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THE INDEPENDENCE OF THE JUDICIARY UNDER THE CONSTITUTION OF 1787*

William F. Fratcher**

On Tuesday, November 18, 1760, King George III opened the first Parliament of his reign. In his speech from the throne the King said that he looked "upon the Independence and Uprightness of Judges as essential to the impartial Administration of Justice, as one of the best Securities of the Rights and Liberties of his loving Subjects, and as most conducive to the Honour of his Crown."¹

On this point all of the Framers of the Constitution of 1787 agreed with their former sovereign. George Washington wrote, "[t]he Judiciary System should not only be independent in its operations, but as perfect as possible in its formation."² In *The Federalist* No. 47 James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."³ In *Nos.*

* An address delivered at the annual meeting of the Missouri Bar in Kansas City on the two hundredth anniversary of the signing of the Constitution of the United States, September 17, 1987. Revised October 1, 1987. Copyright © 1987, William F. Fratcher.

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1. Stat. 1 Geo. III, c. 23, Preamble (1760). The speech was probably written by the Prime Minister, William Pitt.

2. Letter of April 3, 1790, to the Chief Justice and Justices of the Supreme Court of the United States about to depart on their first circuit.

3. H. Dawson, ed., *THE FEDERALIST* No. 47 (1888) (J. Madison); *see also* Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United*

48 and 51 he urged the need for checks and balances to insure that one branch of government does not exceed its proper powers.⁴ In No. 78, Colonel Alexander Hamilton, quoting from Montesquieu, said, "there is no liberty if the powers of judging be not separated from the legislative and executive power," and added, "The complete independence of the courts of justice is peculiarly essential in a limited constitution."⁵

As Montesquieu well knew, the judiciary was not independent in France and other countries which derived their legal systems from the Roman civil law. In France a judge is a civil servant in the Ministry of Justice, appointed upon graduation from law school, whose assignments, promotions and tenure are dependent upon pleasing the Minister of Justice.⁶ Such judges are in no position to oppose the unconstitutional tyranny of a Napoleon, an Adolf Hitler, a Joseph Stalin, or a Latin American military dictator. The Framers knew this and that England offered the best model of an independent judiciary. Five members of the Constitutional Convention were English barristers, trained in the Inns of Court, and others, like John Adams, had studied the position of English judges. What they sought was the English system, with improvements designed to make it difficult for either the President or Congress to interfere with the decision of cases by the federal courts. Those of you who heard Mr. Justice White's address to the American Bar Association in San Francisco last August will recall that he thinks that the Framers were right in seeking such judicial independence and used proper methods to attain it.

King John agreed in Magna Carta in 1215 that he would appoint as justices "only such men as know the law of the realm and mean to observe it well."⁷ This promise was kept by his eighteenth century successors by appointing as judges of the superior courts only lawyers with long and successful experience in practice who had become serjeants at law.⁸ This meant that dismissal from his judicial position was not an economic disaster for a judge because he could make a good living in practice. In consequence, a threat of dismissal was less likely to influence an English judge than it would be in the case of a French judge, who has had no experience as a practising lawyer. No doubt the Framers intended to continue the English rule of appointing judges from among experienced practising lawyers. This was the practice in all of the states. It was unnecessary to put it into the Constitution.

States?, 10 U. PUGET SOUND L. REV. 351, 360 (1987); Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986); Blakesley, *An Essay on Executive Branch Attempts to Eviscerate the Separation of Powers*, 1987 UTAH L. REV. 451.

4. THE FEDERALIST Nos. 48, 51 (J. Madison).

5. THE FEDERALIST No. 78, at 540 (A. Hamilton).

6. SAWER, *Legal Profession*, 10 ENCYCLOPAEDIA BRITANNICA 779, 780-83 (15th ed. 1974).

7. Magna Carta, ch. 45.

8. J. BAKER, *THE ORDER OF SERJEANTS AT LAW* 113 (1984); Sawyer, *supra* note 6, at 780. There were only fourteen practising serjeants at law in 1775 but the King could appoint a senior barrister serjeant in order to qualify him for a judgeship.

The Virginia Plan, presented to the Constitutional Convention on May 29, 1787, by Edmund Randolph, Governor of Virginia and former aide de camp to General Washington, provided that judges should be chosen by Congress, to hold office during good behavior and that their compensation should not be increased or diminished while they held office.⁹ The New Jersey Plan, presented on June 15 by William Paterson, provided that judges should be appointed by the President, with the same tenure and compensation provisions as the Virginia Plan.¹⁰ Benjamin Franklin opposed appointment by the President alone, saying that experience showed that caprice and the intrigues of favorites and mistresses were the means most prevalent in monarchies. On May 29 he suggested that the judges be chosen by the lawyers "who always selected the ablest of the profession, in order to get rid of him, and share his practice among themselves." James Madison favored appointment by the Senate. Tenure during good behavior and no change in compensation were agreed to on May 29 and appointment by the Senate was accepted on June 13.¹¹ On July 18 Gouverneur Morris, with the support of Benjamin Franklin, moved to delete the prohibition on increase in judges' salaries so that they could be adjusted to meet inflation. His motion carried.¹² On July 18 also Nathaniel Gorham suggested that the appointment of judges by the executive, by and with the advice and consent of the Senate, worked well in Massachusetts.¹³ Some of the Framers may have known that the Instrument of Government of 1653 and the draft English Constitution of 1655 provided that the chancellor and the senior judges should be appointed by the Lord Protector [then Oliver Cromwell] with the approbation of Parliament.¹⁴ At any rate, the Convention adopted on September 7 and 17, the provisions of Articles II and III that judges are to be appointed by the President, by and with the advice and consent of the Senate, to hold office during good behavior and to receive compensation which shall not be diminished.¹⁵

An English statute enacted in 1328 provided that the King should not disturb or delay common right by commands to the judges and that, if he did so, "the justices shall not therefore leave to do Right in any Point."¹⁶ In 1616

9. A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 30 (1941).

10. *Id.* at 54.

11. *Id.* at 640, 659-61; S. PADOVER, THE GREAT DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1787, ARRANGED ACCORDING TO TOPICS 400, 407-09 (1970). These provisions were designed to prevent the evils described in the Declaration of Independence, which asserted that King George III "has made judges dependent on his Will alone for the Tenure of their offices, and the Amount and payment of their Salaries."

12. A. PRESCOTT, *supra* note 9, at 664-65.

13. *Id.* at 661.

14. S. GARDINER, CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 416, 443 (3d ed. 1906).

15. A. PRESCOTT, *supra* note 9, at 671-72; T. NORTON, THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION 133 (1922); U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 1.

16. Stat. 2 Edw. III, c. 8 (1328). Stat. 18 Edw. III, Stat. 4 (1344), required the

King James I summarily dismissed Sir Edward Coke as Lord Chief Justice of England for refusal to obey the King's order to delay a case involving the King's authorizing a bishop to hold several lucrative church positions at the same time.¹⁷ This case might have produced revelations embarrassing to the King. The King's dismissal of Coke to prevent public notoriety of the questionable conduct of the King calls to mind the Saturday Night Massacre of October 20, 1973, when Attorney General Elliot Richardson and Deputy Attorney General William D. Ruckelshaus resigned to avoid complying with President Nixon's order to fire Watergate Special Prosecutor Archibald Cox. The Framers did not put the 1328 statute into the Constitution but they did see to it that federal judges could not be summarily dismissed by presidents who did not like their legal views, feared their investigation into presidential behavior, or merely wanted to make partisan appointments to the bench.

Until 1689 the King usually appointed the Lord Chancellor and the justices of the courts of King's Bench and Common Pleas to serve during his pleasure. He usually appointed the barons of the Court of Exchequer to serve during good behavior. All of these judicial appointments expired on the death of the King who made them.¹⁸ The King could remove a Lord Chancellor or a justice without cause; he could remove a baron of the Exchequer with good behavior tenure only by a judicial proceeding in the common law side of the Court of Chancery on a writ of *scire facias*. This required a judicial determination of incompetence or misconduct.¹⁹ King James II abused his powers of appointment and removal of judges to serve his own political ends. James was deposed by the Glorious Revolution of 1688 and his successors, King William III and Queen Mary II, appointed justices of the common law courts to serve during good behavior.²⁰ An Act of Parliament of 1701 required this but authorized the King to remove judges upon the address of both houses of Parliament.²¹ An Act of Parliament of 1760 provided that the commissions of judges

Justices to take an oath "that ye deny to no Man common Right by the King's Letters, nor none other Man's, nor for none other Cause, and in case any Letters come to you contrary to the Law, that ye do nothing by such Letters, but certify the King thereof, and proceed to execute the Law, notwithstanding the same letters." Coke relied on the 1344 statute.

17. W. HOLDSWORTH, HISTORY OF ENGLISH LAW, at V, 439-40 (3d ed. 1945). The case is *Commendam Case*; *Colt v. Bishop of Coventry and Lichfield*, 80 Eng. Rep. 290 (1616). See also J. TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, at 175 (1961). Coke relied on the 1344 statute briefly discussed *supra* in note 16.

18. W. HOLDSWORTH, *supra* note 17, I, at 195 (7th ed. 1956).

19. W. HOLDSWORTH, *supra* note 17, V, at 351 (3d ed. 1945); W. BLACKSTONE, COMMENTARIES, III, 47; Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1480 (1970).

20. W. HOLDSWORTH, *supra* note 17, VI, at 509-14 (2d ed. 1937); 9 ENCYCLOPAEDIA BRITANNICA 542 (11th ed. 1910).

21. Stat. 12 & 13 Will. III, c. 2, § 3 (1701); Berger, *supra* note 19, at 1477; 9 ENCYCLOPAEDIA BRITANNICA 542 (11th ed. 1910); W. HOLDSWORTH, *supra* note 17, I, at 195 (7th ed. 1956); W. HOLDSWORTH, *supra* note 17, VI, at 234 (2d ed. 1937).

should remain in effect notwithstanding the death of the King who appointed them, that their salaries should continue as long as their commissions remain in force, and continued the authorization for removal by the King upon the address of both houses of Parliament.²² Probably because the Lord Chancellor is not only a judge but also presiding officer of one house of the legislature, a principal executive officer and a member of the Cabinet, he is still appointed to serve during the pleasure of the Queen and may be removed by her without cause.

The Framers of the Constitution carefully refrained from creating any judicial office like that of the Lord Chancellor, whose incumbent could be removed by the President without cause. On August 27, 1787, they defeated a motion by John Dickinson of Delaware to permit removal of judges by the President on application of both houses of Congress.²³ The debate makes it clear that this was done because they were aware that this method of removal could be on purely political grounds and that it would weaken the independence of the judiciary.

The Framers knew about the sad fate of Edward Hyde, Earl of Clarendon, a distinguished jurist and historian, who was Lord Chancellor from 1658 to 1667. Many of us knew and respected his kinsman, Laurence Mastick Hyde, Chief Justice of Missouri. Lord Chancellor Hyde seems to have advised King Charles II to get rid of his principal mistress, Barbara Villiers. Barbara contrived to get Hyde impeached for giving bad advice to the King on foreign and military affairs. The King would not protect Hyde because the Lord Chancellor had refused to help the King to get another woman for his collection. Hyde fled to France, whereupon he was condemned to perpetual exile by bill of attainder.²⁴ A bill of attainder is simply an Act of Parliament imposing a punishment, which may include removal from office, imprisonment or death, without conviction of any crime whatever. On August 22, 1787, Elbridge Gerry of Massachusetts and James McHenry of Maryland moved to insert in the Constitution a provision that no bill of attainder or *ex post facto* law shall be passed. The motion carried on September 12.²⁵

Hanging is an effective method of removing a judge from office. The Framers knew about the attempt to end in this manner the career of Anthony Ashley Cooper, Earl of Shaftesbury, an able lawyer who drafted and pushed through Parliament the Habeas Corpus Act and became Lord Chancellor in 1672. English law then required indictment by a grand jury prior to trial for a capital offense. Cooper angered the King by expressing reservations about the

22. Stat. 1 Geo. III, c. 23, §§ 1, 3 (1760); W. HOLDSWORTH, *supra* note 17, I, at 195 (7th ed. 1956).

23. A. PRESCOTT, *supra* note 9, at 669-70.

24. J. CAMPBELL, LIVES OF THE LORD CHANCELLORS, IV, 106-20 (4th ed. 1857); A. WRIGHT & P. SMITH, PARLIAMENT PAST AND PRESENT, II, at 428 (1901); WEBSTER'S BIOGRAPHICAL DICTIONARY 752 (1964).

25. A. PRESCOTT, *supra* note 9, at 738-39; *see also* T. NORTON, *supra* note 15, at 84; U.S. CONST. art. I, § 9, cl. 3.

divine right of kings. He was arrested for high treason but the grand jury for the County of Middlesex refused to indict.²⁶ The Framers also knew that the English definition of treason was broad enough to suggest that a mere expression of opinion proved by a single witness would be enough for conviction.²⁷ The Framers probably knew about the case of William Thorpe, Lord Chief Justice of England, who was accused in 1350 of accepting bribes of 10£ each from defendants in criminal cases to delay their trials. Chief Justice Thorpe, whose annual salary was about 50£, appears to have tripled his income in this manner. King Edward III appointed an *ad hoc* commission of five members to try and sentence Thorpe. The Chief Justice confessed his guilt and the commission sentenced him to imprisonment and forfeiture of land and goods. The King then issued a writ directing the commission to sentence Thorpe to death. It did so.²⁸ Those of you who have served as judge advocates may remember the similar case of Judge Advocate General Swaim in which President Chester A. Arthur twice ordered a general court-martial to increase its sentence.²⁹ The Framers did not see fit to bar criminal prosecution of judges in the regular courts³⁰ but they narrowed the definition of treason and required two witnesses to the same overt act to convict,³¹ guaranteed the right to trial by jury of all crimes, except in cases of impeachment,³² and required an Act of Congress to create a court.³³ The Petition of Right of 1628, which King Charles I accepted with reluctance, forbade the trial of civilians by *ad hoc* military commissions.³⁴ The Framers did not include this provision in the Constitution but the Supreme Court ruled in *Ex parte Milligan*³⁵ that civilians may not be tried by

26. J. CAMPBELL, *supra* note 24, IV, at 220-27; A. WRIGHT & P. SMITH, *supra* note 24, at 433.

27. Stat. 25 Edw. III, c. 2 (1350); W. HOLDSWORTH, *supra* note 17, III, at 287-93 (5th ed. 1942); W. HOLDSWORTH, *supra* note 17, VIII, at 307-21 (2d ed. 1937).

28. E. FOSS, BIOGRAPHICAL DIRECTORY OF THE JUDGES OF ENGLAND 657 (1870); cf. J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND, I, at 90-92 (2d ed. 1858). Thorpe was not hanged. The King relented and later appointed him a baron of the Exchequer. For his salary as chief justice, see W. HOLDSWORTH, *supra* note 17, I, at 256 (7th ed. 1956).

29. Swaim v. United States, 165 U.S. 553 (1897); Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 4 MIL. L. REV. 89, 98-99 (April 1959).

30. United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); United States v. Hastings, 681 F.2d 706 (11th Cir.), *cert. denied*, 459 U.S. 1203 (1982); Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103 (1986); Annotation, *Constitutional Issues Relating to Federal Criminal Prosecution of Federal Judges*, 65 A.L.R. FED. 819 (1983).

31. A. PRESCOTT, *supra* note 9, at 742-47; U.S. CONST. art. III, § 3.

32. A. PRESCOTT, *supra* note 9, at 741-42; U.S. CONST. art. III, § 2.

33. A. PRESCOTT, *supra* note 9, at 654-58; U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

34. Stat. 3 Car. I, c. 1 (1628). Stats. 16 Car. I, cc. 10, 11 (1641) abolished the courts of Star Chamber and High Commission, which had operated like military commissions.

35. 71 U.S. (Wall.) 2 (1866); see also C. FAIRMAN, THE LAW OF MARTIAL

military commission when the civil courts are open. It is apparent, of course, that the members of a military commission, whose assignments and promotions are controlled by the President, lack the independence of judges of the federal courts.

Although the Act of Parliament of 1701 required the judges in England to be appointed to serve during good behavior, it did not extend to the colonies and colonial judges were usually appointed to serve during the King's pleasure, which meant that they could be removed summarily without cause. The King did not always grant requests from colonial legislatures that he remove a royal governor or chief justice. American lawyers knew that in England a judge or executive officer could be removed from office, without the concurrence of the King, if impeached for an offense by the House of Commons and convicted by the House of Lords. The colonial legislatures tried to do likewise in the cases of Governor John Harvey of Virginia in 1635, Chief Justice Nicholas More of Pennsylvania in 1681, Chief Justice Nicholas Trott of South Carolina in 1719, Chief Justice William Smith of North Carolina in 1738, Chief Justice Frederick Smyth of New Jersey in 1767, and, most importantly, Chief Justice Peter Oliver of Massachusetts in 1773. None of these attempts succeeded because the Privy Council ruled that the colonial legislatures did not have the impeachment powers of Parliament. John Adams, who had been active in the effort to oust Oliver, had studied the history of such proceedings in Parliament written by the great English legal historian, John Selden. Adams drafted impeachment provisions for the Massachusetts Constitution and provided drafts for those of Pennsylvania and Virginia. By 1787 eleven states had such provisions, all based on the Adams drafts, which would limit impeachment to persons holding public office and limit the punishment to removal from and disqualification for such office.³⁶

Some of the Framers remembered the impeachment trial of Lord Chancellor Thomas Parker in 1725, they had all heard of those of Lord Chief Justice William Scroggs in 1681³⁷ and Lord Chancellor Francis Bacon in 1621, and they had access to information about the trial of Lord Chief Justice Robert Tresilian in 1388. It is likely that the excesses committed in those proceedings influenced the Framers in restricting the impeachment power in the Constitution. In November, 1386, King Richard II, who was nineteen years old and a prisoner held by a group of power-hungry noblemen (who might be

RULE 38 (2d ed. 1943).

36. P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA 1635-1805*, at 10-11, 16, 21, 25, 30, 35-37, 41-44, 46-47, 49-51 (1984). Selden's book, *OF THE JUDICATURE OF PARLIAMENTS* (c. 1626), sprang from his employment by the House of Lords as adviser in connection with the impeachment trial of Lord Chancellor Francis Bacon. C. TITE, *IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND* 143, 233 (1974).

37. J. CAMPBELL, *supra* note 28, II, at 19-22; W. HOLDSWORTH, *supra* note 17, VI, at 506-07 (1937). Scroggs was charged with high treason consisting, *inter alia*, of suppressing a newspaper and punishing its editor for libel. The trial ceased when the King dissolved Parliament and dismissed Scroggs.

called the "Gang of Five"), signed an instrument transferring most of the royal powers to the Gang of Five for a year, after they had reminded him of how his great-grandfather, King Edward II, was deposed and tortured to death. At that time it was customary for the King and the House of Lords to seek advisory opinions from the judges. Richard escaped from the Gang of Five and sought an opinion from Lord Chief Justice Tresilian and five other royal judges as to the validity of the instrument that he had signed. They advised him that he was not bound by the instrument. When Parliament met in 1388 it was dominated by the Gang of Five. Tresilian was absent but the other judges were in their places, ready to advise the House of Lords. They were arrested and all six judges were charged with giving the advisory opinion to the King. The Justices, Serjeants and Advocates present advised the House that this was not an offense under either the English common law or the Roman civil law. The House of Lords, without witnesses or evidence, sentenced Tresilian to be hanged naked at what is now Marble Arch and the other five judges to exile for life in remote Irish villages.³⁸ All for giving an honest and correct legal opinion to their King. The Framers would not have wanted to encourage this parody of impeachment.

Prior to the appointment of Sir Thomas More in 1529, the Lord Chancellor was usually a bishop with a large church income. The King paid him only nominal compensation, such as robes, candles and wine.³⁹ Secular lawyers who had no church income could not maintain the standard of living expected of a Lord Chancellor, the highest secular officer under the King, without some source of funds. A custom grew up of litigants giving the Lord Chancellor "gifts," usually after their cases were decided. In 1621 the House of Commons impeached the Lord Chancellor, Francis Bacon, Viscount St. Albans, for receiving such gifts. In one instance he accepted a gift of a hundred pounds sterling before deciding the case and then decided against the donor. Bacon admitted guilt and was sentenced by the House of Lords to removal from office, disqualification for public office, banishment from the King's court, a forty thousand pound fine and imprisonment during the King's pleasure. King James I released Bacon from the Tower of London after two days, remitted the fine and banishment, and gave him a pension of twelve hundred pounds a

38. COBBETT'S STATE TRIALS, I, at 90, 113-21 (1809); D. HUME, HISTORY OF ENGLAND, II, at 9-12 (1828). The five judges exiled to Ireland were Chief Justice Robert Belknap of the Court of Common Pleas, Chief Baron John Carey of the Court of Exchequer, Mr. Justice John Lokton of the Court of King's Bench, and Justices John Holt and William Burgh of the Court of Common Pleas. The proceeding against these five was clearly an impeachment by the House of Commons. That against Tresilian was technically an appeal of treason, a type of proceeding abolished by Stat. 1 Hen. IV, c. 14 (1400). See W. HOLDSWORTH, *supra* note 17, II, at 361 (4th ed. 1936).

39. J. BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 175 (1913); W. HOLDSWORTH, *supra* note 17, V, at 218 (3d ed. 1945); D. STENTON, ENGLISH SOCIETY IN THE EARLY MIDDLE AGES 20-21, 31-33, 51-52 (1951).

year.⁴⁰

By 1700 new methods of securing income for the Lord Chancellor had been developed. He received substantial New Year's gifts from the officials of the Chancery and the lawyers practising there and he charged from five to six thousand pounds for appointment as a master in chancery. Each master managed large sums of money deposited in court or belonging to infants or lunatics. The masters were permitted to invest these funds and keep the income, thus reimbursing themselves for the amounts paid for their appointments.⁴¹ Many of you will have noted that this method of financing the judiciary resembles the I.O.T.A. scheme adopted in Florida, Missouri and other states, under which the interest on clients' funds is diverted from the clients and paid over to the state bar organization.⁴² When Lord Cowper became Lord Chancellor in 1705 he abolished the New Year's gifts. Payments for appointments as masters in chancery continued during Cowper's incumbency and after Thomas Parker, Lord Parker, became Lord Chancellor in 1718. Some of the masters seem to have exchanged government bonds, in which funds in their custody were invested, for stock in the South Sea Company. This stock rose in price from a hundred pounds a share to over a thousand before August, 1720, and dropped to nothing the next month.⁴³ Several of the masters in chancery became insolvent and one ran away. The guardian of the Dowager Duchess of Montague, a lunatic, commenced a proceeding to recover funds lost by his ward. The Prince of Wales, who had been angered by a decision of Lord Parker that the King was entitled to the custody and education of the prince's children, had one of his friends commence impeachment proceedings against Parker, now Earl of Macclesfield, for "high crimes and misdemeanors." Parker admitted receiving gifts from masters appointed by him and pleaded custom as a defense. After a thirteen-day trial, the House of Lords sentenced him to a fine of thirty thousand pounds, to be used to reimburse persons whose

40. C. TITE, *supra* note 36, at 110-17; A. WRIGHT & P. SMITH, *supra* note 24, II, at 425-26. In the twelfth century it was customary for successful litigants in the royal courts to make substantial gifts to the King, the Queen and royal officials. D. STENTON, *supra* note 39, at 38.

41. A. WRIGHT & P. SMITH, *supra* note 24, at 440 *et seq.* Stat. 5 & 6 Edw. VI, c. 16, § 1 (1552), prohibited sale of judicial offices but excluded those held in fee simple (§ 3) and those appointed by the Chief Justices of the Courts of King's Bench and Common Pleas (§ 6). W. HOLDSWORTH, *supra* note 17, I, at 246, 252, 255, 259, 262, 440 (7th ed. 1956). The Lord Chief Justice of the Court of Common Pleas controlled appointments to twenty judicial offices for which he was free to charge. Parker had been Chief Justice of the Common Pleas before he received the Great Seal and Chief Justice King of the Court of Common Pleas presided over his impeachment trial. It should be recalled that commissions in the Army were sold until the latter half of the nineteenth century.

42. Marcotte, *Big Interest in Small Change*, A.B.A. J., July 1, 1987, at 70 (discussing *Cone v. The Florida Bar*, pending in the United States Court of Appeals for the 11th Circuit).

43. *South Sea Bubble*, NEW COLUMBIA ENCYCLOPEDIA 2577 (1975); STORY OF THE BRITISH NATION, III, at 1173 (W. Hutchinson ed., c. 1916).

funds were lost by the masters, and to imprisonment in the Tower of London until the fine was paid. With the King's help, Parker raised the money in six weeks.⁴⁴ His successor and later Lord Chancellors were given higher salaries, which enabled them to maintain a suitable standard of living without gifts from litigants, lawyers or masters in chancery.

John Adams, who had studied the English precedents, provided Colonel George Mason with a draft of impeachment provisions for the Virginia Constitution.⁴⁵ When he was Governor of Virginia in 1781, Thomas Jefferson narrowly escaped impeachment for mishandling of the militia and conscription.⁴⁶ In 1783 he proposed a requirement of a two-thirds majority for conviction on impeachment.⁴⁷ The Virginia Plan, presented to the Constitutional Convention on May 29, 1787, and the New Jersey Plan, presented on June 15, called for the trial of impeachments by a federal court; Colonel Hamilton's plan, presented on June 18, would have impeachments for "mal and corrupt conduct" tried by a court consisting of all of the state chief justices who had good behavior tenure.⁴⁸ As late as August 6 the Framers contemplated trial of impeachments by the Supreme Court⁴⁹ but on August 22 they decided upon trial by the Senate.⁵⁰ On September 4 they decided that conviction should require a two-thirds majority.⁵¹ This requirement served two purposes: First, it reduced the danger of removals based on purely partisan political grounds, which James Madison and Alexander Hamilton feared.⁵² Second, in view of the equal representation of the states in the Senate, it ensured that convictions would be by the representatives of a majority of the people of the United States.

As indicated by its action in the Tresilian case,⁵³ the House of Lords treated as a ground for impeachment anything it chose. The Framers sought

44. J. CAMPBELL, *supra* note 24, VI, at 18-19, 33-50; A. WRIGHT & P. SMITH, *supra* note 24, II, at 440 *et seq.*

45. P. HOFFER & N. HULL, *supra* note 36, at 64-65.

46. *Id.* at 85.

47. *Id.* at 71-72. The New York Constitution of 1777 and the Massachusetts Constitution of 1780 required a two-thirds majority for conviction on impeachment. *Id.* at 97.

48. S. PADOVER, *supra* note 11, at 53, 84, 99-100; P. HOFFER & N. HULL, *supra* note 36, at 97-98; A. PRESCOTT, *supra* note 9, at 50, 54, 78.

49. A. PRESCOTT, *supra* note 9, at 774; P. HOFFER & N. HULL, *supra* note 36, at 98.

50. A. PRESCOTT, *supra* note 9, at 466, 774; P. HOFFER & N. HULL, *supra* note 36, at 50.

51. A. PRESCOTT, *supra* note 9, at 466; P. HOFFER & N. HULL, *supra* note 36, at 102-06.

52. Hamilton and Madison would have preferred trial by a judicial tribunal, but neither opposed ratification of the Constitution on this ground. A. PRESCOTT, *supra* note 9, at 775-76; THE FEDERALIST Nos. 65, 79, 81 (A. Hamilton); P. HOFFER & N. HULL, *supra* note 36, at 99-100.

53. See *supra* note 38 and accompanying text.

to define impeachable offenses. They considered "mal and corrupt conduct,"⁵⁴ "malpractice or neglect of duty,"⁵⁵ "treason, bribery or corruption,"⁵⁶ "neglect of duty, malversation or corruption,"⁵⁷ "treason or bribery,"⁵⁸ and "treason, bribery or maladministration,"⁵⁹ and finally agreed, on September 8, on "Treason, Bribery, or other High Crimes and Misdemeanors,"⁶⁰ The last phrase, it will be recalled, was used in the impeachment of Lord Chancellor Parker in 1725.

In England anyone could be impeached and some of the cases mentioned, including those of Lord Chief Justice Tresilian and Lord Chancellor Parker, were against persons who had already been dismissed from office. Moreover, there were no restrictions on the punishments imposable. Tresilian was sentenced to death for writing a judicial opinion which the current majority in the House of Lords did not like. All of the American state constitutional provisions restricted impeachment to persons presently holding office and limited the punishment to removal from office and disqualification for public office. The debates in the Constitutional Convention assumed that impeachment would be so limited and it was.⁶¹

In England the King could not block an impeachment by pardon but he could pardon after judgment, so that the convicted person would not be hanged, imprisoned or forced to pay a fine.⁶² The Framers deprived the President of all power to pardon in cases of impeachment.⁶³ This raises question as to whether there is any way to modify a sentence of disqualification from holding public office. Could it be done by Act of Congress?

All of the justices and judges appointed by Presidents Washington and John Adams were Federalists. The Federal Pension Act of 1792 required justices of the Supreme Court to pass initially on veterans' applications for pensions, with appeal to the Secretary of War. Chief Justice John Jay and Mr. Justice James Wilson refused to do this work on the ground that appeal from the Supreme Court to the Secretary of War was unconstitutional. There was

54. See sources cited *supra* note 48.

55. A. PRESCOTT, *supra* note 9, at 774 (July 26, 1787).

56. *Id.* (August 6, 1787).

57. *Id.* (August 20, 1787).

58. *Id.* at 775 (September 4, 1787).

59. *Id.* (September 8, 1787).

60. *Id.* (September 8, 1787); P. HOFFER & N. HULL, *supra* note 36, at 97, 101-02.

61. P. HOFFER & N. HULL, *supra* note 36, at 96.

62. Stat. 12 & 13 Will. III, c. 2, § 3 (1701). This made statutory the rule laid down by the House of Lords in the Earl of Danby's Case, 11 State Tr. 600 (H.L. 1685). See *Regina v. Boyes*, 1 B. & S. 311, 121 Eng. Rep. 730 (1861).

63. A. PRESCOTT, *supra* note 9, at 652; U.S. CONST. art. II, § 2, cl. 3 (President may pardon, except in cases of impeachment); U.S. CONST. art. I, § 2, cl. 5 (House of Representatives to have sole power of impeachment); U.S. CONST. art. I, § 3, cls. 6, 7 (Senate to try impeachments and convict on two-thirds majority); U.S. CONST. art. II, § 4 (grounds for impeachment).

some agitation for their impeachment but the House of Representatives did not impeach.⁶⁴ The Republican Party won the White House and majorities in both houses of Congress in the election of 1800. The new Republican President, Thomas Jefferson, promptly dismissed all of the United States attorneys and marshals appointed by Washington and Adams. Then he started on the federal judges. The Judiciary Act of February 13, 1801, provided for the appointment of sixteen United States circuit judges and some additional district judges.⁶⁵ President Adams made these appointments, after confirmation by the Senate, before his term expired on March 3, 1801. This act was repealed by the Republicans in 1802, they having a majority of one in the Senate. This left the judges appointed in 1801 without jobs. Some of them had vacated appointments as district judges by accepting the new circuit judgeships. Some of them petitioned Congress for their pay but they never received it. Chief Justice Marshall thought that the deprivation of their offices and salaries was unconstitutional but there appeared to be no remedy.⁶⁶ This episode suggests that the President and a bare majority in each house of Congress could remove all of the federal circuit and district judges by abolishing their courts. As those of you who studied *Marbury v. Madison*⁶⁷ in law school know, President Jefferson saw to it that judicial commissions signed by President Adams but still in the office of the Secretary of State on March 4, 1801, were not delivered.

President Jefferson did not attempt to oust all of the district judges by abolishing their courts but he did have a hand in the impeachment of John Pickering, a United States district judge who had been Chief Justice of New Hampshire. By a 45 - 8 vote the House of Representatives impeached him for improper exclusion of evidence in an admiralty case, improper dismissal of the case, and swearing while drunk on the bench. One of the managers for the House, John Randolph of Roanoke, Virginia, argued that the House could define impeachable offenses as it wished, saying that tenure during good behavior only protected judges from removal by the President.⁶⁸ This argument would mean that all of the Federalist judges could be removed merely because they were Federalists. Vice President Aaron Burr presided over the trial in the Senate. Judge Pickering did not appear, in person or by counsel. He did chal-

64. P. HOFFER & N. HULL, *supra* note 36, at 142.

65. Act of Feb. 13, 1801, ch. 4, §§ 6 & 7, 2 Stat. 89, 90-91 (1801). This legislation had been recommended by President Washington. By providing circuit judges it eliminated the need for Supreme Court justices to ride circuit. The circuit riding was so arduous that older men could not accept appointments to the court or remain on it. Travel by horseback from the District of Columbia to Maine or South Carolina and back twice a year was not easy even for strong young men. C. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835*, at 148-49 (1900).

66. Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132 (1802) (effective July 1, 1802); see also C. HAINES, *supra* note 65, at 42, 149, 177, 180-81, 223-24, 227, 237, 241-42 (1900).

67. 5 U.S. (1 Cranch 137) 368 (1803).

68. P. HOFFER & N. HULL, *supra* note 36, at 189.

lunge President Jefferson to a duel, saying that he was entitled to trial by battle. A Federalist senator tried to stop the trial by presenting an affidavit made by Judge Pickering's son saying that his father was insane. Pickering was convicted and removed from office on a largely partisan vote.⁶⁹

President Jefferson's next target was Samuel Chase, who had been appointed Associate Justice of the United States Supreme Court by President Washington in 1796. Before and during the American Revolution it had become common for judges to deliver patriotic speeches to grand juries. Chase delivered a Federalist speech, criticizing the Republican administration, to a grand jury in Maryland in 1803. He was impeached for this and for improper rulings in the trial for treason of a man named Fries who had led a riot in Pennsylvania. Mr. Justice Chase contended that impeachment lay only for indictable offenses and that a mere error in judgment, without corrupt motives, is not such an offense. President Jefferson, to his credit, let it be known that a vote for acquittal would not be considered disloyal to him. The Senate voted 18 to 16 to convict on two of eight counts. One charged refusal to excuse a juror in the Fries case who had formed an opinion of guilt. The other charged refusal to allow a witness to testify for the defense of Fries on one count against him. As there was not a two-thirds majority for conviction, Mr. Justice Chase was acquitted and remained in office until his death in 1811.⁷⁰ He delivered no more Federalist speeches to grand juries. His acquittal seems to have stopped attempts to oust judges merely because they belonged to a political party which lacked a majority in both houses of Congress.

The next significant judicial impeachment was that of James Hawkins Peck, United States District Judge for the District of Missouri. Judge Peck, who had moved to St. Louis from Tennessee, was appointed to the bench by President Monroe in 1822. He presided over the trial of *Soulard v. United States*, in which the plaintiff, represented by a St. Louis lawyer named Luke E. Lawless, was trying to prove title by a Spanish land grant.⁷¹ Lawless was on good terms with Senator Thomas Hart Benton. Judge Peck ruled that the grant had not been adequately proved. He took the unusual step of publishing his opinion in an anti-Benton St. Louis newspaper, *The Republican*, on March 30, 1826. Mr. Lawless then published a letter in the *Enquirer*, a pro-Benton St. Louis paper, suggesting errors in Judge Peck's ruling. I have read the letter. It was merely a list of errors of the sort that might be put into an appellate brief. Judge Peck summarily convicted Lawless of contempt and sentenced him to twenty-four hours in jail and to be suspended from practice for eighteen months. As Lawless had some seventy Spanish land grant cases pending in the district court, the suspension from practice was a severe punishment. The Supreme Court reversed Judge Peck's judgment in the *Soulard* case⁷² and

69. *Id.* at 207-17.

70. *Id.* at 228-55.

71. *Soulard's Heirs v. United States*, 35 U.S. (10 Pet. 100) 31 (1836).

72. *Id.* at 33.

the House of Representatives, led by James Buchanan, Chairman of the Judiciary Committee, impeached Judge Peck by a vote of 123 - 49 for "high misdemeanors." Vice President John C. Calhoun presided at the trial before the Senate. Congressman McDuffie for the managers argued that summary punishment for contempt is limited to acts in the presence of the court interfering with the administration of justice. That is the present Missouri rule but the question was in doubt here until 1941.⁷³ William Wirt, Attorney General of the United States, who was also representing the United States in the appeal of the *Soulard case*, defended Judge Peck. The testimony revealed that Judge Peck always blindfolded himself before sitting in court in Jefferson City. It also revealed that Lawless, who was reputed to be a crack shot, had offered to withdraw the charges if Peck, whose eyesight was notoriously poor, would fight a duel with him. If Judge Peck had accepted the challenge, President Andrew Jackson would probably have had a vacancy in the office of United States district judge to fill. Twenty one Jacksonian Democrats voted for conviction. The two Jacksonian Democrat senators from Tennessee voted for acquittal, thus indicating that President Jackson was not treating the vote as a matter of party loyalty. All twenty of the Whigs and other non-Jacksonian Democrats in the Senate voted to acquit. Senator Benton, who testified for the prosecution, did not vote. Ex-President John Quincy Adams said that it was almost a party vote. James Buchanan pushed through an Act of Congress to restrict the contempt power.⁷⁴

The 1804 decision in the case of Mr. Justice Chase indicates that a judge will not be removed from office by impeachment merely because he belongs to a political party that is in the minority in both houses of Congress. The 1831 decision in the case of Judge Peck indicates that a judge will not be removed from office by impeachment merely because he makes an honest mistake of law. Together, these cases indicate that the Framers of the Constitution achieved their goal of providing an independent judiciary, able to protect the liberties of the people. The federal judge who eschews liquor and profanity while on the bench need not fear the awful fate of Lord Chief Justice Tresilian.

73. *State ex rel. Pulitzer Publishing Co. v. Coleman*, Judge, 347 Mo. 1239, 1256-59, 152 S.W.2d 640, 646-48 (1941).

74. Bushnell, *The Impeachment and Trial of James H. Peck*, 74 MO. HIST. REV. 137-65 (1980); see also A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833).