privilege and offered a resolution (H. Res. 158) impeaching numerous members and former members of the Federal Reserve Board. During the reading of the resolution, a point of order against it was raised by Mr. Carl E. Mapes, of Michigan:

> I wish to submit the question to the Speaker as to whether or not a person who is not now in office is subject to impeachment? This resolution of the gentleman from Pennsylvania refers to several people who are no longer holding any public office. They are not now at least civil officers. The Constitution provides that the "President, Vice President, and all civil officers shall be removed from office on impeachment", and so forth. I have had no opportunity to examine the precedents since this matter came up, but it occurs to me that the resolution takes in too much territory to make it privileged.

Speaker Henry T. Rainey, of Illinois, ruled as follows:

> That is a constitutional question which the Chair cannot pass upon, but should be passed upon by the House.

The resolution was referred on motion to the Committee on the Judiciary.(19)

§ 3. Grounds for Impeachment; Form of Articles

Article II, section 4 of the U.S. Constitution defines the grounds for impeachment and conviction as "treason, bribery, or other high crimes and misdemeanors." A further provision of the Constitution which has been construed to bear upon the impeachment of federal judges is article III, section 1, which provides that judges of the supreme and inferior courts "shall hold their offices during good behaviour."

When the House determines that grounds for impeachment exist, and they are adopted by the House, they are presented to the Senate in "articles" of impeachment.(20) Any one of the articles may provide a sufficient basis or ground for impeachment. The impeachment in 1936 of Halsted L. Ritter, a U.S. District Court Judge, was based on seven articles of impeachment as amended by the House. The first six articles charged him with several instances of judicial misconduct, including champerty, corrupt practices, violations of the Judicial Code, and violations of criminal law. Article VII charged actions and conduct, including a restatement of some of the charges con-

19. 77 CONG. REC. 4055, 73d Cong. 1st Sess.

20. Jefferson's Manual states that: [B]y the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified in the accusation. *House Rules and Manual* (Jefferson's Manual) § 609 (1973).

tained in the preceding articles, "the reasonable and probable consequence" of which was "to bring his court into scandal and disrepute," to the prejudice of his court, of public confidence in his court, and of public respect for and confidence in the federal judiciary.(1) However, in the Senate, Judge Ritter was convicted only on the seventh article. The respondent had moved, before commencement of trial, to strike article I, or in the alternative to require election as to articles I and II, on the ground that the articles duplicated the same offenses, but the presiding officer overruled the motion and his decision was not challenged in the Senate. The respondent also moved to strike article VII, the "general" article, on the ground that it improperly cumulated and duplicated offenses already stated in the preceding articles, but this motion was rejected by the Senate.(2)

At the conclusion of the Ritter trial, and following conviction only on article VII, a point of order was raised against the vote in that the article combined the grounds that were alleged for impeachment. The President pro tempore overruled the point of order.(3)

The various grounds for impeachment and the form of impeachment articles have been documented during recent investigations. Following the inquiry into charges against President Nixon, the Committee on the Judiciary reported to the House a report recommending impeachment, which report included the text of a resolution and articles impeaching the President.(4) As indicated by the articles, and by the conclusions of the report as to the specific articles, the Committee on the Judiciary determined that the grounds for Presidential impeachment need not be indictable or criminal; articles II and III impeached the President for a course of conduct constituting an abuse of power and for failure to comply with subpenas issued by the committee during the impeachment inquiry.(5) The committee also concluded that an article of impeachment could cumulate charges and facts constituting a course of conduct, as in article II.(6)

1. See § 3.2, infra.

2. See § 3.4, infra.

3. See § 3.5, infra.

4. See § 3.1, infra.

5. See § 3.7, infra, for the majority views and § 3.8, infra, for the minority views on the articles of impeachment.

6. See § 3.3, infra, for the majority and minority views on article II.

In its final report the Committee on the Judiciary cited a staff report by the impeachment inquiry staff on

The grounds for impeachment of federal judges were scrutinized in 1970, in the inquiry into the conduct of Associate Justice Douglas of the Supreme Court. Concepts of impeachment were debated on the floor of the House, as to the ascertainability of the definition of an impeachable offense, and as to whether a federal judge could be impeached for conduct not related to the performance of his judicial function or for judicial conduct not criminal in nature.(7)

A special subcommittee of the Committee on the Judiciary was created to investigate and report on the charges of impeachment against Justice Douglas, and submitted to the committee a final report recommending against impeachment, finding the evidence insufficient. The report concluded that a federal judge could be impeached for judicial conduct which is either criminal or a serious abuse of public duty, or for nonjudicial conduct which is criminal.(8)

Cross References

Amendments to articles adopted by the House, see § 10, infra.

Charges not resulting in impeachment, see § 14, infra.

Grounds for conviction in the Ritter impeachment trial, see § 18, infra.

Collateral Reference

Articles of Impeachment Voted by the House of Representatives, see Impeachment, Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, 93d Cong. 1st Sess., Oct. 1973.

Form of Resolution and Articles of Impeachment

§ 3.1 Articles of impeachment are reported from the Committee on the Judiciary in the form of a resolution.

On Aug. 20, 1974,(9) the Committee on the Judiciary submitted to the House a report on its inves-

the grounds for presidential impeachment, prepared before the committee had proceeded to compile all the evidence and before the committee had proceeded to consider a resolution and articles of impeachment. While the report and its conclusions were not intended to represent the views of the committee or of its individual members, the report is printed in part in the appendix to this chapter as a synopsis of the history, origins, and concepts of the impeachment process and of the grounds for impeachment. See § 3.6, infra, and appendix, infra.

7. See §§ 3.9–3.12, infra.

8. See § 3.13, infra.

9. H. REPT. NO. 93–1305, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29219, 29220, 93d Cong. 2d Sess., Aug. 20, 1974. For complete text of H. REPT. NO. 93–1305, see *id.* at pp. 29219–361.

tigation into charges of impeachable offenses against President Richard Nixon. The committee included in the text of the report a resolution and articles of impeachment which had been adopted by the committee:

Impeaching Richard M. Nixon, President of the United States, of high crimes and misdemeanors.

Resolved, That Richard M. Nixon, President of the United States, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and of all of the people of the United States of America, against Richard M. Nixon, President of the United States of America, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, in that:

On June 17, 1972, and prior thereto, agents of the Committee for the Reelection of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

The means used to implement this course of conduct or plan included one or more of the following:

(1) making or causing to be made false or misleading statements to lawfully authorized investigative officers and employees of the United States;

(2) withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States;

(3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to lawfully authorized investigative officers and employees of the United States and false or misleading testimony in duly instituted judicial and congressional proceedings;

(4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees;

(5) approving, condoning, and acquiescing in, the surreptitious payment of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of

witnesses, potential witnesses or individuals who participated in such unlawful entry and other illegal activities;

(6) endeavoring to misuse the Central Intelligence Agency, an agency of the United States;

(7) disseminating information received from officers of the Department of Justice of the United States to subjects of investigations conducted by lawfully authorized investigative officers and employees of the United States, for the purpose of aiding and assisting such subjects in their attempts to avoid criminal liability;

(8) making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct; or

(9) endeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE II

Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

This conduct has included one or more of the following:

(1) He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.

(2) He misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel, in violation or disregard of the constitutional rights of citizens, by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; he did direct, authorize, or permit the use of information obtained thereby for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and he did direct the concealment of

certain records made by the Federal Bureau of Investigation of electronic surveillance.

(3) He has, acting personally and through his subordinates and agents, in violation or disregard of the constitutional rights of citizens, authorized and permitted to be maintained a secret investigative unit within the office of the President, financed in part with money derived from campaign contributions, which unlawfully utilized the resources of the Central Intelligence Agency, engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused to a fair trial.

(4) He has failed to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities concerning the unlawful entry into the headquarters of the Democratic National Committee, and the cover-up thereof, and concerning other unlawful activities, including those relating to the confirmation of Richard Kleindienst as Attorney General of the United States, the electronic surveillance of private citizens, the break-in into the offices of Dr. Lewis Fielding, and the campaign financing practices of the Committee to Reelect the President.

(5) In disregard of the rule of law, he knowingly misused the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force, of the Department of Justice, and the Central Intelligence Agency, in violation of his duty to take care that the laws be faithfully executed.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE III

In his conduct of the office of President of the United States, Richard M. Nixon, contrary to his oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives on April 11, 1974, May 15, 1974, May 30, 1974, and June 24, 1974, and willfully disobeyed such subpoenas. The subpoenaed papers and things were deemed necessary by the Committee in order to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President. In refusing to produce these papers and things, Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

§ 3.2 Articles impeaching Judge Halsted L. Ritter were reported to the House in two separate resolutions.

In March 1936, articles of impeachment against Judge Ritter were reported to the House: [10]

[H. RES. 422]

Resolved, That Halsted L. Ritter, who is a United States district judge for the southern district of Florida, be impeached for misbehavior, and for high crimes and misdemeanors; and that the evidence heretofore taken by the subcommittee of the Committee on the Judiciary of the House of Representatives under H. Res. 163 of the Seventy-third Congress sustains articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Halsted L. Ritter, who was appointed, duly qualified, and commissioned to serve, during good behavior in office, as United States district judge for the southern district of Florida, on February 15, 1929.

ARTICLE I

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of a high crime and misdemeanor in office in manner and form as follows, to wit: On or about October 11, 1929, A. L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge), as solicitor for the plaintiff, filed in the court of the said Judge Ritter a certain foreclosure suit and receivership proceeding, the same being styled "Bert E. Holland and others against Whitehall Building and Operating Company and others" (Number 678–M–Eq.). On or about May 15, 1930, the said Judge Ritter allowed the said Rankin an advance of $2,500 on his fee for his services in said case. On or about July 2, 1930, the said Judge Ritter by letter requested another judge of the United States district court for the southern district of Florida, to wit, Honorable Alexander Akerman, to fix and deter-

10. H. Res. 422, 80 CONG. REC. 3066–68, 74th Cong. 2d Sess., Mar. 2, 1936 (Articles I–IV); H. Res. 471, 80 CONG. REC. 4597–99, 74th Cong. 2d Sess., Mar. 30, 1936 (amending Article III and adding new Articles IV–VII).

mine the total allowance for the said Rankin for his services in said case for the reason as stated by Judge Ritter in said letter, that the said Rankin had formerly been the law partner of the said Judge Ritter, and he did not feel that he should pass upon the total allowance made said Rankin in that case and that if Judge Akerman would fix the allowance it would relieve the writer, Judge Ritter, from any embarrassment if thereafter any question should arise as to his, Judge Ritter's, favoring said Rankin with an exorbitant fee.

Thereafterward, notwithstanding the said Judge Akerman, in compliance with Judge Ritter's request, allowed the said Rankin a fee of $15,000 for his services in said case, from which sum the said $2,500 theretofore allowed the said Rankin by Judge Ritter as an advance on his fee was deducted, the said Judge Ritter, well knowing that at his request compensation had been fixed by Judge Akerman for the said Rankin's services in said case, and notwithstanding the restraint of propriety expressed in his said letter to Judge Akerman, and ignoring the danger of embarrassment mentioned in said letter, did fix an additional and exorbitant fee for the said Rankin in said case. On or about December 24, 1930, when the final decree in said case was signed, the said Judge Ritter allowed the said Rankin, additional to the total allowance of $15,000 theretofore allowed by Judge Akerman, a fee of $75,000 for his services in said case, out of which allowance the said Judge Ritter directly profited. On the same day, December 24, 1930, the receiver in said case paid the said Rankin, as part of his said additional fee, the sum of $25,000, and the said Rankin on the same day privately paid and delivered to the said Judge Ritter the sum of $2,500 in cash; $2,000 of said $2,500 was deposited in bank by Judge Ritter on, to wit, December 29, 1930, the remaining $500 being kept by Judge Ritter and not deposited in bank until, to wit, July 10, 1931. Between the time of such initial payment on said additional fee and April 6, 1931, the said receiver paid said Rankin thereon $5,000. On or about April 6, 1931, the said Rankin received the balance of the said additional fee allowed him by Judge Ritter, said balance amounting to $45,000. Shortly thereafter, on or about April 14, 1931, the said Rankin paid and delivered to the said Judge Ritter, privately, in cash, an additional sum of $2,000. The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said A. L. Rankin the aforesaid sums of money, amounting to $4,500.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor.

ARTICLE II

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

On the 15th day of February 1929 the said Halsted L. Ritter, having been

appointed as United States district judge for the southern district of Florida, was duly qualified and commissioned to serve as such during good behavior in office. Immediately prior thereto and for several years the said Halsted L. Ritter had practiced law in said district in partnership with one A. L. Rankin, which partnership was dissolved upon the appointment of said Ritter as said United States district judge.

On the 18th day of July 1928 one Walter S. Richardson was elected trustee in bankruptcy of the Whitehall Building and Operating Company, which company had been adjudicated in said district as a bankrupt, and as such trustee took charge of the assets of said Whitehall Building and Operating Company, which consisted of a hotel property located in Palm Beach in said district. That the said Richardson as such trustee operated said hotel property from the time of his said appointment until its sales on the 3d of January 1929, under the foreclosure of a third mortgage thereon. On the 1st of November and the 13th of December 1929, the said Judge Ritter made orders in said bankruptcy proceedings allowing the said Walter S. Richardson as trustee the sum of $16,500 as compensation for his services as trustee. That before the discharge of said Walter S. Richardson as such trustee, said Richardson, together with said A. L. Rankin, one Ernest Metcalf, one Martin Sweeney, and the said Halsted L. Ritter, entered into an arrangement to secure permission of the holder or holders of at least $50,000 of first mortgage bonds on said hotel property for the purpose of filing a bill to foreclose the first mortgage on said premises in the court of said Halsted L. Ritter, by which means the said Richardson, Rankin, Metcalf, Sweeney, and Ritter were to continue said property in litigation before said Ritter. On the 30th day of August 1929, the said Walter S. Richardson, in furtherance of said arrangement and understanding, wrote a letter to the said Martin Sweeney, in New York, suggesting the desirability of contacting as many first-mortgage bondholders as possible in order that their cooperation might be secured, directing special attention to Mr. Bert E. Holland, an attorney, whose address was in the Tremont Building in Boston, and who, as co-trustee, was the holder of $50,000 of first-mortgage bonds, the amount of bonds required to institute the contemplated proceedings in Judge Ritter's court.

On October 3, 1929, the said Bert E. Holland, being solicited by the said Sweeney, requested the said Rankin and Metcalf to prepare a complaint to file in said Judge Ritter's court for foreclosure of said first mortgage and the appointment of a receiver. At this time Judge Ritter was holding court in Brooklyn, New York, and the said Rankin and Richardson went from West Palm Beach, Florida, to Brooklyn, New York, and called upon said Judge Ritter a short time previous to filing the bill for foreclosure and appointment of a receiver of said hotel property.

On October 10, 1929, and before the filing of said bill for foreclosure and receiver, the said Holland withdrew his authority to said Rankin and Metcalf to file said bill and notified the said Rankin not to file the said bill. Notwithstanding the said instructions to

said Rankin not to file said bill, said Rankin, on the 11th day of October 1929, filed said bill with the clerk of the United States District Court for the Southern District of Florida but with the specific request to said clerk to lock up the said bill as soon as it was filed and hold until Judge Ritter's return so that there would be no newspaper publicity before the matter was heard by Judge Ritter for the appointment of a receiver, which request on the part of the said Rankin was complied with by the said clerk.

On October 16, 1929, the said Holland telegraphed to the said Rankin, referring to his previous wire requesting him to refrain from filing the bill and insisting that the matter remain in its then status until further instruction was given; and on October 17, 1929, the said Rankin wired to Holland that he would not make an application on his behalf for the appointment of a receiver. On October 28, 1929, a hearing on the complaint and petition for receivership was heard before Judge Halsted L. Ritter at Miami, at which hearing the said Bert E. Holland appeared in person before said Judge Ritter and advised the judge that he wished to withdraw the suit and asked for dismissal of the bill of complaint on the ground that the bill was filed without his authority.

But the said Judge Ritter, fully advised of the facts and circumstances herein before recited, wrongfully and oppressively exercised the powers of his office to carry into execution said plan and agreement theretofore arrived at, and refused to grant the request of the said Holland and made effective the champertous undertaking of the said Richardson and Rankin and appointed the said Richardson receiver of the said hotel property, notwithstanding that objection was made to Judge Ritter that said Richardson had been active in fomenting this litigation and was not a proper person to act as receiver.

On October 15, 1929, said Rankin made oath to each of the bills for intervenors which were filed the next day.

On October 16, 1929, bills for intervention in said foreclosure suit were filed by said Rankin and Metcalf in the names of holders of approximately $5,000 of said first-mortgage bonds, which intervenors did not possess the said requisite $50,000 in bonds required by said first mortgage to bring foreclosure proceedings on the part of the bondholders.

The said Rankin and Metcalf appeared as attorneys for complainants and intervenors, and in response to a suggestion of the said Judge Ritter, the said Metcalf withdrew as attorney for complainants and intervenors and said Judge Ritter thereupon appointed said Metcalf as attorney for the said Richardson, the receiver.

And in the further carrying out of said arrangement and understanding, the said Richardson employed the said Martin Sweeney and one Bemis, together with Ed Sweeney, as managers of said property, for which they were paid the sum of $60,000 for the management of said hotel for the two seasons the property remained in the custody of said Richardson as receiver.

On or about the 15th day of May 1930 the said Judge Ritter allowed the said Rankin an advance on his fee of $2,500 for his services in said case.

On or about July 2, 1930, the said Judge Ritter requested Judge Alex-

ander Akerman, also a judge of the United States District Court for the Southern District of Florida, to fix the total allowance for the said Rankin for his services in said case, said request and the reasons therefor being set forth in a letter by the said Judge Ritter, in words and figures as follows, to wit:

JULY 2, 1930.

Hon. ALEXANDER AKERMAN,
United States District Judge, Tampa, Fla.

MY DEAR JUDGE: In the case of Holland et al. v. Whitehall Building & Operating Co. (No. 678–M–Eq.), pending in my division, my former law partner, Judge A. L. Rankin, of West Palm Beach, has filed a petition for an order allowing compensation for his services on behalf of the plaintiff.

I do not feel that I should pass, under the circumstances, upon the total allowance to be made Judge Rankin in this matter. I did issue an order, which Judge Rankin will exhibit to you, approving an advance of $2,500 on his claim, which was approved by all attorneys.

You will appreciate my position in the matter, and I request you to pass upon the total allowance which should be made Judge Rankin in the premises as an accommodation to me. This will relieve me from any embarrassment hereafter if the question should arise as to my favoring Judge Rankin in this matter by an exorbitant allowance.

Appreciating very much your kindness in this matter, I am,

Yours sincerely,

HALSTED L. RITTER.

In compliance with said request the said Judge Akerman allowed the said Rankin $12,500 in addition to the $2,500 theretofore allowed by Judge Ritter, making a total of $15,000 as the fee of the said Rankin in the said case.

But notwithstanding the said request on the part of said Ritter and the compliance by the said Judge Akerman and the reasons for the making of said request by said Judge Ritter of Judge Akerman, the said Judge Ritter, on the 24th day of December 1930, allowed the said Rankin an additional fee of $75,000.

And on the same date when the receiver in said case paid to the said Rankin as a part of said additional fee the sum of $25,000, said Rankin privately paid and delivered to said Judge Ritter out of the said $25,000 the sum of $2,500 in cash, $2,000 of which the said Judge Ritter deposited in a bank and $500 of which was put in a tin box and not deposited until the 10th day of July 1931, when it was deposited in a bank with an additional sum of $600.

On or about the 6th day of April 1931, the said Rankin received as a part of the $75,000 additional fee the sum of $45,000, and shortly thereafter, on or before the 14th day of April 1931, the said Rankin paid and delivered to said judge Ritter, privately and in cash, out of said $45,000 the sum of $2,000.

The said Judge Halsted L. Ritter corruptly and unlawfully accepted and received for his own use and benefit from the said Rankin the aforesaid sums of $2,500 in cash and $2,000 in cash, amounting in all to $4,500.

Of the total allowance made to said A.L. Rankin in said foreclosure suit, amounting in all to $90,000, the fol-

lowing sums were paid out by said Rankin with the knowledge and consent of said Judge Ritter, to wit: to said Walter S. Richardson, the sum of $5,000; to said Metcalf, the sum of $10,000; to Shutts and Bowen, also attorneys for the receiver, the sum of $25,000; and to said Halsted L. Ritter, the sum of $4,500.

In addition to the said sum of $5,000 received by the said Richardson as aforesaid, said Ritter by order in said proceedings allowed said Richardson a fee of $30,000 for services as such receiver.

The said fees allowed by said Judge Ritter to A.L. Rankin (who had been a law partner of said judge immediately before said judge's appointment as judge) as solicitor for the plaintiff in said case were excessive and unwarranted, and said judge profited personally thereby in that out of the money so allowed said solicitor he received personally, privately, and in cash $4,500 for his own use and benefit.

While the Whitehall Hotel was being operated in receivership under said proceeding pending in said court (and in which proceeding the receiver in charge of said hotel by appointment of said Judge was allowed large compensation by said judge) the said judge stayed at said hotel from time to time without cost to himself and received free rooms, free meals, and free valet service, and, with the knowledge and consent of said judge, members of his family, including his wife, his son, Thurston Ritter, his daughter, Mrs. M.R. Walker, his secretary, Mrs. Lloyd C. Hooks, and her husband, Lloyd C. Hooks, each likewise on various occasions stayed at said hotel without cost to themselves or to said judge, and received free rooms, and some or all of them received from said hotel free meals and free valet service; all of which expenses were borne by the said receivership to the loss and damage of the creditors whose interests were involved therein.

The said judge willfully failed and neglected to perform his duty to conserve the assets of the Whitehall Building and Operating Company in receivership in his court, but to the contrary, permitted waste and dissipation of its assets, to the loss and damage of the creditors of said corporation, and was a party to the waste and dissipation of such assets while under the control of his said court, and personally profited thereby, in the manner and form hereinabove specifically set out.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of a high crime and misdemeanor in office.

Articles III and IV in House Resolution 422 are omitted because House Resolution 471, adopted by the House on Mar. 30, 1936, amended Article III, added new Articles IV through VI after Article III, and amended former Article IV to read as new Article VII. Articles III through VII in their amended form follow:

ARTICLE III

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while

acting as a United States District judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373) making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that after the employment of the law firm of Ritter and Rankin (which at the time of the appointment of Halsted L. Ritter to be judge of the United States District Court for the Southern District of Florida, was composed of Halsted L. Ritter and A.L. Rankin) in the case of Trust Company of Georgia and Robert G. Stephens, trustee, against Brazilian Court Building Corporation, and others, numbered 5704, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, and after the fee of $4,000 which had been agreed upon at the outset of said employment had been fully paid to the firm of Ritter and Rankin, and after Halsted L. Ritter had, on, to wit, February 15, 1929, become judge of the United States District Court for the Southern District of Florida, Judge Ritter on, to wit, March 11, 1929, wrote a letter to Charles A. Brodek, of counsel for Mulford Realty Corporation (the client which his former law firm had been representing in said litigation), stating that there had been much extra and unanticipated work in the case, that he was then a Federal Judge; that his partner, A.L. Rankin, would carry through further proceedings in the case, but that he, Judge Ritter, would be consulted about the matter until the case was all closed up; and that "this matter is one among very few which I am assuming to continue my interest in until finally closed up"; and stating specifically in said letter:

"I do not know whether any appeal will be taken in the case or not but, if so, we hope to get Mr. Howard Paschal or some other person as receiver who will be amenable to our directions, and the hotel can be operated at a profit, of course, pending the appeal. We shall demand a very heavy supersedeas bond, which I doubt whether D'Esterre can give"; and further that he was "of course primarily interested in getting some money in the case", and that he thought "$2,000 more by way of attorneys' fees should be allowed", and asked that he be communicated with direct about the matter, giving his post-office-box number. On to wit, March 13, 1929, said Brodek replied favorably, and on March 30, 1929, a check of Brodek, Raphael, and Eisner, a law firm of New York City, representing Mulford Realty Corporation, in which Charles A. Brodek, senior member of the firm of Brodek, Raphael and Eisner, was one of the directors, was drawn, payable to the order of "Honorable Halsted L. Ritter" for $2,000 and which was duly endorsed "Honorable Halsted L. Ritter. H. L. Ritter" and was paid on, to wit, April 4, 1929, and the proceeds thereof were received and appropriated by Judge Ritter to his own individual use and benefit, without advising his said former partner that said $2,000 had been received, without consulting with

his former partner thereabout, and without the knowledge or consent of his said former partner, appropriated the entire amount thus solicited and received to the use and benefit of himself, the said Judge Ritter.

At the time said letter was written by Judge Ritter and said $2,000 received by him, Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holdings being within the territorial jurisdiction of the United States District Court, of which Judge Ritter was a judge from, to wit, February 15, 1929.

After writing said letter of March 11, 1929, Judge Ritter further exercised the profession or employment of counsel or attorney, or engaged in the practice of the law, with relation to said case.

Which acts of said judge were calculated to bring his office into disrepute, constitute a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE IV

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows to wit:

That the said Halsted L. Ritter, while such judge, was guilty of a violation of section 258 of the Judicial Code of the United States of America (U.S.C., Annotated, title 28, sec. 373), making it unlawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, in that Judge Ritter did exercise the profession or employment of counsel or attorney, or engage in the practice of the law, representing J.R. Francis, with relation to the Boca Raton matter and the segregation and saving of the interest of J.R. Francis herein, or in obtaining a deed or deeds to J.R. Francis from the Spanish River Land Company to certain pieces of realty, and in the Edgewater Ocean Beach Development Company matter for which services the said Judge Ritter received from the said J.R. Francis the sum of $7,500.

Which acts of said judge were calculated to bring his office into disrepute constitute a violation of the law above recited, and constitute a high crime and misdemeanor within the meaning and intent of section 4 of article II of the Constitution of the United States.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE V

That the said Halsted L. Ritter, having been nominated by the President of

the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146(h) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defend the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1929 said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of some $12,000, yet paid no income tax thereon.

Among the fees included in said gross taxable income for 1929 were the extra fee of $2,000 collected and received by Judge Ritter in the Brazilian Court case as described in article III, and the fee of $7,500 received by Judge Ritter from J.R. Francis.

Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE VI

That the said Halsted L. Ritter, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of a high crime and misdemeanor in office in manner and form as follows, to wit:

That the said Halsted L. Ritter, while such judge, was guilty of violation of section 146(b) of the Revenue Act of 1928, making it unlawful for any person willfully to attempt in any manner to evade or defeat the payment of the income tax levied in and by said Revenue Act of 1928, in that during the year 1930 the said Judge Ritter received gross taxable income—over and above his salary as judge—to the amount of to wit, $5,300, yet failed to report any part thereof in his income-tax return for the year 1930 and paid no income tax thereon.

Two thousand five hundred dollars of said gross taxable income for 1930 was that amount of cash paid Judge Ritter by A. L. Rankin on December 24, 1930, as described in article I.

Wherefore the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office.

ARTICLE VII

That the said Halsted L. Ritter, while holding the office of United States district judge for the southern district of Florida, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned, and, while acting as a United States district judge for the southern district of Florida, was and is guilty of misbehavior and of high crimes and misdemeanors in office in manner and form as follows, to wit:

The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter, hereunder specified or indicated in this article, since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public con-

fidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge:

1. In that in the Florida Power Company case (Florida Power and Light Company against City of Miami and others, numbered 1138–M–Eq.) which was a case wherein said judge had granted the complainant power company a temporary injunction restraining the enforcement of an ordinance of the city of Miami, which ordinance prescribed a reduction in the rates for electric current being charged in said city, said judge improperly appointed one Cary T. Hutchinson, who had long been associated with and employed by power and utility interests, special master in chancery in said suit, and refused to revoke his order so appointing said Hutchinson. Thereafter, when criticism of such action had become current in the city of Miami, and within two weeks after a resolution (H. Res. 163, Seventy-third Congress) had been agreed to in the House of Representatives of the Congress of the United States, authorizing and directing the Judicial Committee thereof to investigate the official conduct of said judge and to make a report concerning said conduct to said House of Representatives an arrangement was entered into with the city commissioners of the city of Miami or with the city attorney of said city by which the said city commissioners were to pass a resolution expressing faith and confidence in the integrity of said judge, and the said judge recuse himself as judge in said Dower suit. The said agreement was carried out by the parties thereto, and said judge, after the passage of such resolution, recused himself from sitting as judge in said power suit, thereby bartering his judicial authority in said case for a vote of confidence. Nevertheless, the succeeding judge allowed said Hutchinson as special master in chancery in said case a fee of $5,000, although he performed little, if any, service as such, and in the order making such allowance recited: "And it appearing to the court that a minimum fee of $5,000 was approved by the court for the said Cary T. Hutchinson, special master in this cause."

2. In that in the Trust Company of Florida cases (Illick against Trust Company of Florida and others numbered 1043–M–Eq., and Edmunds Committee and others against Marion Mortgage Company and others, numbered 1124–M–Eq.) after the State banking department of Florida, through its comptroller, Honorable Ernest Amos, had closed the doors of the Trust Company of Florida and appointed J.H. Therrell liquidator for said trust company, and had intervened in the said Illick case, said Judge Ritter wrongfully and erroneously refused to recognize the right of said State authority to administer the affairs of the said trust company and appointed Julian E. Eaton and Clark D. Stearns as receivers of the property of said trust company. On appeal, the United States Circuit Court of Appeals for the Fifth Circuit reversed the said order or decree of Judge Ritter and ordered the said property surrendered to the State liquidator. Thereafter, on, to wit, September 12, 1932, there was filed in the United States District Court for the Southern District of Florida the Edmunds Committee case, supra. Mar-

ion Mortgage Company was a subsidiary of the Trust Company of Florida. Judge Ritter being absent from his district at the time of the filing of said case, an application for the appointment of receivers therein was presented to another judge of said district, namely, Honorable Alexander Akerman. Judge Ritter, however, prior to the appointment of such receivers, telegraphed Judge Akerman, requesting him to appoint the aforesaid Eaton and Stearns as receivers in said case, which appointments were made by Judge Akerman. Thereafter the United States Circuit Court of Appeals for the Fifth Circuit reversed the order of Judge Akerman, appointing said Eaton and Stearns as receivers in said case. In November 1932, J.H. Therrell, as liquidator, filed a bill of complaint in the Circuit Court of Dade County, Florida—a court of the State of Florida—alleging that the various trust properties of the Trust Company of Florida were burdensome to the liquidator to keep, and asking that the court appoint a succeeding trustee. Upon petition for removal of said cause from said State court into the United States District Court for the Southern District of Florida, Judge Ritter took jurisdiction, notwithstanding the previous rulings of the United States Circuit Court of Appeals above referred to, and again appointed the said Eaton and Stearns as the receivers of the said trust properties. In December 1932 the said Therrell surrendered all of the trust properties to said Eaton and Stearns as receivers, together with all records of the Trust Company of Florida pertaining thereto. During the time said Eaton and Stearns, as such receivers, were in control of said trust properties, Judge Ritter wrongfully and improperly approved their accounts without notice or opportunity for objection thereto to be heard.

With the knowledge of Judge Ritter, said receivers appointed the sister-in-law of Judge Ritter, namely, Mrs. G.M. Wickard, who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building, one of said trust properties. On, to wit, January 1, 1933, Honorable J.M. Lee succeeded Honorable Ernest Amos as comptroller of the State of Florida and appointed M.A. Smith liquidator in said Trust Company of Florida cases to succeed J.H. Therrell. An appeal was again taken to the United States Circuit Court of Appeals for the Fifth Circuit from the then latest order or decree of Judge Ritter, and again the order or decree of Judge Ritter appealed from was reversed by the said circuit court of appeals which held that the State officer was entitled to the custody of the property involved and that said Eaton and Stearns as receivers were not entitled to such custody. Thereafter, and with the knowledge of the decision of the said circuit court of appeals, Judge Ritter wrongfully and improperly allowed said Eaton and Stearns and their attorneys some $26,000 as fees out of said trust-estate properties and endeavored to require, as a condition precedent to releasing said trust properties from the control of his court, a promise from counsel for the said State liquidator not to appeal from his order allowing the said fees to said Eaton and Stearns and their attorneys.

3. In that the said Halsted L. Ritter, while such Federal judge, accepted, in addition to $4,500 from his former law

partner as alleged in article I hereof other large fees or gratuities, to wit, $7,500 from J.R. Francis, on or about April 19, 1929, J.R. Francis at this time having large property interests within the territorial jurisdiction of the court of which Judge Ritter was a judge; and on, to wit, the 4th day of April 1929 the said Judge Ritter accepted the sum of $2,000 from Brodek, Raphael and Eisner, representing Mulford Realty Corporation, as its attorneys, through Charles A. Brodek, senior member of said firm and a director of said corporation, as a fee or gratuity, at which time the said Mulford Realty Corporation held and owned large interests in Florida real estate and citrus groves, and a large amount of securities of the Olympia Improvement Corporation, which was a company organized to develop and promote Olympia, Florida, said holding being within the territorial jurisdiction of the United States District Court of which Judge Ritter was a judge from, to wit, February 15, 1929.

4. By his conduct as detailed in articles I, II, III, and IV hereof, and by his income-tax evasions as set forth in articles V and VI hereof.

Wherefore, the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office.

Cumulative and Duplicatory Articles of Impeachment

§ 3.3 Majority views and minority views were included in the report of the Committee on the Judiciary recommending the impeachment of President Richard M. Nixon, such views relating to Article II, containing an accumulation of acts constituting a course of conduct.

On Aug. 20, 1974, the Committee on the Judiciary recommended in its final report to the House, pursuant to its inquiry into charges of impeachable offenses against President Nixon, three articles of impeachment. Article II charged that the President had "repeatedly engaged in conduct" violative of his Presidential oath and of his constitutional duty to take care that the laws be faithfully executed. The article set forth, in five separate paragraphs, five patterns of conduct constituting the offenses charged.

The conclusion of the committee's report on Article II read in part as follows:

> In recommending Article II to the House, the Committee finds clear and convincing evidence that Richard M. Nixon, contrary to his trust as President and unmindful of the solemn duties of his high office, has repeatedly used his power as President to violate the Constitution and the law of the land.
>
> In so doing, he has failed in the obligation that every citizen has to live under the law. But he has done more, for it is the duty of the President not merely to live by the law but to see that law faithfully applied. Richard M. Nixon has repeatedly and willfully

failed to perform that duty. He has failed to perform it by authorizing and directing actions that violated or disregarded the rights of citizens and that corrupted and attempted to corrupt the lawful functioning of executive agencies. He has failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates that interfered with lawful investigations and impeded the enforcement of the laws. . . .

The conduct of Richard M. Nixon has constituted a repeated and continuing abuse of the powers of the Presidency in disregard of the fundamental principle of the rule of law in our system of government. This abuse of the powers of the President was carried out by Richard M. Nixon, acting personally and through his subordinates, for his own political advantage, not for any legitimate governmental purpose and without due consideration for the national good. . . .

The Committee has concluded that, to perform its constitutional duty, it must approve this Article of Impeachment and recommend it to the House. If we had been unwilling to carry out the principle that all those who govern, including ourselves, are accountable to the law and the Constitution, we would have failed in our responsibility as representatives of the people elected under the Constitution. If we had not been prepared to apply the principle of Presidential accountability embodied in the impeachment clause of the Constitution, but had instead condoned the conduct of Richard M. Nixon, then another President, perhaps with a different political philosophy, might have used this illegitimate power for further encroachments on the rights of citizens and further usurpations of the power of other branches of our government. By adopting this Article, the Committee seeks to prevent the recurrence of any such abuse of Presidential power.

The Committee finds that, in the performance of his duties as President, Richard M. Nixon on many occasions has acted to the detriment of justice, right, and the public good, in violation of his constitutional duty to see to the faithful execution of the laws. This conduct has demonstrated a contempt for the rule of law; it has posed a threat to our democratic republic. The Committee finds that this conduct constitutes "high crimes and misdemeanors" within the meaning of the Constitution, that it warrants his impeachment by the House, and that it requires that he be put to trial in the Senate.[11]

Opposing minority views were included in the report on the "duplicity" of offenses charged in Article II. The views (footnotes omitted) below are those of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti, and Latta:

Our opposition to the adoption of Article II should not be misunderstood as condonation of the presidential conduct alleged therein. On the contrary, we

11. H. REPT. No. 93–1305, at pp. 180–183, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29270, 29271, 93d Cong. 2d Sess., Aug. 20, 1974. For complete text of H. REPT. No. 93–1305, see *id.* at pp. 29219–361.

deplore in strongest terms the aspects of presidential wrongdoing to which the Article is addressed. However, we could not in conscience recommend that the House impeach and the Senate try the President on the basis of Article II in its form as proposed, because in our view the Article is duplicitous in both the ordinary and the legal senses of the word. In common usage, duplicity means belying one's true intentions by deceptive words; as a legal term of art, duplicity denotes the technical fault of uniting two or more offenses in the same count of an indictment. We submit that the implications of a vote for or against Article II are ambiguous and that the Committee debate did not resolve the ambiguities so as to enable the Members to vote intelligently. Indeed, this defect is symptomatic of a generic problem inherent in the process of drafting Articles of impeachment, and its significance for posterity may be far greater than the substantive merits of the particular charges embodied in Article II. . . .

We do not take the position that the grouping of charges in a single Article is necessarily always invalid. To the contrary, it would make good sense if the alleged offenses together comprised a common scheme or plan, or even if they were united by a specific legal theory. Indeed, even if there were no logical reason at all for so grouping the charges (as is true of Article II), the Article might still be acceptable if its ambiguous aspects had been satisfactorily resolved. For the chief vice of this Article is that it is unclear from its language whether a Member should vote for its adoption if he believes any one of the five charges to be supported by the evidence; or whether he must believe in the sufficiency of all five; or whether it is enough if he believes in the sufficiency of more than half of the charges. The only clue is the sentence which states, "This conduct has included one or more of the following [five specifications]". This sentence implies that a Member may—indeed, must—vote to impeach or to convict if he believes in the sufficiency of a single specification, even though he believes that the accusations made under the other four specifications have not been proved, or do not even constitute grounds for impeachment. Thus Article II would have unfairly accumulated all guilty votes against the President, on whatever charge. The President could have been removed from office even though no more than fourteen Senators believed him guilty of the acts charged in any one of the five specifications.

Nor could the President have defended himself against the ambiguous charges embodied in Article II. Inasmuch as five specifications are included in support of three legal theories, and all eight elements are phrased in the alternative, Article II actually contains no fewer than fifteen separate counts, any one of which might be deemed to constitute grounds for impeachment and removal. In addition, if the President were not informed which matters included in Article II were thought to constitute "high Crimes and Misdemeanors," he would have been deprived of his right under the Sixth Amendment to "be informed of the nature and cause of the accusation" against him.

This defect of Article II calls to mind the impeachment trial of Judge Halsted Ritter in 1936. Ritter was nar-

rowly acquitted of specific charges of bribery and related offenses set forth in the first six Articles. He was convicted by an exact two-thirds majority, however, under Article VII. That Article charged that because of the specific offenses embodied in the other six Articles, Ritter had "[brought] his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice. . . ." The propriety of convicting him on the basis of this vague charge, after he had been acquitted on all of the specific charges, will long be debated. Suffice it to say that the putative defect of Article VII is entirely different from that of Article II in the present case, and the two should not be confused.

A more relevant precedent may be found in the House debates during the impeachment of Judge Charles Swayne in 1905. In that case the House had followed the earlier practice of voting first on the general question of whether or not to impeach, and then drafting the Articles. Swayne was impeached in December 1904, by a vote of 198–61, on the basis of five instances of misconduct. During January 1905 these five grounds for impeachment were articulated in twelve Articles. In the course of debate prior to the adoption of the Articles, it was discovered that although the general proposition to impeach had commanded a majority, individual Members had reached that conclusion for different reasons. This gave rise to the embarrassing possibility that none of the Articles would be able to command a majority vote. Representative Parker regretted that the House had not voted on each charge separately before voting on impeachment:

> [W]here different crimes and misdemeanors were alleged it was the duty of the House to have voted whether each class of matter reported was impeachable before debating that resolution of impeachment, and that the committee was entitled to the vote of a majority on each branch, and that now for the first time the real question of impeachment has come before this House to be determined—not by five men on one charge, fifteen on another, and twenty on another coming in generally and saying that for one or another of the charges Judge Swayne should be impeached, but on each particular branch of the case.
>
> When we were asked to vote upon ten charges at once, that there was something impeachable contained in one or another of those charges we have already perhaps stultified ourselves in the mode of our procedure. . . .

In order to extricate the House from its quandary, Representative Powers urged that the earlier vote to impeach should be construed to imply that a majority of the House felt that each of the separate charges had been proved;

> At that time the committee urged the impeachment upon five grounds, and those are the only grounds which are covered by the articles . . . and we had assumed that when the House voted the impeachment they practically said that a probable cause was made out in these five subject-matters which were discussed before the House.

Powers' retrospective theory was ultimately vindicated when the House approved all twelve Articles.

If the episode from the Swayne impeachment is accorded any precedential value in the present controversy over Article II, it might be argued by analogy that the Committee's vote to

adopt that Article must be construed to imply that a majority believed that all five specifications had been proved. Because the Committee did not vote separately on each specification, however, it is impossible to know whether those Members who voted for Article II would be willing to accept that construction. If so, then one of our major objections to the Article would vanish. However, it would still be necessary to amend the Article by removing the sentence "This has included one or more of the following," and substituting language which would make it plain that no Member of the House or Senate could vote for the Article unless he was convinced of the independent sufficiency of each of the five specifications.

However, there remains another and more subtle objection to the lumping together of unrelated charges in Article II:

> There is indeed always a danger when several crimes are tied together, that the jury will use the evidence cumulatively; that is, that although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all.

It is thus not enough protection for an accused that the Senate may choose to vote separately upon each section of an omnibus article of impeachment: the prejudicial effect of grouping a diverse mass of factual material under one heading, some of it adduced to prove one proposition and another to prove a proposition entirely unrelated, would still remain.(12)

12. H. REPT. NO. 93–1305, at pp. 427–431, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29332–34, 93d Cong. 2d Sess., Aug. 20, 1974.

§ 3.4 The Senate, sitting as a Court of Impeachment, rejected a motion to strike articles of impeachment on the ground that certain articles were duplicatory and accumulative.

On Apr. 3, 1936,(13) Judge Halsted L. Ritter, respondent in an impeachment trial, moved in the Senate to strike certain articles on the grounds of duplication and accumulation of changes.

The motion as duly filed by counsel for the respondent is as follows:

In the Senate of the United States of America sitting as a Court of Impeachment. *The United States of America* v. *Halsted L. Ritter, respondent*

MOTION TO STRIKE ARTICLE I, OR, IN THE ALTERNATIVE, TO REQUIRE ELECTION AS TO ARTICLES I AND II; AND MOTION TO STRIKE ARTICLE VII

The respondent, Halsted L. Ritter, moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article I of the articles of impeachment, or, in the alternative, to require the honorable managers on the part of the House of Representatives to elect as to whether they will proceed upon article I or

13. 80 CONG. REC. 4898, 74th Cong. 2d Sess. The motion was submitted on Mar. 31, 1936, 80 CONG. REC. 4656, 4657, and reserved for decision.

upon article II, and for grounds of such motion respondent says:

1. Article II reiterates and embraces all the charges and allegations of article I, and the respondent is thus and thereby twice charged in separate articles with the same and identical offense, and twice required to defend against the charge presented in article I.

2. The presentation of the same and identical charge in the two articles in question tends to prejudice the respondent in his defense, and tends to oppress the respondent in that the articles are so framed as to collect, or accumulate upon the second article, the adverse votes, if any, upon the first article.

3. The Constitution of the United States contemplates but one vote of the Senate upon the charge contained in each article of impeachment, whereas articles I and II are constructed and arranged in such form and manner as to require and exact of the Senate a second vote upon the subject matter of article I.

MOTION TO STRIKE ARTICLE VII

And the respondent further moves the honorable Senate, sitting as a Court of Impeachment, for an order striking and dismissing article VII, and for grounds of such motion, respondent says:

1. Article VII includes and embraces all the charges set forth in articles I, II, III, IV, V, and VI.

2. Article VII constitutes an accumulation and massing of all charges in preceding articles upon which the Court is to pass judgment prior to the vote on article VII, and the prosecution should be required to abide by the judgment of the Senate rendered upon such prior articles and the Senate ought not to countenance the arrangement of pleading designed to procure a second vote and the collection or accumulation of adverse votes, if any, upon such matters.

3. The presentation in article VII of more than one subject and the charges arising out of a single subject is unjust and prejudicial to respondent.

4. In fairness and justice to respondent, the Court ought to require separation and singleness of the subject matter of the charges in separate and distinct articles, upon which a single and final vote of the Senate upon each article and charge can be had.

FRANK P. WALSH,
CARL T. HOFFMAN,
Of Counsel for Respondent.

Presiding Officer Nathan L. Bachman, of Tennessee, overruled that part of the motion to strike relating to Articles I and II, finding that those articles presented distinct and different bases for impeachment. This ruling was sustained. With respect to the application of the motion to Article VII, the Presiding Officer submitted the question of duplication to the Court of Impeachment for a decision. The motion to strike Article VII was overruled on a voice vote.(14)

§ 3.5 During the Ritter impeachment trial in the Sen-

14. For a summary of the arguments by counsel on the motions, and citations thereto, see § 18.12, infra.

ate, the President pro tempore overruled a point of order against a vote of conviction on the seventh article, where the point of order was based on an accumulation or combination of facts and circumstances.

On Apr. 17, 1936, President pro tempore Key Pittman, of Nevada, stated that the Senate had by a two-thirds vote adjudged the respondent Judge Halsted L. Ritter guilty as charged in Article VII of the articles of impeachment. He over-ruled a point of order against the vote, as follows:

MR. [WARREN R.] AUSTIN [of Vermont]: The first reason for the point of order is that here is a combination of facts in the indictment, the ingredients of which are the several articles which precede article VII, as seen by paragraph marked 4 on page 36. The second reason is contained in the Constitution of the United States, which provides that no person shall be convicted without the concurrence of two-thirds of the members present. The third reason is that this matter has been passed upon judicially, and it has been held that an attempt to convict upon a combination of circumstances——

MR. [GEORGE] MCGILL, [of Kansas]: Mr. President, a parliamentary inquiry.

MR. AUSTIN: Of which the respondent has been found innocent would be monstrous. I refer to the case of *Andrews* v. *King* (77 Maine, 235). . . .

THE PRESIDENT PRO TEMPORE: A point of order is made as to article VII, in which the respondent is charged with general misbehavior. It is a separate charge from any other charge, and the point of order is overruled.(15)

Use of Historical Precedents

§ 3.6 With respect to the conduct of President Richard Nixon, the impeachment inquiry staff of the Committee on the Judiciary reported to the committee on "Constitutional Grounds for Presidential Impeachment," which included references to the value of historical precedents.

During an inquiry into impeachable offenses against President Nixon in the 93d Congress by the Committee on the Judiciary, the committee's impeachment inquiry staff reported to the committee on grounds for impeachment of the President. The report discussed in detail the historical bases and origins, in both English parliamentary practice and in the practice of the U.S. Congress, of the impeachment power, and drew conclusions as to the grounds for impeachment of the President and of other federal civil officers from the history of impeachment proceedings

15. 80 CONG. REC. 5606, 74th Cong. 2d Sess.

and from the history of the U.S. Constitution.(16)

Grounds for Presidential Impeachment

§ 3.7 The Committee on the Judiciary concluded, in recommending articles impeaching President Richard Nixon to the House, that the President could be impeached not only for violations of federal criminal statutes, but also for (1) serious abuse of the powers of his office, and (2) refusal to comply with proper subpoenas of the committee for evidence relevant to its impeachment inquiry.

In its final report to the House pursuant to its impeachment inquiry into the conduct of President Nixon in the 93d Congress, the Committee on the Judiciary set forth the following conclusions (footnotes omitted) on the three articles of impeachment adopted by the committee and included in its report:(17)

[ARTICLE I]

CONCLUSION

After the Committee on the Judiciary had debated whether or not it should recommend Article I to the House of Representatives, 27 of the 38 Members of the Committee found that the evidence before it could only lead to one conclusion; that Richard M. Nixon, using the powers of his high office, engaged, personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of the unlawful entry, on June 17, 1972, into the headquarters of the Democratic National Committee; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

This finding is the only one that can explain the President's involvement in a pattern of undisputed acts that occurred after the break-in and that cannot otherwise be rationally explained. . . .

President Nixon's course of conduct following the Watergate break-in, as described in Article I, caused action not only by his subordinates but by the agencies of the United States, including the Department of Justice, the FBI, and the CIA. It required perjury, destruction of evidence, obstruction of justice, all crimes. But, most important, it required deliberate, contrived, and continuing deception of the American people.

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16. The report is printed in full in the appendix to this chapter, infra. The staff report was printed as a committee print, and the House authorized on June 6, 1974, the printing of 3,000 additional copies thereof. H. Res. 935, 93d Cong. 2d Sess.

17. H. REPT. No. 93–1305, at pp. 133 et seq., Committee on the Judiciary. See the articles and conclusions printed in the Record in full at 120 CONG. REC. 29219–79, 93d Cong. 2d Sess., Aug. 20, 1974.

President Nixon's actions resulted in manifest injury to the confidence of the nation and great prejudice to the cause of law and justice, and was subversive of constitutional government. His actions were contrary to his trust as President and unmindful of the solemn duties of his high office. It was this serious violation of Richard M. Nixon's constitutional obligations as President, and not the fact that violations of Federal criminal statutes occurred, that lies at the heart of Article I.

The Committee finds, based upon clear and convincing evidence, that this conduct, detailed in the foregoing pages of this report, constitutes "high crimes and misdemeanors" as that term is used in Article II, Section 4 of the Constitution. Therefore, the Committee recommends that the House of Representatives exercise its constitutional power to impeach Richard M. Nixon.

On August 5, 1974, nine days after the Committee had voted on Article I, President Nixon released to the public and submitted to the Committee on the Judiciary three additional edited White House transcripts of Presidential conversations that took place on June 23, 1972, six days following the DNC break-in. Judge Sirica had that day released to the Special Prosecutor transcripts of those conversations pursuant to the mandate of the United States Supreme Court. The Committee had subpoenaed the tape recordings of those conversations, but the President had refused to honor the subpoena.

These transcripts conclusively confirm the finding that the Committee had already made, on the basis of clear and convincing evidence, that from shortly after the break-in on June 17, 1972, Richard M. Nixon, acting personally and through his subordinates and agents, made it his plan to and did direct his subordinates to engage in a course of conduct designed to delay, impede and obstruct investigation of the unlawful entry of the headquarters of the Democratic National Committee; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities. . . .

[ARTICLE II]

CONCLUSION

In recommending Article II to the House, the Committee finds clear and convincing evidence that Richard M. Nixon, contrary to his trust as President and unmindful of the solemn duties of his high office, has repeatedly used his power as President to violate the Constitution and the law of the land.

In so doing, he has failed in the obligation that every citizen has to live under the law. But he has done more, for it is the duty of the President not merely to live by that law but to see that law faithfully applied. Richard M. Nixon has repeatedly and willfully failed to perform that duty. He has failed to perform it by authorizing and directing actions that violated or disregarded the rights of citizens and that corrupted and attempted to corrupt the lawful functioning of executive agencies. He has failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates that interfered with lawful investigations and impeded the enforcement of the laws.

Article II, section 3 of the Constitution requires that the President "shall

take Care that the Laws be faithfully executed." Justice Felix Frankfurter described this provision as "the embracing function of the President"; President Benjamin Harrison called it "the central idea of the office." "[I]n a republic," Harrison wrote, "the thing to be executed is the law, not the will of the ruler as in despotic governments. The President cannot go beyond the law, and he cannot stop short of it."

The conduct of Richard M. Nixon has constituted a repeated and continuing abuse of the powers of the Presidency in disregard of the fundamental principle of the rule of law in our system of government. This abuse of the powers of the President was carried out by Richard M. Nixon, acting personally and through his subordinates, for his own political advantage, not for any legitimate governmental purpose and without due consideration for the national good.

The rule of law needs no defense by the Committee. Reverence for the laws, said Abraham Lincoln, should "become the political religion of the nation." Said Theodore Roosevelt, "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it."

It is a basic principle of our government that "we submit ourselves to rulers only if [they are] under rules." "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen," wrote Justice Louis Brandeis. The Supreme Court has said:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations upon the exercise of the authority which it gives.

Our nation owes its strength, its stability, and its endurance to this principle.

In asserting the supremacy of the rule of law among the principles of our government, the Committee is enunciating no new standard of Presidential conduct. The possibility that Presidents have violated this standard in the past does not diminish its current—and future—applicability. Repeated abuse of power by one who holds the highest public office requires prompt and decisive remedial action, for it is in the nature of abuses of power that if they go unchecked they will become overbearing, depriving the people and their representatives of the strength of will or the wherewithal to resist.

Our Constitution provides for a responsible Chief Executive, accountable for his acts. The framers hoped, in the words of Elbridge Gerry, that "the maxim would never be adopted here that the chief Magistrate could do no wrong." They provided for a single executive because, as Alexander Hamilton wrote, "the executive power is more easily confined when it is one" and "there should be a single object for the . . . watchfulness of the people."

The President, said James Wilson, one of the principal authors of the Con-

stitution, "is the dignified, but accountable magistrate of a free and great people." Wilson said, "The executive power is better to be trusted when it has no screen. . . . [W]e have a responsibility in the person of our President . . . he cannot roll upon any other person the weight of his criminality. . . ." As both Wilson and Hamilton pointed out, the President should not be able to hide behind his counsellors; he must ultimately be accountable for their acts on his behalf. James Iredell of North Carolina, a leading proponent of the proposed Constitution and later a Supreme Court Justice, said that the President "is of a very different nature from a monarch. He is to be . . . personally responsible for any abuse of the great trust reposed in him."

In considering this Article the Committee has relied on evidence of acts directly attributable to Richard M. Nixon himself. He has repeatedly attempted to conceal his accountability for these acts and attempted to deceive and mislead the American people about his own responsibility. He governed behind closed doors, directing the operation of the executive branch through close subordinates, and sought to conceal his knowledge of what they did illegally on his behalf. Although the Committee finds it unnecessary in this case to take any position on whether the President should be held accountable, through exercise of the power of impeachment, for the actions of his immediate subordinates, undertaken on his behalf, when his personal authorization and knowledge of them cannot be proved, it is appropriate to call attention to the dangers inherent in the performance of the highest public office in the land in air of secrecy and concealment.

The abuse of a President's powers poses a serious threat to the lawful and proper functioning of the government and the people's confidence in it. For just such Presidential misconduct the impeachment power was included in the Constitution. The impeachment provision, wrote Justice Joseph Story in 1833, "holds out a deep and immediate responsibility, as a check upon arbitrary power; and compels the chief magistrate, as well as the humblest citizen, to bend to the majesty of the law." And Chancellor James Kent wrote in 1826:

> If . . . neither the sense of duty, the force of public opinion, nor the transitory nature of the seat, are sufficient to secure a faithful exercise of the executive trust, but the President will use the authority of his station to violate the Constitution or law of the land, the House of Representatives can arrest him in his career, by resorting to the power of impeachment.

The Committee has concluded that, to perform its constitutional duty, it must approve this Article of Impeachment and recommend it to the House. If we had been unwilling to carry out the principle that all those who govern, including ourselves, are accountable to the law and the Constitution, we would have failed in our responsibility as representatives of the people, elected under the Constitution. If we had not been prepared to apply the principle of Presidential accountability embodied in the impeachment clause of the Constitution, but had instead condoned the conduct of Richard M. Nixon, then another President, perhaps with a different political philos-

ophy, might have used this illegitimate power for further encroachments on the rights of citizens and further usurpations of the power of other branches of our government. By adopting this Article, the Committee seeks to prevent the recurrence of any such abuse of Presidential power.

In recommending Article II to the House, the Committee finds clear and convincing evidence that Richard M. Nixon has not faithfully executed the executive trust, but has repeatedly used his authority as President to violate the Constitution and the law of the land. In so doing, he violated the obligation that every citizen has to live under the law. But he did more, for it is the duty of the President not merely to live by the law but to see that law faithfully applied. Richard M. Nixon repeatedly and willfully failed to perform that duty. He failed to perform it by authorizing and directing actions that violated the rights of citizens and that interfered with the functioning of executive agencies. And he failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates interfering with the enforcement of the laws.

The Committee finds that, in the performance of his duties as President, Richard M. Nixon on many occasions has acted to the detriment of justice, right, and the public good, in violation of his constitutional duty to see to the faithful execution of the laws. This conduct has demonstrated a contempt for the rule of law; it has posed a threat to our democratic republic. The Committee finds that this conduct constitutes "high crimes and misdemeanors" within the meaning of the Constitution, that it warrants his impeachment by the House, and that it requires that he be put to trial in the Senate. . . .

[ARTICLE III]

CONCLUSION

The undisputed facts, historic precedent, and applicable legal principles support the Committee's recommendation of Article III. There can be no question that in refusing to comply with limited, narrowly drawn subpoenas—issued only after the Committee was satisfied that there was other evidence pointing to the existence of impeachable offenses—the President interfered with the exercise of the House's function as the "Grand Inquest of the Nation." Unless the defiance of the Committee's subpoenas under these circumstances is considered grounds for impeachment, it is difficult to conceive of any President acknowledging that he is obligated to supply the relevant evidence necessary for Congress to exercise its constitutional responsibility in an impeachment proceeding. If this were to occur, the impeachment power would be drained of its vitality. Article III, therefore, seeks to preserve the integrity of the impeachment process itself and the ability of Congress to act as the ultimate safeguard against improper presidential conduct.[18]

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18. H. REPT. NO. 93–1305, at p. 213, Committee on the Judiciary. See 120 CONG. REC. 29279, 93d Cong. 2d Sess., Aug. 20, 1974.

See also, for the subpena power of a committee conducting an impeachment investigation, § 6, infra. The House has declined to prosecute for

§ 3.8 In the report of the Committee on the Judiciary recommending the impeachment of President Richard Nixon, the minority took the view that grounds for Presidential impeachment must be criminal conduct or acts with criminal intent.

On Aug. 20, 1974, the Committee on the Judiciary submitted a report recommending the impeachment of President Nixon. In the minority views set out below (footnotes omitted), Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti, and Latta discussed the grounds for presidential impeachment: (19)

B. MEANING OF "TREASON, BRIBERY OR OTHER HIGH CRIMES AND MISDEMEANORS"

The Constitution of the United States provides that the President "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Upon impeachment and conviction, removal of the President from office is mandatory. The offenses for which a President may be impeached are limited to those enumerated in the Constitution, namely "Treason, Bribery, or other high Crimes and Misdemeanors." We do not believe that a President or any other civil officer of the United States government may constitutionally be impeached and convicted for errors in the administration of his office.

1. ADOPTION OF "TREASON, BRIBERY, OR OTHER HIGH CRIMES AND MISDEMEANORS" AT CONSTITUTIONAL CONVENTION

The original version of the impeachment clause at the Constitutional Convention of 1787 had made "malpractice or neglect of duty" the grounds for impeachment. On July 20, 1787, the Framers debated whether to retain this clause, and decided to do so.

Gouverneur Morris, who had moved to strike the impeachment clause altogether, began by arguing that it was unnecessary because the executive "can do no *criminal act* without Coadjutors who may be punished." George Mason disagreed, arguing that "When great *crimes* were committed he [favored] punishing the principal as well as the Coadjutors." Fearing recourse to assassinations, Benjamin Franklin favored impeachment "to provide in the Constitution for the regular *punishment* of the executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." Gouverneur Morris then admitted that "corruption & some few other offenses" should be impeachable, but thought "the case ought to be enumerated & defined."

Rufus King, a co-sponsor of the motion to strike the impeachment clause,

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contempt of Congress officers charged with impeachable offenses and refusing to comply with subpenas (see § 6.12, infra).

19. H. REPT. NO. 93–1305, at pp. 362372, Committee on the Judiciary, printed at 120 CONG. REC. 29312–15, 93d Cong. 2d Sess., Aug. 20, 1974.

pointed out that the executive, unlike the judiciary, did not hold his office during good behavior, but during a fixed, elective term; and accordingly ought not to be impeachable, like the judiciary, for "misbehaviour:" this would be "destructive of his independence and of the principles of the Constitution." Edmund Randolph, however, made a strong statement in favor of retaining the impeachment clause:

> Guilt wherever found ought to be *punished*. The Executive will have great opportunitys of abusing his power, particularly in time of war when the military force, and in some respects the public money will be in his hands.

> . . . He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business. He suggested for consideration . . . requiring some preliminary inquest of whether just grounds for impeachment existed.

Benjamin Franklin again suggested the role of impeachments in releasing tensions, using an example from international affairs involving a secret plot to cause the failure of a rendezvous between the French and Dutch fleets—an example suggestive of treason. Gouverneur Morris, his opinion now changed by the discussion, closed the debate on a note echoing the position of Randolph:

> Our Executive . . . may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst. it by displacing him. . . . The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office. . . . When we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the Legislature.

On the question, "Shall the Executive be removable on impeachments," the proposition then carried by a vote of eight states to two.

A review of this debate hardly leaves the impression that the Framers intended the grounds for impeachment to be left to the discretion, even the "sound" discretion, of the legislature. On a fair reading, Madison's notes reveal the Framers' fear that the impeachment power would render the executive dependent on the legislature. The concrete examples used in the debate all refer not only to crimes, but to extremely grave crimes. George Mason mentioned the possibility that the President would corrupt his own electors and then "repeat his guilt," and described grounds for impeachment as "the most extensive injustice." Franklin alluded to the beheading of Charles I, the possibility of assassination, and the example of the French and Dutch fleets, which connoted betrayal of a national interest. Madison mentioned the "perversion" of an "administration into a scheme of peculation or oppression," or the "betrayal" of the executive's "trust to foreign powers." Edmund Randolph mentioned the great opportunities for abuse of the executive power, "particularly in time of war when the military force, and in some respects the public money will be in his hands." He cautioned against "tu-

mults & insurrections." Gouveneur Morris similarly contemplated that the executive might corrupt his own electors, or "be bribed by a greater interest to betray his trust"—just as the King of England had been bribed by Louis XIV—and felt he should therefore be impeachable for "treachery."

After the July 20 vote to retain the impeachment clause, the resolution containing it was referred to the Committee on Detail, which substituted "treason, bribery or corruption" for "malpractice or neglect of duty." No surviving records explain the reasons for the change, but they are not difficult to understand, in light of the floor discussion just summarized. The change fairly captured the sense of the July 20 debate, in which the grounds for impeachment seem to have been such acts as would either cause danger to the very existence of the United States, or involve the purchase and sale of the "Chief of Magistracy," which would tend to the same result. It is *not* a fair summary of this debate—which is the only surviving discussion of any length by the Framers as to the grounds for impeachment—to say that the Framers were principally concerned with reaching a course of conduct whether or not criminal, generally inconsistent with the proper and effective exercise of the office of the presidency. They were concerned with preserving the government from being overthrown by the treachery or corruption of one man. Even in the context of that purpose, they steadfastly reiterated the importance of putting a check on the legislature's use of power and refused to expand the narrow definition they had given to treason in the Constitution. They saw punishment as a significant purpose of impeachment. The changes in language made by the Committee on Detail can be taken to reflect a consensus of the debate that (1) impeachment would be the proper remedy where grave crimes had been committed, and (2) adherence to this standard would satisfy the widely recognized need for a check on potential excesses of the impeachment power itself.

The impeachment clause, as amended by the Committee on Detail to refer to "treason, bribery or corruption," was reported to the full Convention on August 6, 1787, as part of the draft constitution. Together with other sections, it was referred to the Committee of Eleven on August 31. This Committee further narrowed the grounds to "treason or bribery," while at the same time substituting trial by the Senate for trial by the Supreme Court, and requiring a two-thirds vote to convict. No surviving records explain the purpose of this change. The mention of "corruption" may have been thought redundant, in view of the provision for bribery. Or, corruption might have been regarded by the Committee as too broad, because not a well-defined crime. In any case, the change limited the grounds for impeachment to two clearly understood and enumerated crimes.

The revised clause, containing the grounds "treason and bribery," came before the full body again on September 8, late in the Convention. George Mason moved to add to the enumerated grounds for impeachment. Madison's Journal reflects the following exchange:

> COL. MASON. Why is the provision restrained to Treason & bribery

only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—as bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after "bribery" "or maladministration." Mr. Gerry seconded him—

MR. MADISON. So vague a term will be equivalent to a tenure during pleasure of the Senate.

MR. GOVR. MORRIS., it will not be put in force & can do no harm—An election of every four years will prevent maladministration.

Col. Mason withdrew "maladministration" & substitutes "other high crimes and misdemeanors" agst. the State.

On the question thus altered, the motion of Colonel Mason passed by a vote of eight states to three.

Madison's notes reveal no debate as to the meaning of the phrase "other high Crimes and Misdemeanors." All that appears is that Mason was concerned with the narrowness of the definition of treason; that his purpose in proposing "maladministration" was to reach *great* and *dangerous* offenses; and that Madison felt that "maladministration," which was included as a ground for impeachment of public officials in the constitutions of six states, including his own, would be too "vague" and would imperil the independence of the President.

It is our judgment, based upon this constitutional history, that the Framers of the United States Constitution intended that the President should be removable by the legislative branch only for serious misconduct dangerous to the system of government established by the Constitution. Absent the element of danger to the State, we believe the Delegates to the Federal Convention of 1787, in providing that the President should serve for a fixed elective term rather than during good behavior or popularity, struck the balance in favor of stability in the executive branch. We have never had a British parliamentary system in this country, and we have never adopted the device of a parliamentary vote of no-confidence in the chief executive. If it is thought desirable to adopt such a system of government, the proper way to do so is by amending our written Constitution—not by removing the President.

2. ARE "HIGH CRIMES AND MISDEMEANORS" NON-CRIMINAL?

a. Language of the Constitution

The language of the Constitution indicates that impeachment can lie only for serious criminal offenses.

First, of course, treason and bribery were indictable offenses in 1787, as they are now. The words "crime" and "misdemeanor", as well, both had an accepted meaning in the English law of the day, and referred to criminal acts. Sir William Blackstone's *Commentaries on the Laws of England*, (1771), which enjoyed a wide circulation in the American colonies, defined the terms as follows:

> I. A crime, or misdemeanor is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms: though, in common usage, the word "crimes" is made to denote

> such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanors" only.

Thus, it appears that the word "misdemeanor" was used at the time Blackstone wrote, as it is today, to refer to less serious crimes.

Second, the use of the word "other" in the phrase "Treason, Bribery or other high Crimes and Misdemeanors" seems to indicate that high Crimes and Misdemeanors had something in common with Treason and Bribery—both of which are, of course, serious *criminal* offenses threatening the integrity of government.

Third, the extradition clause of the Articles of Confederation (1781), the governing instrument of the United States prior to the adoption of the Constitution, had provided for extradition from one state to another of any person charged with "treason, felony or *other* high misdemeanor." If "high misdemeanor" had something in common with treason and felony in this clause, so as to warrant the use of the word "other," it is hard to see what it could have been except that all were regarded as serious crimes. Certainly it would not have been contemplated that a person could be extradited for an offense which was non-criminal.

Finally, the references to impeachment in the Constitution use the language of the criminal law. Removal from office follows "conviction," when the Senate has "tried" the impeachment. The party convicted is "nevertheless . . . liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." The trial of all Crimes is by Jury, "except in cases of Impeachment." The President is given power to grant "Pardons for Offenses against the United States, except in Cases of Impeachment."

This constitutional usage, in its totality, strengthens the notion that the words "Crime" and "Misdemeanor" in the impeachment clause are to be understood in their ordinary sense, i.e., as importing criminality. At the very least, this terminology strongly suggests the criminal or quasi-criminal nature of the impeachment process.

b. English impeachment practice

It is sometimes argued that officers may be impeached for non-criminal conduct, because the origins of impeachment in England in the fourteenth and seventeenth centuries show that the procedure was not limited to criminal conduct in that country.

Early English impeachment practice, however, often involved a straight power struggle between the Parliament and the King. After parliamentary supremacy had been established, the practice was not so open-ended as it had been previously. Blackstone wrote (between 1765 and 1769) that

> [A]n impeachment before the Lords by the commons of Great Britain, in parliament, is a prosecution of *the already known and established law*. . . .

The development of English impeachment practice in the eighteenth century is illustrated by the result of the first major nineteenth century impeachment in that country—that of Lord Melville, Treasurer of the Navy, in 1805–1806. Melville was charged with wrongful use of public moneys. Before passing judgment, the House of

Lords requested the formal opinion of the judges upon the following question:

> Whether it was lawful for the Treasurer of the Navy, before the passing of the Act 25 Geo. 3rd, c. 31, to apply any sum of money [imprested] to him for navy [sumpsimus] services to any other use whatsoever, public or private, without express authority for so doing; *and whether such application by such treasurer would have been a misdemeanor, or punishable by information or indictment?*

The judges replied:

> It was *not unlawful* for the Treasurer of the Navy before the Act 25 Geo. 3rd, c. 31 . . . to apply any sum of money impressed to him for navy services, to other uses . . . without express authority for so doing, *so as to constitute a misdemeanor punishable by information or indictment.*

Upon this ruling by the judges that Melville had committed no crime, he was acquitted. The case thus strongly suggests that the Lords in 1805 believed an impeachment conviction to require a "misdemeanor punishable by information or indictment." The case may be taken to cast doubt on the vitality of precedents from an earlier, more turbid political era and to point the way to the Framers' conception of a valid exercise of the impeachment power in the future. As a matter of policy, as well, it is an appropriate precedent to follow in the latter twentieth century.

The argument that the President should be impeachable for general misbehavior, because some English impeachments do not appear to have involved criminal charges, also takes too little account of the historical fact that the Framers, mindful of the turbulence of parliamentary uses of the impeachment power, cut back on that power in several respects in adapting it to an American context. Congressional bills of attainder and *ex post facto* laws, which had supplemented the impeachment power in England, were expressly forbidden. Treason was defined in the Constitution—and defined narrowly—so that Congress acting alone could not change the definition, as Parliament had been able to do. The consequences of impeachment and conviction, which in England had frequently meant death, were limited to removal from office and disqualification to hold further federal office. Whereas a majority vote of the Lords had sufficed for conviction, in America a two-thirds vote of the Senate would be required. Whereas Parliament had had the power to impeach private citizens, the American procedure could be directed only against civil officers of the national government. The grounds for impeachment—unlike the grounds for impeachment in England—were stated in the Constitution.

In the light of these modifications, it is misreading history to say that the Framers intended, by the mere approval of Mason's substitute amendment, to adopt *in toto* the British grounds for impeachment. Having carefully narrowed the definition of treason, for example, they could scarcely have intended that British treason precedents would guide ours.

c. American impeachment practice

The impeachment of President Andrew Johnson is the most important precedent for a consideration of what constitutes grounds for impeachment of a President, even if it has been his-

torically regarded (and probably fairly so) as an excessively partisan exercise of the impeachment power.

The Johnson impeachment was the product of a fundamental and bitter split between the President and the Congress as to Reconstruction policy in the Southern states following the Civil War. Johnson's vetoes of legislation, his use of pardons, and his choice of appointees in the South all made it impossible for the Reconstruction Acts to be enforced in the manner which Congress not only desired, but thought urgently necessary.

On March 7, 1867, the House referred to the Judiciary Committee a resolution authorizing it

> to inquire into the *official conduct of* Andrew Johnson . . . and to report to this House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were *designed or calculated to overthrow or corrupt the government of the United States* . . . and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes and misdemeanors, requiring the interposition of the constitutional powers of this House.

On November 25, 1867, the Committee reported to the full House a resolution recommending impeachment, by a vote of 5 to 4. A minority of the Committee, led by Rep. James F. Wilson of Iowa, took the position that there could be no impeachment because the President had committed no crime:

> In approaching a conclusion, we do not fail to recognize two standpoints from which this case can be viewed—the legal and the political.
>
> . . . Judge him politically, we must condemn him. But the day of political impeachments would be a sad one for this country. Political unfitness and incapacity must be tried at the ballot-box, not in the high court of impeachment. A contrary rule might leave to Congress but little time for other business than the trial of impeachments.
>
> . . . [C]rimes and misdemeanors are now demanding our attention. Do these, within the meaning of the Constitution, appear? Rest the case upon political offenses, and we are prepared to pronounce against the President, for such offenses are numerous and grave . . . [yet] we still affirm that the conclusion at which we have arrived is correct.

The resolution recommending impeachment was debated in the House on December 5 and 6, 1867, Rep. George S. Boutwell of Massachusetts speaking for the Committee majority in favor of impeachment, and Rep. Wilson speaking in the negative. Aside from characterization of undisputed facts discovered by the Committee, the only point debated was whether the commission of a crime was an essential element of impeachable conduct by the President. Rep. Boutwell began by saying, "If the theory of the law submitted by the minority of the committee be in the judgment of this House a true theory, then the majority have no case whatsoever." "The country was disappointed, no doubt, in the report of the committee," he continued, "and very likely this House participated in the disappointment, that there was no specific, heinous, novel offense charged upon and proved against the President of the United States." And again, "It may not be possible, by specific charge, to arraign him for this great crime, but is he therefore to escape?"

The House of Representatives answered this question the next day, when the majority resolution recommending, impeachment was defeated by a vote of 57 to 108. The issue of impeachment was thus laid to rest for the time being.

Earlier in 1867, the Congress had passed the Tenure-of-Office Act, which took away the President's authority to remove members of his own Cabinet, and provided that violation of the Act should be punishable by imprisonment of up to five years and a fine of up to ten thousand dollars and "shall be deemed a high misdemeanor"—fair notice that Congress would consider violation of the statute an impeachable, as well as a criminal, offense. It was generally known that Johnson's policy toward Reconstruction was not shared by his Secretary of War, Edwin M. Stanton. Although Johnson believed the Tenure-of-Office Act to be unconstitutional, he had not infringed its provisions at the time the 1867 impeachment attempt against him failed by such a decisive margin.

Two and a half months later, however, Johnson removed Stanton from office, in apparent disregard of the Tenure-of-Office Act. The response of Congress was immediate: Johnson was impeached three days later, on February 24, 1868, by a vote of 128 to 47—an even greater margin than that by which the first impeachment vote had failed.

The reversal is a dramatic demonstration that the House of Representatives believed it had to find the President guilty of a crime before impeaching him. The nine articles of impeachment which were adopted against Johnson, on March 2, 1868, all related to his removal of Secretary Stanton, allegedly in deliberate violation of the Tenure-of-Office Act, the Constitution, and certain other related statutes. The vote had failed less than three months before; and except for Stanton's removal and related matters, nothing in the new Articles charged Johnson with any act committed subsequent to the previous vote.

The only other case of impeachment of an officer of the executive branch is that of Secretary of War William W. Belknap in 1876. All five articles alleged that Belknap "corruptly" accepted and received considerable sums of money in exchange for exercising his authority to appoint a certain person as a military post trader. The facts alleged would have sufficed to constitute the crime of bribery. Belknap resigned before the adoption of the Articles and was subsequently indicted for the conduct alleged.

It may be acknowledged that in the impeachment of federal judges, as opposed to executive officers, the actual commission of a crime does not appear always to have been thought essential. However, the debates in the House and opinions filed by Senators have made it clear that in the impeachments of federal judges, Congress has placed great reliance upon the "good behavior" clause. The distinction between officers tenured during good behavior and elected officers, for purposes of grounds for impeachment, was stressed by Rufus King at the Constitutional Convention of 1787. A judge's impeachment or conviction resting upon "general misbehavior," in whatever degree, cannot be an appropriate guide for the impeachment or conviction of an elected officer serving for a fixed term.

The impeachments of federal judges are also different from the case of a President for other reasons: (1) Some of the President's duties *e.g.,* as chief of a political party, are sufficiently dissimilar to those of the judiciary that conduct perfectly appropriate for him, such as making a partisan political speech, would be grossly improper for a judge. An officer charged with the continual adjudication of disputes labors under a more stringent injunction against the appearance of partisanship than an officer directly charged with the formulation and negotiation of public policy in the political arena—a fact reflected in the adoption of Canons of Judicial Ethics. (2) The phrase "and all civil Officers" was not added until after the debates on the impeachment clause had taken place. The words "high crimes and misdemeanors" were added while the Framers were debating a clause concerned exclusively with the impeachment of the President. There was no discussion during the Convention as to what would constitute impeachable conduct for judges. (3) Finally, the removal of a President from office would obviously have a far greater impact upon the equilibrium of our system of government than the removal of a single federal judge.

d. The need for a standard: criminal intent

When the Framers included the power to impeach the President in our Constitution, they desired to "provide some mode that will not make him dependent on the Legislature." To this end, they withheld from the Congress many of the powers enjoyed by Parliament in England; and they defined the grounds for impeachment in their written Constitution. It is hardly conceivable that the Framers wished the new Congress to adopt as a starting point the record of all the excesses to which desperate struggles for power had driven Parliament, or to use the impeachment power freely whenever Congress might deem it desirable. The whole tenor of the Framers' discussions, the whole purpose of their many careful departures from English impeachment practice, was in the direction of limits and of standards. An impeachment power exercised without extrinsic and objective standards would be tantamount to the use of bills of attainder and *ex post facto* laws, which are expressly forbidden by the Constitution and are contrary to the American spirit of justice.

It is beyond argument that a violation of the President's oath or a violation of his duty to take care that the laws be faithfully executed, must be impeachable conduct or there would be no means of enforcing the Constitution. However, this elementary proposition is inadequate to define the impeachment power. It remains to determine what kind of conduct constitutes a violation of the oath or the duty. Furthermore, reliance on the summary phrase, "violation of the Constitution," would not always be appropriate as a standard, because actions constituting an apparent violation of one provision of the Constitution may be justified or even required by other provisions of the Constitution.

There are types of misconduct by public officials—for example, ineptitude, or unintentional or "technical" violations of rules or statutes, or "maladministration"—which would not be criminal; nor could they be made crimi-

nal, consonant with the Constitution, because the element of criminal intent or *mens rea* would be lacking. Without a requirement of criminal acts or at least criminal intent, Congress would be free to impeach these officials. The loss of this freedom should not be mourned; such a use of the impeachment power was never intended by the Framers, is not supported by the language of our Constitution, and, if history is to guide us, would be seriously unwise as well.

As Alexander Simpson stated in his *Treatise on Federal Impeachments* (1916):

> The Senate must find an intent to do wrong. It is, of course, admitted that a party will be presumed to intend the natural and necessary results of his voluntary acts, but that is a presumption only, and it is not always inferable from the act done. So ancient is this principle, and so universal is its application, that it has long since ripened into the maxim, *Actus non facit reun, [nisi] mens sit rea*, and has come to be regarded as one of the fundamental legal principles of our system of jurisprudence. (p. 29).

The point was thus stated by James Iredell in the North Carolina ratifying convention: "I beg leave to observe that, when any man is impeached, it must be for an error of the heart, and not of the head. God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. This is not the case here.

The minority views did support a portion of Article I on the ground that criminal conduct was alleged therein and sustained by the evidence; but found no impeachable offenses constituted in Articles II and III:

> (1) With respect to proposed Article I, we believe that the charges of conspiracy to obstruct justice, and obstruction of justice, which are contained in the Article in essence, if not in terms, may be taken as substantially confessed by Mr. Nixon on August 5, 1974, and corroborated by ample other evidence in the record. Prior to Mr. Nixon's revelation of the contents of three conversations between him and his former Chief of Staff, H. R. Haldeman, that took place on June 23, 1972, we did not, and still do not, believe that the evidence of presidential involvement in the Watergate cover-up conspiracy, as developed at that time, was sufficient to warrant Members of the House, or dispassionate jurors in the Senate, in finding Mr. Nixon guilty of an impeachable offense beyond a reasonable doubt, which we believe to be the appropriate standard.
>
> (2) With respect to proposed Article II, we find sufficient evidence to warrant a belief that isolated instances of unlawful conduct by presidential aides and subordinates did occur during the five-and-one-half years of the Nixon Administration, with varying degrees of direct personal knowledge or involvement of the President in these respective illegal episodes. We roundly condemn such abuses and unreservedly favor the invocation of existing legal sanctions, or the creation of new ones, where needed, to deter such reprehensible official conduct in the future, no

matter in whose Administration, or by what brand or partisan, it might be perpetrated.

Nevertheless, we cannot join with those who claim to perceive an invidious, pervasive "pattern" of illegality in the conduct of official government business generally by President Nixon. In some instances, as noted below, we disagree with the majority's interpretation of the evidence regarding either the intrinsic illegality of the conduct studied or the linkage of Mr. Nixon personally to it. Moreover, even as to those acts which we would concur in characterizing as abusive and which the President appeared to direct or countenance, neither singly nor in the aggregate do they impress us as being offenses for which Richard Nixon, or any President, should be impeached or removed from office, when considered, *as they must be*, on their own footing, apart from the obstruction of justice charge under proposed Article I which we believe to be sustained by the evidence.

(3) Likewise, with respect to proposed Article III, we believe that this charge, standing alone, affords insufficient grounds for impeachment. Our concern here, as explicated in the discussion below, is that the Congressional subpoena power itself not be too easily abused as a means of achieving the impeachment and removal of a President against whom no other substantive impeachable offense has been proved by sufficient evidence derived from sources other than the President himself. We believe it is particularly important for the House to refrain from impeachment on the sole basis of noncompliance with subpoenas where, as here, colorable claims of privilege have been asserted in defense of nonproduction of the subpoenaed materials, and the validity of those claims has not been adjudicated in any established, lawful adversary proceeding before the House is called upon to decide whether to impeach a President on grounds of noncompliance with subpoenas issued by a Committee inquiring into the existence of sufficient grounds for impeachment.[20]

Grounds for Impeachment of Federal Judges

§ 3.9 Following introduction and referral of impeachment resolutions against a Supreme Court Justice in the 91st Congress, when grounds for impeachment of federal judges were discussed at length in the House, the view was taken that federal civil officers may be impeached for less than indictable offenses; that an impeachable offense is what a majority of the House considers it to be; and that a higher standard of conduct is expected of federal judges than of other federal civil officers.

On Apr. 15, 1970, resolutions relating to the impeachment of

20. H. REPT. NO. 93–1305, at pp. 360, 361, Committee on the Judiciary, printed in the Record at 120 CONG. REC. 29311, 93d Cong. 2d Sess., Aug. 20, 1974.

Associate Justice William O. Douglas of the Supreme Court were introduced and referred, following a special-order speech by the Minority Leader, Gerald R. Ford, of Michigan. Mr. Ford discussed the grounds for impeachment of a federal judge, saying in part:[1]

> No, the Constitution does not guarantee a lifetime of power and authority to any public official. The terms of Members of the House are fixed at 2 years; of the President and Vice President at 4; of U.S. Senators at 6. Members of the Federal judiciary hold their offices only "during good behaviour."
>
> Let me read the first section of article III of the Constitution in full:
>
> > The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices *during good Behaviour,* and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. . . .
>
> . . . Thus, we come quickly to the central question: What constitutes "good behaviour" or, conversely, ungood or disqualifying behaviour?
>
> The words employed by the Framers of the Constitution were, as the proceedings of the Convention detail, chosen with exceedingly great care and precision. Note, for example, the word "behaviour." It relates to action, not merely to thoughts or opinions; further, it refers not to a single act but to a pattern or continuing sequence of action. We cannot and should not remove a Federal judge for the legal views he holds—this would be as contemptible as to exclude him from serving on the Supreme Court for his ideology or past decisions. Nor should we remove him for a minor or isolated mistake—this does not constitute behaviour in the common meaning.
>
> What we should scrutinize in sitting Judges is their continuing pattern of action, their behaviour. The Constitution does not demand that it be "exemplary" or "perfect." But it does have to be "good."
>
> Naturally, there must be orderly procedure for determining whether or not a Federal judge's behaviour is good. The courts, arbiters in most such questions of judgment, cannot judge themselves. So the Founding Fathers vested this ultimate power where the ultimate sovereignty of our system is most directly reflected—in the Congress, in the elected Representatives of the people and of the States.
>
> In this seldom-used procedure, called impeachment, the legislative branch exercises both executive and judicial functions. The roles of the two bodies differ dramatically. The House serves as prosecutor and grand jury; the Senate serves as judge and trial jury.
>
> Article I of the Constitution has this to say about the impeachment process:
>
> > The House of Representatives—shall have the sole power of Impeachment.

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1. 116 CONG. REC. 11912–14, 91st Cong. 2d Sess. Charges against Justice Douglas were investigated by a subcommittee of the Committee on the Judiciary, which recommended against impeachment (see §§ 14.14, 14.15, infra).

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

Article II, dealing with the executive branch, states in section 4:

> The President, Vice President, and all civil Officers of the United States shall be removed from office on impeachment for, and conviction of, Treason, Bribery or other high crimes and misdemeanors.

This has been the most controversial of the constitutional references to the impeachment process. No consensus exists as to whether, in the case of Federal judges, impeachment must depend upon conviction of one of the two specified crimes of treason or bribery or be within the nebulous category of "other high crimes and misdemeanors." There are pages upon pages of learned argument whether the adjective "high" modifies "misdemeanors" as well as "crimes," and over what, indeed, constitutes a "high misdemeanor."

In my view, one of the specific or general offenses cited in article II is required for removal of the indirectly elected President and Vice President and all appointed civil officers of the executive branch of the Federal Government, whatever their terms of office. But in the case of members of the judicial branch, Federal judges and Justices, I believe an additional and much stricter requirement is imposed by article II, namely, "good behaviour."

Finally, and this is a most significant provision, article I of the Constitution specifies:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law. . . .

With this brief review of the law, of the constitutional background for impeachment, I have endeavored to correct two common misconceptions: first, that Federal judges are appointed for life and, second, that they can be removed only by being convicted, with all ordinary protections and presumptions of innocence to which an accused is entitled, of violating the law.

This is not the case. Federal judges can be and have been impeached for improper personal habits such as chronic intoxication on the bench, and one of the charges brought against President Andrew Johnson was that he delivered "intemperate, inflammatory, and scandalous harangues."

I have studied the principal impeachment actions that have been initiated over the years and frankly, there are too few cases to make very good law. About the only thing the authorities can agree upon in recent history, though it was hotly argued up to President Johnson's impeachment and the trial of Judge Swayne, is that an offense need not be indictable to be impeachable. In other words, something less than a criminal act or criminal dereliction of duty may nevertheless be sufficient grounds for impeachment and removal from public office.

What, then, is an impeachable offense?

The only honest answer is that an impeachable offense is whatever a ma-

jority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.

I think it is fair to come to one conclusion, however, from our history of impeachments: a higher standard is expected of Federal judges than of any other "civil officers" of the United States.

The President and Vice President, and all persons holding office at the pleasure of the President, can be thrown out of office by the voters at least every 4 years. To remove them in midterm—it has been tried only twice and never done—would indeed require crimes of the magnitude of treason and bribery. Other elective officials, such as Members of the Congress, are so vulnerable to public displeasure that their removal by the complicated impeachment route has not even been tried since 1798. But nine Federal judges, including one Associate Justice of the Supreme Court, have been impeached by this House and tried by the Senate; four were acquitted; four convicted and removed from office; and one resigned during trial and the impeachment was dismissed.

In the most recent impeachment trial conducted by the other body, that of U.S. Judge Halsted L. Ritter of the southern district of Florida who was removed in 1936, the point of judicial behavior was paramount, since the criminal charges were admittedly thin. This case was in the context of F.D.R.'s effort to pack the Supreme Court with Justices more to his liking; Judge Ritter was a transplanted conservative Colorado Republican appointed to the Federal bench in solidly Democratic Florida by President Coolidge. He was convicted by a coalition of liberal Republicans, New Deal Democrats, and Farmer-Labor and Progressive Party Senators in what might be called the northwestern strategy of that era. Nevertheless, the arguments were persuasive:

In a joint statement, Senators Borah, La Follette, Frazier, and Shipstead said:

> We therefore did not, in passing upon the facts presented to us in the matter of the impeachment proceedings against Judge Halsted L. Ritter, seek to satisfy ourselves as to whether technically a crime or crimes had been committed, or as to whether the acts charged and proved disclosed criminal intent or corrupt motive: we sought only to ascertain from these facts whether his conduct had been such as to amount to misbehavior, misconduct—as to whether he had conducted himself in a way that was calculated to undermine public confidence in the courts and to create a sense of scandal.
>
> There are a great many things which one must readily admit would be wholly unbecoming, wholly intolerable, in the conduct of a judge, and yet these things might not amount to a crime.

Senator Elbert Thomas of Utah, citing the Jeffersonian and colonial antecedents of the impeachment process, bluntly declared:

> Tenure during good behavior . . . is in no sense a guaranty of a life job, and misbehavior in the ordinary,

dictionary sense of the term will cause it to be cut short on the vote, under special oath, of two-thirds of the Senate, if charges are first brought by the House of Representatives. . . . To assume that good behavior means anything but good behavior would be to cast a reflection upon the ability of the fathers to express themselves in understandable language.

But the best summary, in my opinion, was that of Senator William G. McAdoo of California, son-in-law of Woodrow Wilson and his Secretary of the Treasury:

I approach this subject from the standpoint of the general conduct of this judge while on the bench, as portrayed by the various counts in the impeachment and the evidence submitted in the trial. The picture thus presented is, to my mind, that of a man who is so lacking in any proper conception of professional ethics and those high standards of judicial character and conduct as to constitute misbehavior in its most serious aspects, and to render him unfit to hold a judicial office . . .

Good behavior, as it is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. No judge can besmirch the robes he wears by relaxing these standards, by compromising them through conduct which brings reproach upon himself personally, or upon the great office he holds. No more sacred trust is committed to the bench of the United States than to keep shining with undimmed effulgence the brightest jewel in the crown of democracy—justice.

However disagreeable the duty may be to those of us who constitute this great body in determining the guilt of those who are entrusted under the Constitution with the high responsibilities of judicial office, we must be as exacting in our conception of the obligations of a judicial officer as Mr. Justice Cardozo defined them when he said, in connection with fiduciaries, that they should be held "to something stricter than the morals of the market-place. *Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.*" (Meinhard v. Solmon, 249 N.Y. 458.)

§ 3.10 The view has been taken that the term "good behavior," as a requirement for federal judges remaining in office, must be read in conjunction with the standard of "high crimes and misdemeanors," and that the conduct of federal judges to constitute an impeachable offense must be either criminal conduct or serious judicial misconduct.

On Apr. 21, 1970, Mr. Paul N. McCloskey, Jr., of California, took the floor for a special-order speech in which he challenged the hypothesis of Mr. Gerald R. Ford, of Michigan (see § 3.9, supra), as to the grounds for impeachment of federal judges: (2)

I respectfully disagree with the basic premise "that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."

To accept this view, in my judgment, would do grave damage to one of the

2. 116 CONG. REC. 12569–71, 91st Cong. 2d Sess.

most treasured cornerstones of our liberties, the constitutional principle of an independent judiciary, free not only from public passions and emotions, but also free from fear of executive or legislative disfavor except under already-defined rules and precedents. . . .

First, I should like to discuss the concept of an impeachable offense as "whatever the majority of the House of Representatives considers it to be at any given time in history." If this concept is accurate, then of course there are no limitations on what a political majority might determine to be less than good behavior. It follows that judges of the Court could conceivably be removed whenever the majority of the House and two-thirds of the Senate agreed that a better judge might fill the position. But this concept has no basis, either in our constitutional history or in actual case precedent.

The intent of the framers of the Constitution was clearly to protect judges from political disagreement, rather than to simplify their ease of removal.

The Original Colonies had had a long history of difficulties with the administration of justice under the British Crown. The Declaration of Independence listed as one of its grievances against the King:

> He has made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries.

The signers of the Declaration of Independence were primarily concerned about preserving the independence of the judiciary from direct or indirect pressures, and particularly from the pressure of discretionary termination of their jobs or diminution of their salaries.

In the debates which took place in the Constitutional Convention 11 years later, this concern was expressed in both of the major proposals presented to the delegates. The Virginia and New Jersey plans both contained language substantively similar to that finally adopted, as follows:

> Article III, Section 1 states "The Judges, both of the Supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The "good behavior" standard thus does not stand alone. It must be read with reference to the clear intention of the framers to protect the independence of the judiciary against executive or legislative action on their compensation, presumably because of the danger of political disagreement.

If, in order to protect judicial independence, Congress is specifically precluded from terminating or reducing the salaries of Judges, it seems clear that Congress was not intended to have the power to designate "as an impeachable offense whatever a majority of the House of Representatives considers it to be at a given moment."

If an independent judiciary is to be preserved, the House must exercise decent restraint and caution in its definition of what is less than good behavior. As we honor the Court's self-imposed doctrine of judicial restraint, so we might likewise honor the principle of legislative restraint in considering serious charges against members of a co-equal branch of Government which we have wished to keep free from political tensions and emotions. . . .

The term "good behavior," as the Founding Fathers considered it, must be taken together with the specific provisions limiting cause for impeachment of executive branch personnel to treason, bribery or other high crimes and misdemeanors. The higher standard of good behavior required of Judges might well be considered as applicable solely to their judicial performance and capacity and not to their private and nonjudicial conduct unless the same is violative of the law. Alcoholism, arrogance, nonjudicial temperament, and senility of course interfere with judicial performance and properly justify impeachment. I can find no precedent, however, for impeachment of a Judge for nonjudicial conduct which falls short of violation of law.

In looking to the nine cases of impeachment of Judges spanning 181 years of our national history, in every case involved, the impeachment was based on either improper judicial conduct or nonjudicial conduct which was considered as criminal in nature. . . .

From the brief research I have been able to do on these nine cases, and as reflected in the Congressional Quarterly of April 17, 1970, the charges were as follows:

District Judge John Pickering, 1804: Loose morals, intemperance, and irregular judicial procedure.

Associate Supreme Court Justice Samuel Chase, 1805: Partisan, harsh, and unfair conduct during trials.

District Judge James H. Peck, 1831: Imposing an unreasonably harsh penalty for contempt of court.

District Judge West H. Humphreys, 1862: Supported secession and served as a Confederate judge.

District Judge Charles Swayne, 1905: Padding expense accounts, living outside his district, misuse of property and of the contempt power.

Associate Court of Commerce Judge Robert Archbald, 1913: Improper use of influence, and accepting favors from litigants.

District Judge George W. English, 1926: Tyranny, oppression, and partiality.

District Judge Harold Louderback, 1933: Favoritism, and conspiracy.

District Judge Halsted L. Ritter, 1936: Judicial improprieties, accepting legal fees while on the bench, bringing his court into scandal and disrepute, and failure to pay his income tax.

The bulk of these challenges to the court were thus on judicial misconduct, with scattered instances of nonjudicial behavior. In all cases, however, insofar as I have been able to thus far determine, the nonjudicial behavior involved clear violation of criminal or civil law, and not just a "pattern of behavior" that others might find less than "good."

If the House accepts precedent as a guide, then, an impeachment of a Justice of the Supreme Court based on charges which are neither unlawful in nature nor connected with the performance of his judicial duties would represent a highly dubious break with custom and tradition at a time when, as the gentleman from New York (Mr. Horton), stated last Wednesday:

> We are living in an era when the institutions of government and the people who man them are undergoing the severest tests in history.

There is merit, I think, in a strict construction of the words "good behav-

ior'' as including conduct which complies with judicial ethics while on the bench and with the criminal and civil laws while off the bench. Any other construction of the term would make judges vulnerable to any majority group in the Congress which held a common view of impropriety of conduct which was admittedly lawful. If lawful conduct can nevertheless be deemed an impeachable offense by a majority of the House, how can any Judge feel free to express opinions on controversial subjects off the bench? Is there anything in our history to indicate that the framers of our Constitution intended to preclude a judge from stating political views publicly, either orally or in writing? I have been unable to find any constitutional history to so indicate.

The gentleman from New Hampshire (Mr. Wyman) suggests that a judge should not publicly declare his personal views on controversies likely to come before the Court. This is certainly true. But it certainly does not preclude a judge from voicing personal political views, since political issues are not within the jurisdiction of the court and thus a judge's opinions on political matters would generally not be prejudicial to interpretations of the law which his jurisdiction is properly limited.

§ 3.11 The view has been taken that a federal judge may be impeached for misbehavior of such nature as to cast substantial doubt upon his integrity.

On Aug. 10, 1970, Minority Leader Gerald R. Ford, of Michigan, inserted in the *Congressional Record* a legal memorandum on impeachment of a federal judge for ''misbehavior,'' the memorandum was prepared by a private attorney and reviewed constitutional provisions, views of commentators, and the precedents of the House and Senate in impeachment proceedings. The memorandum concluded with the following analysis: [3]

> A review of the past impeachment proceedings has clearly established little constitutional basis to the argument that an impeachable offense must be indictable as well. If this were to be the case, the Constitution would then merely provide an additional or alternate method of punishment, in specific instances, to the traditional criminal law violator. If the framers had meant to remove from office only those officials who violated the criminal law, a much simpler method than impeachment could have been devised. Since impeachment is such a complex and cumbersome procedure, it must have been directed at conduct which would be outside the purview of the criminal law. Moreover, the traditionally accepted purpose of impeachment would seem to work against such a construction. By restricting the punishment for impeachment to removal and disqualification from office, impeachment seems to be a protective, rather than a punitive, device. It is meant to protect the public from conduct by high

3. 116 CONG. REC. 28091–96, 91st Cong. 2d Sess.

public officials that undermines public confidence. Since that is the case, the nature of impeachment must be broader than this argument would make it. [Such] conduct on the part of a judge, while not criminal, would be detrimental to the public welfare. Therefore it seems clear that impeachment will lie for conduct not indictable nor even criminal in nature. It will be remembered that Judge Archbald was removed from office for conduct which, in at least one commentator's view, would have been blameless if done by a private citizen. See Brown, *The Impeachment of the Federal Judiciary*, 26 Har. L. Rev. 684, 704–05 (1913).

A sound approach to the Constitutional provisions relating to the impeachment power appears to be that which was made during the impeachment of Judge Archbald. Article I, Sections 2 and 3 give Congress jurisdiction to try impeachments. Article II, Section 4, is a mandatory provision which requires removal of officials convicted of "treason, bribery or other high crimes and misdemeanors". The latter phrase is meant to include conduct, which, while not indictable by the criminal law, has at least the characteristics of a crime. However, this provision is not conclusively restrictive. Congress may look elsewhere in the Constitution to determine if an impeachable offense has occurred. In the case of judges, such additional grounds of impeachment may be found in Article III, Section 1 where the judicial tenure is fixed at "good behavior". Since good behavior is the limit of the judicial tenure, some method of removal must be available where a judge breaches that condition of his office. That method is impeachment. Even though this construction has been criticized by one writer as being logically fallacious, See Simpson, *Federal Impeachments*, 64 U. of Penn. L. Rev. 651, 806–08 (1916), it seems to be the construction adopted by the Senate in the Archbald and Ritter cases. Even Simpson, who criticized the approach, reaches the same result because he argues that "misdemeanor" must, by definition, include misbehavior in office. *Supra* at 812–13.

In determining what constitutes impeachable judicial misbehavior, recourse must be had to the previous impeachment proceedings. Those proceedings fall mainly into two categories, misconduct in the actual administration of justice and financial improprieties off the bench. Pickering was charged with holding court while intoxicated and with mishandling cases. Chase and Peck were charged with misconduct which was prejudicial to the impartial administration of justice and with oppressive and corrupt use of their office to punish individuals critical of their actions. Swayne, Archbald, Louderback and Ritter were all accused of using their office for personal profit and with various types of financial indiscretions. English was impeached both for oppressive misconduct while on the bench and for financial misdealings. The impeachment of Humphries is the only one which does not fall within this pattern and the charges brought against him probably amounted to treason. See Brown, *The Impeachment of the Federal Judiciary*, 26 Har. L. Rev. 684, 704 (1913).

While various definitions of impeachable misbehavior have been advanced, the unifying factor in these definitions is the notion that there must be such

misconduct as to cast doubt on the integrity and impartiality of the Federal judiciary. Brown has defined that misbehavior as follows:

> It must act directly or by reflected influence react upon the welfare of the State. It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute . . . An act or course of misbehavior which renders scandalous the personal life of a public officer, shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness. Brown, *supra* at 692–93.

As Simpson stated with respect to the outcome of the Archbald impeachment:

> It determined that a judge ought not only be impartial, but he ought so demean himself, both in and out of court, that litigants will have no reason to suspect his impartiality and that repeatedly failing in that respect constitutes a "high misdemeanor" in regard to his office. If such be considered the result of that case, everyone must agree that it established a much needed precedent. Simpson, *Federal Impeachments,* 64 U. of Penn. L. Rev. 651, 813 (1916).

John W. Davis, House Manager in the Impeachment of Judge Archbald, defined judicial misbehavior as follows:

> Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect, are all violations of his official oath . . . And it is easily possible to go further and imagine . . . such willingness to use his office to serve his personal ends as to be within reach of no branch of the criminal law, yet calculated with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice. 6 Cannon 647.

Representative Summers, one of the managers in the Louderback impeachment gave this definition:

> When the facts proven with reference to a respondent are such as are reasonably calculated to arouse a substantial doubt in the minds of the people over whom that respondent exercises authority that he is not brave, candid, honest, and true, there is no other alternative than to remove such a judge from the bench, because wherever doubt resides, confidence cannot be present. Louderback Proceedings 815.

IV. Conclusion

In conclusion, the history of the constitutional provisions relating to the impeachment of Federal judges demonstrates that only the Congress has the power and duty to remove from office any judge whose proven conduct, either in the administration of justice or in his personal behavior, casts doubt on his personal integrity and thereby on the integrity of the entire judiciary. Federal judges must maintain the highest standards of conduct to preserve the independence of and respect for the judicial system and the rule of law. As Representative Summers stated during the Ritter impeachment:

> Where a judge on the bench, by his own conduct, arouses a substantial doubt as to his judicial integrity he commits the highest crime that a judge can commit under the Con-

stitution. Ritter Proceedings 611 (1936).

Finally, the application of the principles of the impeachment process is left solely to the Congress. There is no appeal from Congress' ultimate judgment. Thus, it can fairly be said that it is the conscience of Congress—acting in accordance with the constitutional limitations—which determines whether conduct of a judge constitutes misbehavior requiring impeachment and removal from office. If a judge's misbehavior is so grave as to cast substantial doubt upon his integrity, he must be removed from office regardless of all other considerations. If a judge has not abused his trust, Congress has the duty to reaffirm public trust and confidence in his actions.

Respectfully submitted,

BETHEL B. KELLEY,
DANIEL G. WYLLIE.

§ 3.12 The view has been taken that the House impeaches federal judges only for misconduct that is both criminal in nature and related to the performance of the judicial function.

On Nov. 16, 1970, Mr. Frank Thompson, Jr., of New Jersey, inserted into the *Congressional Record* a study by a professor of constitutional law of impeachment proceedings against federal judges and the grounds for such proceedings. The memorandum discussed in detail the substance of such charges in all prior impeachment proceedings and concluded as follows: (4)

In summary, the charges against Justice William O. Douglas are unique in our history of impeachment. The House has stood ready to impeach judges for Treason, Bribery, and related financial crimes and misdemeanors. It has refused to impeach judges charged with on-the-job misconduct when that behavior is not also an indictable criminal offense. Only once before has a judge even been charged with impeachment for non-job-related activities—in 1921, when Judge Kenesaw Mountain Landis was charged with accepting the job as Commissioner of big-league baseball—and the House Judiciary Committee refused to dignify the charge with a report pro or con. Never in our impeachment history, until Congressman Ford leveled his charges against Mr. Justice Douglas, has it ever been suggested that a judge could be impeached because, while off the bench, he exercised his First Amendment rights to speak and write on issues of the day, to associate with others in educational enterprises. . . .

This brief history of Congressional impeachment shows several things. First, it shows that it works. It is not a rusty, unused power. Since 1796, fifty-five judges have been charged on the Floor of the House of Representatives, approximately one in every three to four years. Presumably, most of the federal judges who should be impeached, are impeached. Thirty-three judges have been charged with "Trea-

4. 116 CONG. REC. 37464–70, 91st Cong. 2d Sess.

son, Bribery, or other High Crimes and Misdemeanors." Three of them have been found guilty by the Senate and removed from office; twenty-two additional judges have resigned rather than face Senate trial and public exposure. This is one "corrupt" judge for approximately every seven years—hopefully, all there are.

Second, by its deeds and actions, Congress has recognized what Chief Justice Burger recently described as "the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." With a few aberrations in the early 1800's, a period of unprecedented political upheaval, Congress has refused to impeach a judge for lack of "good behaviour" unless the behavior is both job-related and criminal. This is true whether the judge gets drunk on the bench, whether the judge exploits and abuses the authority of his robes, or whether the judge hands down unpopular or wrong decisions.

How could it be otherwise? The purpose of an "independent judiciary" in our system of government by separation of powers, is to check the excesses of the legislative and executive branches of the government, to cry a halt when popular passions grip the Congress and laws are adopted which abridge and infringe upon the rights guaranteed to all citizens by the Constitution. The judges must be strong and secure if they are to do this job well.

John Dickinson proposed at the Constitutional Convention that federal judges should be removed upon a petition by the majority of each House of Congress. This was rejected, because it was contradictory to judicial tenure during good behavior, because it would make the judiciary "dangerously dependent" on the legislature.

During the Jeffersonian purge of the federal bench, Senate leader William Giles proclaimed that "removal by impeachment" is nothing more than a declaration by both Houses of Congress to the judge that "you hold dangerous opinions." This theory of the impeachment power was rejected in 1804 because it would put in peril "the integrity of the whole national judicial establishment."

Now Congressman Ford suggests that "an impeachable offense" is nothing more than "whatever a majority of the House of Representatives considers it to be at a given moment in history."

Does he really mean that Chief Justice Warren might have been impeached because "at a given moment in history" a majority of the House and two-thirds of the Senate objected strongly to his opinion ordering an end to school-segregation, or to his equally controversial decision against school prayer? Does he really mean that Judge Julius Hoffman is impeachable if a majority of this or the next Congress decides that he was wrong in his handling of the Chicago Seven? Does he really want a situation where federal judges must keep one eye on the mood of Congress and the other on the proceedings before them in court, in order to maintain their tenure in office?

If Congressman Ford is right, it bodes ill for the concept of an independent judiciary and the corollary doctrine of a Constitutional government of laws.

In 1835, the French observer de Tocqueville wrote that:

> A decline of public morals in the United States will probably be marked by the abuse of the power of impeachment as a means of crushing political adversaries or ejecting them from office.

Let us hope that that day has not yet arrived.

Mr. Thompson summarized the study as follows:

> . . . [I] requested Daniel H. Pollitt, a professor of constitutional law at the University of North Carolina to survey the 51 impeachment proceedings in this House during the intervening years.
>
> I want to make several comments on this survey.
>
> First, it shows that impeachment works. Thirty-three judges have been charged in this body with "treason, bribery, or other high crimes and misdemeanors." Twenty-two of them resigned rather than face Senate trial; three chose to fight it out in the Senate; and seven were acquitted by the vote of this Chamber against further impeachment proceedings.
>
> Second, it shows that never since the earliest days of this Republic has the House impeached a judge for conduct which was not both job-related and criminal. This body has consistently refused to impeach a judge unless he was guilty of an indictable offense.
>
> Third, it shows that never before Mr. Ford leveled his charges against Justice Douglas has it ever been suggested that a judge could be impeached because, while off the bench, he exercised his first amendment rights to speak and write on issues of the day.

§ 3.13 A special subcommittee of the Committee on the Judiciary found in its final report on charges of impeachment against Associate Justice William O. Douglas of the Supreme Court, that (1) a judge could be impeached for judicial conduct which was criminal or which was a serious dereliction of public duty; (2) that a judge could be impeached for nonjudicial conduct which was criminal; and (3) that the evidence gathered did not warrant the impeachment of Justice Douglas.

On Sept. 17, 1970, the special subcommittee of the Committee on the Judiciary, which had been created to investigate and report on charges of impeachment against Associate Justice Douglas of the Supreme Court, submitted its final report to the full committee. The report reviewed the grounds for impeachment and found the evidence insufficient. The report provided in part: [5]

> II. CONCEPTS OF IMPEACHMENT
>
> The Constitution grants and defines the authority for the use of impeach-

5. Final report by the special subcommittee on H. Res. 920 (Impeachment of Associate Justice Douglas) of the Committee on the Judiciary, Committee Print, 91st Cong. 2d Sess., Sept. 17, 1970.

ment procedures to remove officials of the Federal Government. Offenses subject to impeachment are set forth in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from office on impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

An Associate Justice of the Supreme Court is a civil officer of the United States and is a person subject to impeachment. Article II, Section 2, authorizes the President to appoint ". . . Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . ."

Procedures established in the Constitution vest responsibility for impeachment in the Legislative Branch of the government and require both the House of Representatives and the Senate to participate in the trial and determination of removal from office. Article I, Section 1, provides: "The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."

After the House of Representatives votes to approve Articles of Impeachment, the Senate must hear and decide the issue. Article I, Section 3 provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Decision for removal in an impeachment proceeding does not preclude trial and punishment for the same offense in a court of law. Article III, Section 3 in this regard provides:

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

Other provisions of the Constitution underscore the exceptional nature of the unique legislative trial. The President's power to grant reprieves and pardons for offenses against the United States does not extend to impeachments. Article 2, Section 2, provides: "The President . . . shall have the power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Inasmuch as the Senate itself hears the evidence and tries the case, the Constitutional right to a trial by jury when a crime has been charged is not available. Article III, Section 2 provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ."

The Constitution provides only one instrument to remove judges of both the Supreme and inferior courts, and that instrument is impeachment. The provisions of Article II, Section 4, defines the conduct that render federal officials subject to impeachment procedures. For a judge to be impeachable, his conduct must constitute ". . . Treason, Bribery, or other High Crimes and Misdemeanors."

Some authorities on constitutional law have contended that the impeach-

ment device is a cumbersome procedure. Characterized by a high degree of formality, when used it preempts valuable time in both the House and Senate and obstructs accomplishment of the law making function of the legislative branch. In addition to distracting the attention of Congress from its other responsibilities, impeachments invariably are divisive in nature and generate intense controversy in Congress and in the country at large.

Since the adoption of the Constitution in 1787, there have been only 12 impeachment proceedings, nine of which have involved Federal judges. There have been only four convictions, all Federal judges.

The time devoted by the House and Senate to the impeachments that resulted in the trials of the nine Federal judges varied substantially. The impeachment of Robert Archbald in 1912 consumed the shortest time. The Archbald case required three months to be processed in the House, and six months in the Senate. The impeachment of James H. Peck required the most time for trial of a Federal judge. The House took three years and five months to complete its action, and the Senate was occupied for nine months with the trial. The most recent case, Halsted Ritter, in 1933, received the attention of the House for two years and eight months, and required one month and seven days for trial in the Senate.

Although the provisions of Article II, Section 4 define conduct that is subject to impeachment, and Article I establishes the impeachment procedure, impeachments of Federal judges have been complicated by the tenure provision in Article III, Section 1. Article III, Section 1, provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office

The content of the phrase "during good Behaviour" and its relationship to Article II, Section 4's requirement for conduct that amounts to "treason, bribery, or other high crimes and misdemeanors" have been matters of dispute in each of the impeachment proceedings that have involved Federal judges. The four decided cases do not resolve the problems and disputes that this relationship has generated. Differences in impeachment concepts as to the meaning of the phrase "good behavior" in Article III and its relationship to the meaning of the word "misdemeanors" in Article II are apparent in the discussions of the charges that have been made against Associate Justice Douglas.

A primary concern of the Founding Fathers was to assure the creation of an independent judiciary. Alexander Hamilton in *The Federalist Papers* (No. 78) stated this objective:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the

> medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The Federalist Papers (No. 79) discusses the relationship of the impeachment procedures to judicial independence:

> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, 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.
>
> 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 catalog 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.

The desire of the American people to assure independence of the judiciary and to emphasize the exalted station assigned to the judge by our society, have erected pervasive constitutional and statutory safeguards. The judge of a United States court holds office "during good behavior." Further his salary may not be reduced while he is in office by any branch of Government. A judge may be removed from office only by the cumbersome procedure of impeachment.

Accordingly, when the public is confronted with allegations of dishonesty or venality, and is forced to recognize that judges are human, and hence fallible, the impact is severe. Exposure of infirmities in the judicial system is undertaken only with reluctance. It is an area in which the bar, the judiciary, and the executive and legislative branches alike have seen fit to move cautiously and painstakingly. There must be full recognition of the necessity to proceed in such a manner that will result in the least damage possible to judicial independence, but which, at the same time, will result in correction or elimination of any condition that brings discredit to the judicial system.

Removal of a Federal judge, for whatever reason, historically has been difficult. Constitutional safeguards to assure a free and independent judiciary make it difficult to remove a Federal judge who may be unfit, whether through incompetence, insanity, senility, alcoholism, or corruption.

For a judge to be impeached, it must be shown that he has committed treason, accepted a bribe, or has committed a high crime or misdemeanor. All conduct that can be impeached must at least be a "misdemeanor." A judge is entitled to remain a judge as long as he holds his office "during good behav-

ior." The content of the word "misdemeanor" must encompass some activities which fall below the standard of "good behavior." Conduct which fails to meet the standard of "good behavior" but which does not come within the definition of "misdemeanor" is not subject to impeachment.

In each of the nine impeachments involving judges, there has been controversy as to the meaning of the word "misdemeanor." Primarily the controversy concerned whether the activities being attacked must be criminal or whether the word "misdemeanor" encompasses less serious departures from society norms.

In his memorandum "Opinion on the Impeachment of Halsted L. Ritter," Senator H. W. Johnson described the confusion of thought prevailing in the Senate on these concepts. He stated:

> The confusion of thought prevailing among Senators is evidenced by their varying expressions. One group eloquently argued any gift to a judge, under any circumstances, constituted misbehavior, for which he should be removed from office—and moreover that neither corrupt motive or evil intent need be shown in the acceptance of a gift or in any so-called misbehavior. Another prefaced his opinion with the statement: "I do not take the view that an impeachment proceeding of a judge of the inferior Federal courts under the Constitution of the United States is a criminal proceeding. The Constitution itself has expressly denuded impeachment proceedings of every aspect or characteristic of a criminal proceeding."
>
> And yet another flatly takes a contrary view, and states although finding the defendant guilty on the seventh count: "The procedure is criminal in its nature, for upon conviction, requires the removal of a judge, which is the highest punishment that could be administered such an officer. The Senate, sitting as a court, is required to conduct its proceedings and reach its decisions in accordance with the customs of our law. In all criminal cases the defendant comes into court enjoying the presumption of innocence, which presumption continues until he is proven guilty beyond a reasonable doubt."
>
> And again we find this: "Impeachment, though, must be considered as a criminal proceeding."

In his April 15, 1970, speech, Representative Ford articulated the concept that an impeachable offense need not be indictable and may be something less than a criminal act or criminal dereliction of duty. He said:

> What, then, is an impeachable offense?
>
> The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.
>
> I think it is fair to come to one conclusion, however, from our history of impeachments: a higher standard is expected of Federal judges than of any other "civil officers" of the United States. (First Report, p. 31).

The "Kelley Memorandum" submitted by Mr. Ford enforces this position. The Kelley Memorandum asserts that misbehavior by a Federal judge may constitute an impeachable offense

though the conduct may not be an indictable crime or misdemeanor. The Kelley Memorandum concludes:

> In conclusion, the history of the constitutional provisions relating to the impeachment of Federal judges demonstrates that only the Congress has the power and duty to remove from office any judge whose proven conduct, either in the administration of justice or in his personal behavior, casts doubt on his personal integrity and thereby on the integrity of the entire judiciary. Federal judges must maintain the highest standards of conduct to preserve the independence of and respect for the judicial system and the rule of law.

On the other hand, Counsel for Associate Justice Douglas, Simon H. Rifkind, has submitted a memorandum that contends that a Federal judge may not be impeached for anything short of criminal conduct. Mr. Rifkind also contends that the other provisions of the Constitution, i.e., the prohibition of *ex post facto* laws, due process notice requirement and the protection of the First Amendment prevent the employment of any other standard in impeachment proceedings. In conclusion Mr. Rifkind stated:

> The constitutional language, in plain terms, confines impeachment to "Treason, Bribery, or other high Crimes and Misdemeanors." The history of those provisions reinforces their plain meaning. Even when the Jeffersonians sought to purge the federal bench of all Federalist judges, they felt compelled to at least assert that their political victims were guilty of "high Crimes and Misdemeanors." The unsuccessful attempt to remove Justice Chase firmly established the proposition that impeachment is for *criminal* offenses only, and is not a "general inquest" into the behavior of judges. There has developed the consistent practice, rigorously followed in every case in this century, of impeaching federal judges only when criminal offenses have been charged. Indeed, the House has never impeached a judge except with respect to a "high Crime" or "Misdemeanor." Characteristically, the basis for impeachment has been the soliciting of bribes, selling of votes, manipulation of receivers' fees, misappropriation of properties in receivership, and willful income tax evasion.

A vast body of literature has been developed concerning the scope of the impeachment power as it pertains to federal judges. The precedents show that the House of Representatives, particularly in the arguments made by its Managers in the Senate trials, favors the conclusion that the phrase "high crimes and misdemeanors" encompasses activity which is not necessarily criminal in nature.

Although there may be divergence of opinion as to whether impeachment of a judge requires conduct that is criminal in nature in that it is proscribed by specific statutory or common law prohibition, all authorities hold that for a judge to be impeached, the term "misdemeanors" requires a showing of misconduct which is inherently serious in relation to social standards. No respectable argument can be made to support the concept that a judge could be impeached if his conduct did not amount at least to a serious dereliction of his duty as a member of society.

The punishment imposed by the Constitution measures how serious misconduct need be to be impeachable. Only serious derelictions of duty owed to society would warrant the punish-

ment provided. An impeachment proceeding is a trial which results in punishment after an appropriate finding by the trier of facts, the Senate. Deprivation of office is a punishment. Disqualification to hold any future office of honor, trust and profit is a greater punishment. The judgment of the Senate confers upon that body discretion, in the words of the *Federalist Papers* ". . . to doom to honor or to infamy the most influential and the most distinguished characters of the community. . . .

Reconciliation of the differences between the concept that a judge has a right to his office during "good behavior" and the concept that the legislature has a duty to remove him if his conduct constitutes a "misdemeanor" is facilitated by distinguishing conduct that occurs in connection with the exercise of his judicial office from conduct that is non-judicially connected. Such a distinction permits recognition that the content of the word "misdemeanor" for conduct that occurs in the course of exercise of the power of the judicial office includes a broader spectrum of action than is the case when non-judicial activities are involved.

When such a distinction is made, the two concepts on the necessity for judicial conduct to be criminal in nature to be subject to impeachment becomes defined and may be reconciled under the overriding requirement that to be a "misdemeanor", and hence impeachable, conduct must amount to a serious dereliction of an obligation owed to society.

To facilitate exposition, the two concepts may be summarized as follows:

Both concepts must satisfy the requirements of Article II, Section 4, that the challenged activity must constitute ". . . Treason, Bribery or High Crimes and Misdemeanors."

Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involve criminal conduct in violation of law, or (2) that involve serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench or unwarranted and unreasonable impartiality manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.

Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve criminal acts in violation of law.

The two concepts differ only with respect to impeachability of judicial behavior not connected with the duties and responsibilities of the judicial office. Concept 2 would define "misdemeanor" to permit impeachment for serious derelictions of public duty but not necessarily violations of statutory or common law.

In summary, an outline of the two concepts would look this way:

A judge may be impeached for ". . . Treason, Bribery, or High Crimes or Misdemeanors."

A. Behavior, connected with judicial office or exercise of judicial power.

Concept I

1. Criminal conduct.

2. Serious dereliction from public duty.

Concept II

1. Criminal conduct.

2. Serious dereliction from public duty.

B. Behavior not connected with the duties and responsibilities of the judicial office.

Concept I

1. Criminal conduct.

Concept II

1. Criminal conduct.

2. Serious dereliction from public duty.

Chapter III, Disposition of Charges sets forth the Special Subcommittee's analysis of the charges that involve activities of Associate Justice William O. Douglas. Under this analysis it is not necessary for the members of the Judiciary Committee to choose between Concept I and II.

The theories embodied in Concept I have been articulated by Representative Paul N. McCloskey, Jr. In his speech to the House on April 21, 1970, Mr. McCloskey stated:

> The term "good behavior," as the Founding Fathers considered it, must be taken together with the specific provisions limiting cause for impeachment of executive branch personnel to treason, bribery or other high crimes and misdemeanors. The higher standard of good behavior required of judges might well be considered as applicable solely to their judicial performance and capacity and not to their private and nonjudicial conduct unless the same is violative of the law. Alcoholism, arrogance, nonjudicial temperament, and senility of course interfere with judicial performance and properly justify impeachment. I can find no precedent, however, for impeachment of a Judge for nonjudicial conduct which falls short of violation of law.
>
> In looking to the nine cases of impeachment of Judges spanning 181 years of our national history, in every case involved, the impeachment was based on either improper judicial conduct or non-judicial conduct which was considered as criminal in nature. CONG. REC. 91st Cong., 2nd Sess., H 3327.

In his August 18, 1970, letter to the Special Subcommittee embodying his comments on the "Kelley Memorandum", Mr. McCloskey reaffirmed this concept. He stated:

> Conduct of a Judge, while it may be less than criminal in nature to constitute "less than good behavior", has never resulted in a successful impeachment unless the judge was acting in his *judicial* capacity or misusing his *judicial* power. In other words the precedents suggest that misconduct must either be "*judicial* misconduct" or conduct which constitutes a crime. There is no basis for impeachment on charges of *non*-judicial misconduct which occurs off the bench and does *not* constitute a crime. . . .

IV. RECOMMENDATIONS OF SPECIAL SUBCOMMITTEE TO JUDICIARY COMMITTEE

1. It is not necessary for the members of the Judiciary Committee to take a position on either of the concepts of impeachment that are discussed in Chapter II.

2. Intensive investigation of the Special Subcommittee has not disclosed creditable evidence that would warrant

preparation of charges on any acceptable concept of an impeachable offense.

EMANUEL CELLER,
BYRON G. ROGERS,
JACK BROOKS.

The minority views of Mr. Edward Hutchinson, of Michigan, a member of the special subcommittee, concluded as follows on the "concepts of impeachment":

> The report contains a chapter on the Concepts of Impeachment. At the same time, it takes the position that it is unnecessary to choose among the concepts mentioned because it finds no impeachable offense under any. It is evident, therefore, that while a discussion of the theory of impeachment is interesting, it is unnecessary to a resolution of the case as the Subcommittee views it. This chapter on Concepts is nothing more than dicta under the circumstances. Certainly the Subcommittee should not even indirectly narrow the power of the House to impeach through a recitation of two or three theories and a very apparent choice of one over the others, while at the same time asserting that no choice is necessary. The Subcommittee's report adopts the view that a Federal judge cannot be impeached unless he is found to have committed a crime, or a serious indiscretion in his judicially connected activities. Although it is purely dicta, inclusion of this chapter in the report may be mischievous since it might unjustifiably restrict the scope of further investigation.

Following the submission of the report, further proceedings against Justice Douglas were discontinued.[8]

6. See § 14.16 infra.

Offenses Committed Prior to Term of Office

§ 3.14 The Speaker and the House declined to take any action on a request by the Vice President for an investigation into possible impeachable offenses against him, where the offenses were not related to his term of office as Vice President and where the charges were pending before the courts.

On Sept. 25, 1973,[7] Speaker Carl Albert, of Oklahoma, laid before the House a communication from Vice President Spiro T. Agnew requesting that the House investigate offenses charged to the Vice President in an investigation being conducted by a U.S. Attorney. The alleged offenses related to the Vice President's conduct before he became a civil officer under the United States. No action was taken on the request.

Parliamentarian's Note: The Vice President cited in his letter a request made by Vice President John C. Calhoun in 1826 (discussed at 3 Hinds' Precedents § 1736). On that occasion, the alleged charges related to the Vice President's prior service as Secretary of War. The communication

7. 119 CONG. REC. 31368, 93d Cong. 1st Sess.

was referred on motion to a select committee which investigated the charges and subsequently reported to the House that no impropriety had been found in the Vice President's former conduct as a civil officer under the United States. The report of the select committee was ordered to lie on the table and the House took no further action thereon. The Vice President's letter did not cite the Committee on the Judiciary's recommendation to the House (discussed in 3 Hinds' Precedents § 2510) that conduct of Vice President Colfax allegedly occurring prior to his term as Vice President was not grounds for impeachment, since not "an act done or omitted while the officer was in office." (See § 5.14, infra).

§ 4. Effect of Adjournment

Under parliamentary law, as stated in Jefferson's Manual, "an impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament."[8] Both Judge John Pickering and Judge Harold Louderback were impeached by the House in one Congress and tried by the Senate in the next.[9] The practice at the time of the Pickering impeachment was to present a resolution of impeachment to the Senate and then to prepare and adopt articles of impeachment for presentation to the Senate. In that case, impeachment proceedings begun in the 7th Congress were resumed by the House in the 8th Congress.[10]

The question arose in the 73d Congress whether the appointment in the 72d Congress of House managers to conduct impeachment proceedings against Judge Louderback was such as to permit them to act in that function in the 73d Congress without a further grant of authority. The House adopted in the 73d Congress a resolution filling vacancies, making reappointments, and vesting the managers with powers and granting them funds.[11]

In the case of Judge Halsted L. Ritter, the House authorized and the Committee on the Judiciary conducted an impeachment investigation in the 73d Congress, with

8. *House Rules and Manual* § 620 (Jefferson's Manual) (1973).

9. See 3 Hinds' Precedents §§ 2319, 2320, for the presentation of the resolution impeaching Judge Pickering, and § 4.1, infra, for the presentation to the Senate of the resolution impeaching Judge Louderback.

10. See 3 Hinds' Precedents § 2321. For the later practice of presenting to the Senate a resolution together with articles of impeachment, see § 8.1, infra.

11. See § 4.2, infra.