4 states that: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." De Tocqueville, for one, found this a most unfortunate choice of phraseology. He wrote that "[n]othing can be more alarming than the vagueness with which political offenses, properly so called, are described in the laws of America." Apparently, the men who wrote the Constitution did not share the Frenchman's alarm. De Tocqueville was worried

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1 U.S. CONST. art. II, § 4. Of course, the President may also remove himself from office by not seeking reelection for a second term, by resigning while in office (which none have yet done), or simply through death in office.
2 See generally COMMISSION ON ELECTORAL COLLEGE REFORM, AMERICAN BAR ASS'N, ELECTING THE PRESIDENT (1967).
3 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 114 (P. Bradley ed. 1945).
because he saw impeachment as a tool which might be used by some future congressional majority to dominate or destroy the executive branch of the government. The framers of the Constitution, on the other hand, saw the broad impeachment power as a safeguard which the people might use to deliver themselves from the grasp of a power-hungry executive. The nineteenth century commentator on constitutional law, John Norton Pomeroy, expressed this attitude well:

Narrow the scope of impeachment, and the restraint over the acts of rulers is lessened. If any fact respecting the Constitution is incontrovertible, it is that the convention which framed, and the people who adopted it, while providing a government sufficiently stable and strong, intended to deprive all officers, from the highest to the lowest, of any opportunity to violate their public duties, to enlarge their authority, and thus to encroach gradually or suddenly upon the liberties of the citizen.

Granted, then, that the impeachment power of Congress is broad; the question yet remains, “How broad?” One must assume that the term “other high Crimes and Misdemeanors,” albeit vague, has some meaning. Taking the whole range of conduct of which a civil officer, and more especially a President, of the United States is capable, which of his acts are properly included under the heading of “high Crimes and Misdemeanors,” and which are not? Legal theoreticians have been addressing themselves to this question almost since the beginning of the Republic. Predictably, there have been differences of opinion between them.

According to the conventional wisdom that prevails in this particular corner of the law, all interpretations of “high Crimes and Misdemeanors” must proceed from an initial examination of English precedents. This reasoning is founded on the supposition that, since the phrase “high Crimes and Misdemeanors” had been used for some centuries by Parliament in describing impeachable offenses, “that ancient formula was adopted by the Convention with the construction which had been given it in the English system, for the good and sufficient reason that, without such construction, it was meaningless.” While the commentators share this assumption as a sort of common starting point, they quickly differ as to precisely what meaning the troublesome phrase actually had acquired in parliamentary usage. One group, who may be referred to as the broad constructionists, lumps all the precedents together and concludes that “high Crimes and Misdemeanors” had no very definite meaning at all in England. Rather, they argue, it was “in the nature of a term of art,” and was simply used to describe any conduct which the current Parliament happened to find sufficiently objectionable.

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4 See id. at 114-15.
5 William Davie, for instance, claimed that if the President “be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected.” 2 The Records of the Federal Convention of 1787, at 64 (M. Farrand ed. 1911) [hereinafter cited as FARRAND].
Thus, persons have been impeached for giving bad counsel to the king, advising a prejudicial peace, enticing the king to act against the advice of Parliament, purchasing offices, giving medicine to the king without advice of physicians, preventing other persons from giving counsel to the king except in their presence, and procuring exorbitant personal grants from the king.9

The virtue of this broad interpretation, as applied to America, is alleged to lie in its flexibility:

The internal evils which undermine the polity of a state are too insidious to predetermine; the nefarious workings of political craft are too elusive to classify in advance of their overt manifestation. Indeed, the wisdom of the ages multiplied by eternity would not suffice to devise a system of positive laws that would adequately anticipate the ingenuities of selfish ambition and the machinations of avarice and greed and graft in the administration of the affairs of government.10

This broad interpretation has been seriously advanced before the Senate sitting as a court of impeachment on only two occasions. It was rejected both times. The first occasion was during the abortive attempt of the Jeffersonians to remove Samuel P. Chase from his position on the Supreme Court in 1805;11 the second was at the impeachment trial of President Andrew Johnson in 1868. A good illustration of the "broad construction" theory at work is the "definition" of an impeachable offense offered by Senator Benjamin F. Butler, one of the managers of Johnson's impeachment:

We define, therefore, an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives, or for any improper purpose.12

As one cynic has remarked, that covers "just about everything but an unshielded cough."13

Needless to say, President Johnson's defenders did not find themselves enamored of Ben Butler's rather expansive "definition." In its place, they adopted the narrow construction of the phase "high Crimes and Misdemeanors" first espoused by Luther Martin in his successful defense of Justice Chase. Martin,

9 1 J. Story, Commentaries on the Constitution of the United States 584-85 (5th ed. 1891) [hereinafter cited as Story].
10 Brown, supra note 8, at 687.
11 Although the event is beyond the scope of this Note, Chase's trial and acquittal are extremely important in the development of the impeachment process as applied to the federal judiciary. Had the trial resulted in a conviction, one likely effect would have been the immediate impeachment of all other Federalists on the Supreme Court, including John Marshall. See 3 A. Beveridge, The Life of John Marshall 157-222 (1919).
12 1 Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, On Impeachment by the House of Representatives for High Crimes and Misdemeanors 88 (1868) [hereinafter cited as Trial Record]. Butler's definition was taken from an article on the subject written by William Lawrence, a member of the House of Representatives from Ohio. Lawrence, The Law of Impeachment, 6 Am. L. Register 641, 660 (1867). Butler submitted this article in toto at the trial, as a brief for the prosecution. 1 Trial Record 123-47.
who had been a delegate from Maryland to the Constitutional Convention, asserted that impeachment would only lie for an indictable offense. He did not seriously attempt to reconcile this position with parliamentary precedents, but rather relied on policy considerations which decried those precedents:

Admit that the House of Representatives have a right to impeach for acts which are not contrary to law, and that thereon the Senate may convict and the officer be removed, you leave your judges and all your other officers at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England during the contest between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

A congressional impeachment based on non-criminal conduct would directly conflict, Martin added, with the constitutional prohibition of ex post facto laws.

Theodore W. Dwight, a professor at Columbia, writing shortly before President Johnson’s impeachment trial, adopted Martin’s position and carried the battle to the “broad constructionists” on their own terms. Dwight made an independent examination of the British precedents, and concluded that impeachment was simply “a method of trial” involving the application of no independent substantive law at all. While conceding that “the judgments of the courts are not absolutely uniform,” he explained away these inconsistencies with the observation (no doubt true) that “the House of Lords has been at times impelled by faction or overborne by importunity or overawed by fear.” These aberrations aside, Dwight was able to assert that

[. . .] the decided weight of authority is, that no impeachment will lie except for a true crime, or, in other words, for a breach of the common or statute law, which, if committed within any county of England, would be the subject of indictment or information.

Applying this conclusion to the law regarding impeachment of federal officials in the United States, Dwight was able to further narrow the proper grounds for conviction:

A basis for a very important conclusion has now been laid. It is this: as there are under the laws of the United States no common-law crimes, but only those which are contrary to some positive statutory rule, there can be

14 Although now largely forgotten, Martin was “an acknowledged leader of the American bar for two generations.” The Attorney General of Maryland for thirty years, Martin was also known as the “heaviest drinker of that period of heavy drinking men.” For an interesting biography of Martin, see Gould, Luther Martin, in 2 GREAT AMERICAN LAWYERS 3-46.
15 REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE 175 (1805); 14 ANNALS OF CONG. 432 (1804); 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 762 (1907).
16 REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE 177 (1805); 14 ANNALS OF CONG. 434 (1804); 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 763 (1907).
17 REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE 177 (1805); 14 ANNALS OF CONG. 434 (1804); 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 763 (1907).
18 Dwight, Trial by Impeachment, 6 Am. L. Register 257 (1867).
19 See id. at 258-63.
20 Id. at 263.
21 Id. at 264.
22 Id.
no impeachment except for a violation of a law of Congress or for the commission of a crime named in the constitution.\textsuperscript{23}

While these theories advanced by each side at the time of President Johnson's trial must be regarded as the most "popular" interpretation of "high Crimes and Misdemeanors," other parties have shown little hesitancy in coming forward with new explanations. One has suggested that, contrary to Butler, impeachment will only lie for a "true crime," but that, contrary to Dwight, this need not be an indictable offense.\textsuperscript{24} Another has contended that the phrase includes only those offenses recognized as crimes or misdemeanors at the time the Constitution was adopted.\textsuperscript{25} Indeed, a list of plausible interpretations, based solely on the English precedents, could be extended indefinitely. The trouble, it would seem, is that the recorded British impeachment cases simply do not lend themselves to any one, definitive, commonly acceptable interpretation. The same, moreover, must be said of the American cases. Thus, although the Senate of the United States has conducted eleven impeachment trials during its history, this lengthy experience with the impeachment process has done little to clarify the legal puzzles which surround it. Eminent authorities are still diametrically opposed to each other on the principal points of controversy . . . . Senatorial inconsistency and forgetfulness of its own precedents have rendered the process arbitrary and uncertain.\textsuperscript{26}

Thus, it would appear that there are actually two major stumbling blocks which must thwart any attempt to conclusively define the nature of an impeachable offense: (1) The phrase "high Crimes and Misdemeanors" has itself no inherently ascertainable meaning and had acquired none in England by the time it was adopted in the United States; and (2) There has been no consistent effort on the part of the Senate to supply that meaning in the cases that have come before it. As matters now stand, therefore, the efforts of those scholars who have essayed to define a phrase which the House of Lords, the Constitutional Convention and the Senate have all conspired not to define, must be viewed simply as excursions in academic speculation. No true definition of an impeachable offense will be possible until at least one of the stumbling blocks has been removed: Either "high Crimes and Misdemeanors" must be replaced by an explicit listing of activities which may be deemed impeachable, or the conduct of impeachment trials must be turned over to some tribunal better equipped to interpret, and consistently apply, the present constitutional provision.

III. The Senate As a Court of Justice

While de Tocqueville may have found the substantive aspects of impeachment in America "alarming," he was scarcely less troubled over the procedural provisions:

\textsuperscript{23} Id. at 268.
\textsuperscript{24} Van Nest, Impeachable Offences under the Constitution of the United States, 16 Am. L. Rev. 798, 816-17 (1882).
\textsuperscript{25} 2 Trial Record 140.
[I] am not sure that political jurisdiction, as it is constituted in the United States, is not, all things considered, the most formidable weapon that has ever been placed in the grasp of a majority. When the American republics begin to degenerate, it will be easy to verify the truth of this observation by remarking whether the number of political impeachments is increased.2

The provisions which so concerned de Tocqueville are clause 5 of article I, section 2, giving the House of Representatives "sole Power of Impeachment," 28 and clause 6 of article I, section 3, which gives the Senate "Sole Power to try all Impeachments," with a concurrence of two-thirds of those present necessary for conviction. This procedure is modeled, of course, on the practice followed in Britain, whereby the House of Commons impeached and the trial was conducted by the House of Lords. At first glance, it might seem natural enough that the founders of the new Republic would adopt this familiar procedure from their erstwhile "mother" country. Upon consideration, however, the choice seems strangely inconsistent with the remainder of the Constitution which they drew up in the summer of 1787.29

The original resolutions put before the convention by Edmund Randolph and Charles Pinckney both provided for the trial of impeachment to be conducted by the judicial, rather than the legislative, branch. Randolph apparently anticipated that trial would be before a lower federal court with appeal to "the supreme tribunal," 30 while Pinckney placed the actual trial of such cases within the original jurisdiction of the Supreme Court.31 Later suggestions were introduced by John Dickinson 32 and Alexander Hamilton, 33 but the draft constitution

27 1 A. de Tocqueville, supra note 3, at 115.
28 "Impeachment" is here used in its literal sense, meaning simply an "accusation." Thus, under the present constitutional provisions, the House of Representatives alone has power to bring a public official to trial before the Senate, and it does this by accusing (impeaching) him of certain acts which, in the opinion of a majority of the House, amount to "high Crimes and Misdemeanors." These accusations are sent along to the Senate in the form of a document called the "articles of impeachment." The Senate thereupon appoints certain of its members to act as prosecuting attorneys, or "managers" of the "impeachment." If two-thirds of the senators present find (1) that the official did, in fact, commit the acts which the House has charged him with, and (2) that these acts amount to "high Crimes and Misdemeanors" then the official stands convicted and is subject to the penalties provided in the Constitution. See text accompanying note 79 infra. Thus, the word "impeachment," properly speaking, only describes the first step in a long and somewhat involved process. In addition, however, "impeachment" has also come to be accepted as a shorthand term applicable to the whole process of accusation, trial and judgment. For purposes of convenience, this Note follows the common usage and, depending upon the context, employs the term "impeachment" to describe both the formal accusation, and the entire process initiated by that accusation.

Why such a hybrid as the present impeachment law is tolerated is an unsolved enigma. The present Impeachment Procedure may have well fitted in the general scheme of the English Government when it originated over there. It was entirely out of tune with American ideals when first adopted over here. Id. at 270.
30 Read that a National Judiciary be established ... that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort ... impeachments of any National officers, and questions which may involve the national peace and harmony.

1 FARRAND 21-22.
31 One of these Courts shall be termed the Supreme Court whose Jurisdiction shall extend to . . . the trial of impeachments of Officers of the United States. . . . In cases of impeachment affecting Ambassadors & other public Ministers the Jurisdiction shall be original . . . 3 FARRAND 600.
32 Dickinson moved that the President "be removable by the national legislature upon request by a majority of the legislatures of the Individual States." 1 FARRAND 78.
33 On June 18, 1887, Hamilton introduced a list of suggestions, including the following:
submitted by the Committee of Detail on August 6, 1787 included the following:

"The Jurisdiction of the Supreme Court shall extend . . . to the trial of impeachments of Officers of the United States . . . . In cases of impeachment . . . this jurisdiction shall be original."\textsuperscript{34} The first mention of any trial of impeachments before the Senate was not made until August 22, 1787, just three weeks before the close of the convention, and then it was limited to the trial of members of the Supreme Court.\textsuperscript{26} The idea that the Senate should try \textit{all} impeachments was not put before the convention until September 4, in the report of the Committee of Eleven.\textsuperscript{38} Although this recommendation finally was adopted by the convention as a whole, James Madison, the "father of the Constitution," expressed strong reservations about it:

Mr. Madison objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanour \textsuperscript{sic}. The President under these circumstances was made improperly dependent. He would prefer the supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part.\textsuperscript{37}

Madison's thoughts were recognized by others. "Few parts of the Constitution have been assailed with more vigor," wrote Story, "and few have been defended with more ability."\textsuperscript{38} Hamilton devoted two numbers of \textit{The Federalist} to a defense of the impeachment procedures of the Constitution,\textsuperscript{39} and Story was able to fill some thirty-one sections of his \textit{Commentaries} in the same task.\textsuperscript{40} Unfortunately, the history of the process they so strenuously defended belies the logic that they attempted to infuse into it. Impeachment as it was known in England was already a moribund process at the time the Constitutional Convention met in Philadelphia:

[b]ut, before this ancient method of trial thus passed into desuetude in the land of its birth, it was embodied, in a modified form, first, in the several State constitutions, and, finally, in the Constitution of the United States. And so, at rare intervals, this ghost of the past stalks upon the shores of the New World as a spirit exorcised from the Old.\textsuperscript{41}

If it may be assumed for the moment that a ghost is a creature with form but little substance, then the ghost analogy is an apt one. As Hamilton and Story

\begin{itemize}
  \item The Governor Senators and all officers of the United States to be liable to impeachment for mal—\textsuperscript{sic} and corrupt conduct . . . . all impeachments to be tried by a Court to consist of the Chief \textsuperscript{sic} Judge or Judge of the Superior Court of Law of each State . . . .
  \item 1 FARRAND 292.
  \item 34 2 FARRAND 186.
  \item 35 The Committee of Detail recommended that "[t]he Judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives." 2 FARRAND 367.
  \item 36 The Committee recommended that "[t]he Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two thirds of the Members present." 2 FARRAND 493.
  \item 37 2 FARRAND 551.
  \item 38 1 STORY 547.
  \item 39 \textit{The Federalist} Nos. 65, 66.
  \item 40 1 STORY §§ 745-75.
  \item 41 Taylor, \textit{supra} note 7, at 502.
\end{itemize}
demonstrated, it is entirely possible to defend, *in abstracto*, the present Constitution as providing a suitable *form* for the conduct of trials in cases of impeachment. Substantively, however, an examination of that form in light of the actual, historical trials it has governed reveals a process which cannot so readily be justified. This is illustrated, above all, in that "most remarkable event in the annals of jurisprudence" — the impeachment trial of Andrew Johnson.

Happily, the story of President Johnson's impeachment, trial and acquittal has been effectively told many times. While it is not feasible to recount the details of the entire affair here, a brief look at one incident during the trial will serve to point up many shortcomings of the present impeachment procedure. The manner in which the Senate majority handled the admission of evidence is particularly enlightening.

The bill of impeachment presented against President Johnson by the House of Representatives was a ponderous, deliberately vague affair "embracing all Johnson's alleged offences, from the misdemeanor of malfeasance in office to the high crime of bad manners." The basic charge was that Johnson, "with intent to violate the Constitution of the United States," had ignored the Tenure of Office Act in attempting to remove Edwin M. Stanton, his ambitious Secretary of War. In an effort to refute this averment of intent, Johnson's lawyers proposed to introduce evidence that the President had been formally advised by his cabinet that the Tenure of Office Act was itself unconstitutional. Gideon Welles, Secretary of the Navy under both Presidents Lincoln and Johnson, was placed on the stand and the defense made the following offer of proof:

We offer to prove that the President, at a meeting of the cabinet while the bill was before the President for his approval, laid before the cabinet the tenure-of-civil-office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the Cabinet then present gave their advice to the President that the bill was unconstitutional, and should be returned to Congress with his objections, and that the duty of preparing a message, setting forth the objections to the constitutionality of the bill, was devolved on Mr. Seward and Mr. Stanton; to be followed by proof as to what was done by the President and cabinet up to the time of sending in the message.

A long and important debate ensued on the admissibility of this evidence. Ben Butler, in a "characteristically demagogic" argument, charged that the opinion of the President's cabinet on the wisdom of a piece of legislation could not be offered as an excuse for the President's failure to obey the law once it

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43 For an interesting work on the subject, see D. Dewitt, *The Impeachment and Trial of Andrew Johnson* (1903). Although the style is dated, Dewitt's narrative is still considered a minor classic. See also G. Milton, *The Age of Hate* 486-612 (1930) [hereinafter cited as Milton].
44 F. Hill, *Decisive Battles of the Law* 144 (1907).
45 1 *Trial Record* 7.
46 Id. at 676.
47 Milton 561.
had been passed over his veto. William M. Evarts, a leader of the defense forces, quickly cleared away Butler's smoke screen:

> Whenever any such pretension as that is set forth here, that the order of the cabinet in council for any act of the President is to shield him from his amenability under the Constitution for trial and judgment upon his act before this constitutional tribunal, it will be time enough to insist upon the argument, or to attempt an answer.

The force of the argument which Evarts went on to present, and the lack of any sound answer to it, greatly worried the managers of the impeachment. The Senate adjourned at the close of Evarts' remarks, allowing the managers a night of "great party drilling and caucussing" to line up the necessary votes. The proceedings of the next day (Saturday, April 18) opened with a speech against admission of the evidence by Senator Wilson of Massachusetts. He was answered by Benjamin R. Curtis, formerly Justice Curtis of the United States Supreme Court. The bill of impeachment, Curtis reminded his audience, specifically averred that Johnson had acted with intent to violate the Constitution. If, as Senator Wilson would now have it, this allegation of intent was mere surplusage, Curtis reasoned that this was not the time to argue it. The evidence should be admitted, he claimed, and if the Senators later found the President's intent immaterial, they could simply ignore it. If, on the other hand, they should determine to try the President for the intentional offenses he was actually charged with, then they ought to have before them the fact that he acted by the advice of the usual and proper advisers; that he resorted to the best means within his reach to form a safe opinion upon this subject, and that therefore it is a fair conclusion that when he did form that opinion it was an honest and fixed opinion, which he felt he must carry out in practice if the proper occasion should arise. It is in this point of view, and this point of view only, that we offer this evidence.

The debate having ended, Chief Justice Salmon P. Chase, presiding over the Senate by constitutional mandate, delivered his ruling. He pointed out that the admissibility, rather than the weight, of the proposed evidence was the question in issue. "To determine that question," he said, "it is necessary to see what is charged in the articles of impeachment." Finding that the President was in fact charged with acting with intent to violate the Constitution, Chase ruled the testimony admissible. But the radicals were not to be defeated so easily. Senator Howard of Michigan rose quickly and moved that the question be sub-

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48 1 Trial Record 676-77.
49 Id. at 679.
50 Milton 562.
51 1 Trial Record 681-89.
52 Id. at 689-93. Curtis' judicial career is probably best remembered for his dissent in the Dred Scott Case, 60 U.S. (19 How.) 393, 564-633 (1857).
53 1 Trial Record 691.
54 U.S. Const. art. I, § 3 specifically provides: "When the President of the United States is tried, the Chief Justice shall preside . . . ."
55 Id. at 693.
mitted to the floor. The roll was called, and the Senate of the United States arbitrarily voted to suppress the evidence — twenty-nine to twenty.\textsuperscript{56}

Although much could be said about this incident, Chief Justice Chase probably summed it up best himself the next day when he wrote:

\begin{quote}
I could conceive of no evidence more proper to be received, or more appropriate to enlighten the court as to the intent with which the act was done. . . . The vote, I fear, indicated a purpose which, if carried into effect, will not satisfy the American people, unless they are prepared to admit that Congress is above the Constitution.\textsuperscript{57}
\end{quote}

Some have expressed the same thought with a little less restraint:

\begin{quote}
It was the sort of justice which the cur proposed for the mouse in\textit{ Alice's Wonderland}:

\begin{quote}
"I'll be judge—I'll be jury!"

Said cunning old Fury.

"I'll try the whole cause

And condemn you to death!"\textsuperscript{58}
\end{quote}
\end{quote}

IV. A Proposal for Reform

The impeachment trial of Andrew Johnson is, of course, an extreme example, a glaring symptom of what one historian aptly termed the "Age of Hate" in American history.\textsuperscript{59} However, that characterization does not necessarily detract from the value of the episode as illustrative of the nature of American impeachment proceedings in general. On examination, some scholars have concluded that serious defects are to be expected in any instance where a governmental body essentially legislative in nature (like the Senate) attempts to assume a function essentially judicial in character (like the trial of a President). Dean Pound isolated the following as common characteristics of such "legislative justice":

\begin{quote}
[L]egislative justice is unequal, uncertain, and capricious.

[L]egislative justice in its relatively small number of cases in which it was exercised showed the influence of personal solicitation, lobbying and even corruption far beyond anything which even the most bitter opponent of our judicial system has charged against the courts . . . .

[L]egislative justice has always proved highly susceptible to the influence of passion and prejudice.

Closely related to the foregoing characteristic of legislative justice is . . . the preponderance of purely partisan or political motives as grounds of decision.

[L]egislative justice has been disfigured very generally by the practice of participation in argument and decision by many who had not heard all the evidence and participation in the decision by many who had not heard all the arguments.\textsuperscript{60}
\end{quote}

\textsuperscript{56} Id.

\textsuperscript{57} Letter from Salmon P. Chase to Gerritt Smith, April 19, 1868, quoted in\textit{ Milton} 564.

\textsuperscript{58} F. Hill,\textit{ supra} note 44, at 158-59.

\textsuperscript{59} This is the title of Milton's book cited in note 43\textit{ supra}.

\textsuperscript{60} Pound,\textit{ Justice According to Law}, 14\textit{ Colum. L. Rev.} 1, 7-11 (1914).
To the extent that these conclusions are correct, responsibility for the evils so graphically illustrated in President Johnson's trial cannot be assigned solely to a group of power-mad radicals who grossly misused the impeachment process in their attempt to gain control of the White House. Rather, some blame must be shared by the process itself, a process which, by its very nature, invites such abuse. The Senate may leave something to be desired as a court, but, in fact, it was never designed to act as a court and its members are singularly not elected for their capacity to serve as judges. The fault does not lie with the individual Senators, or even in the Senate as an institution, but rather in some fundamental incompatibility between the legislative and judicial function. The framers of the Constitution seemed to recognize this incompatibility when they specifically deprived Congress of the power to pass bills of attainder and ex post facto laws. Indeed, the distinction may be seen as simply one facet of the broad principle of separation of powers which underlies the entire governmental structure laid down in 1787. Unfortunately, despite the efforts of Madison and others, the framers may have overlooked that salutary principle when they adopted the present impeachment provisions of the Federal Constitution.

If, then, the United States Senate is something less than ideal as a tribunal for the trial of a President — or, for that matter, any other civil officer of the United States — what other, more suitable forum is available? The example of the state of Nebraska may be instructive in this regard. The impeachment of Governor Butler of that state in 1871 was reputedly so partisan that a few years later the legislature passed a joint resolution expunging all record of the affair from the journals. When the time came to draw up a new constitution in 1875, the framers determined that any future impeachment trial would be conducted as "a strictly judicial investigation according to judicial methods." The actual power to impeach is retained by the legislature, but the power to try such impeachments is now vested in the Nebraska Supreme Court. If a supreme court justice is himself impeached, he is tried by a panel made up of "all the judges of the District Court in the State." Whichever body conducts the trial, a majority of two-thirds of the members of the court of impeachment is necessary for a conviction.

Admittedly, Nebraska's lead has not been widely followed in other jurisdictions. The Missouri constitution of 1945 seems to contain the most similar provision: "All impeachments shall be tried before the supreme court, except that

62 See Lydick, supra note 29, at 257.
63 See text accompanying note 37 supra.
64 Mr. [Rufus] King expressed his apprehensions that an extreme caution in favor of liberty might enervate the Government we were forming. He wished the House to recur to the primitive axiom that the three great departments of Govts. should be separate & independent . . . [U]nder no circumstances ought [the President] to be impeached by the Legislature. This would be destructive of his independence and of the principles of the Constitution. 2 Farrand 66-67.
65 See note 77 infra.
66 Joint Resolution of February 15, 1877, Neb. Laws 14th Sess. 257 provides:
That the records of the impeachment and removal from office of David Butler, late Governor, be and the same are hereby expunged from the journals of the senate and house of representatives of the eighth session of the legislature of Nebraska.
68 Neb. Const. art. 3, § 17.
the governor or a member of the supreme court shall be tried by a special commission of seven eminent jurists to be elected by the senate. 69 The court for the trial of impeachments in New York is made up of "the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them." 70 This rather unusual arrangement was adopted in 1846 because at the time it was felt that the members of the Senate, "like those of all legislative bodies, were more or less imbued with partisan feelings," making it necessary to infuse "into the court a share of the judicial force to restrain that feeling." 71 With the exceptions of Indiana and Oregon, the provisions of other state constitutions are modeled more or less strictly on the present federal structure. 72 The Indiana legislature has an option whereby it may drop the facade of judicial process altogether 73 while Oregon has gone to the other extreme in making the trial of political offenses a strictly judicial affair:

Public Officers shall not be impeached, but incompetency, corruption, malfeasance, or delinquency in office may be tried in the same manner as criminal offences (sic), and judgment may be given of dismissal from Office, and such further punishment as may have been prescribed by law. 74

It is submitted that this general uniformity among the states reflects not so much a satisfaction with the legislative trial of impeachments, as a simple lack of concern with the whole subject. As one authority wrote over a hundred years ago, "[t]he exercise of the power of impeachment is fortunately of such

69 Mo. Const. art. 7, § 2.
70 N.Y. Const. art. 6, § 10. A somewhat similar procedure was proposed for the trial of federal impeachments by Senator Hiram Bingham of Connecticut in 1931. He suggested a constitutional amendment which would give either House the right to impeach, with trial before a court consisting of twenty members of the other House and four members of the Supreme Court. Bingham, A Proposed Constitutional Amendment Regarding Impeachment Proceedings, 65 U.S.L. Rev. 323 (1931).
72 The great majority of states follow the federal procedure strictly, with impeachment by a majority vote of the lower house of the legislature and conviction upon a two-thirds vote of the upper house. Ariz. Const. art. 8, pt. 2, §§ 1, 2; Ark. Const. art. 15 § 2; Calif. Const. art. 4, § 17; Colo. Const. art. 13, § 1; Conn. Const. art. 9, §§ 1, 2; Ga. Const. §§ 2-1603, -1604, -1703; Idaho Const. art. 5, §§ 3, 4; Ill. Const. art. 4, § 24; Iowa Const. art. 3, § 19; Kan. Const. art. 2, § 27; Ky. Const. §§ 66, 67; La. Const. art. 9, § 2; Me. Const. art. 4, pt. 1, § 8, art. 4, pt. 2, § 6; Md. Const. art. 3, § 26; Mich. Const. art. 11, § 7; Minn. Const. art. 4, § 14; Mont. Const. art. 5, § 16; Nev. Const. art. 7, § 1; N.J. Const. art. 7, § 3; N.M. Const. art. 4, § 35; N.C. Const. art. 4, §§ 3, 4; N.D. Const. §§ 194, 195; Ohio Const. art. 2, § 23; Okla. Const. art. 8, §§ 3, 4; Pa. Const. art. 6, §§ 1, 2; S.D. Const. art. 16, §§ 1, 2; Tenn. Const. art. 5, §§ 1, 2; Tex. Const. art. 15, §§ 1-3; Va. Const. § 54; Wash. Const. art. 5, § 1; W. Va. Const. art. 4, § 9; Wis. Const. art. 7, § 1; Wyo. Const. art. 3, § 17. A number of states have made the process more difficult by requiring a two-thirds vote of the lower house to impeach as well as a two-thirds vote of the upper house to convict. Del. Const. art. 6, § 1; Miss. Const. art. 4, §§ 49, 52; R.I. Const. art. 11, §§ 1, 2 (governor); S.C. Const. art. 15, §§ 1, 2; Utah Const. art. 6, §§ 17, 18; Vt. Const. ch. 2, §§ 53, 54. On the other hand, a few states require only a majority vote for impeachment and a simple majority for conviction. Ala. Const. § 173; Mass. Const. §§ 44, 51; N.H. Const. pt. 2, art. 38. Alaska has reversed the normal procedure by providing for impeachment by a two-thirds vote in the senate with conviction upon a two-thirds vote in the house of representatives. Ala. Const. art. 2, § 20.
73 Ind. Const. art 6, § 7 provides:
All State officers shall, for crime, incapacity, or negligence, be liable to be removed from office, either by impeachment by the House of Representatives, to be tried by the Senate, or by a joint resolution of the General Assembly; two-thirds of the members elected to each branch voting, in either case, therefor.
74 Ore. Const. art. 7, § 19 (original).
rare occurrence that less attention has been paid to it than its importance des-
erves.” In spite of this historical apathy, or perhaps because of it, the Senate’s con-
duct of Andrew Johnson’s impeachment trial should now serve as a pointed
reminder that the subject indeed deserves considerable attention. The proposed
amendment which follows may serve as a basis for a brief consideration of some
possible improvements:

Impeachment of civil officers of the United States shall be by joint
resolution of both Houses of Congress, but no such impeachment shall be
presented to the President for his approval. An impeachment of the Presi-
dent or the Vice President shall be tried solely in the Supreme Court. Any
other impeachment shall also be tried in the Supreme Court unless Congress
shall provide for its trial in some other court of the United States. If an
impeachment is tried in a court other than the Supreme Court, the Supreme
Court shall exercise appellate jurisdiction over the proceedings, subject to
such regulations as Congress may establish."

First, it might be well to mention those aspects of the present process which
this amendment would not affect. It does not change the class of persons liable
to impeachment: “The President, Vice President and all civil Officers of the
United States.” The judgment which may be passed on an officer convicted
in a trial of impeachment likewise remains the same:

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 trial of impeachment would continue to be conducted without a jury, and
the President would still have no power to grant pardons “in Cases of Im-
peachment.” Perhaps surprisingly, the amendment does not even vary the
substantive grounds on which impeachment may be brought: “Treason, Bribery,
or other high Crimes and Misdemeanors.” Although this latter provision was
criticized at some length earlier in this Note, it is felt that any need for a direct
change in its wording would be obviated by the transfer of the trial of impeach-

75 Lawrence, supra note 12, at 641.
76 This clause is inserted to take the proposed joint resolutions on impeachments out of the
operation of U.S. Const. art. I, §7:
    Every Order, Resolution or Vote to which the Concurrence of the Senate and
House of Representatives may be necessary (except on a question of adjournment)
shall be presented to the President of the United States; and before the Same shall
take Effect, shall be approved by him . . . .
77 This Note has been largely confined, of course, to a consideration of the federal im-
peachment process as applied to the President rather than judges or other civil officers
generally. While there are enough important practical distinctions to justify, and even neces-
sitate, a separate textual treatment of impeachment as applied to the Presidency, many of the
considerations and criticisms expressed in that regard are equally applicable to the trial of other
federal officers. Thus, the suggested amendment contemplates the depoliticization of all im-
peachment trials through their transfer from the Senate to the Supreme Court.
79 Id. art. I, § 3.
80 Id. art. III, § 2.
81 Id. art. II, § 2.
82 Id. art. II, § 4.
83 See text accompanying notes 3 to 26 supra.
ments, and of the concomitant duty of interpreting and applying that phrase, from the Senate to the federal courts.

While many aspects of the present impeachment procedure would thus remain stable, the reforms which the suggested amendment would introduce are major. It is, in all essential aspects, self-executing. It would require the concurrence of a majority of the Senate, as well as the House, in any future impeachment. This change, while probably not essential, would seem desirable and perhaps politically expedient in that it preserves an equal role in the process for the Senate. The Senate would give up its present power to try impeachments, and all future trials in such cases would be before a court. In a case involving a President or Vice-President, trial could only be before the Supreme Court of the United States. In all other cases, Congress would have power to grant original jurisdiction to a lower federal court. The trial of an impeached district court judge might be before the judges of the circuit court of appeals for that district, sitting en banc; the trial of a justice of the Supreme Court might be committed to a special panel made up of several senior circuit court judges; the trial of a circuit judge could be left to the original jurisdiction of the Supreme Court. In addition, cases involving other, non-judicial officers of the United States might be tried before the judges of the court of appeals for the circuit wherein the alleged offenses took place. In cases originating in a lower court, the Supreme Court would retain appellate jurisdiction “subject to such regulations as Congress may establish.”

The idea of holding the trial of impeachments before the Supreme Court is, of course, far from new. Since this was the method of trial first proposed in the Constitutional Convention, it received considerable attention from the early defenders of the present system. They urged, inter alia, that the members of the Court would not have the “fortitude” necessary to take on the task; that the Court would not enjoy the “credit and authority” required to reconcile the people to an unpopular decision; that giving the Court jurisdiction of impeachment trials would concentrate too much power in the hands of too few men and “create a general dread of its influence”; that the justices would not have the political expertise needed to properly determine the nature of an impeachable offense; that the Court might become too much involved in politics; and that people might doubt the impartiality of judges called upon to try the man who had appointed them. Perhaps the only new objection which could be added to this list would be the observation that, practically speaking, most recent proposals for changes in the Supreme Court’s jurisdiction have aimed at narrowing, rather than expanding, the class of cases which can come before the court.

84 See text accompanying notes 30 to 37 supra.
86 Id.
87 Id. at 428.
88 1 STORY 558.
89 Id. at 559.
90 Id. at 560-61.
91 Id. at 561-62.
92 See Elliott, Court-Curbing Proposals in Congress, 33 NOTRE DAME LAWYER 597 (1958); McKay, Court, Congress, and Reapportionment, 63 MICH. L. REV. 255 (1964).
There is no need to consider these objections in detail. The historical development of the Supreme Court, its growth in stature, power, and even independence, have all gone to drain many of the early arguments of whatever force they may have formerly enjoyed. The central answer to all such arguments, however, is simply this: the trial of a President impeached by Congress, like the trial of an ordinary citizen indicted by a grand jury, is by nature a judicial, rather than a legislative, function. The mere fact that some difficulties may arise in the course of such a trial before the Supreme Court, difficulties perhaps peculiar to the impeachment process, does not change the nature of the event. The Constitution provides certain definite procedures whereby a President may be politically removed from office. Impeachment is not one of these. In short, the trial of an impeached President is a judicial, not a political, task, and it should be turned over to that branch of the federal government properly designed to carry out such tasks. Under the proposed amendment, the Supreme Court can only try a President after a majority of both Houses of Congress, acting in their roles as representatives of the people, have called on it to do so. If that constitutes an “expansion” of the Court’s jurisdiction, it is an extension wholly in keeping with the spirit of the original Constitution and its underlying policy of the separation of powers.

V. Conclusion

One optimistic historian has concluded that, as a result of the Senate’s failure to convict Andrew Johnson, “[n]ever will the practice of deposing presidents by political impeachment become domiciliated in this republic. Centuries will pass by before another President of the United States can be impeached . . . .” Unfortunately, such predictions have a habit of proving false. Andrew Johnson escaped impeachment “only by the merest chance,” and only fortune, and a long-run period of general internal stability, have spared subsequent Presidents from similar trials. As long as the trial of impeachments is constitutionally committed to a political, rather than judicial, institution, it will be open to political abuse and subject to all the inherent defects of “legislative justice.” The Republic cannot “continue to rely solely on the intervention of the Providence that is said to have fools and the American people in its special care.” If it does, all of the efforts expended in the adoption of the twenty-fifth amendment and in the current drive for electoral college reform might easily be wasted. Should Providence fail, there is nothing in the present federal impeachment provisions to prevent some future Ben Butler from constitutionally effecting the virtual destruction of the Presidency itself.

Francis X. Wright

93 D. Dewitt, supra note 43, at 579. Some more recent historians share Dewitt’s optimism.
94 After Justice Chase’s acquittal in 1804, Jefferson is reported to have stated that “impeachment is a farce which will not be tried again.” C. Rossiter, The American Presidency 52 (rev. ed. 1960).
95 D. Dewitt, supra note 43, at 611.
96 See text accompanying note 60 supra.
97 E. Corwin, The President 67 (1957).