

Removal and Discipline of Federal Judges

INTRODUCTION

On July 12, 1979, the Committee on the Judiciary of the U.S. House of Representatives heard testimony on several bills to establish a court with the power to remove federal judges without impeachment proceedings. The statements of two senators appeared to have convinced the Committee of the constitutionality of the proposals when Professor Monroe Freedman began speaking. The significant impact of his words manifested itself in the resulting bills, none of which contained any removal provisions at all. The following is the text of that testimony.

Monroe H. Freedman*

Mr. Chairman:

Thank you for inviting me to testify on behalf of the American Civil Liberties Union regarding proposals affecting judicial tenure.

The American Civil Liberties Union opposes the pending legislation, which would provide for removal or other discipline of federal judges by any means other than impeachment. ACLU shares the view of those who founded our system of government that the independence of the judges is essential to ensure "inflexible and uniform adherence to the rights of the Constitution, and of individuals. . . ." ¹ Toward that end, the framers of the Constitution sought to establish virtual "permanency in office" and "permanent tenure" for the federal judges.²

As Alexander Hamilton explained, there was a single constitutional provision for dealing with a lack of "responsibility" on the part of individual judges.

The precautions for their responsibility *are comprised in the article respecting impeachments*. They are liable to be impeached for misconduct by the House of Representatives, and tried by the Senate; and, if con-

* Professor of Law and former Dean, Hofstra University School of Law. Harvard University (A.B., 1951); (LL.B., 1954); (LL.M., 1956). Member of the State Bars of New York, Massachusetts, Pennsylvania, and the District of Columbia.

1. THE FEDERALIST No. 78 (A. Hamilton) 502, 508-510 (Mod. Lib. ed. 1937).
2. THE FEDERALIST No. 79 (A. Hamilton) 512, 513 (Mod. Lib. ed. 1937).

victed, may be dismissed from office, and disqualified for holding any other. *This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.*³

The same proposition has been stated unequivocally by eminent authorities from that time forward.⁴ James Madison said: "The judges are to be removed only on impeachment, and conviction before Congress."⁵ Thomas Jefferson first supported life tenure for judges so that they should not be dependent upon any man or body of men, but he then sponsored the impeachment attacks against Federalist judges and sought constitutional amendment to eliminate life tenure—thereby reaffirming in the most emphatic way his understanding of the relevant constitutional provisions.⁶ After a century of experience with the Constitution, Lord Bryce concluded that, "[t]he Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary,"⁷ and accordingly, "impeachment is the only means by which a Federal judge can be got rid of."⁸ More recently, the Supreme Court has described Article III courts as "presided over by judges appointed for life, subject only to removal by impeachment."⁹

In the face of those authorities, and numerous others,¹⁰ how could it be supposed that federal judges can be removed from office by means other than impeachment? As Congressman Celler observed: "It scarcely can be believed that the framers intended vesting Congress with an important power [to provide for removal other than by impeachment] and then so skillfully concealed it it could not be discovered save after 150 years."¹¹

3. *Id.* at 513-514 (emphasis added).

4. Numerous other authorities are cited in Address by Judge Irving R. Kaufman, Chilling Judicial Independence, 34th Annual Benjamin N. Cardozo Lecture (November 1, 1978), reprinted in 88 *YALE L.J.* 681 (1979). Ervin, *Separation of Powers: Judicial Independence*, 35 *L. & CONTEMP. PROB.* 108 (1970); Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 *SUP. CT. REV.* 135; Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 *U. CHI. L. REV.* 665 (1969); Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary*, in *SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL* (G. Winters, ed. 1973); W. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* (1918); B. BAILYN, *PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776* (1965).

5. Quoted by Rep. Rutledge in 11 *ANNALS OF CONG.* 738 (1802); Kaufman, *supra* note 4, at 32 & n.111.

6. Kurland, *supra* note 4, at 694-695.

7. 1 J. BRYCE, *THE AMERICAN COMMONWEALTH* 268 (2d ed. 1891).

8. *Id.* at 107, 226.

9. *United States v. Quarles*, 350 U.S. 11, 16 (1955); *See also* *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

10. *See* note 4 *supra*.

11. 81 *CONG. REC.* 6171 (1937); Kurland, *supra* note 4, at 691 n.63. The reference is to Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities*

Professor Raoul Berger (the principal academic opponent of judicial life tenure) has retorted that the framers' true intention was concealed "only from those who did not pause to turn the pages of history"¹² and ask the right questions—a category that includes, as we have seen, Hamilton, Madison, Jefferson, and others who participated in drafting and explaining the Constitution before "the accumulated dust of generations"¹³ had settled upon it to confound understanding.

Like other critics of judicial life tenure,¹⁴ Professor Berger begins his argument by pointing to the awkwardness of impeachment as a method of removal.¹⁵ In short, he argues that impeachment is not the exclusive removal procedure because it is so clumsy that, in his view, it should not be the only means of ousting a venal judge. But that, of course, is precisely the point. The framers quite consciously and explicitly sought to assure an independent judiciary by making judges removable only by the extremely difficult process of impeachment. As Hamilton expressed it, the purpose was thus to provide "permanency in office" and "permanent tenure" for federal judges.¹⁶ Therefore, to protest, as Professor Berger does, that impeachment is not a very efficient means for removing a judge from office, is simply to confirm that the framers' purpose has been achieved.

Professor Berger's principal contention, however, derives from the fact that there are two relevant clauses in the Constitution which use different phrases to express the standard for judicial tenure. Article II, section 4, provides for impeachment of all civil officers of the United States for treason, bribery, or other "high crimes and misdemeanors."¹⁷ Article III, section 1, provides that the judges shall hold their offices "during good behavior."¹⁸ Thus, Professor Berger argues that the "good behavior" standard is broader than the "high crimes and misdemeanor" standard,¹⁹ and therefore, that impeachment is not the exclusive procedure for removal.

I understand everything except the "therefore." That is, even if there are two *standards* for removal, it does not follow that there cannot be an exclusive *procedure* for removal. Put otherwise, assuming that Professor

under the Constitution, 28 MICH. L. REV. 870 (1930).

12. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 179 (1973).

13. *Id.* at 178.

14. Shartel, *supra* note 11.

15. BERGER, *supra* note 12, at 122-123. Illustrative of Professor Berger's misleading selectivity in the use of authorities is his quote from Bryce on the clumsiness of impeachment, and his subsequent failure to note both Bryce's approval of life-tenure as an essential safeguard of judicial independence and his conclusion that impeachment is the exclusive constitutional procedure for removal. See notes 7 & 8 *supra*.

16. See note 2 *supra*.

17. U.S. CONST. art. II, § 4.

18. U.S. CONST. art. III, § 1.

19. BERGER, *supra* note 12, at 125.

Berger is correct in his inference of a double standard of judicial removal, the Constitution appears to say simply that all civil officers can be impeached for high crimes and misdemeanors, and that judges also can be impeached for lack of good behavior. It is a *non sequitur* when Professor Berger says: "When the Framers employed "good behavior," a common law term of ascertainable meaning, with no indication that they were employing it in a new and different sense, *it might be presumed that they implicitly adopted the judicial enforcement machinery that traditionally went with it.*"²⁰ Professor Berger's conclusion, therefore, is a mere presumption, dangling from a "might" and tied tenuously to an "implicitly."

More importantly, there is solid historical evidence that the framers used the phrase "good behavior" in a special sense, without intending to broaden the standard of high crimes and misdemeanors, and without intending to carry with it any "judicial enforcement machinery" other than impeachment. First, the framers never said that they had adopted any other procedure. Second, on the contrary, they expressly provided for only one procedure and repeatedly explained that only one was intended.

In addition to the previously quoted statements, consider the observation of Gouverneur Morris, the most important member of the Committee of Style and Revision of the Constitutional Convention:²¹

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 misdemean, if they shall, on impeachment, be convicted of misdemeanor, they shall be removed."²²

Similarly, Bryce defined good behavior as synonymous with impeachment: "[The justices] hold office during good behavior, i.e., they are removable only by impeachment."²³

Finally, Professor Berger suggests that Hamilton conceded the propriety of removal, in cases of insanity, by means other than impeachment.²⁴ Again, Professor Berger is demonstrably wrong. This is what Hamilton said:

20. *Id.* at 131 (emphasis added).

21. He is so characterized by Ziskind, *supra* note 4, at 150.

22. 11 ANNALS OF CONG. 90 (1802). Professor Berger replies that Morris was wrong because "misbehavior" was used in two colonial constitutions. Surely, however, Morris' understanding—or even misunderstanding—of the words he used is more significant than Professor Berger's emendation. And again, apart from the standard to be applied, Morris is clear that the sole procedure intended by the framers is impeachment.

23. BRYCE, *supra* note 7, at 226.

24. BERGER, *supra* note 12, at 139. Once again, the contenton rests upon an unfounded "presumably." In this instance, Dr. Ziskind shares Professor Berger's misreading. See Ziskind, *supra* note 4, at 152.

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.²⁵

A careful reading of that important passage shows that the Constitution had been attacked in 1788 by those who believed, as Professor Berger does, that there should be a provision for removing judges for "inability," as distinguished from impeachment for malconduct. Significantly, Hamilton did not respond, as Professor Berger would have wanted, by saying that Congress has the power to provide for judicial removal of judges for disability under the necessary and proper clause.²⁶ On the contrary, Hamilton met the criticism head-on by defending the lack of an alternate procedure in cases of disability. He gave two reasons: 1) The line between ability and inability cannot be drawn; and 2) The opportunity to draw such a line more frequently would give scope to partisanship than it would advance the interests of justice or the public good.

Accordingly, Hamilton explained, the result of a decision based upon disability would, for the most part, be arbitrary. Concededly, he added, that decision would not be arbitrary in the case of insanity, the extreme form of disability, but those cases simply are not going to arise often enough to justify an alternative to impeachment for malconduct as the exclusive removal procedure. Insanity, after all, is a "virtual disqualification;" literally, it is not a ground for disqualification, but for practical purposes it is not going to happen with any significant frequency.

Other prominent scholars share this reading. Explaining in his *Commentaries* why judges are not constitutionally removable other than by impeachment for malconduct, Justice Story repeated almost verbatim Hamilton's argument quoted above. However, Story paraphrased the last clause of Hamilton's argument to read: "and instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision."²⁷

Thus, even the problem of insanity of a judge, though such a determi-

25. THE FEDERALIST No. 79 (A. Hamilton) 512, 519 (Mod. Lib. ed. 1937).

26. U.S. CONST. art. I, § 8, cl. 18. See BERGER, *supra* note 12, at 179-80.

27. III J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1619 (5th ed. 1891).

nation could be made without arbitrariness, is not sufficiently serious to have justified alternative constitutional standards or procedures for judicial removal. The threat to judicial independence was deemed too great.

One might well conclude that the text of the Constitution and the explanations of the framers are so clear that any argument based upon policy is superfluous. Indeed, a major concern of the American Civil Liberties Union is that the integrity of the constitutional language and structure be respected. That policy, in itself, is sufficient ground to oppose the proposed legislation. The policy of judicial independence, however, and its inevitable relationship to civil rights and liberties, cannot be overstressed. It was the expressly reiterated purpose of the framers, and it is of paramount concern to the ACLU. As Professor Kurland has observed: "When dealing with so fundamental and so fragile a notion as the independence of the judiciary, one ought to tread warily lest the ultimate cost far outweigh the immediate gains."²⁸

Moreover, there is good reason to believe that any novel and more relaxed removal power would be directed against those judges who are most zealous in safeguarding the rights and liberties of unpopular minorities and individuals. Judges in New York who regularly violate the constitutional rights of citizens accused of crimes are reappointed without difficulty, but one who takes those constitutional rights seriously has been threatened by the mayor with nonreappointment. As Justice Douglas has testified from personal experience, retaliation against the more libertarian judge is not "a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren." As a result, "the nonconformist has suffered greatly at the hands of his fellow judges."²⁹ On the other hand, judges who have joined in hysterical antiradicalism, or who have fought against civil rights and liberties, have been rewarded with judicial appointments and promotions to higher office.

Finally, Chief Judge Irving Kaufman of the Second Circuit has given two additional policy reasons against looser removal standards and procedures: 1) Judges would be exposed to harassment through complaints by disgruntled litigants;³⁰ and 2) "Disciplinary schemes pitting judge against judge . . . would also disrupt the sense of community so essential to the functioning of the courts."³¹

Then is there no judicial accountability? Are there no checks on the insane judge, the corrupt judge, or the incompetent one? Of course, there

28. Kurland, *supra* note 4, at 666.

29. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 129, 137 (1970) (Douglas, J., dissenting).

30. Kaufman, *supra* note 4, at 48.

31. *Id.* at 716.

are. One, obviously, is impeachment. Another check is even closer to home, that is more care and conscientiousness in the appointment process. Ironically, the members of the Senate who support looser removal procedures have themselves helped to create the problem they now decry—either by their own selections or by their tolerance, through “senatorial courtesy,” of the irresponsible selections of their colleagues. Another check, within the judiciary, is appellate review.

Yet another check on the judiciary is the right of freedom of speech and press. Recently, for example, the *New York Times* gave prominent front-page coverage to the severe appellate criticism of two trial court judges who had abused the powers of their office.³² Such public condemnation cannot be ineffective.³³

For those reasons, Mr. Chairman, the American Civil Liberties Union opposes the proposals before this Committee to remove or to discipline federal judges by procedures other than impeachment.

32. N.Y. Times, July 11, 1979, § 1, at 1, col. 1.

33. The attitude of the established bar to criticism of judges is illustrated by the Code of Professional Responsibility, in which lawyers are required to volunteer unprivileged knowledge of another lawyer's misconduct, but must reveal knowledge of judicial misconduct only upon the request of an official body. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103.

