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“CHILLING JUDICIAL INDEPENDENCE”: A SCARECROW

Raoul Berger†

In an article entitled “Chilling Judicial Independence,”¹ Chief Judge Irving R. Kaufman sounds the alarm against a pending proposal to facilitate judicial removal of federal judges. This, he trumpets, is “fatally misguided”; it “pose[s] an ominous threat to . . . judicial independence”;² it is a “Trojan Horse,” pitting “Judge against Judge”;³ it “may mask something more sinister”—“a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator”;⁴ “the threat of punishment,” that is, of removal, “would project [a] dark . . . shadow” over the vital potential of dissent.⁵ Apparently the impeachment process to which he clings does not “project a dark shadow,” presumably because it is quite unlikely to be invoked. What is the proposal that conjures up such a spectral parade?

It is proposed⁶ to establish a twelve-judge Judicial Conduct and Disability Commission drawn from each circuit and the special courts, each member from a circuit to be elected by its circuit and district judges.⁷ Each circuit shall have a committee of judges to review complaints forwarded by the Commission. The committee shall make recommendations to the Commission which thereupon shall dismiss the complaint or initiate its own investigation, and make its recommendations to a seven-man Court on Judicial Conduct and Disability. The Commission shall have the burden of proving its report “by clear and convincing evidence”;

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¹ 88 YALE L.J. 681 (1979) [hereinafter cited without cross-reference as Kaufman].

² *Id.* at 683.

³ *Id.* at 710.

⁴ *Id.* at 703. He borrowed this from Justice Douglas. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 157-58 (1973) [hereinafter cited without cross-reference as *IMPEACHMENT*] (citing *Chandler v. Judicial Council*, 398 U.S. 74, 137 (1970) (dissenting opinion, Douglas, J.)).

⁵ Kaufman 714.

⁶ Judge Kaufman directs his criticism to S. 1423, 95th Cong., 2d Sess. (1978), which passed the Senate on September 7, 1978. Kaufman 682. The bill was introduced as S. 295 in the 96th Cong., 1st Sess. (1978) and I draw thereon for details.

⁷ S. 295, 96th Cong., 1st Sess. § 381 (1978).

and an adverse judgment may be reviewed by the Supreme Court.⁸ At each stage the complained-of judge is entitled to notice and a hearing.⁹ "The bill," Judge Kaufman maintains, is "unconstitutional. . . . Impeachment was the only procedure the Framers allowed for judicial removal, and they deliberately made it unwieldy."¹⁰

Why does Judge Kaufman, who chants the praises of "collegiality," of "collective decisionmaking" on appeal, and of the "tightly knit" "judicial fraternity"¹¹—a fraternity which can repeatedly rule against a dissenter below without stifling dissent—suspect that Dr. Jekyll would become Mr. Hyde when sitting as a court drawn from the entire nation, a sinister dragnet for dissenters? The implication that the summoned judge will suspect that such a court would remove him for deciding for (or against) desegregation is unworthy both of the judge and of the court which would sit on the removal hearing.¹² To object to the trial of a judge, for misconduct, by his judicial peers drawn from the entire United States is to cast doubt on the fairness of the judicial process. If such a panel cannot be trusted to fairly try a "dissenter" for alleged judicial misconduct, no more can a district judge be trusted to try social rebels. If the process is good enough for the common man in matters of life or death, it is good enough for the trial of a judge's fitness to try others. As to the "chill" factor, Justice Jackson rejected the argument that summary contempts by the offended judge posed a threat to the independence of counsel, because "[i]t is to be doubted whether the profession will be greatly terrorized by punishment of some of its members after . . . extended and detached consideration" by appellate courts.¹³ Judges do not possess less fortitude. The proposed bill is altogether without summary elements; all is based on hearing and trial by dispassionate judges.

⁸ *Id.* §§ 382-85. The Judicial Conference shall annually elect one member of the Conference to be presiding officer of the Court, and he shall select six members of the Conference to serve with him. *Id.* § 385.

⁹ The complained-of judge is entitled to submit a written statement to the circuit panel. *Id.* § 383.

¹⁰ Kaufman 683.

¹¹ *Id.* at 708-10.

¹² Hatton Sumners, the veteran chairman of the House Judiciary Committee, stated in 1937, "I never heard it said until today . . . that three judges of the circuit court of appeals trying a district judge might stultify themselves in order to convict an honest man and remove him from office." 81 CONG. REC. 6184 (1937).

¹³ *Sacher v. United States*, 343 U.S. 1, 13 (1952).

Judge Kaufman notices the "dangers inherent" in trial by a "political body" such as Congress, and the sweeping claims that have been made by its leaders, as when Congressman Gerald Ford maintained, with respect to Justice Douglas, that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history."¹⁴ He recognizes that "Congress has at times distorted the 'high Crimes and Misdemeanors' language in judicial impeachments."¹⁵ Yet he strangely prefers an impeachment by Congress, often riven by political passions, often inattentive to the evidence,¹⁶ to a hearing by judges who sit and listen and are schooled to evaluate evidence and to strive for its dispassionate appraisal. It is true that adjudication demands freedom from political pressure, but it does not follow that a nation-wide panel of judges hearing charges of misconduct will become political pawns.

Judge Kaufman recognizes that the cumbersome impeachment process was structured for the "imperative," exceptional case.¹⁷ Activists—Judge Kaufman sings the praises of the relatively recent expansion of judicial activism¹⁸—explain that judicial alteration of the Constitution (which is without textual warrant) is compelled by the cumbersomeness of the amendment process.¹⁹ If "cumbersomeness" justifies dispensing with the amendment process, one might expect an activist to seize upon the textual common law term "good behavior" for avoidance of the "cumbersome" impeachment procedure. But more influential considerations are at play. It is no secret that Congress is loath to

¹⁴ Kaufman 705-06. Because impeachable offenses, Hamilton said, are of a nature "denominated POLITICAL," they "seldom fail to agitate the passions of the whole community," exposing officials "to the persecution of an intemperate or designing majority in the House of Representatives." THE FEDERALIST, No. 65 (A. Hamilton), at 423-24, 428 (Mod. Lib. Ed. 1937).

¹⁵ Kaufman 705.

¹⁶ Hatton Sumners, who had participated in the impeachment of Judge Harold Louderback, said it was "the greatest farce ever presented. At one time only three senators were present, and for ten days we presented evidence to what was practically an empty chamber." IMPEACHMENT 167 n.199 (citing Note, *Removal of Federal Judges: A Proposed Plan*, 31 ILL. L. REV. 631, 634 (1937) (quoting TIME, Mar. 16, 1936, at 19)).

¹⁷ Kaufman 704-05.

¹⁸ *Id.* at 684-86.

¹⁹ Because "the process of amendment is politically difficult, other modes of change have emerged." McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 293 (1945); Kutler, *Raoul Berger's Fourteenth: A History or Ahistorical*, 6 HASTINGS CONST. L. Q. 511, 525 (1979) ("the path for amendment . . . is often blocked by inertia or irresponsibility," hence judicial alteration).

tear itself away from urgent national problems to undertake judicial housecleaning. The veteran Hatton Sumners, chairman of the House Judiciary Committee and participant in two out of the nine impeachments, observed that they take "the time of the entire Senate . . . away from all of the other business of a great nation, and make them sit there for days and days. . . ." "[F]or this reason alone," remarked Senator William McAdoo, after one such impeachment, it "is always resorted to with extreme reluctance, even in cases of flagrant misconduct."²⁰ As a result, he said, "the practical certainty that in a large majority of cases misconduct will never be visited with impeachment is a standing invitation for judges to abuse their authority with impunity and without fear of removal."²¹

Judge Kaufman recognizes that "[i]f impeachment is designed for occasional use only, there must be some other means of ensuring that judges do not abuse their trust."²² But he dismisses removal of judges for criminal offenses because of the availability of indictment, *e.g.*, Judges Kerner and Manton were indicted and convicted.²³ On the other hand, the noisome practices of District Judge Albert W. Johnson of Pennsylvania extended over a twenty-year period; complaints about his conduct began almost immediately; he was under continuous investigation; a judge of his own Circuit Court went to Washington to obtain relief. At last he was indicted but acquitted, though his co-conspirator son, the object of his corrupt favors, was convicted. Two of the witnesses who had themselves been convicted refused to repeat the testimony they had given before the grand jury.²⁴ Who has not witnessed jury acquittals that leave a large area of doubt as to the innocence of the defendant? What too of the cases which just fall short of "beyond a reasonable doubt" but nevertheless besmirch the court? Then there are the cases altogether devoid of criminality but yet discredit the judicial process.

Judge Kaufman would solve the problem of the senile judge by "peer pressure."²⁵ At times that is effective; but it has also

²⁰ IMPEACHMENT 167 (quoting 80 CONG. REC. 5934 (1936)).

²¹ *Id.* After the trial of District Judge Halsted Ritter, Congressman Chauncey W. Reed said that Senators should not thus "be required to set aside their legislative duties, paralyzing for weeks the lawmaking function." 81 CONG. REC. 6175 (1937).

²² Kaufman 706.

²³ *Id.*

²⁴ IMPEACHMENT 168. See J. BORKIN, *THE CORRUPT JUDGE* 185 (1962).

²⁵ Kaufman 709.

been sadly wanting, as in the long-drawn-out effort to procure the retirement of the aged Judge Buffington, an unwitting tool of his corrupt associate, Judge Davis. Their associate, Circuit Judge Biggs, finally "persuaded these elderly gentlemen to retire," but it took "a good deal of effort and quite a long time," adding that there is not the slightest doubt "that the present machinery for the removal of unfit judges is inadequate,"²⁶ a view earlier expressed by Justice Samuel Miller.²⁷

Judge Kaufman, to borrow from him, has "shed the robe of the judge . . . and assumed the mantle of the advocate."²⁸ A more judicious attitude might have prompted him to acknowledge that his peers, Chief Justice Burger,²⁹ Justices Blackmun,³⁰ Rehnquist,³¹ the late Justice Tom Clark,³² and former Circuit Judge Griffin Bell³³ saw no threat to judicial independence in proposals for judicial removal of judges and regarded them as constitutional. His deep-grained commitment to judicial "independence" has led him to level a barrage of pejoratives at the contrary views I expressed in 1970, in a study that was the product of scholarly curiosity, without commitments to one side the other.³⁴ If I failed to bring the study into focus, it was not

²⁶ IMPEACHMENT 168 n.204 (quoting *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 16 (1966) (testimony of Judge John Biggs, Jr., 3d Cir.)).

²⁷ In 1878 Justice Samuel Miller wrote, it "must be confessed that the means provided . . . for removing a judge, who for any reason is found to be unfit for his office, is very unsatisfactory . . . [and] after the experience of nearly a century . . . must be pronounced inadequate." IMPEACHMENT 169 n.205 (quoting Address by Mr. Justice Miller, New York State Bar Ass'n Annual Banquet, 2 N.Y. STATE BAR ASS'N REP. 40 (1878)). See also C.E. HUGHES, *THE SUPREME COURT* 76 (1928). One expects that a judge will take account of such weighty opinion opposed to his own.

²⁸ Kaufman 708.

²⁹ *Nomination of Warren E. Burger, of Virginia, to be Chief Justice of the United States: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 11 (1969).

³⁰ *Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 52 (1970).

³¹ *The Independence of Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 330 (1970) (statement of W. Rehnquist, Asst. Attorney General of the United States).

³² Clark, *Judicial Self-Regulation—Its Potential*, 35 L. & CONTEMP. PROBS. 37, 40-41 (1970).

³³ *Judicial Tenure Act: Hearings on S. 1110 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 141 (1976) [hereinafter cited as *Hearings*] (statement of G. Bell, attorney at law).

³⁴ Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475 (1970); this article formed the basis of Chapter 4 of my IMPEACHMENT, against which Judge Kaufman directs his fire.

because of bias or a desire to tailor the facts to a particular result. Consequently Judge Kaufman's charges that my reading of sources was "highly selective," that I "excised," *i.e.* suppressed language, and relied on incomplete quotations,³⁵ comports better with over-heated advocacy than with the detachment befitting a judge. One thing needs at once to be made clear: neither Professor Burke Shartel, who in 1930 pioneered the view opposed to that of Judge Kaufman,³⁶ nor I, were prompted by "[d]ispleasure with the outcome or trend of decisions."³⁷ My 1970 study followed on the heels of my defense of the legitimacy of judicial review.³⁸ Not until 1974, when I began my study of the fourteenth amendment, did I begin to perceive the judicial takeover of functions that the Framers had withheld.³⁹

COMMON LAW TERMS

"Led by Berger," states Judge Kaufman, the "theorists have reached across the ocean in an attempt to bolster their position" respecting the meaning of "good behavior" and the machinery for its effectuation.⁴⁰ Where but to England are we to look for the meaning of common law terms? Both "good behavior" tenure and "impeachment for 'high crimes and misdemeanors,'" Hamilton said, were "copied" from the English institutions.⁴¹ It has long been a canon of construction that when the Framers employed common law terms, the common law "definitions," as Justice Story

³⁵ Kaufman 698, 697.

³⁶ IMPEACHMENT 178; Kaufman 691 n.70. See Shartel, *Federal Judges—Apportionment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 723, 870 (1930).

³⁷ Kaufman 681.

³⁸ R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969).

³⁹ R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

⁴⁰ Kaufman 694.

⁴¹ THE FEDERALIST No. 65 (A. Hamilton) at 425, No. 78 (A. Hamilton) at 511 (Mod. Lib. Ed. 1937). "The provisions of the Constitution of the United States," wrote Holmes, "are organic legal institutions transplanted from English soil." Jones, *Introduction to POLITICAL SEPARATION AND LEGAL CONTINUITY* at xiv (H.W. Jones ed. 1976). Professor Harry W. Jones comments that "American continuity with the English past was . . . something natural, inevitable and predetermined by the circumstances and culture of the time." Jones, *The Common Law in the United States* in *id.* at 91, 92. See *id.* at 97. Where Hamilton laid down in No. 78 of *The Federalist* that judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case," Jones asks, "where were the American courts to look to find them, other than in the corpus of English common law doctrine?" *Id.* at 101-02.

held, "are necessarily included, as much as if they stood in the text" of the Constitution.⁴² Earlier Chief Justice Marshall, considering the meaning of "levying war," held that treason "is a technical term. . . . It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it."⁴³ They looked to the common law for the meaning of such common law terms as "felony," "ex post facto," and the like.⁴⁴ But, Judge Kaufman urges, the "difficulty is that neither 'good Behaviour' nor the procedure for determining its breach is anywhere explicitly defined in Article III—or, in fact, anywhere else in the Constitution."⁴⁵ That same "difficulty" exists with respect to "high crimes and misdemeanors" to which he would confine removals; for its definition we must look to English practice.⁴⁶

⁴² *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). *Ex parte Grossman*, 267 U.S. 87, 109 (1925) ("The statesmen and lawyers of the Convention . . . were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.").

⁴³ *United States v. Burr*, 25 F. Cas. 55, 159 (C.C.D. Va. 1807) (No. 14,693). That was earlier held by Justice Iredell in *Fries' Case*, 9 F. Cas. 826, 911-12 (C.C.D. Pa. 1799) (No. 5, 126), *new trial granted on other grounds*, 3 U.S. (3 Dall.) 515 (1799).

⁴⁴ For "felony," see Madison in the Virginia Ratification Convention, 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 484 (2d ed. Washington 1836). For "ex post facto," see John Dickinson, 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 448 (1911). So too, Chief Justice Marshall consulted English practice for the effect of a pardon. *IMPEACHMENT* 131 n.43 (citing *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833)).

⁴⁵ Kaufman 691; *see also id.* at 698.

⁴⁶ *IMPEACHMENT* 67-71. Since "high crimes and misdemeanors," are not defined by any statute, Justice Story stated, "Resort, then, must be had either to parliamentary practice and the common law, in order to ascertain what are high crimes and misdemeanors, or the whole subject must be left to the arbitrary discretion of the Senate. . . ." *IMPEACHMENT* 87 n.161 (quoting 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, §§ 796-97, at 580-81 (5th ed. 1891)). So too, the judicial "contempt" power was not "explicitly" provided for but was derived from English practice. Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602, 618 (1942). Nor is there an "explicit" provision for the separation of powers, a basic tenet of our democratic system. Judicial review itself was not "explicitly" provided for; in fact it ran counter to British practice at the time of the Revolution. 1 W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 91 (Oxford 1765); whereas there were a number of common law definitions of "misbehavior." *IMPEACHMENT* 160-61.

Professor Jones observes:

Manifestly the standard for removal of a judge should be violation of "good behavior" rather than guilt of "high Crimes and Misdemeanors," and a judicial commission would seem far better qualified than the two Houses of Congress for the disciplinary task involved. The demands an impeachment and im-

"Good behavior" tenure reaches back across the centuries. In 1803 Judge St. George Tucker, a pioneer commentator on the Constitution, noted that "these words (by a long train of decisions in England . . .) . . . imported an office or estate . . . determinable only by [the grantee's] death, or breach of good behavior."⁴⁷ Bacon's *Abridgment* explained that under "a grant to a man for so long time as he shall behave himself well . . . his misbehavior in each case determines [i.e. terminates] his Interest," as was held by Coke, and in 1693 by Chief Justice Holt.⁴⁸ A grant during "good behavior" is simply an estate on condition subsequent which is forfeited by non-performance of the condition. Blackstone refers to "all the forfeitures which are given by law of life estates . . . for any acts done by the tenant himself, that are incompatible with the estate."⁴⁹ Given termination upon misbehavior there must be a power to remove the officer, Lord Mansfield held, lest "offices might be forfeited for offences; and yet there would be no means to carry the law into execution."⁵⁰ Without such a remedy the limitation of tenure to so long as the grantee "doth behave himself well" would be an impotent formula. "[W]here the patentee hath done an act that amounts to a forfeiture of the grant," Blackstone stated, "the remedy to repeal the patent is by writ of *scire facias*."⁵¹

"The most daring aspect of this argument," Judge Kaufman writes, "is Berger's hypothesis that by adopting the substantive standard of good behavior, the Framers implied the availability of a *particular* procedural device, *scire facias*. But the Framers never

peachment trial make on an already overcrowded Congressional schedule have made the impeachment process almost a dead letter in all but great matters like the Nixon impeachment. . . .

Jones, *The Common Law in the United States* in POLITICAL SEPARATION AND LEGAL CONTINUITY 114 (H.W. Jones ed. 1976).

⁴⁷ IMPEACHMENT 125-26 (quoting St. G. Tucker, *Appendix* in 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 353 (St. G. Tucker ed. 1803)).

⁴⁸ *Id.* at 126 (quoting 3 M. BACON, A NEW ABRIDGMENT OF THE LAWS 733 (5th ed. Dublin 1786) (1st ed. London 1736)).

⁴⁹ *Id.* at 133 n.55 (quoting 2 W. BLACKSTONE, *supra* note 46, at 153).

⁵⁰ *Id.* at 127 n.25 (quoting Rex v. Richardson, 31 Geo. II B.R. 517, 539, 97 Eng. Rep. 426, 438 (1758)). In 1862, the English crown law officers rendered an opinion with reference to judicial "good behavior" tenure that "when a public office is held during good behavior, a power [of removal for misbehavior] must exist somewhere." *Id.* at 127 n.25 (quoting 2 A. TODD, ON PARLIAMENTARY GOVERNMENT IN ENGLAND 729 (London 1869)). Senator David Stone drew the same conclusion in 1803. 11 ANNALS OF CONG. 72 (1802); *see* text of Stone's remarks accompanying note 156 *infra*.

⁵¹ IMPEACHMENT 133 n.53 (quoting 3 W. BLACKSTONE, *supra* note 46, at 260-61).

felt the need to mention *scire facias* in their debates or to refer to it in the Constitution itself."⁵² Had the Framers sought to describe the remedy appropriate to every constitutional right they would have emerged with a swollen, inflexible code. Instead their approach is illustrated by the response in the Virginia Ratification Convention to anxious inquiries whether the words "trial by jury" included the right to challenge jurors. Madison assured the Ratifiers that "where a technical word was used *all the incidents* belonging to it, necessarily attended it," an explanation in which John Marshall, Judge Edmund Pendleton and Edmund Randolph joined.⁵³

Of course, I did not insist on the "particular" remedy of *scire facias*, described by Blackstone as appropriate not long before the Convention. It was cited only to show that the common law afforded a *remedy* to effectuate the forfeiture. When the Framers limited judicial tenure to "during good behavior" (many weeks before impeachment of the Supreme Court Justices was "mentioned"), they self-evidently did not intend that a judge who violated the condition should continue in office. Remedies, I showed, were not frozen by the Constitution to those extant in 1787; if *scire facias* had become obsolete (not if Blackstone be credited), it is open to Congress to provide another remedy. In addition, Marshall laid claim in *Marbury v. Madison* to the common law power to fashion a remedy for every right.⁵⁴

Judge Kaufman finds a "gaping hole in [my] armor" in that "there is no English case wherein a judge comparable to a federal judge was removed in a judicial proceeding."⁵⁵ But for the fact that this falls from the lips of a veteran judge this might be dismissed as the veriest ribbon-matching. He emphasizes, however, that the simple *scire facias* proceeding was appropriate for "inferior officers" because "it is not necessary that they have the

⁵² Kaufman 694 (emphasis added). Chief Justice Marshall required a showing that "had this particular case been suggested, the language would have been so varied, as to exclude it." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819).

⁵³ IMPEACHMENT 131 (citing 3 J. ELLIOT, *supra* note 44, at 483-84, 497, 506-09, 520) (emphasis added).

⁵⁴ 5 U.S. (1 Cranch) 137, 163 (1803). Professor Jones referred to the "ingrained common law idea that there is no meaningful right if there is no effective remedy to vindicate it." Jones, *supra* note 46, at 126. That we are merely dealing with the "remedy" is confirmed by Blackstone: "where the patentee hath done an act that amounts to a forfeiture of the grant . . . the *remedy* to repeal the patent is by writ of *scire facias*." 3 W. BLACKSTONE, *supra* note 46, at 260-61 (emphasis added).

⁵⁵ Kaufman 694.

independence expected of judges.”⁵⁶ He rides his hobby horse too hard. The “independence” of judges was late aflowering. Since they were appointed “at pleasure” they could be unceremoniously removed, as when James I dumped Coke.⁵⁷ Historically the common law has grown by application of a principle to analogous circumstances. Once judges were given “good behavior” tenure it was natural to follow the removal procedure traditionally associated with it. Consequently, when several rare “good behavior” high court appointees were threatened by arbitrary royal removal, they insisted on the protection of a *scire facias* proceeding. One such was Sir John Walter, Chief Baron of the Exchequer, who refused in 1628 to surrender his patent of appointment on the ground “that he ought not to be removed without a proceeding on a *scire facias*.”⁵⁸ In 1672, Sir John Archer, a Justice of Common Pleas which ranked with King’s Bench, “refused to surrender his patent without a *scire facias*.”⁵⁹ These cases are dismissed by Judge Kaufman: the judges “made the argument only because they were then fending off removal by another procedure,”⁶⁰ in fact without any procedure whatever. Why then did they not, instead of insisting on *scire facias*, invoke impeachment, so dear to Judge Kaufman’s heart, for that would have been an even more plausible way (in his eyes) of “fending off removal by another procedure.” The fact that Archer and Walter turned rather to *scire facias* testifies both that *scire facias* was the familiar remedy and that judges justly preferred trial by judges rather than by Parliament. When the Archer-Walter cases were cited in 1692 before Chief Justice Holt and his associate Justices by Sergeant Levinz, himself a former Justice, Holt made the significant remark that “our places as Judges are so settled, only determinable upon misbehavior.”⁶¹

In another case, that of Sir Jonah Barrington, a judge of the court of admiralty in Ireland, Lord Justice Denman, then a noted advocate, arguing against removal by Address (without trial)

⁵⁶ *Id.* at 695.

⁵⁷ IMPEACHMENT 3 (citing 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 430-40 (2d ed. London 1937)).

⁵⁸ *Id.* at 128 (quoting McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 221 (1913)).

⁵⁹ *Id.* at 128-29 (quoting 83 Eng. Rep. 113 (1674)).

⁶⁰ Kaufman 695.

⁶¹ IMPEACHMENT 129 (quoting *Harcourt v. Fox*, 1 Show. K.B. 506, 539, 89 Eng. Rep. 720, 734 (1693)).

stated, "a *scire facias* could have been sued out to abrogate the patent of office."⁶² Denman, Judge Kaufman tells us, was attempting "to throw every obstacle in the way of a speedy decision."⁶³ Nevertheless, one who is familiar with the relation of barristers to the high tribunals of England will not readily conclude that a noted advocate would put a frivolous alternative to the tribunal or fail to be reprimanded if he did. Dilatory tactic or not, it cannot be gainsaid that Denman once more preferred *scire facias* to removal without trial.

This view of the law was summarized by Lord Chancellor Erskine when, in the course of a debate in the House of Lords in 1806 upon whether to employ an Address for the removal of Justice Luke Fox of Common Pleas in Ireland, he asked, "Were their Lordships afraid to trust the ordinary tribunals upon this occasion, to let the guilt or innocence of the honorable judge be decided . . . upon a *scire facias* to repeal the patent by which he held his office?"⁶⁴ Once more, Judge Kaufman resorts to a hollow distinction: "Berger *excises* the words 'by a jury' in reporting this statement because they indicate *Erskine's confusion* about the nature of *scire facias*. The writ was issuable in a civil proceeding, but, as Erskine's complete speech makes clear, he was discussing the procedures employed in a criminal trial."⁶⁵ I "excised" the words "by a jury" because they did not bear upon the distinction between trial by a court (be it civil or criminal) and removal by Parliament. To attribute to one of the greatest English judges "confusion" about whether *scire facias*, a familiar writ noted by Blackstone, was civil or criminal borders on the laughable. What matters is that Erskine once more preferred judicial removal to removal by Parliament.⁶⁶ English judges regarded removal by judges as a privilege—not an invasion of their "independence"—to be preferred to trial by Parliament on impeachment or removal without trial by Address.

⁶² *Id.* at 130 n.40 (quoting 24 Parl. Deb. 966 (Hansard, 2d Ser. 1830)).

⁶³ Kaufman 695 n.91. Despite Denman's appeal to *scire facias*, Judge Kaufman argues that the extension of *scire facias* for removal of judges is rebutted by Denman's assertion that the "misconduct of Judges had frequently come under the consideration of Parliament." *Id.* at 695 (quoting 24 Parl. Deb. 965 (2d Ser. 1830)). Notwithstanding, Denman preferred *scire facias*.

⁶⁴ IMPEACHMENT 130 (quoting 7 Parl. Deb. 770 (1st Ser. 1806)).

⁶⁵ Kaufman 697 (emphasis added).

⁶⁶ Lord Campbell, himself a Lord Chancellor, and one who did not shrink from pointing out errors in the views of his predecessors, quoted the Erskine passage without comment, thus giving it credit. 6 J. CAMPBELL, LIVES OF THE CHANCELLORS 559-60 (London 1847).

Another unfounded charge of suppression is contained in Judge Kaufman's treatment of my remark, "Eminent scholars, among them Holdsworth, consider that removal of judges by *scire facias* remains available in England."⁶⁷ He states:

Not surprisingly, though, [Berger] does not quote Holdsworth, for that would undermine his case. Holdsworth merely wrote that judges 'may, it is said,' be removed by several procedures other than address: 'either by *scire facias* . . . criminal information, or *impeachment*, or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords.' Holdsworth's qualified statement of this view indicates that he was not vouching for its truth—and with good reason. Except for the mention of address, it was lifted almost verbatim from his only source on the point: Denman's petition in the House of Lords for an accused judge, Sir Jonah Barrington.⁶⁸

Mark that one of the greatest English legal historians attaches more weight to Denman than does Judge Kaufman. Nor did Holdsworth have to "vouch for the truth" of the fact that judges were removable by impeachment. Plainly Judge Kaufman grasps at straws. Worse, he again accuses me of "excising," that is suppressing, allegedly unfavorable facts so that my "case" should not be "undermined." What motivation would a long-time student of legal history have for such suppression? Judge Kaufman's zeal for "independence" has carried him too far.

Against Holdsworth, Judge Kaufman summons one of the bright stars of legal history, Maitland, citing from his lectures on constitutional law that "*scire facias* is not available."⁶⁹ But as H.A.L. Fisher's preface states, this early work "does not claim to be based upon original research; for much of his information [Maitland] was confessedly content to draw upon the classical text-books."⁷⁰ Compare with this the later, studied conclusion of Charles McIlwain, in his essay on "The Tenure of English Judges" (as reported by Judge Kaufman) that "English judges may be removed by *scire facias*, address or impeachment."⁷¹ Whatever the views of the nineteenth century commentators, Blackstone, to

⁶⁷ IMPEACHMENT 130.

⁶⁸ Kaufman 697-98 (emphasis added).

⁶⁹ *Id.* at 698 n.103.

⁷⁰ IMPEACHMENT 130 n.42 (quoting Fisher, *Preface* to F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* at vi (1911)).

⁷¹ Kaufman 698 n.103 (citing McIlwain, *supra* note 58, at 225).

whom the colonists looked for a statement of the common law, had not long before the Revolution declared that *scire facias* was the "remedy" for forfeiture upon misbehavior.⁷²

ACT OF SETTLEMENT

In 1700 the Act of Settlement gave judges good behavior tenure. Entitled "An Act for further limitation of the Crown," it provided that "Judges Commissions be made *Quamdiu se bene gesserint* [as long as he shall behave himself well] . . . but upon the Address of both Houses of Parliament, it may be lawful to remove them."⁷³ By this time "good behaviour" had an accepted connotation, associated with a judicial proceeding to declare the forfeiture for misbehavior. Bacon's *Abridgment* states that "If a Statute make use of a Word the Meaning of which is well known at the Common Law, the Word shall be understood in the same Sense it was understood at the Common Law."⁷⁴ Consequently it needed no Address procedure to effectuate a forfeiture for breach of "good behaviour." Judge Kaufman argues, however, that removal upon address was conditioned on misbehavior.⁷⁵ "But" is defined as "except that," "with the exception of," so that notwithstanding the tenure for good behavior judges could be removed by Address.⁷⁶ An English authority, Alpheus Todd, remarked that removal by Address, "is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof."⁷⁷

To counter this analysis, Judge Kaufman invokes the Act of 1760 for "the most persuasive interpretation" of the Act of Settlement. After alluding to the benefits of "independency," the Act made "further Provision for continuing Judges in the Enjoyment of their Offices during their good Behaviour . . . *Provided* always . . . That it may be lawful for his Majesty . . . to remove any Judge

⁷² 3 W. BLACKSTONE, *supra* note 46, at 260-61.

⁷³ IMPEACHMENT 151 n.131 (emphasis added) (quoting Act of Settlement, 12 & 13 William II, c. 2, § 3 (1700)).

⁷⁴ 4 M. BACON, *supra* note 48, at 647 (*Statute*, section (1)(4)). For an early American case to the same effect, see *Mayo v. Wilson*, 1 N.H. 53, 55 (1817).

⁷⁵ Kaufman 696 n.94.

⁷⁶ "But" indicates "that what follows is an exception to that which has gone before." In re *Naftzger's Estate*, 24 Cal. 2d 595, 599, 150 P.2d 873, 875 (1944). See *E.H. Rollins & Sons v. Board of Comm'rs*, 199 F. 71, 78 (8th Cir. 1912); *Petition of Sullivan County R.R.*, 76 N.H. 185, 186, 81 A. 473, 474 (1911).

⁷⁷ IMPEACHMENT 88 n.162 (quoting A. TODD, *supra* note 50, at 729).

or Judges upon the Address of both Houses of Parliament.”⁷⁸ The “but” of 1700 was thus replaced by “Provided always,” read by Judge Kaufman as “standard language” to indicate “not an exception but a further elucidation.”⁷⁹ A *proviso*, however, carves out an exception from what precedes.⁸⁰ Against this Judge Kaufman argues that “[n]either judicial ‘independency’ nor good behavior tenure could be regarded as more than hollow and pious hopes if a judge could be removed at any time at the whim of Crown and Parliament.”⁸¹ Yet he states that “[u]nlike impeachment, which required a trial and bore potentially heavy penalties, address was merely a petition to the Crown for the removal of an objectionable judge,”⁸² inferably without trial. The employment of Address therefore indicates that judges *were* to remain “at the whim” of Parliament. In truth, there is no evidence that Parliament shared Kaufman’s attachment to “absolute independence,” a notion of the very recent past,⁸³ or that it meant by the proviso for Address to repudiate the association of that term with unrestricted removal,⁸⁴ or, least of all, to replace the traditional judicial trial for breach of “good behavior” by trial by impeachment, surely a roundabout way of articulating that result. Justice Story better understood the Act: “The object of the act of Parliament was to secure the judges from removal at the mere pleasure of the crown; but not to render them independent of the action of Parliament,”⁸⁵ as the title of Act of 1700 confirms. Because removal by

⁷⁸ Kaufman 696 n.94 (quoting Act of 1760, 1 Geo. 3, c. 23, § 2) (emphasis added).

⁷⁹ *Id.* For this he merely cites other “provided always” in other sections of the Act, each of which requires individual analysis.

⁸⁰ With an air of stating settled law, Chief Justice Marshall held in 1825 that “[t]he proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 30 (1825). See also *Cox v. Hart*, 260 U.S. 427, 435 (1922). In England it was held, “the proviso, of which, according to the ordinary rules of construction, the effect must be to except out of the earlier part of the section something which, but for the proviso, would be within it.” *Duncan v. Dixon*, 44 Ch. D. 211, 215, 62 L.T.R. (n.s.) 319, 321 (1890). This rule of construction is confirmed by the facts hereinafter set forth.

⁸¹ Kaufman 696 n.94.

⁸² *Id.*

⁸³ IMPEACHMENT 153-55. See Kurland, *The Constitution and the Tenure of Federal Judges*, 36 U. CHI. L. REV. 665, 667 (1969).

⁸⁴ According to Blackstone, the acts of Parliament were not subject to judicial control; it was omnipotent. 1 W. BLACKSTONE, *supra* note 46, at 91. See *Hurtado v. California*, 110 U.S. 516, 531 (1884) (“[N]otwithstanding what was attributed to Lord Coke in *Bonham’s Case*, . . . the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.”)

⁸⁵ IMPEACHMENT 151 n.133 (quoting 2 J. STORY, *supra* note 46, at § 1623).

Address required no trial, a motion to incorporate the 1760 proviso in the Constitution was rejected by the Framers. Gouverneur Morris "thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial . . . it was fundamentally wrong to subject Judges to so arbitrary an authority."⁸⁶

Another analytical flaw is exhibited by Judge Kaufman's reliance on a non-judicial interpretation in 1930 of the Consolidation Act of 1925—judges of the High Court "shall hold their offices during good behaviour *subject* to a power of removal . . . on an address"—to the effect that such a judge "is *only* removable on an address to the Crown."⁸⁷ This interpretation would attribute to Parliament renunciation of its power of impeachment, a renunciation which would leave it powerless to remove objectionable judges, because as McIlwain points out, no Act "forces the king to remove."⁸⁸ Thus this reading converts an Act designed to shelter judges from royal removal into royal authority to continue objectionable judges in office against the will of Parliament. It was precisely this power, to remove those whom the king sought to shelter, for which Parliament had fought.⁸⁹ Edmund Burke,⁹⁰ Lord Chancellor Erskine, Holdsworth and McIlwain consider that the other means of removal—impeachment, *scire facias*—remain, and such authorities are not to be laughed out of court.

A reading more respectful of the syntax of the Act and the history of its terms is that of R.M. Jackson: "the power to remove [judges] after an address is additional to the common law. It is a

⁸⁶ 2 M. FARRAND, *supra* note 44, at 428. The separation between judicial removal on breach of "good behavior" and removal by address is clearly marked in the Maryland Constitution of 1776: "Judges shall be removed for misbehavior, on conviction in a court of law, and may be removed by the Governor, upon the address of the General Assembly." IMPEACHMENT 152 n.137 (quoting 1 B. POORE, *THE FEDERAL AND STATE CONSTITUTIONS* 819 (1877)) (emphasis added). So too, the Massachusetts Constitution of 1780 provided, "All judicial . . . officers shall hold their offices during good behavior . . . *Provided, nevertheless,* The governor . . . may remove them upon the address of both houses of the legislature," *i.e.*, regardless of good behavior. *Id.* at 152 n.137 (quoting 1 B. POORE, *supra* at 968). These statutes constitute a colonial gloss upon the Acts of 1700 and 1760.

⁸⁷ Kaufman 696 n.94 (emphasis added). Mark the progression from "but" through "provided that" to "subject to."

⁸⁸ IMPEACHMENT 151 (citing McIlwain, *supra* note 58, at 226).

⁸⁹ *Id.* at 71-72. The fear of "favorites" was vigorously expressed in the Convention. See discussion in *id.* at 140. Judge Kaufman notices that "the address procedure, as a limitation on the power of the monarch to remove disfavored judges, stands in contrast to impeachment, which allowed Parliament to remove the King's favorites." Kaufman 696 n.94.

⁹⁰ IMPEACHMENT 151 n.132 (citing 2 A. TODD, *supra* note 50, at 730).

principle of construction that judicial process is not abolished except by clear words. . . ."⁹¹ Our own Supreme Court declined to construe the all-inclusive "every person" to strike down an established judicial immunity in the absence of specific language indicating such an intention.⁹² The view that the Act of Settlement provided both for judicial trial for misbehavior and unqualified removal on Address (implicit in Gouverneur Morris' statement) is spelled out in the Maryland Constitution of 1776, patently modeled on the Act: "Judges shall be removed for misbehavior, on conviction in a court of law, *and* may be removed by the Governor [without reference to misbehavior] upon the address of the General Assembly."⁹³ If the argument that removal by Address excluded removal for misbehavior by judges fails, and this though both provisions are contained in the same section of the Act, the case for the exclusivity of impeachment is even weaker, for the "good behavior" and impeachment provisions were in quite different Articles and temporally separated.

AMERICAN MATERIALS

The starting point for analysis is that the Constitutional Framers employed long-established technical terms of widely disparate provenance and located them in two separate Articles. Article III conditioned judicial tenure "on good behavior"; there it appeared almost from the beginning of the Convention, May 29th, long before impeachment of the Justices was mentioned.⁹⁴ The provision for impeachment for "high crimes and misdemeanors," chosen precisely because those words had a "technical," "limited" meaning,⁹⁵ was placed in Article II, the Executive Article, for the simple reason that almost all of the impeachment debate centered on the President. As said by Hamilton, both the English and several state constitutions "seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?"⁹⁶ When at

⁹¹ *Id.* (citing R.M. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 289 n.1 (5th ed. 1967)).

⁹² *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

⁹³ 1 B. POORE, *supra* note 86, at 819.

⁹⁴ See 1 M. FARRAND, *supra* note 44, at 21; 2 *id.* at 367.

⁹⁵ See 2 *id.* at 443.

⁹⁶ *THE FEDERALIST* No. 65 (A. Hamilton), at 425 (Mod. Lib. Ed. 1937).

last, on August 20th, the Committee of Five was directed to report "a mode for trying the supreme Judges in case of impeachment," no mention was made of impeachment of "inferior" judges.⁹⁷ Judge Kaufman himself notes English authority held that "the 'judges of our inferior courts' who had been placed 'under the general supervision of the Queen's Bench' might be removed at common law or by statute for misbehavior."⁹⁸ The distinction between the "superior judges" and "the lower ranks of the judiciary," stressed by Judge Kaufman,⁹⁹ was thus implicitly drawn by the Convention. And the absence of "mention" (of the "lower courts") upon which Judge Kaufman often relies for proof,¹⁰⁰ justifies the inference that *they* at least were to be removed in the traditional way by judges for breach of good behavior under Article III.

Only at the last minute were the words "vice-President and other Civil officers" added to Article II, an afterthought as it were.¹⁰¹ So far as the text goes—Judge Kaufman's fellow activists have consigned the "legislative intention" to deepest limbo,¹⁰² and one of them insists that "*the most important datum*

⁹⁷ IMPEACHMENT 146 (citing 2 M. FARRAND, *supra* note 44, at 337).

⁹⁸ Kaufman 698 n.104. King's Bench, said Bacon's Abridgment, "exercises a Superintendency over all inferior Courts, and may grant an Attachment against the Judges of such Courts for oppressive, unjust or irregular Practice . . ." IMPEACHMENT 66 (quoting 3 M. BACON, *supra* note 48, at 744).

⁹⁹ Kaufman 698 n.104. Judge Kaufman argues that an "English judge comparable to a federal judge could [not] have been removed by *scire facias* proceedings," that "judges cannot . . . be easily analogized to inferior officers." Kaufman 698, 695. Judges of the English high courts thought otherwise. See text accompanying notes 58-66 *supra*. The Framers labelled the lower courts the "inferior" courts and left their creation and jurisdiction in the hands of Congress, testimony that the Framers did not share Judge Kaufman's awed regard for the "inferior" federal judges. Indeed Hamilton assured them that of the three departments "the judiciary is next to nothing." THE FEDERALIST No. 78 (A. Hamilton), at 504 (Mod. Lib. Ed. 1937).

¹⁰⁰ Thus Judge Kaufman argues, "The very absence of a removal provision in Article III indicates that the Framers must have implied a reference to the impeachment clauses and thereby intended that bad behavior be dealt with exclusively by impeachment." Kaufman 692. "The very absence" of a reference to impeachment of "inferior" judges when impeachment of the "supreme Judges" was mentioned even more forcibly indicates that the removal of "inferior" judges was to "be dealt with" under Article III for breach of "good behavior." His reliance on the Framers' silence is pointed up by his dismissal of an *express* statutory provision for penalties on the ground that "there was no mention in either House of the bribery penalties, constituting a brief portion of a long statute aimed at punishing crimes against the United States." *Id.* at 702 n.127. See text accompanying notes 143-45 *infra*.

¹⁰¹ IMPEACHMENT 147 (citing 2 M. FARRAND, *supra* note 44, at 552).

¹⁰² See Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L. Q. 603 (1978); Murphy, Book Review, 87 YALE L.J. 1652 (1978).

bearing on what was intended is the constitutional language itself"¹⁰³—the association of "President, Vice President and other civil officers" in the Executive article permits the inference, under the maxim *noscitur a sociis* ("a word is known by the company it keeps"),¹⁰⁴ that those words referred to officers of the Executive Department. A commentator often quoted by Judge Kaufman, observed that "[t]here is a legitimate textual question whether judges were included in the impeachment provisions of Article II."¹⁰⁵ Moreover, impeachment, as the Founders knew, proceeded against great offenders for "great and dangerous offenses";¹⁰⁶ in the words of Judge Kaufman, it is "a drastic remedy, essential but dangerous, to be used only in imperative cases,"¹⁰⁷ a category that ill fits the removal of a sordid district judge for misconduct. In the North Carolina Ratification Convention, Archibald Maclaine rejected the notion "that petty officers might be impeached. . . [I]mpeachments cannot extend to inferior officers of the United States."¹⁰⁸ To be sure, Judge Kaufman entertains a more exalted view of the "inferior" courts, but when that is balanced against the tremendous problems from which impeachment would divert the Congress, it is difficult to conclude that the Framers meant the wheels of Congress to grind

¹⁰³ Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 418 (1978) (emphasis in original).

¹⁰⁴ *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). For reliance on such a maxim by a prefervid activist, see C. BLACK, *IMPEACHMENT: A HANDBOOK* 36 (1974).

¹⁰⁵ Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 151. Against this Judge Kaufman argues, "It has long been settled that federal judges are 'Civil Officers' within the meaning of this clause," Kaufman 691, citing a "dictum" in *Shurtleff v. United States*, 189 U.S. 311, 316 (1903). Since when do dicta "settle" issues? See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821), quoted at text accompanying note 137 *infra*.

¹⁰⁶ *IMPEACHMENT* 86 (quoting 2 M. FARRAND, *supra* note 44, at 550).

¹⁰⁷ Kaufman 705. When Judge Kaufman asks how his opponents can "ignore two hundred years of history," (*id.* at 693), he overlooks that the history of impeachment is tied to "high crimes and misdemeanors," not to breaches of "good behavior," a quite different category; that impeachment was the medium for removal of the highest officials, *e.g.*, the Earl of Strafford, the Duke of Suffolk, the Duke of Buckingham, not lower tier corruptionists. See *IMPEACHMENT* 30-40, 67-69. That is why we experience no "difficulty [in] explaining Alexander Hamilton's statement that trial for removal from office on the grave charges specified by the impeachment clauses must be held before the Senate, because of [t]he awful discretion, which a court of impeachment must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community." Kaufman 693-94 (emphasis added). "Awful discretion" is involved in removing a President Andrew Johnson or Richard Nixon, but it is absurd to insist that it is likewise involved in removing obscure corruptionists.

¹⁰⁸ *IMPEACHMENT* 162-63 (quoting 4 J. ELLIOT, *supra* note 44, at 70).

to a halt in order to oust a judge soiled by corruption or incapacitated by senility.

The weightiest evidence of the Framers' original intention must be sought in the records of the Convention. There, but for the last-minute reference to the impeachment of the "Supreme judges," there was no reference to the removal of the inferior judges nor to exclusion of the traditional removal by judges for breaches of good behavior. The remarks before and after the Convention need to be weighed against the Framers' awareness that the technical common law terms they employed carried with them their common law connotations. Thus, when they employed "treason" they carefully redefined it to avoid the excesses of English history.¹⁰⁹ Noting that so defined treason would not include subversion of the State—the cardinal impeachable offense—the words "high crimes and misdemeanors" were added, after canvassing a number of alternatives, because they had a "technical", "limited" meaning.¹¹⁰ John Dickinson sought for the meaning of "ex post facto" in Blackstone and concluded that to expand it beyond criminal cases would require "some further provision."¹¹¹ By the same token, to curtail the traditional judicial remedy for breach of good behavior would therefore require some redefinition. The test, articulated by Chief Justice Marshall, is a showing that had "this particular case been suggested, the language would have been so varied as to exclude it."¹¹² No evidence remotely suggesting that the Framers would have rejected judicial removal of the "inferior" judges is to be found in the records of the Convention; their respect for the common law meaning of the terms argues against it.

One other fact needs to be noted: the Framers did not share Judge Kaufman's devotion to "absolute independence." So, James Wilson, next to Madison the chief architect of the Constitution, declared, "The independency of each power consists in this, that its proceedings . . . should be free from the remotest influence . . . of either of the other two powers. But further than this, the independency of each power ought not to extend."¹¹³ Hamilton wrote, "The standard of good behavior . . . is an excellent barrier

¹⁰⁹ See U.S. CONST. art. III, § 3, para. 1.

¹¹⁰ IMPEACHMENT 86-87 (citing 2 M. FARRAND, *supra* note 44, at 550); see also notes 43-44 and accompanying text *supra*.

¹¹¹ 2 M. FARRAND, *supra* note 44, at 448-49; see also notes 91-92 *supra*.

¹¹² Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 644 (1819).

¹¹³ 1 WORKS OF JAMES WILSON 299 (R. McCloskey ed. 1967).

to the despotism of the prince” and “to the encroachments and oppressions of the representative body,”¹¹⁴ not, be it noted, to removal of judges by judges. One of the earliest commentators on the Constitution, Judge St. George Tucker of the Virginia Court of Appeals, wrote that the “absolute independence of the judiciary for which we contend is . . . an independence of the other *co-ordinate* branches of the government . . . who have the custody of the purse and sword. . . .”¹¹⁵ Judge Kaufman cites no English or American constitutional source for the proposition that “it is equally essential to protect the independence of the individual judge, even from incursions by other judges.”¹¹⁶ The English practice, as we have seen, was to the contrary. Hamilton himself considered that “all impeachments” should be tried by “a Court.”¹¹⁷ And at one stage the Convention referred to the Committee on Detail a resolution that “[i]mpeachments shall be . . . before the Senate and the judges of the federal [sic] judicial court,”¹¹⁸ thereby indicating that impairment of “collegiality” played no part in their thinking.

The evidence most favorable to the Kaufman view is Rufus King’s statement that “the Judiciary hold their places not for a limited time, but during good behaviour. It is necessary therefore that a forum should be established for trying misbehaviour. Was the Executive to hold his place during good behaviour? . . . He ought not to be impeachable unless he hold his office during good behaviour. . . .”¹¹⁹ But King’s attempt to link impeachment to good behavior tenure met with no favor. In the upshot the “forum” was not to “try misbehavior” but “high crimes and misdemeanors,” a quite different standard. The pitfalls of reliance on such desultory remarks are illustrated by statements on the same day by Gouverneur Morris and George Mason that impeachment was designed to punish “criminal act[s].”¹²⁰ The final structure of the impeachment provisions separated removal for impeachable offenses from indictment for the crime.¹²¹ Then too Madison urged on the same day that impeachment should comprehend

¹¹⁴ THE FEDERALIST No. 78 (A. Hamilton), at 503 (Mod. Lib. ed. 1937).

¹¹⁵ IMPEACHMENT 155 n.149 (quoting St. G. Tucker, *supra* note 47, at 359).

¹¹⁶ Kaufman 713.

¹¹⁷ 1 M. FARRAND, *supra* note 44, at 292.

¹¹⁸ 2 *id.* at 136.

¹¹⁹ 2 *id.* at 66-67.

¹²⁰ 2 *id.* at 64-65.

¹²¹ See IMPEACHMENT 79.

"incapacity . . . of the chief Magistrate," and Morris added that "incapacity" was among the "causes of impeachment,"¹²² a view that finds no warrant in the impeachment trials for "high crimes and misdemeanors," adopted by the Framers because of its "limited" nature. And in *The Federalist*, Hamilton rejected "incapacity" as a basis for impeachment because the task of fixing the bounds of inability "would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good."¹²³ Who is to be given greater credence—Madison and Morris or Hamilton? In electing "high crimes and misdemeanors" because of its "technical" meaning, I suggest, the Framers chose to rely on the English practice rather than the views earlier expressed by individual Framers.¹²⁴ Since the Framers singled out the "Supreme Judges" for impeachment it is reasonable to infer that removal of "inferior" judges was left to forfeiture under Article III. If impeachment was available, it was when their breaches rose to the level of "great offenses" and Congress chose to employ impeachment as a "supplementary remedy" because the Judiciary neglected to cleanse its own house.

"The Framers," Judge Kaufman writes, "believed that the tenure of judges should be established in terms of good behavior and the remedy for a breach should be impeachment," referring to "an essay published in 1776" by John Adams, and "quoted ver-

¹²² 2 M. FARRAND, *supra* note 44, at 65, 69.

¹²³ THE FEDERALIST No. 79 (A. Hamilton), at 514 (Mod. Lib. ed. 1937).

¹²⁴ The Framers' respect for these technical terms (*see* text accompanying notes 43-44 *supra*), undermines Judge Kaufman's statement that "[t]he American draftsmen were not concerned with whether tenure during good behavior had taken on a technical meaning in England . . ." Kaufman 700. So too, it vitiates his statement that "[j]udicial tenure during good behavior was widely adopted in America not because it indicated the possibilities of unspoken methods of removal but, as the Adams statement demonstrates, because it was this formulation that had guaranteed English judges life tenure since the beginning of the century." *Id.* And he states, "the use of 'good behavior' in Article III was meant to protect tenure, not to categorize grounds for removal." *Id.* at 701 n.123. The divorce between tenure and its forfeiture is a discovery of Judge Kaufman's, without roots in English law. In 1862, the English Crown law officers confirmed the appeals of Justices Archer and Walter to *scire facias*, holding with reference to judicial "good behaviour" tenure that "when a public office is held during good behaviour, a power [of removal for misbehavior] must exist somewhere; and when it is put in force, the *tenure* of the office is *not* thereby abridged, but it is *forfeited* and declared vacant for non-performance of the condition on which it was originally conferred." IMPEACHMENT 127 n.25 (quoting 2 A. TODD, *supra* note 50, at 728) (emphasis added). Never was impeachment the "method" of forfeiture. For the "categories" of "misbehavior" resort must be had, as in the case of "high crimes and misdemeanors," to English practice. In 1768 Josiah Quincy, Sr., had directed attention to the scope of impeachment in England in a letter to the *Boston Gazette*. IMPEACHMENT 143 n.97 (citing QUINCY'S MASS. REP. 580-84 (Boston 1865)).

batim . . . in a letter by Thomas Jefferson the same year."¹²⁵ Jefferson came to take a broader view, writing in 1816 (after the abortive Chase impeachment) that judges "are irremovable, *but by their own body*, for any depravities of conduct,"¹²⁶ being confirmed in this in 1825 by a renowned commentator on constitutional law, William Rawle.¹²⁷ Adams, of course, was not a "Framer," being, like Jefferson, absent on a diplomatic mission during the sessions of the Convention.¹²⁸ Had Adams consulted Blackstone he would have learned that a forfeiture for breach of "good behavior" was declared on a writ of *scire facias*. The State Trials which Adams invoked for impeachment of judges were for "high crimes and misdemeanors," not breaches of "good behavior." A clue to the potential influence of such remarks is furnished by the fact that the Convention turned to English practice rather than to existing State constitutions for light.¹²⁹

Next Judge Kaufman relies on Hamilton's statement in *The Federalist*, No. 79: judges "are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate. . . . This is the only provision on the point which is consist-

¹²⁵ Kaufman 699 n.111. Adams, who had just discovered the State Trials (IMPEACHMENT 142-43 (citing 2 WORKS OF JOHN ADAMS 329-30 (Boston 1850))), but had not noticed that they proceeded for "high crimes and misdemeanors," wrote: "The judges . . . should hold estates for life . . . their commissions should be during good behavior For misbehavior, the grand inquest of the colony . . . should impeach them . . ." Kaufman 699.

¹²⁶ IMPEACHMENT 155 n.150 (quoting 15 WRITINGS OF THOMAS JEFFERSON 34 (Mem. ed. 1905) (emphasis added)).

¹²⁷ Rawle wrote that, in England, "Judges are held liable to trial for every offense before their brethren . . ." IMPEACHMENT 155 n.150 (quoting W. RAWLE, A VIEW OF THE CONSTITUTION 214 (2d ed. 1829)).

¹²⁸ A similar slipshod remark is Judge Kaufman's statement that "The Jeffersonian Congress, so eager to remove Federalists from the bench, wasted much effort in the cases of John Pickering and Samuel Chase if, instead of twice running the gauntlet of impeachment, it might have utilized a more streamlined and far simpler procedure to accomplish the same result." Kaufman 694. When Jefferson became President, his biographer, Dumas Malone, observed, "the federal judiciary," one hundred per cent Federalist, amounted to "an arm of the party." 4 D. MALONE, JEFFERSON AND HIS TIME 114 (1970). In fact, the judiciary often made intemperate attacks on the Jeffersonians (IMPEACHMENT 155-56 (citing 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 273-79 (1922)); see D. MALONE, *supra*, at 464-68), so they were little likely to remove one of their own on complaints from the Jeffersonians.

Another such slip is Judge Kaufman's statement that "[t]he logical flaws in Berger's gap theory" are illustrated by the fact that "the sole penalties" on impeachment "are removal and *disqualification* from office." How, he argues, "can one reasonably contend that those *precise* penalties may be imposed for a lesser offense . . ." Kaufman 693 (emphasis added). I have never contended that removal for breach of "good behavior" can be accompanied by "disqualification from office." His indictment was too hastily drawn.

¹²⁹ IMPEACHMENT 114 n.101 (citing 2 M. FARRAND, *supra* note 44, at 428-29).

ent with the necessary independence of the judicial character."¹³⁰ Having in mind that the Convention had rejected removal by address, this remark may be construed to refer to and rule out such removal. For Hamilton sought to make judges independent of the other branches, not of judges.¹³¹ Moreover, he immediately made his "only" subject to an exception: "insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification."¹³² Why should an exception for the unmentioned "insanity" rise higher than an exception, to use his own words, for the explicit "standard of good behavior,"¹³³ a standard different from that of "high crimes and misdemeanors"? The House speedily approved another exception, removal by the President of his subordinates, of which Judge Kaufman says, "Of course, it is perfectly fitting for the President to remove his own executive subordinates without invoking the impeachment process . . ." ¹³⁴ Why "of course"? Executive subordinates squarely fit within the all inclusive "all civil officers" of Article II, whereas there is at least a doubt whether the Article III judges, covered by the "standard of good behavior" were meant to fit within the terms of Article II. Such exceptions as those of Judge Kaufman are dictated by taste rather than irrefragable logic. It is easier to recognize an "exception" for the established forfeiture proceeding that was a time-honored concomitant of the technical term "good behavior" than to remove Executive subordinates from "all civil officers."

Judge Kaufman also draws on the "removal" debate in the First Congress, where a sharply divided House gratuitously expressing its views as to the *President's* power vis-à-vis the Senate,

¹³⁰ Kaufman 702.

¹³¹ See text accompanying notes 96 & 114 *supra*. Judge Kaufman reminds us that "one of the grievances against George III listed in the Declaration of Independence was: 'He has made Judges dependent on his Will alone . . . ' . . . therefore, they provided . . . that they should continue in office 'during good Behaviour.'" Kaufman 690-91.

The view that "the impeachment clauses were meant as limitations only on Congress," Judge Kaufman argues, is vitiated by the fact that the power to try impeachment was vested in the Senate rather than the Court. Kaufman 693 n.76. But, as Hamilton explained, the Framers doubted whether the Supreme Court would "be endowed with so eminent a portion of fortitude" as to "bridle" the "executive servants of the government." THE FEDERALIST No. 65 (A. Hamilton), at 425 (Mod. Lib. ed. 1937). Then too, the impeachment clause constituted an exception from the separation of powers. See IMPEACHMENT 118 n.73.

¹³² THE FEDERALIST No. 79 (A. Hamilton), at 514 (Mod. Lib. ed. 1937).

¹³³ *Id.* No. 78, at 503.

¹³⁴ Kaufman 692.

considered whether his power of appointment carried with it the power of removal, leading to the argument that since the Senate shared the one it should participate in the other.¹³⁵ The remarks upon which Judge Kaufman relies are admittedly "somewhat tangential to the issue debated." The focus of the debate was on removal by the President of his subordinates, not on the exclusivity of impeachment of judges. Kaufman defends these remarks because they are "unambiguous."¹³⁶ A dictum is not the less a dictum because stated "unambiguously"; and as Chief Justice Marshall held, dicta "ought not to control the judgment in a subsequent suit when the very point is presented for decision . . . [because] their possible bearing on all other cases is seldom completely investigated."¹³⁷ Speaking on behalf of the President's removal power, "Madison . . . stated that impeachment could not be the exclusive means for removing subordinate officers, but added that this 'might be the case' 'as applied to Judges.'"¹³⁸ Opponents were asking whether the *President* could also remove judges, and the thrust of the debate is disclosed by the reply of Roger Sherman, a Framer: "the power *which appoints* can also remove, unless there are express exceptions made. Now the power *which appoints* the judges cannot displace them, because there is a constitutional restriction [good behavior] in their favor."¹³⁹ Michael Stone chimed in that good behavior limited "the exercise of the power *which appoints*. It is thus in the case of the judges."¹⁴⁰ It is in this context that one must read the remark by Abraham Baldwin: "The judges are appointed by the President but they are removable only by impeachment The President has no agency in the removal."¹⁴¹ Elias Boudinot, the erstwhile President of the Continental Congress, was closer to the mark in the First Congress: "it is nowhere said that officers shall never be removed *but* by impeachment; but it says they shall be

¹³⁵ The "removal" debate is discussed in R. BERGER, *CONGRESS V. THE SUPREME COURT* 146-49 (1969).

¹³⁶ Kaufman 702 n.126.

¹³⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

¹³⁸ Kaufman 692 n.74 (emphasis added).

¹³⁹ IMPEACHMENT 149 (quoting 1 ANNALS OF CONG. 510 (Gales & Seaton eds. 1789) (print bearing running title "History of Congress")) (emphasis added).

¹⁴⁰ *Id.* (quoting 1 ANNALS OF CONG. 512 (Gales & Seaton eds. 1789) (print bearing running title "History of Congress")) (emphasis added).

¹⁴¹ 1 ANNALS OF CONG. 557 (Gales & Seaton eds. 1789) (print bearing running title "History of Congress"). See Kaufman 702 n.126.

removed on impeachment."¹⁴² It is not a little remarkable that Judge Kaufman, who dismisses the pertinent demands of Justices Archer, Walter, and of Denman on behalf of Justice Barrington, for judicial trial because they sought to avoid a legislative proceeding, should here pitch his case on sheer dicta.

Such dicta were ignored by the First Congress when it was confronted by an actual case, and by its *action* repudiated the several suggestions that impeachment was exclusive. In the Act of 1790 the First Congress provided that upon conviction in court for bribery a judge shall "forever be disqualified to hold any office."¹⁴³ Since the impeachment clause provides for removal and *disqualification* upon impeachment and conviction, as Judge Kaufman recognizes,¹⁴⁴ the Act is unconstitutional if the clause indeed provides the "exclusive" method of disqualification. The First Congress, in which sat many Framers and Ratifiers, is scarcely to be charged with misconstruing the Constitution. Hence the 1790 statute must be recognized as a weighty construction that the impeachment clause does not provide the "only" means for the disqualification of judges. As with "disqualification," so with "removal," for the two stand on a par in the impeachment clause. What the First Congress did when it had to deal with the "disqualification" of judges thus speaks against reliance upon some earlier utterances by its members when the removal of judges was not involved. To dispose of the 1790 Act Judge Kaufman resorts to a truly marvelous argument: the bribery provision was "a brief portion of a long statute" and "there was *no mention* in either House of the bribery penalties. . . ." ¹⁴⁵ Thus silence in the debates about an express statutory provision deprives it of effect, an original contribution to the uses of legislative history!

¹⁴² IMPEACHMENT 138 n.73 (quoting I ANNALS OF CONG. 486-87 (Gales & Seaton eds. 1789) (print bearing running title "History of Congress")) (emphasis added).

¹⁴³ *Id.* at 150 (quoting An Act for the Punishment of certain Crimes against the United States, ch. 9, § 21, 1 Stat. 117 (1790)).

¹⁴⁴ Kaufman 693.

¹⁴⁵ *Id.* at 702 n.127 (emphasis added). Judge Kaufman also relies on *Burton v. United States*, 202 U.S. 344, 369-70 (1906), which considered a statute rendering a senator convicted of taking a bribe "forever hereafter incapable" of holding any office under the United States. "The statute, the court said, did not of its own force remove Burton from office, for that remained the sole prerogative of the Senate under Article I, § 5." Kaufman 693 n.75. This had no reference to impeachment under Article II, § 4, but to the powers of each House to judge the "qualifications of its own members"; only the Senate could "expel its members." Moreover, the Court held, Senators are "chosen by state legislature, and cannot properly be said to hold their places 'under the Government of the United States,'" which cannot be said of federal judges.

For Judge Kaufman "the explanation [in 1802] by Gouverneur Morris erases doubt that impeachment was the intended remedy:

'Misbehaviour is not a term known in our law; the idea is expressed by the word misdemeanor; which word is in the clause respecting impeachments. Taking, therefore, the two together, and speaking plain old English, the Constitution says: "The judges shall hold their offices so long as they demean themselves well; but if they shall misdemeanor, if they shall, on impeachment, be convicted of misdemeanor, they shall be removed."' ¹⁴⁶

To my comment that "Morris was incorrect in claiming that the term misbehavior was unknown to the American law, because two of the early state constitutions expressly made misbehavior triable"—let alone that Article III refers not to "misbehaviour" but to "good behavior," a common law term of established meaning—Judge Kaufman responds that this is irrelevant.¹⁴⁷ Yet those state constitutions were before the Convention; Morris' remark was made 15 years later. Judge Kaufman maintains, however, that Morris was "the most important member of the Committee on Style and Revision," and that he was therefore best "qualified to *define* precisely the *meaning*" of the constitutional terms.¹⁴⁸ But he was not entitled to define the meaning of those terms long after the Convention completed its labors, when his "revision" could no longer be submitted for its approval.

The "Committee of Style," as its name suggests, was appointed "to revise the *style* of and arrange the articles *agreed* to by the House,"¹⁴⁹ not by defining to make changes of substance. Can Morris' mistaken and after-the-fact "revision," for instance, alter the meaning of "high crimes and misdemeanors" as he purports to do? "High crimes and misdemeanors," as I have shown, meant

¹⁴⁶ Kaufman 701 (citation omitted) (emphasis added). "Misdemean" and "misbehave" were sometimes interchangeable terms—identified for purpose of "good behavior"—but it does not follow that "misbehavior" was equated with "misdemeanor"; rather "misbehave" and "misdemean" illustrate the familiar fact that the same word may have different meanings in different contexts. See IMPEACHMENT 161; text accompanying notes 150-52 *infra*.

¹⁴⁷ Kaufman 701.

¹⁴⁸ *Id.* (emphasis added).

¹⁴⁹ 2 M. FARRAND, *supra* note 44 at 547 (emphasis added). In April 1831, Madison wrote that "the *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris." C. VAN DOREN, *THE GREAT REHEARSAL* 160 (1948) (emphasis in original). See Berger, *supra* note 135, at 220-21.

"and High Misdemeanors," a term peculiar to impeachment,¹⁵⁰ meaning political crimes against the State as distinguished from "misdemeanors" which appeared long after in criminal law to identify private wrongs.¹⁵¹ "High Misdemeanors" were never confused with "misdemeanors" in English law, and but for a few statutes directed at political crimes, the term found no place in American criminal law.¹⁵² The terms were chosen by the Framers precisely because they were not "so vague" as "maladministration" and had a limited, technical meaning.¹⁵³ Judge Kaufman would make impeachment turn on commission of a crime, exactly as Richard Nixon sought to do. True it is that the Framers did not ascribe "a well-defined technical meaning to the standard 'good behavior,'" ¹⁵⁴ but neither did they do so with "*habeas corpus*" and other common law terms. But they recognized that "treason," "*ex post facto*" had technical meanings; in another context the Convention struck out the word "high misdemeanor", "it being doubtful whether 'high misdemeanor' had not a technical meaning too limited . . ." ¹⁵⁵ No occasion arose similarly to underscore the technical meaning of "good behavior." Now, through the medium of Morris' muddled remarks, Judge Kaufman would empty the Framers' reliance on technical terms.

A far better understanding of textual differentiation was exhibited in the same year, 1802, by Senator David Stone: Judges, he declared,

doubtless shall, (as against the President's power to retain them in office,) . . . be removed from office by impeachment and conviction; but it does not follow that they might not be removed by other means. They shall hold their offices during good behaviour, and they shall be removed from office upon impeachment and conviction of treason, bribery, and other high crimes and misdemeanors. If the words, impeachment of

¹⁵⁰ IMPEACHMENT 74 n.108.

¹⁵¹ See *id.* at 61-63.

¹⁵² See, e.g., Act of June 5, 1794, 3d Cong., 1st Sess., ch. 50, § 1, 1 Stat. 381-82 (1845) (acceptance by a citizen of a commission to serve a foreign state); Act of June 14, 1798, 5th Cong., 2d Sess., ch. 74, 1 Stat. 596 (1845) (unlawful combination to oppose measures of government); Act of Jan. 30, 1799, 5th Cong., 3d Sess., ch. 1, 1 Stat. 613 (1845) (correspondence by citizens with a foreign government in order to influence measures in dispute with the United States); Act of June 25, 1948, ch. 646, 28 U.S.C. 454 (1976) (practice of law by a judge).

¹⁵³ IMPEACHMENT 74 (citing 2 M. FARRAND, *supra* note 44, at 65, 550).

¹⁵⁴ Kaufman 701.

¹⁵⁵ IMPEACHMENT 74 (quoting 2 M. FARRAND, *supra* note 44, at 443).

high crimes and misdemeanors, be understood according to any construction of them hitherto received and established, it will be found, that although a judge, guilty of high crimes and misdemeanors, is always guilty of misbehaviour in office, yet that of the various species of misbehaviour in office, which may render it exceedingly improper that a judge should continue in office, many of them are neither treason, nor bribery, nor can they be properly dignified by the appellation of high crimes and misdemeanors; and for the impeachment of which no precedent can be found; nor would the words of the Constitution justify such impeachment.

To what source, then, shall we resort for a knowledge of what constitutes this thing, called misbehaviour in office? The Constitution, surely, did not intend that a circumstance so important as the tenure by which the judges hold their offices, should be incapable of being ascertained. Their misbehaviour certainly is not an impeachable offense; still it is the ground upon which the judges are to be removed from office. The process of impeachment, therefore, cannot be the only one by which the judges may be removed from office, under, and according to the Constitution. I take it, therefore, to be a thing undeniable, that there resides somewhere in the Government a power to declare what shall amount to misbehaviour in office, by the judges, and to remove them from office for the same, without impeachment.¹⁵⁶

My regard for the intention of the Framers is much greater than that of the activists, with whom Judge Kaufman apparently identifies himself. But it is a regard for the clearly discernible, unmistakable original intention, not for a history that is inconclusive, tangential and muddled. Inconclusive history, in my judgment, cannot overcome the Framers' choice of common law terms of settled attributes.

JUDICIAL RULE BY DIVINE RIGHT

"Independence," states Judge Kaufman, "becomes more—not less—critical as the issues faced by the courts expand."¹⁵⁷ But it is the courts that have "expanded" their jurisdiction, intruding

¹⁵⁶ 11 ANNALS OF CONG. 72-73 (1802). Stone mistakenly concluded that "[t]he Constitution does not prohibit their removal by the Legislature," (*id.* at 73), which is true enough if one seeks for an express prohibition. But impeachment is an exception from the separation of powers (*see* IMPEACHMENT 118 n.73); in other respects his analysis responds to the historical facts.

¹⁵⁷ Kaufman 682.

into legislative policymaking and undertaking constitutional revision. It is precisely this unremitting and unauthorized expansion of judicial governance that counsels us to reject the claim to "absolute" independence. For uncircumscribed power is alien to our democratic system. Apparently oblivious to the ongoing debate whether the powers exercised by the courts under the fourteenth amendment exceed its grants,¹⁵⁸ Judge Kaufman repeatedly assumes the answer. Thus, "Federal judges have been increasingly *entrusted* with basic and vital questions regarding the structure of our society and its allocation of wealth and power, ranging from the admissions policy of a California medical school . . . to governmental funding for abortions . . ." ¹⁵⁹ He acknowledges that

until modern times the most . . . controversial exercises of judicial power were negative actions limiting the scope of government. . . . In the law few decades the courts have given broad construction to affirmative personal rights and manifested an increased willingness to articulate and implement *new* ones. The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history: racial discrimination and segregation, school admissions and affirmative action, busing . . . ¹⁶⁰

This, he notes, represents a "profound evolution in the role of the judiciary."¹⁶¹ Others have called it a "revolution."¹⁶² Let a fellow activist, Professor Louis Lusky, who defends the change, describe it: "[T]he Court's new and grander conception of its own

¹⁵⁸ See *Oregon v. Mitchell*, 400 U.S. 112, 202-03 (1970) (dissenting opinion, Harlan, J.); R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975). A number of reviewers state that *GOVERNMENT BY JUDICIARY*, *supra*, raises serious questions that call for an answer. Perry, 78 *COLUM. L. REV.* 685 (1978); Kommers, *REVIEW OF POLITICS*, July 1978, at 407; Beloff, *THE TIMES* (London), *HIGHER EDUC. SUPP.* Apr. 7, 1978, II; Kay, 10 *CONN. L. REV.* 801 (1978).

¹⁵⁹ Kaufman 681 (emphasis added).

¹⁶⁰ *Id.* at 684-85 (emphasis added). Judge Kaufman recognizes that a judge "cannot reach out like a legislator to resolve pressing social issues." *Id.* at 707.

¹⁶¹ *Id.* at 688.

¹⁶² Alfred Kelly, an admirer of the Warren Court, wrote that the Court was determined "to carry through a constitutional egalitarian revolution." Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119, 158. Former Justice Abe Fortas said, "It is fascinating, although disconcerting to some, that the first and fundamental breakthrough in various categories of revolutionary progress has been made by the courts . . ." Fortas, *Equal Rights—For Whom?*, *N.Y.L.J.*, Apr. 5, 1967, at 4. Where is the warrant for a "revolution" by judges?

place in the governmental scheme" rests on "two basic shifts in its approach to constitutional adjudication"—"assertion of power to revise the Constitution, *bypassing the cumbersome amendment procedure* prescribed by Article V," and "*repudiation of the limits on judicial review that are implicit in the orthodox doctrine of Marbury v. Madison (1803)*,"¹⁶³ and, it may be added, are explicit in the constitutional history. In less enthusiastic terms, Professor Philip Kurland wrote that this change in judicial function presents "the most immediate constitutional crisis of our present time, the usurpation by the judiciary of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment."¹⁶⁴

Notwithstanding, Judge Kaufman refers to the judiciary as "the least dangerous branch," quoting Hamilton,¹⁶⁵ and overlooks Hamilton's assurance to the Ratifiers that of the three branches "the judiciary is next to nothing."¹⁶⁶ For Hamilton's view of the judicial role was far removed from the new and grand activist vision, as can speedily be made plain by his own words. (1) "The judiciary . . . can take no active resolution whatever. It may be truly said to have neither FORCE nor WILL, but merely judgment,"¹⁶⁷ that is, it cannot *initiate* policy. (2) "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers," which speaks against the assumption of such powers by the judiciary.¹⁶⁸ (3) The courts may not "on the pretense of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature,"¹⁶⁹ much less substitute their own "pleasure" for the policy choices of the Framers, as the Supreme Court has done with respect to desegregation and reapportionment. (4) "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . ."¹⁷⁰ (5) And to make his meaning clear, Hamilton assured the Ratifiers that the judges could be impeached for "deliberate usurpations on the authority of the legis-

¹⁶³ Lusky, "Government by Judiciary": *What Price Legitimacy*, 6 HASTINGS CONST. L.Q. 403, 406, 408 (1979) (emphasis added).

¹⁶⁴ Letter from Philip Kurland to Harvard University Press (Aug. 15, 1977) (on file at *Cornell Law Review*).

¹⁶⁵ Kaufman 684.

¹⁶⁶ THE FEDERALIST No. 78 (A. Hamilton), at 504 n.* (Mod. Lib. ed. 1937) (quoting 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, at 185 (Philadelphia 1802)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 504 (quoting 1 MONTESQUIEU, *supra* note 166 at 181).

¹⁶⁹ *Id.* at 507.

¹⁷⁰ *Id.* at 510.

lature."¹⁷¹ So confined, the judiciary was indeed "the least dangerous branch," but that is poles apart from the judiciary of today as portrayed by Judge Kaufman. He tells us that the judiciary has been "increasingly entrusted" with essentially political questions, but not *who* "entrusted" them with these decisions. In truth these "new" powers have been self-conferred.

Judge Kaufman observes that "as the judiciary more frequently *assumes* functions ordinarily associated with the representative branches and bases its decisions on the same [legislative] criteria used by those divisions, it is a natural tendency to treat and think of judges as political officials."¹⁷² That natural tendency is not a whit diminished because in judicial eyes the "role continues to be a judicial one."¹⁷³ Judges must be judged by what they do, not by what they conceive their role to be. Inevitably, to borrow from him, as courts "become involved in issues with profound political repercussions, [people believe] they should be held politically accountable."¹⁷⁴ This he views as "dangerous," but his distinguished predecessor, Judge Learned Hand, impliedly held to the contrary: "If we do need a third [legislative] chamber it should appear for what it is, and not as the interpreter of inscrutable principles."¹⁷⁵ Increasing assumption of legislative-political functions calls for greater, not less, accountability.

"Implicit in the system of government [the Framers] designed," Alpheus T. Mason wrote, "is the basic premise that unchecked power in any hands whatsoever is intolerable."¹⁷⁶ With Charles McIlwain, I would urge that the "two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary [ungranted] power and a complete political responsibility of government to the governed."¹⁷⁷ If judges are to *govern*, as they are increasingly doing, they must be politically responsible.¹⁷⁸ Judge Kaufman, however,

¹⁷¹ *Id.* No. 81 (A. Hamilton), at 526-27.

¹⁷² Kaufman 687 (emphasis added).

¹⁷³ *Id.* at 688.

¹⁷⁴ *Id.* at 681.

¹⁷⁵ L. HAND, *THE BILL OF RIGHTS* 70 (1958). Hand rejected rule by nine "Platonic Guardians." *Id.* at 73. J.H. Ely observes that "our society did not make the constitutional decision to move to near-universal suffrage only to turn around and have superimposed on popular decisions the values of the first-rate lawyers," *i.e.*, judges. Ely, *Foreword: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 5, 38 (1979).

¹⁷⁶ Mason, *Myth and Reality in Supreme Court Decisions*, 48 *VA. L. REV.* 1385, 1405 (1962).

¹⁷⁷ C. MCLWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 149 (1940).

¹⁷⁸ "[J]udicial review of legislation inevitably involves the courts in issues heavily freighted with policy and political considerations and so makes the idea that judges should be

is outraged because a California judge was "defeated in his bid for reelection shortly after he ordered busing to desegregate the Los Angeles public school system . . ." ¹⁷⁹ Busing has encountered widespread, stubborn resistance, and since it is designed to reduce segregation it is in violation of the fourteenth amendment which excluded federal interference with segregation. ¹⁸⁰ The people are entitled to insist on self-government except in so far as it is limited by the Constitution; and the defeat of the California judge by the people manifested the will of the voters to govern themselves. That busing may seem desirable to a judge is not dispositive if the power to command it was withheld.

A last word about the alleged threat removal by judges poses to judicial independence: where Judge Kaufman regards it as an irrefutable postulate, practical experience has shown that such removal proceedings have little or no impact on judicial independence. Thirty-five to forty states have such removal procedures, and there is no evidence that the administration of justice has thereby been impaired. To the contrary, a pioneer state, California, considers that such procedures "can [raise] the caliber of the judiciary, while concomitantly increasing the confidence of the public in the whole judicial structure." ¹⁸¹ A past president of the American Bar Association, Robert W. Meserve, who studied the state practice, reminds us of Justice Brandeis' words that the states are the laboratories of experimentation, and that "with substantial unanimity" they have reached the conclusion that this is "a desirable way to approach the rare problem of the judge who needs to be removed or retired. . . ." ¹⁸² That practice rebuts Judge Kaufman's assumption that "all conceptions of judicial hierarchy would be toppled if the tenure of any judge could be ended by any other judge issuing a writ," ¹⁸³ a distorted version of the

politically responsible more plausible than it would otherwise be." Jones, *The Common Law in the United States*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 116 (1976).

¹⁷⁹ Kaufman 683 n.14.

¹⁸⁰ Nathanson, Book Review, 56 TEX. L. REV. 579, 580-81 (1978). Brown v. Board of Educ., 347 U.S. 483 (1954), an activist tells us, was decided by "a badly splintered Court. Discontent lurked behind the facade of unanimity, symbolizing a nation that outwardly was all for racial decency but inwardly was not." Since then, he writes, "the principle of racial equality has simply not been fully accepted by the American people. The formal law of the Constitution [what the Justices say it is] says one thing, the 'living' law of the *zeitgeist* another. In the final analysis it is the *zeitgeist* that controls. . . ." Miller, *Brown's 25th: A Silver Lining Tarnished With Time*, 3 DIST. LAW. 21, 25, 26 (1979).

¹⁸¹ Hearings, *supra* note 33, at 123 (statement of Jack E. Frankel, Executive Officer, California Commission on Judicial Qualifications).

¹⁸² *Id.* at 156.

¹⁸³ Kaufman 695.

country-wide panel of judges proposed by the bill he assaults. No reports of “toppling” state hierarchies have come from the forty states. Since the “delicate balance of collegiality and individualism” is no more “necessary to the work of the federal bench”¹⁸⁴ than to that of the states, “absolute” independence is patently not a *sine qua non* of impartial adjudication.

It remains to emphasize that the proposed judicial removal procedure is not designed to curtail independence, “absolute” or not, for it is not intended to deal with the judicial takeover of large-scale policymaking, but rather with judicial misconduct, criminal or otherwise, when it affects the functioning of the courts.

¹⁸⁴ *Id.* at 710.