BRIBERY AND OTHER NOT SO "GOOD BEHAVIOR": CRIMINAL PROSECUTION AS A SUPPLEMENT TO IMPEACHMENT OF FEDERAL JUDGES

INTRODUCTION

> Q: "But if incarcerated in Leavenworth for 10 years, could a district judge exercise judicial power during that period?"
> A: "I would say actually yes. This is [quite] shocking, I know, but . . . it's not my policy. I think that it's a bad idea, but I think that's where the Constitution leads us. . . . I think that that would be an unfortunate situation, [to have] the monthly taxpayers' check sent to such a judge in Leavenworth, and that he or she ought to be speedily impeached by the House and convicted and removed by the Senate."[1]

This exchange, between Professors Roger Cramton and Walter Dellinger, occurred during the Constitutional Roundtable Discussion Before the National Commission of Judicial Discipline and Removal ("the Commission") on December 18, 1992. In the wake of several lengthy and costly impeachment proceedings of already-convicted federal judges,[2] Congress established the Commission to investigate alternative mechanisms for removing federal judges from office. Professor Dellinger's response to Professor Cramton, above, was indicative of the Commission's conclusions: (1) the current impeachment procedure is the exclusive

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1. This exchange occurred between Professor Roger C. Cramton, Professor of Law, Cornell University, questioner, and Professor Walter Dellinger, Professor of Law, Duke University, respondent, during the Constitutional Roundtable Discussion Before the National Commission of Judicial Discipline and Removal, December 18, 1992, *in* Hearings of the National Commission on Judicial Discipline and Removal 380 (1993) [hereinafter Roundtable]. During the debate, Professor Dellinger appeared to modify this statement by agreeing that jurisdictional statutes could explicitly preclude a judge from exercising judicial powers while in jail. See id. at 382.

2. Recent impeachments include: Judge Harry Eugene Claiborne of the U.S. District Court for the District of Nevada, who was impeached and removed in 1986 for income tax evasion; Judge Alcee Hastings of the U.S. District Court for the Southern District of Florida, who was impeached in 1988 and removed in 1989 for corruption and giving false testimony; and Judge Walter Nixon of the U.S. District Court for the Southern District of Mississippi who was impeached and removed in 1988 for perjury. See Michael J. Gerhardt, The Constitutional Limits to Impeachment and Its Alternatives, 68 Tex. L. Rev. 1, 4 n.11, (1989) (cataloguing current and past impeachments). Aside from these modern actions, the most recent impeachment occurred nearly fifty years ago when Judge Halsted Ritter of the U.S. District Court for the Southern District of Florida was impeached and removed from office in 1936. See id. at 10 n.29. In two other recent cases, impeachment has not resulted. Judge Robert Collins of the U.S. District Court for the Eastern District of Louisiana resigned from office in August 1993, after having been convicted of bribery in the federal courts. See John McQuaid, Collins Resigns Federal Judgeship; Resignation Letter is Given to Clinton, The Times-Picayune, Aug. 7, 1993, at B1. Judge Robert P. Aguilar of the U.S. District Court for the Northern District of California successfully appealed his conviction for racketeering. See Judge Aguilar's Conviction Overturned, Nat'l L.J., May 2, 1994, at A8.

means to remove a federal judge, (2) the process can only be changed by constitutional amendment and (3) the Commission would not recommend such a change.[3] The Commission wrote, "[We] understand[ ] the public's outrage when convicted federal judges continue to draw their salaries in prison. [We] also understand[ ] the frustration of Members of Congress when they are put to the burdens of impeaching and removing those judges from office."[4] Nevertheless, the Commission admonished that "[n]either outrage nor frustration . . . should cause us to forget that Congress has the power to lighten some of the burdens of the impeachment process, or that others of those burdens are inherent and desirable in a system of checks and balances."[5]

The Commission's conclusions are but the most recent volley in the long-running debate about whether impeachment is the only constitutionally permissible mechanism for removing federal judges from office. Two fundamental values are at the heart of this controversy: judicial independence and judicial integrity. Often the debate pits one value against the another. Yet it would seem that judicial independence without judicial integrity is an empty, if not dangerous, concept. The constitutional mechanisms that provide for an independent judiciary should serve to insulate federal judges from the political pressures of the executive and the legislature, not to justify handing a federal judge's paycheck through the bars of a prison cell. This latter result improperly places federal judges outside the reach of the ordinary consequences of imprisonment—loss of job and cessation of pay.

Convinced that this would be an odd result for our pragmatic founders to have intended, this Note revisits the Commission's conclusion that the Impeachment Clause of the Constitution is the exclusive means to remove a federal judge from office. Picking up on a strand of the debate that emerged during the Constitutional Roundtable, it focuses on the possibility of removal, disqualification from office, or both through criminal conviction. Under this view, Congress could pass criminal statutes punishing judicial misconduct with removal and disqualification from office. The First Congress did just this in the Act of 1790, a criminal statute which provided for the perpetual disqualification from office of a federal judge convicted of bribery.[6] Although the Commission considered the statute in its deliberations, it eventually discounted the statute as inconclusive, at best, and unconstitutional, at worst.[7]

The Commission's views on the constitutionality of removal by means of criminal conviction reflect Justice Joseph Story's analysis of the Impeachment Clause in his *Commentaries on the Constitution of the United*

3. See National Commission on Judicial Discipline and Removal, Report, 5–6 (1993).

4. Id. at 7.

5. Id.

6. See Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 ("Act for the Punishment of certain Crimes against the United States.") [hereinafter Act of 1790].

7. See Report, supra note 3, at 19–20.

States.[8] While Justice Story offered several insights into the impeachment process, his discussion of impeachment makes no reference to the Act of 1790 or to any of the other early congressional statutes with similar penalties of removal, disqualification, or both.[9]

These statutes indicate a different understanding of the Impeachment Clause than the one reached recently, by the Commission, and long ago, by Justice Story. By placing the Act of 1790 into a pattern of early Congressional enactments designed to punish the abuse of public trust by federal officeholders, this Note shows that the founders considered removal of federal officers through criminal sanctions to be a constitutionally permissible supplement to removal through impeachment. The early statutes demonstrate that the founders did not intend impeachment to preclude removal or disqualification of executive officers through criminal prosecution, nor did they intend it to prevent the explicit disqualification of judicial officers as a criminal penalty. The punishment of removal from office required the forfeiture of office; the punishment of disqualification resulted in ineligibility for federal office. The use of these penalties in the early statutes reveal that criminal prosecution operated *in addition to* the constitutional removal mechanism of impeachment of both executive and judicial officials.

Based upon this evidence, this Note argues that removal and disqualification of an Article III judge upon conviction of a crime contrary to "good behavior" exists as an historically sound supplement to the constitutional mechanism of impeachment. This Note ultimately proposes that a judge convicted under a federal criminal statute that provides for the punishments of removal and disqualification would cease to exercise the duties or to enjoy the privileges assigned to judicial office by the Constitution: judicial power and undiminished salary. Part I traces the re-emergence of the Act of 1790 in the current debate about judicial discipline, particularly as it reflects the received wisdom of Justice Joseph Story. Part II examines the language of early federal statutes in an effort to demonstrate that disqualification and removal clauses in criminal statutes existed as an alternative to impeachment. Part III asserts that the unique role of the judiciary does not preclude alternatives to the constitutional impeachment process, but rather supports the enforcement of judicial integrity through criminal prosecution. Finally, Part IV suggests the viability of criminal prosecution as a supplement to impeachment.

I. RE-EMERGENCE OF THE 1790 ACT IN THE CURRENT DEBATE ABOUT JUDICIAL DISCIPLINE

In creating the Commission, Congress mandated that it investigate and suggest solutions to the problems of disciplining and removing unfit

8. See Joseph Story, Commentaries on the Constitution of the United States (Boston, Hilliard, Gray & Co. 1833).

9. See infra notes 90–94 and accompanying text.

federal judges.[10] As a preliminary matter, the Commission sought to resolve two closely connected questions: first, was the impeachment mechanism the only constitutionally permissible means to remove a corrupt federal judge from office and, second, whether statutorily mandated punishments of removal and disqualification upon conviction of certain crimes were constitutionally permitted. Scholars associated with the Commission reconsidered the Act of 1790 in light of the Commission's investigation into removal as a criminal punishment. This Part first sets out the two sides of the debate over the exclusivity of impeachment and then focuses on the Commission's consideration of criminal prosecution as a constitutionally permissible removal mechanism.

A. *The Constitutional Framework*

All debate relating to removal and disqualification of federal judges begins with the Constitution of the United States. Two central provisions set forth the impeachment mechanism. The Impeachment Clause of Article II states: "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."[11] Article I sets forth the limits on the scope and effect of an impeachment:

> 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.[12]

With this language, the Framers wove the check of impeachment into the delicate balance of powers between the three branches of the newly created government.

The delegates to the Constitutional Convention designed the impeachment mechanism to be an essentially political process. Delegate James Wilson described impeachment as a proceeding of a political nature, "confined to political characters" for "political crimes and misdemeanors," which resulted only in "political punishments."[13] By

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10. Created on December 1, 1990, the Commission formally began its work on January 30, 1992. Its final report was published in August, 1993. See Report, supra note 3, at iii–iv. Members of the Commission included Robert W. Kastenmeier (Chairman), S. Jay Plager (Vice-Chairman), Stephen B. Burbank (Professor of Law, University of Pennsylvania), Stephen L. Carter (Professor of Law, Yale University), Roger C. Cramton (Professor of Law, Cornell University), Howell T. Heflin (United States Senator), Levin H. Campbell (Circuit Judge, U.S. Court of Appeals for the First Circuit) and Beth Nolan (Associate Counsel to the President). See id. at frontispiece.

11. U.S. Const. art. II, § 4.

12. Id. at art. I, § 3, cl. 7.

13. James Wilson, 1 The Works of James Wilson 426 (Robert G. McCloskey ed., 1967). For scholarship on the uniqueness of the American institution of impeachment, see

constitutional design, it reaches all "civil officers"; this includes executive and judicial officers,[14] but not members of Congress[15] or military officers.[16] And although the list of impeachable offenses is an open one—"Treason, Bribery, or other high Crimes and Misdemeanors"[17]—there is general agreement that impeachable offenses are public in their nature, and involve the abuse of public trust.[18]

The Constitution fully vests the impeachment power in the legislature, the most representative body of the government.[19] The Constitution assigns the power to bring the charge of impeachment to the House of Representatives[20] and the power to try impeachments to the

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generally Peter C. Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 (1984) (describing role of impeachment in early American political order).

14. While judges are not explicitly named in this language, they are considered to be included. See 2 The Records of the Federal Convention of 1787, at 64–69 (Max Farrand ed., 1966) [hereinafter Farrand] (recording debates which indicated that judiciary was subject to impeachment); Gerhardt, supra note 2, at 10 n.29 (listing thirteen impeachments of federal judges, beginning with District Judge John Pickering in 1803); Peter M. Shane, Who May Discipline or Remove Federal Judges? A Constitutional Analysis, 142 U. Pa. L. Rev. 209, 213 (1993) (concluding that judges are included in Article II); see also United States v. Claiborne, 727 F.2d 842, 845 n.3 (9th Cir.) (stating that federal judges fall within meaning of "civil officers"), cert. denied, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 709 n.6 (11th Cir. 1982) (same), cert. denied, 459 U.S. 1203 (1983).

15. See Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 523 n.7 (1969) (referring to attempted impeachment of William Blount in 1798–99; he was acquitted because he was a Senator and not a "civil officer"). Members of Congress have consistently been distinguished from other "civil officers." The English system offers an historical basis for the distinction; the Parliament was equated with the people, as opposed to the other government officers who were responsible to the King. Reference to the difference is also made in the Constitution, see U.S. Const. art. I, § 6, cl. 2, which forbids civil officers from simultaneously serving in Congress. Finally, the distinction has an important policy aspect which preserves the rights of constituents to vote for the candidate of their choice. See Powell v. McCormack, 395 U.S. 486, 553 (1969) (Douglas, J., concurring) ("basic integrity of the electoral process" at stake in decision not to seat Powell).

16. See 2 Story, supra note 8, at 258–59 ("The reason for excepting military and naval officers is, that they are subject to trial and punishment according to a peculiar military code . . . . [T]he constitution has wisely committed the whole trust to the decision of courts-martial.").

17. U.S. Const. art. II, § 4.

18. See The Federalist No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (identifying impeachable offenses as those that involved "abuse or violation of some public trust"); Hoffer & Hull, supra note 13, at 101 (describing impeachable offenses as political); Gerhardt, supra note 2, at 14 (same). For details on the debate over the definition of crimes, see Hoffer & Hull, supra note 13, at 101–02; Gerhardt, supra note 2, at 14–16.

19. Professor Charles Black offers an excellent description of the actual impeachment process in Charles L. Black, Jr., Impeachment: A Handbook (1974).

20. See U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.").

Senate.[21] Commentators have likened this division of labor to the division between the grand jury and the petit jury in ordinary criminal trials.[22] The judiciary branch is excluded from the impeachment process. There is an explicit constitutional prohibition against the ordinary criminal jury sitting in impeachment cases.[23] Likewise, the President's pardon power does not extend to impeachments, limiting the role of the executive branch in impeachment.[24]

The language of the Impeachment Clause in Article I makes clear that impeachment does not preclude criminal indictment.[25] In other words, no double jeopardy problem arises when a civil officer is impeached and then tried in a criminal court or vice versa.[26] This arrangement reflects both the political nature of the impeachment process and the limited punishments that can be imposed through impeachment. In an historical work on impeachment, Peter Hoffer and N.E.H. Hull distinguished impeachments from criminal prosecutions: "[I]mpeachment hearings were not trials in which the senators were jurors, despite the fact that they sat on oath or affirmation, so much as deliberative sessions, where they decided whether an official had betrayed his public trust."[27] Furthermore, if the Senate did impeach an officer, it could only remove that person from office and disqualify him from holding and enjoying any "Office of honor, Trust or Profit under the United States."[28] This limitation on the range of punishments represented a considered deci-

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21. See U.S. Const. art. I, § 3, cl. 6 ("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.").

22. See Black, supra note 19, at 6 (likening the impeachment process to the two stages of a traditional criminal trial); Akhil R. Amar, On Judicial Impeachment and Its Alternatives, Remarks Prepared For the National Commission on Judicial Discipline and Removal 4 (Dec. 18, 1992) [hereinafter Amar, On Judicial Impeachment] (unpublished manuscript, on file with the Columbia Law Review) (noting division emphasizes importance of juries; while ordinary juries played no role in impeachment proceedings, House and Senate assume role of juries).

23. See U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury").

24. See id. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

25. See supra note 12 and accompanying text.

26. See 2 Story, supra note 8, at 251 (language drafted to preclude doubts over the legitimacy of the second proceeding); Stephen B. Burbank, Alternative Career Resolution: An Essay on the Removal of Federal Judges, 76 Ky. L.J. 643, 667 (1987–88) (language intended to clarify that no double jeopardy problem arose upon the subsequent trial); see also United States v. Hastings, 681 F.2d 706, 710 (11th Cir.) (constitutional language addresses the procedural rights of the accused), cert. denied, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir.) (impeachment does not foreclose criminal charges), cert. denied, 417 U.S. 976 (1974).

27. Hoffer & Hull, supra note 13, at 106; see generally The Federalist No. 65 (Alexander Hamilton) (describing impeachment as unique and delicate proceeding).

28. U.S. Const. art. I, § 3, cl. 7.

sion to depart from the English practice of impeachment in which the impeached individual could also be fined, imprisoned or beheaded.[29]

B. *Summary of the Debate over the Exclusivity of Impeachment*

Since the beginning of our nation, the legal community has debated whether impeachment is the exclusive method of removal and disqualification of federal judges.[30] Although impeachment is the only removal mechanism described for civil officers, the Constitution does not explicitly state that impeachment is the exclusive method of removal. Often debates over the validity of alternate means of removal were sparked by political struggles in which the executive or the legislature sought to gain control of the judiciary. The repeal of the Judiciary Act of 1801 and President Franklin D. Roosevelt's "court-packing" plan are but two of many examples.[31] More recently the debate has arisen in an effort to relieve Congress of the burden of engaging in the cumbersome process of impeachment.[32]

Scholars who argue for the exclusivity of impeachment ground their arguments in the text of the Constitution, a structural analysis of the separation of powers, and an emphasis on the importance of judicial independence.[33] They apply the maxim of constitutional interpretation *expressio*

29. See Hoffer & Hull, supra note 13, at 59–60, 96–106 (identifying the characteristics which distinguished the American process from the British). Another difference was that the American process was limited to officeholders while the British process could extend to any citizen. See id. at 97.

30. See Gerhardt, supra note 2, at 5–10, 19–40 (giving a thorough overview of the scholarly debate).

31. President Thomas Jefferson supported the repeal of the Midnight Judges Act, Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, passed on the eve of John Adams's departure from the Oval Office. As a result, several judges were removed. See Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 35 (3d ed. 1988) [hereinafter Hart and Wechsler]. In the 1930s, President Roosevelt attempted to "pack" the Supreme Court in the hopes of easing his New Deal legislation through the courts. His plan sought to overcome the influence of certain Justices, who were reluctant to resign, by outnumbering them on the Court. Id. at 39–42. For a survey of the ebb and flow of the impeachment impulses in the United States, see generally Raoul Berger, Impeachment: The Constitutional Problems (1973); Hoffer & Hull, supra note 13; William H. Rehnquist, Grand Inquests (1992); Burbank, supra note 26, at 645–48; Philip B. Kurland, The Constitution and the Tenure of Federal Judges: Some Notes From History, 36 U. Chi. L. Rev. 665 (1969).

32. Congress created the recent Commission for this purpose. See supra notes 1, 10 and accompanying text.

33. For those who argue in favor of exclusivity see Report, supra note 3, at 4–12; Burbank, supra note 26, at 648–50 (impeachment constitutes exclusive mechanism for removal and constitutional amendment is only means to alter arrangement); Harry T. Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges, 87 Mich. L. Rev. 765, 776, 778–85 (1989) (agreeing that impeachment is the exclusive means of removal, but suggesting that the judiciary may regulate its own members for behavior that falls short of an impeachable offense); Kurland, supra note 31, at 668 (asserting that impeachment is the sole means to remove judges according to original intent); Merrill E. Otis, A Proposed Tribunal: Is it Constitutional?, 7 U. Kan. City

unius est exclusio alterius ("the expression of one thing is the exclusion of another") and conclude that because the Constitution explicitly mentions impeachment as the mechanism for removal, it precludes all other removal mechanisms.[34] They draw further textual support from the Good Behavior Clause of Article III, arguing that it grants federal judges life tenure subject only to removal by impeachment.[35] The capstone of the arguments for the exclusivity of impeachment rests on the importance of judicial independence. According to this reasoning, the founders adopted impeachment—a difficult, public process reserved to the Congress—and designated it as the sole means of removal of federal judges in order to shield the judiciary from political pressures.[36]

Scholars who advocate alternatives to impeachment generally agree that impeachment is the exclusive mechanism through which the legislature or executive can remove judicial officers.[37] However, they argue that the Constitution does not preclude mechanisms of removal implemented by the judiciary itself. Burke Shartel first framed the debate in these terms.[38] He argued that the delegates to the Constitutional Convention were aware of the range of removal mechanisms available to the legisla-

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L. Rev. 3, 6–10 (1938) (setting forth historical evidence that impeachment is only constitutional way to remove judges); Shane, supra note 14, at 213–22 (finding impeachment the sole mechanism of removal); Martha A. Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 Sup. Ct. Rev. 135 (arguing that impeachment is the sole means to remove a judge); see also Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 141 (1970) (Douglas, J., dissenting) ("Only Congress can take [impeachment] action . . . ."); id. at 142 (Black, J., dissenting) ("[J]udge[s] [cannot] . . . be partly disqualified or wholly removed from office except by . . . impeachment . . . .").

34. See Sam J. Ervin, Jr., Separation of Powers: Judicial Independence, 35 Law & Contemp. Probs. 108, 117 (1970) (applying maxim of construction to determine that impeachment was intended to be exclusive); Otis, supra note 33, at 38 (same).

35. See, e.g., Otis, supra note 33, at 6 (drawing on the writings of Alexander Hamilton in The Federalist). The Good Behavior Clause provides: "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." U.S. Const. art. III, § 1.

36. See Kurland, supra note 31, at 666 ("When dealing with so fundamental and so fragile a notion as the independence of the judiciary, one ought to tread warily lest the ultimate costs far outweigh the immediate gains."); see also Burbank, supra note 26, at 650 (advising against "proposals that might diminish the judiciary's independence").

37. Those who find alternatives available include: Berger, supra note 31 (offering historical evidence to support finding constitutionally permissible alternatives to impeachment); Gerhardt, supra note 2, at 29–32 (arguing that impeachment is not exclusive means of removing federal judges as demonstrated by the actions of First Congress); Burke Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, 28 Mich. L. Rev. 870, 882–83 (1930) (arguing that judicial officers retain right to remove other judicial officers through the writ of *scire facias* or similar proceeding); Jon Gallo, Comment, Removal of Federal Judges—New Alternatives to an Old Problem: *Chandler v. Judicial Council of the Tenth Circuit*, 13 UCLA L. Rev. 1385 (1966) (arguing that current mechanisms for removing judges are inadequate and suggesting that removal by judicial tribunals is both desirable and constitutional).

38. See Shartel, supra note 37, at 881–83.

ture, the executive, and the judiciary in the English constitutional system.[39] Among the legislative alternatives, the delegates adopted and adapted the impeachment mechanism, prohibited Bills of Attainder, and explicitly rejected removal on address by Parliament to the King.[40] Additionally, the delegates further denied executive authority to remove judges at pleasure, such as the English King possessed, by investing judges with tenure during "good behavior."[41] However, the delegates did not specifically consider judicial proceedings for forfeiture of office—the writ of *scire facias* or *quo warranto*—that allowed judges to remove other judges from office.[42] As a result, some scholars argue, this judiciary-dependent method of removal continues to be available.[43]

Some scholars have invoked the Act of 1790, enacted by the First Congress, to support arguments that alternatives to impeachment existed near the time of the founding and should thus continue to exist today.[44] Section 21 of the Act provided that any judge convicted of bribery shall "forever be disqualified to hold any office."[45] These scholars argue that

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39. See id. at 880–81.

40. See id. The impeachment clauses are reprinted supra, notes 11–12 and accompanying text, the bill of attainder is prohibited in U.S. Const. art. I, § 10, cl. 1, and the removal by address was proposed to the Convention and rejected, according to 2 Farrand, supra note 14, at 428–29.

41. See Shartel, supra note 37, at 882.

42. See id. at 882–83. A writ of *scire facias* was a court action in a suit brought to enforce a clear condition attached to the officeholder's right to hold office; if that condition was found to be breached, the writ would result in the forfeiture of the office. *Quo warranto* was a similar action taken against lower officials. See also Gallo, supra note 37, at 1392 n.30 (explaining the history of the writ of *scire facias*).

43. See Shartel, supra note 37, at 882–83. But see Shane, supra note 14, at 235. In his piece for the Commission, Shane dismissed *scire facias* as the "thinnest of reeds on which to build any interpretation of the founders' intent". The debate has a long history: Shartel, supra note 37, at 882–83 (arguing that *scire facias* was not barred by the Constitution and that removal of judges by other judges by means of this writ did not violate the separation of powers, and therefore was available under the Constitution); Ziskind, supra note 33, at 137–38, 153–54 (rejecting Shartel's theory because no historical evidence supports the proposition that *scire facias* was considered by the Convention or was used in the colonies or the states); Kurland, supra note 31, at 668 (embracing Ziskind's research, claiming "it has been made pellucidly clear by [her] that the intention was to make impeachment the sole means of removal of federal judicial officers"); Berger, supra note 31, at 127–31 (criticizing validity of Ziskind's research and offering evidence of viability of the writ *scire facias* among the colonies and new states). See also Gerhardt, supra note 2, at 27–32 (agreeing with Berger that Ziskind's research was not as authoritative as Kurland claimed).

44. For example, Raoul Berger found it probative that alternatives to impeachment existed. See Berger, supra note 31, at 150 ("[T]he 1790 statute must be regarded as a construction that the impeachment clause does not constitute the 'only' means for the disqualification of judges. As with 'disqualification' so with 'removal,' for the two stand on a par in the impeachment provision.").

45. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117. Section 21 of the Act provided that any judge convicted of bribery would be disqualified from holding office.

> That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any

the Act of 1790 demonstrates that the First Congress rejected the exclusivity of impeachment as a mechanism for disciplining and removing federal judges.[46] The presumptive constitutionality of the Act of 1790 corroborates these arguments. Legislation enacted by the First Congress is often placed among authoritative texts like the Constitution and records of the ratifying debates because many of the new congressmen had been delegates to the Constitutional Convention.[47]

Unlike other scholars who invoke the Act of 1790 generally to support the possibility of other alternatives to impeachment, Professor

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> other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit, controversy, matter or cause depending before him or them, and shall be thereof convicted, such person or persons so giving, promising, contracting or securing to be given, paid or delivered, any sum or sums of money, present, reward or other bribe as aforesaid, and the judge or judges who shall in any wise accept or receive the same, on conviction thereof shall be fined and imprisoned at the discretion of the court; and shall forever be disqualified to hold any office of honour, trust or profit under the United States.

A fuller discussion of the Act of 1790 in the context of other early federal legislation is the subject of Part II of this Note.

For a history of the Act of 1790, see 6 Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791, at 1719–52 (Charlene B. Bickford & Helen E. Veit eds., 1986) [hereinafter Documentary History] (compiling calendar and edits made to bill in Senate and House); Elizabeth B. Bazan, Disqualification of Federal Judges Convicted of Bribery—An Examination of the Act of April 30, 1790 and Related Issues, reprinted in 2 Research Papers of the National Commission on Judicial Discipline and Removal 1285, 1308–19 (1993) (providing a facsimile of the Act of 1790 in Appendix A and a legislative history in Appendix B); Gerhardt, supra note 2, at 30 n.147 (detailing subsequent statutory history). This scholarship documents the subsequent history of the Act of 1790. A treatment of the subsequent history of the other early statutes herein cited is beyond the scope of this Note.

46. See Gerhardt, supra note 2, at 29 (referring to "incontrovertible fact that the First Congress itself rejected any notion that impeachment was intended as the sole means of removing federal judges"); see also United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir.) (claiming that Act of 1790 represents a "contemporaneous construction of the Constitution" that allowed the removal of a judge without impeachment), cert. denied, 417 U.S. 976 (1974).

47. See Gerhardt, supra note 2, at 30–31 & n.149 (stating that "actions relating to constitutional decision making by the First Congress . . . are highly probative of the framers' intent," citing to Bowsher v. Synar, 478 U.S. 714, 724 n.3 (1986), in which the Supreme Court noted that 20 members of the First Congress were also delegates to the Constitutional Convention); Shane, supra note 14, at 214 (including the records of the First Congress in a list of authoritative material). Professor Dellinger suggested that the Act of 1790 was not entitled to such deference. Arguing that the Act of 1790 might be unconstitutional, he said, "Now I know that it is the first Congress, but [it was] an act of the first Congress that was declared unconstitutional in *Marbury v. Madison*, [which demonstrates] that their actions are somehow not sacrosanct forever." Roundtable, supra note 1, at 354. He was referring, of course, to § 13 of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. For an alternate interpretation, suggesting that Justice John Marshall creatively misread that section in Marbury v. Madison, see Akhil R. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 453–63 (1989).

Michael Gerhardt[48] suggested that the Act specifically offered an alternative removal mechanism: "[T]he Act of 1790 demonstrated that Congress could, if it combined its powers under the necessary and proper and the impeachment clauses, provide for automatic removal and disqualification of impeachable officials upon conviction for the specific offenses listed in the impeachment clause."[49] He argued that by delegating its impeachment power to juries, Congress actually benefited defendants, because they received the protection of the higher "beyond a reasonable doubt" standard of proof. In another argument for the finding of constitutionality, he pointed out that punishment for criminal misconduct did not impinge on any essential judicial activity.[50] In response to this assertion that the Act spoke only of "disqualification," not "removal," and thus did not actually offer an alternative to removal by impeachment,[51] Gerhardt wrote: "If someone is disqualified from ever holding office in the future, the plain implication is that the person may no longer occupy the office presently held; in short, the person is effectively removed."[52]

The long scholarly debate over the exclusivity of the Impeachment Clause has yielded neither a definitive resolution, nor even a consensus.[53] Out of necessity, Congress and the federal courts have begun to address the problem of removing corrupt judicial officials, while leaving the constitutional issue undecided. Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("Act of 1980"),[54] which established a system within the federal judiciary to allow judges or judicial councils to discipline, but not remove, other judges.[55] A severe

48. Assistant Professor of Law, Wake Forest University.

49. Gerhardt, supra note 2, at 102.

50. See id. at 68–69. The intention here is not to advocate a delegation of Congress's impeachment powers but rather to revive a viable supplement to those powers. In this proposal, impeachment retains its importance as Congress's mechanism to check judicial misconduct. There is no intention to lessen the vigilance of Congress. Rather, the proposal suggests a supplement or an alternative, but not a delegation or replacement of Congress's impeachment authority.

51. See Lynn A. Baker, Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117, 1131 n.86 (1985). The author claims that the relevant clause of the Constitution provides that civil officers shall be removed from office, and does not say civil officers "shall be removed from office *and disqualified from holding any office*," so that Professor "Berger's assertion that disqualification and removal 'stand on a par in the impeachment provision' . . . is patently false." Id. See also Berger, supra note 31, at 150 (offering an interpretation of the impeachment clause).

52. Gerhardt, supra note 2, at 31–32.

53. See id. at 5 (dividing the scholarship on impeachment between the formalists, who adhere to original intent and are reluctant to find alternatives to impeachment, and the informalists, who often find alternatives through ad hoc analysis).

54. Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified as amended at 28 U.S.C. §§ 331, 332, 372, 604 (1988 & Supp. IV 1993)).

55. The Act of 1980 does allow judicial councils to suspend another judge. While some have argued against the validity of the Act of 1980, the Commission affirmed its constitutionality, adopting Shane's position. See Shane, supra note 14, at 232–40. For a

form of discipline could conceivably strip a judge of all cases.[56] The criminal system offers another method of preventing a judge from exercising her office: imprisonment.[57] Both of these methods can effectively prevent judges from performing their judicial duties, although neither is technically considered a "removal" of the judges from their offices. Congress was thus faced with the unappealing prospect of censured judges remaining on the bench with no judicial duties. In this context, Congress sought alternatives to impeachment and created the Commission to study the issues and report its findings and recommendations.[58]

C. *The Debate Rejoined: The Commission's Constitutional Roundtable*

The Commission sought the opinions of many constitutional scholars in its recent investigations into alternatives to impeachment.[59] Professor Peter M. Shane wrote a constitutional analysis for the Commission. His analysis formed the basis for discussion at the Constitutional Roundtable.[60] An exchange during the Roundtable discussion between Shane and Professor Akhil Reed Amar on the possibility of criminal prosecution as an alternative to impeachment is the most recent consideration of removal through criminal sanctions.

In his constitutional analysis, Professor Shane was guided by the principle of separation of powers. Regarding the issue of the exclusivity of impeachment, Shane concluded that impeachment was the sole *political* process by which federal judges could be removed from office.[61] The

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sample of those opposed, see Edwards, supra note 33, at 787–88 (arguing that the Act's attempt to "delegate" power to the judiciary is misguided because Congress never had the power of judicial oversight to delegate in the first place); Baker, supra note 51, at 1131–33 (arguing that because the Act of 1980 authorizes suspension, which can effectively result in removal, it is unconstitutional).

56. See, e.g., Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 78, 88 (1970) (refusing to grant extraordinary relief to federal judge whose cases had been removed and reassigned by Judicial Council).

57. Criminal charges against corrupt federal judges have resulted in imprisonment; see, e.g., United States v. Collins, 972 F.2d 1385 (5th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993); United States v. Claiborne, 727 F.2d 842 (9th Cir.), cert. denied, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

58. See Report, supra note 3, at iii–iv (setting forth Commission's mandate).

59. Among its consultants were Michael J. Gerhardt (Associate Professor, Marshall-Wythe School of Law, College of William and Mary), Peter M. Shane (Professor, University of Iowa College of Law), Todd D. Peterson (Associate Professor, The National Law Center, The George Washington University), Elizabeth B. Bazan (Legislative Attorney, American Law Division, The Library of Congress), and Jerome M. Marcus (Berger and Montague, Philadelphia, PA). See Report, supra note 3.

60. In addition to Professors Amar and Shane, a number of other scholars participated: Walter Dellinger (Professor, Duke University), Peter Charles Hoffer (Professor, University of Georgia), Philip B. Kurland (Professor, University of Chicago). Roundtable, supra note 1, at 337.

61. See Shane, supra note 14, at 215–18. Shane explained:

impeachment mechanism prevented the Congress or the President from acting unilaterally to remove a federal judge. It did not, however, preclude judiciary-dependent mechanisms of *disciplining* federal judges, because such mechanisms did not violate the separation of powers.[62] Shane thus echoed the distinction that previous scholars had made between impeachment—the sole acceptable politically dependent mechanism of removal—and the possibility of judiciary-dependent means of removal.[63]

Unlike these earlier scholars, however, Shane stopped short of affirming that judiciary-dependent mechanisms of discipline could effect the *removal* of a federal judge.[64] Although Shane included pre-impeachment criminal prosecution in the category of permissible judiciary-dependent sanctions,[65] he did not envision criminal conviction resulting in technical removal, or "the formal termination of one's tenure in office."[66] As a result, the functional removal worked by incarceration did not violate the strictures of the impeachment process or impinge upon the separation of powers.[67]

Professor Amar was invited to respond to Shane's analysis during the Roundtable discussion.[68] Amar agreed that impeachment was the sole political mechanism of removal. As to judiciary-dependent means, Amar pushed the debate on criminal prosecutions one step further than Shane by arguing that the constitutional impeachment mechanism did not preclude such prosecutions from working removal and disqualification from office.[69] Amar's extension of this concept was based in structural logic; it

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> By political mechanisms, I mean those removal methods that can be fully initiated and fully implemented by the elected (or "political") branches of the federal government without the involvement of the judiciary. . . . [H]istory provides clear evidence that impeachment was to be the sole *political* mechanism for disciplining of federal judges.

Id. at 211 (footnote omitted) (emphasis added). He discussed the consideration and elimination of mechanisms of other removal by the delegates of the Constitutional Convention; those alternatives included removal by the executive at will, by the executive upon "address" from the legislature, and impeachment. Id. at 215–16.

62. See id. at 218–20.

63. See supra notes 37–52 and accompanying text.

64. With regard to judicial self-regulation, he hedged on whether it was constitutionally permissible for Congress to provide for removal. Stating that it was questionable whether the Supreme Court would uphold such a measure, he wrote, "Congress's wisdom in excluding judicial removals of Article III judges from the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is clear." Shane, supra note 14, at 239 (footnote omitted).

65. See id. at 212 (also including judicial self-regulation, as under the Act of 1980, in this category).

66. Id. at 227 & n.63 (citing Burbank, supra note 26, at 671).

67. See id. at 226–27.

68. See Roundtable, supra note 1. Amar outlined his comments in Amar, On Judicial Impeachment, supra note 22.

69. See Amar, On Judicial Impeachment, supra note 22, at 8–9. Amar agreed with Shane that the judiciary could engage in self-regulation or discipline, short of removal. However, Amar found this limitation a constitutional restraint, whereas Shane phrased it as

was captured in his move from Shane's language of "judiciary-dependent" to "jury-dependent."

> Here, then, is how I read the Constitution's text and structure: Judges, like everyone else, must obey the general criminal law, and are subject to criminal prosecution and punishment. Such criminal punishment is often designed to impoverish, deprive, dishonor and disqualify. It may include—but is not limited to—removal from office, forfeiture of title and salary, stripping of honor, and political banishment and disqualification. Because criminal punishment can be so severe, it is subject to a host of constraints. . . . [P]erhaps most important of all, a grand jury must indict and a petit jury must convict. To modify Professor Shane's terminology, criminal prosecution is *jury*-dependent.[70]

Professor Amar thus recast criminal conviction as a constitutionally permissible removal mechanism by focusing on the general operation of criminal law and the role of the jury in the criminal system. Amar argued that, even if the Constitution had no Impeachment Clause, society could remove judges through the criminal process because judges, like everyone else, are subject to the criminal law.[71] According to Amar, criminal prosecutions could work removal and disqualification: "The impeachment provisions . . . are best read as providing a political mechanism for punishing judges that *supplements*, but does not *supplant*, the ordinary modes of criminal punishment."[72]

Although both Shane and Amar cited the Act of 1790, neither found it dispositive. Amar argued that it supported his position that criminal sanctions exist as an alternative, but did not analyze the statute in detail.[73] Shane dismissed the Act of 1790 as "inconclusive" because it was never enforced,[74] because it was sufficiently ambiguous that it could have been

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a "wise" policy choice because of the uncertain constitutionality of allowing removal. Compare id. (restricting judicial discipline to appellate or administrative discipline by likening it to appellate process where judicial decisions may be overruled, and arguing that Act of 1980 was valid because it did not seek to remove or disqualify federal judges and that absence of power to remove was a constitutional limit) with Shane, supra note 14, at 240 n.123 (disagreeing that this discipline for misconduct is like appellate review). See also Gerhardt, supra note 2, at 75–77 (for an argument about unconstitutionality of the Act of 1980).

70. Amar, On Judicial Impeachment, supra note 22, at 4 (footnotes omitted).

71. See Roundtable, supra note 1, at 342 (comments of Professor Akhil R. Amar).

72. Amar, On Judicial Impeachment, supra note 22, at 4–5.

73. See id.

74. See Shane, supra note 14, at 228 (citing Ervin, supra note 34, at 118 & n.43). This assertion is slightly misleading. See infra note 97 for cases that have referred to the Act.

narrowed to render it constitutional,[75] and because it provided explicitly only for disqualification and not for removal.[76]

D. *The Commission's Conclusions Regarding the Act of 1790*

After hearing the opinions of many constitutional scholars, the Commission ultimately resolved the underlying constitutional questions in the following manner. It concluded that impeachment is the only constitutionally permissible mechanism for removing a federal judge,[77] and found further that criminal conviction could not technically remove a judge from office, although it could result in an effective "removal" through incarceration. The Commission's position on criminal sanctions is the corollary of its primary conclusion that the Impeachment Clause is exclusive. Although the Commission considered the validity of the Act of 1790. It concluded that "[t]he best view of the 1790 Act is that it would disqualify a convicted judge from further office, but that it did not purport to remove the judge."[78]

The Commission relied on the research of Elizabeth Bazan[79] and Jerome Marcus[80] in addressing this issue.[81] Bazan concluded that the Act of 1790 did not work a removal of a sitting federal judge. She supported this conclusion, in part, with an analysis of another statute passed by the First Congress.[82] The Act Laying Duties on Distilled Spirits included explicit reference to removal as well as disqualification of federal officers convicted of fraud or embezzlement.[83] Bazan argued that "the Congress,

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75. See Shane, supra note 14, at 228 (suggesting a court might have upheld a bribery statute on the limited grounds that it was an explicit offense that triggered impeachment in the Constitution, so that Congress might always designate it as an offence that justified removal).

76. See id. at 229 n.69 (offering a convoluted reading of the statute as a "*post-impeachment* criminal proceeding" and drawing on *Burton v. United States*, 202 U.S. 344 (1906), for support). Elizabeth Bazan also draws this analogy to *Burton*. See Bazan, supra note 45, at 1291–97. The penalty was applied to a Senator in *Burton*; because the Congress is governed by special constitutional restraints on removal, the Court's interpretation of the statute in *Burton* would likely *not* apply to executive and judicial officers. See infra note 99.

77. See Report, supra note 3, at 5–6.

78. Id. at 20.

79. See Bazan, supra note 45, at 1308–19.

80. See Jerome M. Marcus, The 1790 Statute and Control of a Judge's Tenure in Office, reprinted in 2 Research Papers of the National Commission on Judicial Discipline and Removal 1321 (1993).

81. See Report, supra note 3, at 20, 139 n.23.

82. Act of Mar. 3, 1791, ch. 15, 1 Stat. 199 ("An Act repealing, after the last day of June next, the duties heretofore laid upon Distilled Spirits imported from abroad, and laying others in their stead; and also upon Spirits distilled within the United States, and for appropriating the same.") [hereinafter Act Laying Duties upon Distilled Spirits].

83. See id. § 49, 1 Stat. at 210. This statute drew significant attention from the Commission. See Report, supra note 3, at 20; Roundtable, supra note 1, at 383 (Professor Burbank's comment to Professor Amar).

where it so chose, did make a clear distinction between removal and disqualification, and expressly provided for both."[84]

Marcus provided additional support for this distinction between removal and disqualification. Marcus argued that the Impeachment Clause set forth the exclusive constitutional removal mechanism, but that disqualification could be accomplished through criminal sanctions as well as impeachment.[85] He reasoned that, because disqualification was viewed as a punishment, it was captured in the second phrase of the Impeachment Clause allowing criminal prosecution of a civil officer.[86] As a result, the Act of 1790, which he argued allowed only for disqualification, was constitutional.[87] However, this is an unconvincing basis to distinguish removal and disqualification. Removal was also a punishment involving the forfeiture of a property interest in an office, which under Marcus' reasoning, should also be included in the second sentence of the Impeachment Clause.

Perhaps most persuasive to the Commission was Professor Shane's analysis that the Constitution excluded judicial removal from the realm of permissible criminal sanctions.[88] Professor Shane contended that "the way in which the impeachment clauses were written represented a considered decision to depart from English practice and completely sever removal and disqualification as a process from the criminal law as a process."[89]

This argument can be traced back to Justice Joseph Story, who wrote in his *Commentaries on the Constitution of the United States*:

> There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, at least so far, as the jurisdiction and trial are concerned, into its proper elements, bringing the political part under the power of the political department of the gov-

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84. Bazan, supra note 45, at 1306.

85. See Marcus, supra note 80, at 1322.

86. See id.

87. See id. at 1324.

88. See Report, supra note 3, at 19 ("The Constitution quite explicitly separates impeachment and removal from the ordinary criminal process."); Burbank, supra note 26, at 667 (explaining that, as opposed to English practice of combining criminal punishment and removal, "the framers made an informed decision to divorce them"); Shane, supra note 14, at 226 (finding purpose of second half of impeachment clause "indicates that the exclusion of criminal sanctions from the impeachment process *separates* impeachment from criminal law, without altogether rendering impeachable—or, indeed, impeached—officials immune from criminal prosecution").

89. Roundtable, supra note 1, at 386; see also Shane, supra note 14, at 226 (arguing that criminal sanctions cannot include removal or disqualification). Shane ultimately relies on Justice Story and William Rawle in support of this proposition. See id. at 227 n.63; see also infra notes 90–94 and accompanying text for a consideration of Justice Story's views. Rawle's comments are made in the context of defending the usefulness of the American adaption of impeachment. See William Rawle, A View of the Constitution of the United States of America 207 (Philadelphia, H.C. Carey & I. Lea 1825) ("[T]he sentence which this court is authorized to impose cannot regularly be pronounced by the courts of law. They can neither remove nor disqualify the person convicted . . . .").

> ernment, and retaining the civil part for presentment and trial in the ordinary forum. . . . In the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as part of its regular judgment. *If it results at all, it results as a consequence, and not as part of the sentence.*[90]

By adopting Justice Story's view, the Commission and its consultants maintain the awkward position that incarceration does not effect "technical" removal but only a "functional" removal.

Justice Story made his comments in the context of upholding the impeachment process. He did not address the Act of 1790 or similar congressional statutes that explicitly provided for the punishment of removal and disqualification of "civil officers."[91] Perhaps, he was unaware of them or perhaps he was simply not thinking about them here. Instead of engaging in such speculation, it is more useful to examine his objections to the use of disqualification and removal within the criminal system. Justice Story advanced three principal concerns. First, he objected to entrusting these "political" punishments to the discretion of a court of law.[92] The discretion to impose removal penalties, as opposed to a statutory duty to do so, created the possibility that courts could abuse their power. Justice Story's concern over unguided discretion seems to reflect a desire to avoid the application of these sanctions in a biased or unpredictable manner. Second, Story recognized that the underlying crimes for which constitutionally proscribed impeachment was the appropriate punishment were not, and could not be, clearly defined. While the Senate could be trusted to apply the amorphous phrase "high crimes and misdemeanors," Justice Story believed that allowing an ordinary court to do so would be disastrous: "What could be more embarrassing, than for a court of law to pronounce for a removal upon the mere ground of political usurpation, or malversation in office, admitting of endless varieties, from the slightest guilt up to the most flagrant corruption?"[93] Third, Story raised the recurring objection of those who oppose this alternative to impeachment: "Ought a president to be removed from office at the mere will of the court for political misdemeanors?"[94]

The Commission was aware of the Act of 1790, yet instead of considering whether the Act actually embodied the potential abuses that Justice Story warned against, the Commission approached the statute with an *a priori* understanding that if it operated to remove an Article III judge, it was unconstitutional. Part II offers a careful analysis of the Act of 1790 and other early congressional enactments. These statutes responded to

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90. 2 Story, supra note 8, at 253–54 (emphasis added).

91. See infra Part II.

92. See 2 Story, supra note 8, at 254 ("But it may be properly urged, that the vesting of such high and delicate power, *to be exercised by a court of law at its discretion*, would, in relation to the distinguished functionaries of the government, be peculiarly unfit and inexpedient.") (emphasis added).

93. Id.

94. Id.

the concerns that Justice Story raised. The punishments of removal and disqualification are mandatory when they appear in the statutes. They accompany clearly defined crimes that involve the abuse of public office. Finally, none of them extends to the removal or disqualification of the President.

II. PARSING THE LANGUAGE OF EARLY FEDERAL LAWS PUNISHING OFFICIAL WRONGDOING

Early congressional statutes belie the exclusivity of the Impeachment Clause. These statutes mandated criminal sanctions that disqualified and removed federal officers (both executive and judicial) convicted of abusing their offices. The most widely known of these statutes is the Act of 1790, also called the "Act for the Punishment of Certain Crimes Against the United States."[95] According to the statute, a judge found guilty of accepting or receiving a bribe would be subject to fine, imprisonment, and would "forever be disqualified to hold any office of honor, trust or profit under the United States."[96] By mandating perpetual disqualification upon conviction, the Act of 1790 constituted an alternative to disqualification through impeachment and, arguably, an alternative to removal through impeachment as well.

Commentators have dismissed the importance of the Act of 1790, discounting it as an isolated statute that was never enforced.[97] In addition to holding this view, Professor Shane has suggested that the statute could be narrowly interpreted as allowing Congress to make a categorical determination that the specific offenses mentioned in the Impeachment Clause (in this case bribery) always merited removal.[98] Several recent commentators have argued that the Act of 1790 does not offer an alternative to impeachment because it is explicit only as to disqualification, which should not be understood to include removal.[99]

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95. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. For the language of Section 21, see supra note 45.

96. Section 21, 1 Stat. at 117.

97. Generally, commentators, see e.g. Shane, supra note 14, at 228, support this proposition by citing to Ervin, supra note 34, at 118 & n.43, but this is slightly misleading. A review of the cases shows that bribery of an official was considered in United States v. Worrall, 2 U.S. (2 Dall.) 384 (1798) (confronting the difficulty of penalizing defendant for attempting to bribe the "Commissioner of the Revenue" because no statute existed proscribing this action); Slade v. United States, 85 F.2d 786, 789–90 (1936) (applying a successor to the Act of 1790 to a juror who was convicted of bribery; the successor, 18 U.S.C.A. § 237, included the language of perpetual disqualification); United States v. Collins, 972 F.2d 1385, 1395 (1992) (applying the current version of the bribery statute, 18 U.S.C. §§ 2, 201(b)(2), to a federal judge and convicting, but not disqualifying him). The Act of 1790 is noted in dicta in two other cases, indicating that the statute was known and accepted as valid: Weems v. United States, 217 U.S. 349, 399 (1910) (White, J., dissenting); De Veau v. Braisted, 363 U.S. 144, 159 (1960).

98. See Shane, supra note 14, at 228.

99. See Report, supra note 3, at 20 (removal and disqualification are distinguishable, and alternate means of removal are constitutionally impermissible); Shane, supra note 14,

The Act of 1790 is not an anomaly.[100] There was a series of early statutes that include language of disqualification and removal.[101] These statutes support the conclusion that Congress frequently employed the punishment of disqualification, removal, or both in an attempt to concretize and enforce the accountability of individuals in positions of public trust. Furthermore, the statutes establish a pattern which supports the assertion that in certain circumstances disqualification was understood to include removal from office.

The majority of these statutes addressed the misbehavior of federal executive officers, but they are relevant to the removal of federal judicial officers as well. It is true that, unlike judicial officers, executive officers can be removed by means other than impeachment—for example, in some situations the President has authority to remove an executive officer.[102] Nonetheless, these statutes are important because they suggest a

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at 228 (referring to distinction as narrowing construction that preserves constitutionality of statute); Bazan, supra note 45, at 1299–1301 (drawing attention to another early statute which explicitly referred to disqualification and removal); Marcus, supra note 80, at 1326–27 (arguing that disqualification through criminal statute was constitutionally permissible, although removal was not).

Bazan and, to a lesser extent, Shane and Marcus, argue that Justice Harlan's opinion in Burton v. United States, 202 U.S. 344 (1906), proved that statutory disqualification language, by itself, did not work a removal. At issue in that case was the effect of a statute which provided that, upon conviction for bribery, a Senator "'shall, moreover, . . . be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.'" 202 U.S. at 359–60 (quoting Rev. Stat. § 1782 (1864)). Justice Harlan concluded that "the final judgment of conviction did not operate, *ipso facto*, to vacate the seat of the convicted Senator." Id. at 369. Bazan argues that "the 1790 statute's disqualification language might be regarded as not operating '*ipso facto*' to remove a convicted judge from his judicial office." Bazan, supra note 45, at 1295. Justice Harlan's opinion supports the opposite conclusion. Harlan did not hold that statutory language of disqualification could never work a removal. Rather, he started from the assumption that it generally could, and distinguished the case before him, which involved a Senator, from that rule. The expulsion of a Senator must be determined by the Senate, according to the constitutional provision giving each House authority to "expel a Member." U.S. Const. art. I, § 5, cl. 2. See also supra note 15 (describing historically different position of members of Congress).

100. While the Commission was aware of one other early statute that included disqualification and removal as punishments, it too was treated as an isolated example. See Report, supra note 3, at 20, 139 n.21; Roundtable, supra note 1, at 383 (Professor Burbank); Bazan, supra note 45, at 1299–1301; Marcus, supra note 80, at 1328.

101. The findings in this Note seek to be thorough but not exhaustive. The investigator worked with an index of federal statutes developed to accompany the Revised Statutes of 1875. From that index, laws that employed language of disqualification, removal, or both could be identified and their predecessors traced.

102. See Myers v. United States, 272 U.S. 52, 132–34 (1926) (concluding that President has authority to remove officers with "executive" function, such as regional postmaster). This area is the subject of much controversy. While the core of *Myers* is arguably intact, its dicta was limited by the Court's decision in Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) (restricting the President's power to remove officers with "legislative" or "judicial" functions). A recent chapter in this difficult area was Morrison v. Olson, 487 U.S. 654 (1988) (affirming Congress's power to establish an

removal mechanism that is distinct from both executive removal and impeachment. The statutes mandated removal and disqualification upon criminal conviction for abuse of public trust; they created a process separate from impeachment, but serving a similar purpose. The remaining statutes directly addressed the misbehavior of federal judicial officers and indicate that judges could be disqualified and removed from office through criminal sanctions. There are far fewer statutes encompassing judicial officers, perhaps only two. Yet their existence and the larger pattern of statutory enactments point to the availability of criminal sanctions as an accepted method of removing and disqualifying judges convicted of certain crimes.

In search of a fuller understanding of the Act of 1790, this Note evaluates the Act in the context of the statutes discussed above.[103] These early statutes—particularly the enactments of the First Congress—carry a unique cachêt. They are strongly indicative of the framers' intent[104] both because the First Congress followed soon after the Constitutional Convention and because many of its members also had participated in the Constitutional Convention.[105] This examination reveals a consistent practice which demonstrates that the First Congress and those that followed did intend to use criminal punishment as an alternative to impeachment for removal of federal judges.

A. *A Brief Overview of the Statutes*

Early Congresses included the punishment of disqualification, removal, or both, in statutes addressed to public officeholders in order to deter or punish official wrongdoing. The positions of public trust in-

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independent prosecutor). For a discussion on this line of cases and their implications on the power of the President, see Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 5–6, 23–25, 106–19 (1994).

103. The examination ends with a statute passed by the 32d Congress in 1853. Later statutes do include the language of forfeiture and disqualification. However, because the intervention of the Civil War changed the political context and drew into question whether political accountability and public security were the principle guides to such penalties, the comparison in this Note is limited to pre-Civil War statutes. Some examples of statutes passed during the Civil War that include the penalties of removal, disqualification, or both, are Rev. Stat. § 1781 (1862–63) (prohibiting taking of consideration for procuring contracts, offices, etc.); Rev. Stat. § 1782 (1864) (prohibiting taking compensation in matters to which the United States was a party); Rev. Stat. § 5332 (1862) (punishing treason); Rev. Stat. § 5334 (1862) (prohibiting inciting or engaging in rebellion or insurrection against authority of the United States); Rev. Stat. § 1996 (1865) (deeming rights as citizens forfeited by desertion).

104. See Gerhardt, supra note 2, at 30 & n.149 (stating that "actions relating to constitutional decision making by the First Congress . . . are highly probative of the framers' intent").

105. See Bowsher v. Synar, 478 U.S. 714, 724 n.3 (1986) (noting that 20 members of the First Congress were also delegates to the Constitutional Convention).

cluded judges,[106] customs officers,[107] post-officers,[108] treasury officials,[109] ship registry officers,[110] revenue collectors,[111] steamboat inspectors,[112] and, in the broadest language, a "member [of Congress], officer or person."[113] The crimes addressed involved abuses of office, such as bribery,[114] extorting money,[115] self-dealing,[116] defrauding the government[117] and embezzling public funds.[118] The first statutes stipulated perpetual disqualification or removal and disqualification, while later statutes modified the punishment according to the actor and action committed.[119]

B. *Statutes of the First Congress*

The First Congress was charged with bringing the nation to order according to the blueprint of the Constitution. The congressmen began

106. See Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117.

107. See Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46 ("An Act to Regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States.") [hereinafter Act to Regulate the Collection of Duties].

108. See Act of Feb. 20, 1792, ch. 7, § 11, 1 Stat. 232, 235 ("An Act to Establish the Post-Office and Post Roads within the United States.") [hereinafter Act to Establish the Post-Office].

109. See Act of May 8, 1792, ch. 37, § 12, 1 Stat. 279, 281 ("An Act Making Alterations in the Treasury and the War Departments.") [hereinafter Act Altering the Treasury].

110. See Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 287, 298 ("An Act concerning the registration and recording of ships or vessels.") [hereinafter Act concerning the registration of ships]; Act of Feb. 18, 1793, ch. 8, § 29, 1 Stat. 305, 315–16 ("An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same.") [hereinafter Act for licensing ships]; Act of Mar. 2, 1803, ch. 18, § 1, 2 Stat. 209 ("An Act in addition to the act, entitled 'An act concerning the registering and recording of ships and vessels in the United States,' and to the act entitled 'An act to regulate the collection of duties on imports and tonnage.'") [hereinafter Act in addition to previous acts on ships and duties].

111. See Act of July 6, 1797, ch. 11, § 12, 1 Stat. 527, 530 ("An Act laying Duties on stamped Vellum, Parchment and Paper.") [hereinafter Act laying Duties on stamped Vellum].

112. See Act of Aug. 30, 1852, ch. 105, § 37, 10 Stat. 61, 74 ("An Act to Amend an act entitled 'An act to provide for the better Security of the lives of Passengers on board of Vessels propelled in whole or in part by Steam' and for other purposes.") [hereinafter Act regulating steamboat safety].

113. Act of Feb. 26, 1853, ch. 81, §§ 4–6, 10 Stat. 170, 170–71 ("Act to prevent Frauds upon the Treasury of the United States.") [hereinafter Act to prevent Frauds upon the Treasury].

114. See Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117; Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46.

115. See Act of Feb. 20, 1792, ch. 7, § 11, 1 Stat. 232, 235; Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 287, 298; Act of Feb. 18, 1793, ch. 8, § 29, 1 Stat. 305, 315–16; Act of Aug. 30, 1852, ch. 106, § 37, 10 Stat. 61, 74.

116. See Act of May 8, 1792, ch. 37, § 12, 1 Stat. 279, 281.

117. See Act of July 6, 1797, ch. 11, § 12, 1 Stat. 527, 530; Act of Mar. 2, 1803, ch. 18, § 1, 2 Stat. 209, 209.

118. See Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 ("An Act to establish the Treasury Department.") [hereinafter Act to establish the Treasury Department].

119. See infra Part II.C for an analysis of the different punishments.

with a flurry of activity—creating offices, levying taxes, collecting revenue and delegating authority to the executive and judiciary. Their recent experience with the government under the Articles of the Confederation, generally considered a disaster and openly referred to as "the state of imbecility" in congressional debates,[120] led them to pay strict attention to the accountability and responsibility of the offices created. At least four statutes passed by the First Congress contained clauses disqualifying federal officers engaging in improper behavior: Act to Regulate the Collection of the Duties, enacted on July 31, 1789;[121] Act to Establish the Treasury Department, enacted on Sept. 2, 1789;[122] Act of 1790, addressing crimes, enacted on April 30, 1790;[123] and Act Laying Duties on Distilled Spirits, enacted on March 3, 1791.[124]

James Madison introduced the Act to Regulate the Collection of Duties[125] only seven days after a quorum had formed in the House of Representatives.[126] The Act established districts and ports, stretching from New Hampshire to Georgia. It also created a network of customs officials—including collectors, naval officers, surveyors,[127] deputy collectors,[128] and inspectors[129]—all of whom had interlocking responsibilities regarding the levying of duties and collection of revenue. Section 35 of the Act levelled a penalty upon "any officer of the customs" who received "any bribe . . . or recompense for conniving, or [planning to] connive at a false entry of any ship or vessel, or of any goods, wares or merchandise."[130] This crime involved an abuse of the position entrusted to the customs officers. Upon conviction, the officer incurred a stiff fine of two hundred to two thousand dollars for each offense and was "forever disabled from holding any office of trust or profit under the United States."[131]

The seriousness of this punishment is indicative of how serious a crime bribery was considered to be. Bribery was regarded as a "heinous"

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120. 1 Annals of Cong. 107 (Joseph Gales & William W. Seaton eds., 1834) (James Madison). See also Wood, supra note 15, at 471 (recording nearly universal recognition of "'the weakness of the Confederation'" in 1787, the time of the Constitutional Convention).

121. Act of July 31, 1789, ch. 5, 1 Stat. 29.

122. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

123. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

124. Act of Mar. 3, 1791, ch. 15, 1 Stat. 199.

125. Act of July 31, 1789, ch. 5, 1 Stat. 29.

126. 1 Annals of Cong., supra note 120, at 106–08.

127. Ch. 5, § 5, 1 Stat. 29, 36–37 (1789).

128. See id. § 6, at 37.

129. See id. § 15, at 40.

130. Id. § 35, at 46.

131. Id. This section was not overlooked by the Senate. Indeed, one of the suggested and accepted amendments was to insert "For conniving" after "Recompense." See 1 Documentary History, supra note 45, at 97.

crime, threatening the very fabric of society.[132] Moreover, it posed a special danger within the system of revenue collection. The states, newly joined together, resisted taxes of any kind. The debates accompanying this legislation in the House of Representatives revealed mutual distrust and concern over the continued competitiveness of trade, manufacturing, and agriculture.[133] These were overcome only by a delicate balancing of taxes between states and a clearly expressed intention to raise revenue to pay the nation's debt. Dishonesty within the system would bring disaster to the nation. Yet, the task of enforcing accountability on such a far-flung group of officials was daunting.[134] Subjecting each offender to impeachment would have strained both the operations of the customs and that of the Congress. The First Congress instead chose to employ a more practical means of disciplining federal officials: criminal sanctions.

Although the statute did not explicitly provide for the removal of the convicted customs officers, disqualification without removal would have been inconsistent with the purpose of the statute. Certainly the danger to be avoided—undercutting public confidence in the federal government's revenue collecting officers—would not have been addressed by disqualifying the corrupt officials from holding future positions, but not removing them from their present positions.[135] Moreover, Section 35 did not include imprisonment in the punishment, so the officer would not have been "functionally" removed from office if removal had not been implicit in disqualification.

Three days after resolving the controversy over duties, the House took up the challenge of ordering the executive branch and creating the Department of the Treasury.[136] On May 19, 1789, the members of the

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132. See 4 William Blackstone, Commentaries of the Laws of England 139 (Birmingham, Ala., Legal Classics Library 1983) [hereinafter Blackstone, Commentaries].

133. See 1 Annals of Cong., supra note 120, at 106–26, 129–48, 150–77, 180–240, 243–57, 261–76, 282–330, 337–82 (debates continued from April 8 until May 16 when the bill was engrossed).

134. Geographic concerns also played a role in other Congressional schemes, such as the pension plan at issue in Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). That plan enlisted the aid of the circuit courts in the Secretary of War's pension distribution. The circuit judges rejected this extra-judicial role. But see Hart and Wechsler's comment which suggests the geographic logic of the plan: "Note that the provision made perfectly good short-run practical sense. The judges were in a better position than the 'Secretary at War' to appraise the personal good faith of claimants . . . . But the Secretary was in a better position . . . to check the official military records." Hart and Wechsler, supra note 31, at 95. See also Akhil R. Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1560 & n.222 (1990) ("To serious historians of the period, it is rather obvious that geography was an overwhelming fact of daily life and an overarching concern of both federalists and antis in the late 1780s.").

135. While the scheme of punishments in this Act is discussed in In re Leszynsky, 15 F. Cas. 397, 401 (C.C.S.D.N.Y. 1879) (explaining that the dual punishment of monetary forfeiture and disqualification do not violate the Fifth Amendment), this Note has not focused on contemporary case law and further research in this area would be helpful.

136. See 1 Annals of Cong., supra note 120, at 383–84.

House of Representatives began the now famous debate over the constitutionality of legislation vesting the power to remove executive officers with the President.[137] The House resolved the debate in favor of the President's power to remove in this context.[138] In support of this position, Madison suggested that authorizing the President to remove lower executive officers would increase the President's own accountability for the actions of those officers. The First Congress found this effect desirable.[139]

At the close of this debate, and before the House sent the bill to the Senate, Representative Burke announced that he planned to add a clause "to prevent any of the persons appointed to execute the offices created by this bill from being directly or indirectly concerned in commerce, or in speculating in the public funds, under high penalty, and being deemed guilty of a high crime or misdemeanor."[140] Burke's suggestion became Section 8 of the Treasury bill. It applied to the Secretary of the Treasury, a Comptroller, an Auditor, a Treasurer, a Register and an Assistant to the Secretary.[141] It forbade these officers from participating in a wide range of investments that might involve self-dealing.[142] Classifying the crime as a "high misdemeanor," the Act stipulated the punishment of a fine, removal, and perpetual disqualification.[143]

The logic of the clause is clear. It punished officers of the Treasury for abusing the trust implicit in the office conferred. However, the punishment of removal and disqualification seems remarkable on the heels

137. The debate in the House of Representatives is recorded in id. at 384–412, 473–608, 614–31, 635–39.

138. The meaning of this debate has given rise to much controversy concerning the scope of the presidential powers. See Lessig & Sunstein, supra note 102, at 22–27 for a summary of the scholarly debate.

139. See 1 Annals of Cong., supra note 120, at 387 (Madison said, "I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the constitutionality of the declaration I have no manner of doubt.").

140. Id. at 635.

141. See Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (creation of offices).

142. See id. § 8, at 67 ("And be it further enacted, That no person appointed to any office instituted by this act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use, any emolument or gain for negotiating or transacting any business in the said department, other than what shall be allowed by law . . . .").

143. See id. ("[H]e shall be deemed guilty of a high misdemeanor, and forfeit to the United States the penalty of three thousand dollars, and shall upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States . . . .").

of an exhaustive debate over whether to recognize the Executive's power to remove such officers. Section 8, providing for removal through criminal sanctions, directly follows the clause acknowledging the President's power to remove Treasury officers.[144] Unlike the provision for removal by the President, the provision for removal through criminal sanctions did not engender debate. The ease of acceptance of the amendment[145] indicates that Congress considered removal of federal officers through indictment and conviction to be an acceptable alternative to impeachment. This Act, taken in combination with the Constitution, recognized three means to remove a Treasury officer from executive office: (1) impeachment, (2) removal by the President, and (3) conviction of the crime of self-dealing as defined in Section 8.

Because the statute provided for both removal and disqualification, one could argue that Congress believed that disqualification did not encompass removal, since otherwise Congress would not have needed to include removal as an additional penalty.[146] A more reasonable interpretation, however, would be that Congress believed that permanent disqualification encompassed removal, but explicitly provided for removal in this statute because it had just finished discussing removal in another context—Presidential removal of Treasury officers—and the word was fresh in the minds of its members. Another reason for the use of both terms may have been the changes made to the House version of the Bill by the Senate. The House draft bifurcated the penalties, distinguishing between "any person," who was liable for a fine and perpetual disqualification, and "any other Officer," who was to be fined and removed from office.[147] In redrafting this section, the Senate changed the language so that the pen-

144. See id. § 7, at 67 ("And be it further enacted, That *whenever the Secretary shall be removed from office by the President of the United States*, or in any other case of vacancy in the office of Secretary, the Assistant shall, during the vacancy, have the charge and custody of the records, books, and papers appertaining to the said office.") (emphasis added).

145. The clause that Burke suggested was submitted to the Senate. The Senate rewrote the penalty provision and the House agreed to this amendment on August 5, 1789. See 6 Documentary History, supra note 45, at 1986 n.11.

146. This charge could be levelled at the interpretation made above of § 35 of the Act to Regulate Duties on Tonnage, Act of July 31, 1789, ch. 5, 1 Stat. 29. See supra notes 126–135 and accompanying text.

147. The original penalty provision drafted by the House read as follows:

> [I]f any person shall offend against any of the prohibitions of this act, he shall, on conviction, be deemed guilty of a high misdemeanor, shall forfeit the penalty of five thousand dollars, and be forever incapable of holding any office under the United States; and any other Officer herein mentioned, so offending, shall be removed from office, and pay a fine of two thousand dollars; the forfeitures under this act to go, one half to the United States, the other half to him who will sue for it.

6 Documentary History, supra note 45, at 1985, 1986 & n.11.

alties applied only to officers,[148] and made clear that a removed officer would *also* be perpetually disqualified.[149]

Congress enacted the Treasury Bill on the second of September. By this time, the Senate had crafted the Act of 1790 and had sent it to the House for concurrence.[150] The First Session of the Congress ended that month. Though the Bill that was to become the Act of 1790 was read in the House, no action was taken before the end of the Session. As a result, it had to be reconsidered in the Senate at the opening of the Second Session in January of 1790.[151] Ironically, although the Act of 1790 has engendered much contemporary debate, Senator Maclay described the day that Congress passed the Bill for a second time as "a most unimportant day."[152] The legislative history records discussions about the Bill, but there is no indication that special consideration was given to Section 21, which sets forth the crime of bribing a judge and the consequence of perpetual disqualification upon conviction.

In the Third Session of the First Congress, the House took up a revenue proposal from the Treasury and drafted what would become An Act Laying Duties on Distilled Spirits.[153] According to a report from Secretary of the Treasury Alexander Hamilton, the most pressing problem facing the U.S. Treasury was raising sufficient funds to meet the upcoming interest payments on the debts of the States, assumed by the Union, and the Union's own debt.[154] Laying a tax on domestic distilled spirits was among the Secretary's recurrent suggestions.[155] Hamilton emphasized that his proposed legislation establishing such a tax would "make[ ] the SECURITY of the REVENUE to depend chiefly on the *vigilance* of the PUBLIC OFFICERS" rather than on the oaths of dealers that they had complied with the law.[156]

The statute in its final version reflected this general concern for the integrity of the revenue collection system and the revenue collectors

148. See Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 ("no person appointed to any office instituted by this act").

149. See id. § 8, at 67 ("he shall be deemed guilty of a high misdemeanor, and forfeit to the United States the penalty of three thousand dollars, and shall upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States").

150. See supra note 45 for secondary sources which recreate the timetable of this act, the changes made to it, and its statutory history.

151. For a personal account of the controversy that accompanied this rule of *de novo* consideration, see 9 Documentary History, supra note 45, at 185 & n.19, 189 (Senator William Maclay's diary).

152. Id. at 191 (entry in Senator Maclay's diary).

153. Ch. 15, 1 Stat. 199 (1791).

154. See 4 Documentary History, supra note 45, at 582–90 (reprinting Report of the Secretary of the Treasury, Dec. 13, 1790).

155. See id. at 583–84. Hamilton had recommended this tax in an earlier report of Jan. 14, 1790. See 5 id. at 768–69. He included the draft of the statute in that report. It was enacted with minor changes. See id. at 799–822.

156. 4 id. at 584.

themselves. Section 39 provided that, if any supervisor or officer was convicted in a criminal prosecution "of oppression or extortion in the execution of his office," he would be subject to fines, imprisonment, or both, at the court's discretion, and would "also forfeit his office."[157] This section affirmed the acceptance of criminal conviction as an alternative means of removing a "civil officer" who had been selected by the President, with the advice and consent of the Congress.[158] Lastly, Section 49 was a catch-all provision applying to "such supervisor or other officer" who was guilty of any abuse of his position, including fraud or embezzlement.[159] The penalty imposed was a fine and both removal and disqualification.[160]

C. *Propositions Suggested by the Early Enactments of Congress*

The statutes of the First Congress suggest several conclusions. Moreover, these conclusions find support in several statutes passed by subsequent Congresses which employed similar penalties. First, "civil officers" were not immune from criminal prosecution. Second, "civil officers" could be disqualified from holding a particular office or any office by means of criminal prosecution. Third, "civil officers" could be removed through the criminal law. Fourth, statutes including both removal and disqualification duplicated the maximum punishment contained in the Impeachment Clause.

1. *"Civil officers" were not immune from criminal prosecution.* — Impeachment was intended to heighten the responsibility and accountability of civil officers, not to shield them from criminal sanctions.[161] If there were any doubts on this point, the language of the first crime bill passed

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157. Act of Mar. 3, 1791, ch. 15, § 39, 1 Stat. 199, 208.

158. See id. § 4, at 199–200 (authorizing the President, with the advice and consent of the Senate, to appoint supervisors and inspectors). Supervisors and other officers could be prosecuted for unreasonable searches and seizures. See id. § 38, at 208.

159. See id. § 49, at 210 (listing the forms of wrongdoing: "That if any such supervisor or other officer, shall enter into any collusion with any person or persons for violating or evading any of the provisions of this act, or the duties hereby imposed, or shall fradulently [sic] concur in the delivery of any of the said spirits, out of any house, building or place, wherein the same are deposited, without payment or security for the payment of the duties thereupon, or shall falsely or fraudulently mark any cask, case or vessel, contrary to any of the said provisions, or shall embezzle the public money or otherwise be guilty of fraud in his office . . . .").

160. See id. ("upon conviction of any of the said offences, shall forfeit his office, and shall be disqualified for holding any other office under the United States"). This provision was included in the draft of the bill that Hamilton submitted to the House along with his Treasury Report on January 14, 1790. While some changes were made to the section, the language of the penalty clause mirrors the final bill. See 5 Documentary History, supra note 45, at 819. This is the clause that Bazan drew to the attention of the Commission. See Bazan, supra note 45, at 1306.

161. See U.S. Const. art. I, § 3, cl. 7. ("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."); cf. Amar, On Judicial Impeachment, supra note 22, at 5 (arguing that

by Congress—the Act of 1790—would dispel them. The crimes, from treason to larceny and beyond, are consistently applied to "any person or persons."[162] Government officers were not protected from the operation of the criminal law, and in two clauses, the Act singled out government officials, punishing them for abuse of office.[163] Also, in the Act to Lay Duties on Distilled Spirits, Section 38 made it explicit that revenue collectors were open to suit for abuse of office.[164]

Disqualification and removal are among the punishments that Congress may choose to enforce its law. It has been argued that this is true because the greater power of Congress to stipulate capital punishment for a crime in 1800 included the lesser power to set a milder sanction. As one scholar argued, "It could allow people who have been convicted of crimes to keep their heads, but to suffer political dishonor."[165] The nation's first crime bill, the Act of 1790, supports this argument. Treason was punished by death,[166] and bribery of a federal judge was punished by fine, imprisonment, and perpetual disqualification.[167]

2. *"Civil officers" may be disqualified from holding a particular office or any office by means of criminal prosecution.* — Four of the statutes passed by the First Congress included provisions disqualifying officers who had abused their position of public trust.[168] Two of the statutes of the First Congress stipulated perpetual disqualification.[169] In two other statutes,

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"ordinary criminal prosecution is no longer *necessary* to punish judges; but it remains *sufficient*" as a result of the impeachment clauses).

162. Act of Apr. 30, 1790, ch. 9, passim, 1 Stat. 112, 112–19.

163. The best known of these examples is section 21, which punishes a judge for "in any wise accept[ing] or receiv[ing] a bribe" intended to influence his behavior in "any suit, controversy, matter or cause depending before him." Id. § 21, at 117. Sections 25 and 26 sought to enforce the recognition of diplomatic immunity nationwide by criminalizing the behavior of "any person . . . and all officers" involved in executing a writ or process against an "ambassador or other public minister of any foreign prince or state." Id. §§ 25, 26, at 117–18. Section 25 specifically mentions the judges and justices of courts of the United States and of the states in its description of the illegal action of violating diplomatic immunity by means of court orders. See id. § 25, at 117–18.

164. See discussion supra notes 157–158 and accompanying text.

165. Roundtable, supra note 1, at 342–43 (testimony of Professor Amar); see also Amar, On Judicial Impeachment, supra note 22, at 5 ("I would even say that Congress could, by law, create criminal offenses that apply only to judges—say, a federal Bribery in Adjudication statute.").

166. See Act of Apr. 30, 1790, ch. 9, § 1, 1 Stat. 112, 112.

167. See id. § 21, at 117.

168. See supra notes 121–124.

169. See Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 ("and shall *forever* be disqualified to hold any office of honour, trust or profit under the United States" as well as fine and imprisonment "at the discretion of the court") (emphasis added); Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46 (customs officer receiving a bribe shall be "*forever* disabled from holding any office of trust or profit under the United States" in addition to fines) (emphasis added).

Congress provided for both disqualification and removal.[170] These statutes reached both judicial and executive officers, including even the Secretary of the Treasury.[171]

Subsequent statutes also provided the punishment of disqualification from office for certain abuses. Two types of crimes appeared to trigger this punishment: bribery and falsely registering a ship. In addition to the two statutes punishing bribery passed by the First Congress, another notable statute was the Act to Establish the Post-Office passed by the Second Congress. Section 11 of that Act applied to postmasters who demanded or received payment above and beyond the scheduled postal rates. Upon conviction, the officer was fined and disqualified from holding federal office.[172] At least three statutes included provisions punishing the fraudulent registering of a ship with fines and disqualification from office for the offending officer.[173] One of the acts, which dealt with forging or using forged sea letters or passports,[174] applied generally to "any person," but included a separate and additional penalty of disqualification for officers of the United States who committed such a crime.[175]

3. *"Civil officers" may be removed through the criminal law.* — Statutes with provisions to punish the miscarriage or the neglect of official duties explicitly mandated removal or forfeiture of office in some circumstances. In the Act Laying Duties upon Distilled Spirits, Section 39 imposed forfeiture of office upon any supervisor or officer who had been convicted in a criminal prosecution "of oppression or extortion in the execution of his office."[176] This is the first instance, apparently, of a statute imposing removal without also imposing disqualification.[177] In the Act laying Duties on stamped Vellum, passed in 1797, Section 12 required

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170. See Act of Mar. 3, 1791, ch. 15, § 49, 1 Stat. 199, 210; Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.

171. See Act of Sept. 2, 1789, ch. 12, §§ 1, 8, 1 Stat. 65, 65, 67.

172. See Act of Feb. 20, 1792, ch. 7, § 11, 1 Stat. 232, 235 ("and shall be rendered incapable of holding any office under the United States").

173. See Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 287, 298 (in the Act concerning the registration of ships, a penalty was placed on making false registers or demanding unlawful fees or neglecting to do duty); Act of Feb. 18, 1793, ch. 8, § 29, 1 Stat. 305, 315–16 (in the Act for licensing ships, penalty placed on making false enrollment or demanding unlawful fees or neglecting to do duty); Act of Mar. 2, 1803, ch. 18, § 1, 2 Stat. 209, 209 (Act in addition to previous acts on ships and duties).

174. See Act of Mar. 2, 1803, ch. 18, § 1, 2 Stat. 209, 209 ("shall knowingly make, utter, or publish any false sea letter, Mediterranean passport, or certificate of registry, or shall knowingly avail himself of any such Mediterranean passport, sea letter, or certificate of registry").

175. See id. ("*and if an officer of the United States,* he shall for ever thereafter be rendered incapable of holding any office of trust or profit, under the authority of the United States") (emphasis added).

176. Act of Mar. 3, 1791, ch. 15, § 39, 1 Stat. 199, 208 (other penalties include "fined not exceeding five hundred dollars, or imprisoned not exceeding six months, or both, at the discretion of the court" but the statute is not explicit about disqualification).

177. It is also interesting to note that the penalties of removal and disqualification were coupled in section 49 of the very same Act. 1 Stat. at 210.

forfeiture of office by "any supervisor of the revenue" convicted of stamping vellum, parchment, or paper before the duties were paid or secured.[178] The language of the Act offered an insight into the punishment of removal: "[H]e shall for every such offence, forfeit his office together with the sum of five hundred dollars."[179] It appears that the crime of fraudulently affixing a stamp to parchment was capable of repetition by the same person, verifying that an officer who was removed could be reinstated. This demonstrates that removal was not as severe a punishment as disqualification, which restricted eligibility from both present and future public office. Removal was also required in a later statute regarding the collection of duties[180] and in a statute regarding steamships.[181]

4. *Statutes that included both disqualification and removal from office duplicates the maximum impeachment penalty.* — Four early statutes set forth both removal and disqualification penalties for official misconduct. The Act to establish the Treasury Department[182] was the first statute to explicitly include removal in addition to disqualification as the punishment for certain acts of official wrongdoing. A follow-up act—the Act Altering the Treasury—extended the restrictions on self-dealing to the newly created position of Commissioner of Revenue, who was also subject to fine, removal, and disqualification.[183]

Similarly, the Act Laying Duties upon Distilled Spirits provided explicitly for both removal and disqualification.[184] The fourth statute—An Act to Prevent Frauds on the Treasury[185]—was passed by Congress in 1853, long after it passed the other three statutes.[186] In two sections, Congress linked the penalties of disqualification and removal. Both sec-

178. Act of July 6, 1797, ch. 11, § 12, 1 Stat. 527, 530.

179. Id.

180. See Act of Mar. 2, 1799, ch. 22, § 73, 1 Stat. 627, 680 (penalty on public gaugers for making returns without having actually gauged; first offense, $50 fine; second offense, $200 fine "and be discharged from the public service").

181. See Act of Aug. 30, 1852, ch. 106, § 37, 10 Stat. 61, 74 (requiring the forfeiture of office by any inspector who has received anything but the stated fees for his services; penalties in addition to forfeiture of office included a "fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both").

182. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65. For a discussion of the adoption of the Act to establish the Treasury Department, see supra text and accompanying notes 136–149.

183. See Act of May 8, 1792, ch. 37, § 12, 1 Stat. 279, 281 (also removing broad restrictions on clerks of the Treasury Department from carrying on certain trades or businesses).

184. See Act of Mar. 3, 1791, ch. 15, § 49, 1 Stat. 199, 210 ("upon conviction of any of the said offences, shall forfeit his office, and shall be disqualified for holding any other office under the United States").

185. Act of Feb. 26, 1853, ch. 81, 10 Stat. 170.

186. The large gap between the statutes clustered around 1800 and this one may be explained by the preference for the penitentiary as a punishment. See David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 79–108 (1971) (describing the evolution of the penitentiary as the primary mechanism for punishing criminals in America during the Jacksonian period).

tions apply to "any officer," language which appears to include executive and judicial officers, read in the context of the statute.[187]

D. *Questions Raised by the Examination of the Early Statutes*

Thus far, these propositions challenge any rigid adherence to impeachment as the sole mechanism of removal and disqualification of "civil officers." Executive officers, while subject to impeachment, could also be removed and disqualified under several of the early federal statutes. Judicial officers, while also subject to impeachment, could be disqualified from office under the Act of 1790. These early statutes challenge any general contention that impeachment is the sole constitutionally permissible mechanism to remove or disqualify federal officers. Still, the critical link between removal and judicial officers remains to be made. This section takes up two questions in the effort to establish that connection: (1) whether the penalty of removal was subsumed in that of disqualification, and (2) whether the availability of the punishments of removal and disqualification applied equally to federal judges and executive officers.

1. *Is removal subsumed in perpetual disqualification from office?* — Disqualification and removal are conceptually different penalties; "one logically need not entail the other."[188] Removal from current office does not necessarily entail disqualification from future offices. While removal causes the loss of a current property interest in the office, the possibility of regaining a federal position still exists. In the Act laying Duties on stamped Vellum, the language of the penalty indicated that removal might be repeatedly imposed, suggesting that an officer who has been removed, but not disqualified, may be reinstated.[189] Disqualification, by contrast, leads to permanent ineligibility as well as lasting dishonor.[190]

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187. The statute is considered in detail, see infra notes 209–218 and accompanying text.

188. Shane, supra note 14, at 229 n.69.

189. See Act of July 6, 1797, ch. 11, § 12, 1 Stat. 527, 530.

190. The legislation may explicitly limit the duration of disqualification. A few of the early statutes limited the penalty of disqualification to seven years or less. Section 12 of the Act to regulate the Collection of the Duties set this penalty for masters of ships and others who permitted goods to be unladened contrary to statute. See Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39 ("shall moreover be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years"). A seven-year disqualification was also imposed on those duty collectors who were engaged in liquor or tea trade in territories northwest and south of the Ohio River. See Act of June 5, 1794, ch. 49, § 14, 1 Stat. 378, 380 ("An Act making further provision for securing and collecting the Duties on foreign and domestic distilled Spirits, Stills, Wines and Teas."). A later statute on duties imposed up to seven years disqualification from federal office for the second conviction of an inspector who neglected his duty. See Act of Mar. 2, 1799, ch. 22, § 53, 1 Stat. 627, 667 ("An Act to Regulate the collection of duties on imports and tonnage."). It is interesting to speculate on why the disqualification was limited in these situations. Perhaps, because the statutes addressed lower officers, the offenses were not so damaging to the federal government's reputation.

When early statutes specified disqualification for non-officeholders, only ineligibility attached. However, when early statutes specified disqualification of officeholders, the language and the purpose of the statutes strongly suggest that disqualification could also operate to remove the officer. Of the several statutes providing for perpetual disqualification, or "forever disabl[ing] [an individual] from holding office,"[191] three applied to customs, judicial, or postal officers who were convicted of bribery.[192] Both the gravity of the offense and the importance of maintaining the integrity of those offices support the interpretation that disqualification of the sitting officer necessarily included removal from the particular office in which the crime was perpetrated.[193]

The more severe punishment of the sitting officer was justified by the greater harm caused to society through that officer's abuse of his position. This distinction can be drawn by comparing Section 12 of the Act to Regulate the Collection of Duties to Section 35 of the same Act.[194] Section 12 prevented the "master or commander of any ship or vessel" from unloading his merchandise unless in "open day" and with a permit.[195] Violators—including masters, commanders and any others who assisted them—were subject to fines of four hundred dollars for every offense and "moreover [were] disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years."[196] The penalty of disqualification logically would have only worked a removal if an *officer* had been caught assisting an offender. When applied to the public at large, disqualification would not have entailed removal because there would have been, by definition, no government office to be forfeited. In contrast, Section 35 applied explicitly to "any officer of the customs" who was convicted of bribery. It stipulated that the offender "be forever disabled from holding any office of trust or profit under the United States."[197] In this situation, perpetual disqualification was applied to a sitting officer, and it strongly appears to have included removal, which would end the danger of continued corrupt acts by that official.[198]

In examining the issue of whether removal was subsumed in disqualification in the Act of 1790, scholars engaged in the Commission's study did not appreciate these other early statutes. They advanced two main arguments against the conclusion that removal was subsumed in disquali-

191. Act of July 31, 1789, § 35, 1 Stat. 29, 46 ("shall . . . be forever disabled from holding any office of trust or profit under the United States").

192. See id.; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 ("shall forever be disqualified to hold any office of honour, trust, or profit under the United States"); Act of Feb. 20, 1792, ch. 7, § 11, 1 Stat. 232, 235 ("shall be rendered incapable of holding office under the United States").

193. See supra notes 126–135 and accompanying text.

194. See Act of July 31, 1789, ch. 5, §§ 12, 35, 1 Stat. 29, 39, 46.

195. See id. § 12, at 39.

196. Id.

197. Id. § 35, at 46.

198. See discussion supra text accompanying note 135.

fication in the context of the Act of 1790.[199] First, they argued that such an interpretation would be contrary to the exclusivity of the Impeachment Clause and that the language in that Act should be read solely as disqualifying the officer from future positions, but not removing the officer from his current position.[200] To dismiss the Act of 1790 because it was explicit only as to disqualification is dissatisfying. The Impeachment Clause in Article I explicitly mentions both removal *and* disqualification together.[201] It would thus seem that if the Impeachment Clause eliminates removal from the realm of allowable criminal sanctions, it should also eliminate disqualification. *Disqualification*, for which the Act undeniably provides, also intrudes on the exclusivity of impeachment.[202]

Second, they pointed to Congress's explicit reference to removal in an early statute. Commission consultant Elizabeth Bazan contended that "the Congress, where it so chose, did make a clear distinction between removal and disqualification, and expressly provided for both."[203] The early statutes do offer an array of combinations of the two penalties; removal and disqualification are listed together, modify each other, or are completely independent. The variation of usage might support Bazan's argument.

There are several reasons, however, why Congress may not have felt it necessary to make removal explicit in the Act of 1790 or in other similar statutes and may have relied instead on its implicit presence. Timing may have been a factor. The issue of removal was most powerfully and forcibly raised in the House debates surrounding the Treasury Act. The punishment of removal was explicitly prescribed in Section 8 of the Act to Establish the Treasury, enacted on September 2, 1789.[204] The Act of 1790 had emerged from committee in the Senate by July 28, 1789, only a few days before the Senate passed the Treasury Act.[205] It is likely that the language in Section 21 of the Act of 1790 was written before, or at least simultaneously with, the language of the Treasury Act.[206] This close timing suggests that the Act of 1790 may not have included removal because it was written prior to the debates surrounding the President's removal power. The Treasury Act, by contrast, was written immediately after the debates and included removal explicitly because of Congress's height-

199. See supra notes 78–87 and accompanying text.

200. This debate is described above, see supra notes 85–87 and accompanying text.

201. See supra note 12 and accompanying text.

202. See U.S. Const. art. I, § 3, cl. 7 ("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 . . . .").

203. Bazan, supra note 45, at 1306.

204. See supra notes 140–143 and accompanying text.

205. The Senate passed the Treasury Bill with amendments on July 31, 1789. The House and the Senate did not come to agreement over the final form of the Bill until September 2, 1789. See 6 Documentary History, supra note 45, at 1979–80.

206. The crime bill was one of the first actions of the Senate, just as the Treasury Bill was one of the first of the House. See 1 Annals of Cong. at 35, 384.

ened awareness about removal. Furthermore, the Act to Establish the Treasury and the debate over removal powers originated in the House of Representatives, while the Act of 1790 arose in the Senate. Certainly, the Senators were aware of the issues considered in the House, but they might not have believed it essential to make removal explicit in a bill that did not touch on the Treasury.[207]

The difference in language could also be explained by the subject matter of the statutes. Virtually all the statutes that provided for both removal and disqualification were related to the Department of the Treasury. Again, it was in the debates over the establishment of the Treasury Department that the concern arose over the Executive's power to remove. While no similar controversy accompanied discussions of the criminal penalties imposed upon Treasury officials, removal may have been mentioned explicitly for the purpose of clarity. If so, then it is not surprising that subsequent statutes that touched on the Treasury were explicit about removal, both because of the model of previous statutes and because of the particular nature of the institution. The Act Laying Duties on Distilled Spirits stands as an outlier to this theory.[208] Although as a revenue statute this Act was related to the Treasury, revenue statutes had not consistently carried such penalties. It is possible that the penalties were made explicit following the model for bills relating to the Treasury because the Secretary of the Treasury submitted the draft of the bill.

2. *Do these penalties apply to a federal judge?* — The removal of executive officers by means other than impeachment is not contested. However, the early statutes confirm the power of Congress to impose criminal sanctions of removal and disqualification upon executive officers for serious abuses of office, thus providing an alternative to impeachment and executive removal. Does the same hold true for judicial officers? A survey of statutes revealed only two that applied the penalties of disqualification or removal to judges. The first is the well-known Act of 1790. The other is the Act to Prevent Frauds upon the Treasury, passed in 1853.[209]

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207. An objection to this argument might be that subsequent bills should have made removal uniformly explicit. According to the statutes analyzed in this Note, this was not the case. Congress imposed the sole penalty of perpetual disqualification in more post-Treasury acts than the dual penalty of disqualification and removal. However, in subsequent bills, both punishments were consistently made explicit only in bills relating to the Treasury. See supra Part II.C.

208. See Act of Mar. 3, 1791, ch. 15, § 49, 1 Stat. 199, 210 (providing for both removal and disqualification).

209. See Act of Feb. 26, 1853, ch. 81, 10 Stat. 170. The Act was originally intended to prevent any officer of the government from maintaining an interest in a claim against the United States or from prosecuting claims for a fee. It grew out of the concern that Thomas Corwin, then Secretary of the Treasury, might have retained a personal interest in some Mexican claims. Controversy arose over whether Corwin had accepted an interest in certain claims as payment for his services; this debate grew heated because it was said that the claims were fraudulent. Representative Stephens argued that such legislation was redundant and that no additional legislation was needed to prosecute Mr. Corwin, if he had acted improperly. He read aloud Section 8 of the Act to establish the Treasury of 1789

In two different sections of the later Act, the penalties of disqualification and removal were applied to "officers," a term that appears to include judicial officers.

The Act to Prevent Frauds on the Treasury strongly suggests that the early Congresses believed that it was constitutionally permissible to remove judicial officers through imposing criminal sanctions. In Section 6, Congress provided for removal of "an officer or person holding any such place of trust or profit" in addition to a fine, imprisonment and disqualification from office upon conviction for bribery. A reasonable reading of the broad definition of "officer" in Section 6 would include executive and judicial officers.[210] The description of the intent element of bribery offers further evidence that judicial officers were contemplated in this section: "with intent to influence his vote or *decision* on any question, matter, *cause, or proceeding* which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity, or in his place of trust or profit . . . ."[211] The inclusion of judicial conduct under this section indicates that Congress believed it had the authority to remove and disqualify a judicial officer through criminal sanctions. The drafters reached the same conclusion in Sections 4 and 5, which addressed the crime of destroying official documents. The documents enumerated in Section 4 included "any paper or document or record filed or deposited in any public office, or with any judicial or public officer."[212] Section 4 stipulated a fine for "any person" who committed the illegal action. Section 5 added an additional penalty for "any officer" who "shall fraudulently take away, or withdraw, or destroy any such record, document, paper, or proceeding filed in his office or deposited with him, or in his custody."[213] The language of "proceeding filed in his office" in Section 5 and the reference to "judicial or public officer" in Section 4 support the conclusion that judges were "officers" within the scope of Section 5, which mandated removal and disqualification.[214]

The legislative history behind the Act also supports the view that Congress believed it could remove judicial officers through criminal sanctions. Senator Badger presented the House bill to the Senate, along with the Senate committee's suggested amendments.[215] In the original bill,

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and concluded, "here is a law of the country that has been in existence since 1789, under which you can proceed against him, and by which you can not only displace him, but disgrace him forever." Cong. Globe, 32d Cong., 2d Sess. 288 (1853).

210. See Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. at 171 ("or to any officer of the United States, or person holding any place of trust or profit").

211. Id. (also mentions "right in action") (emphasis added).

212. Id. § 4, at 170.

213. Id. § 5, at 170–71.

214. See id. ("shall forfeit his office and be forever afterwards disqualified from holding any office under the Government of the United States").

215. See Cong. Globe, 32d Cong., 2d Sess. 391 (1853). In his review of sections 4, 5 and 6, he made several suggestions and comments. He referred to section 4 as "a very wise and excellent" section and made suggestions to make it more stringent. He also

the penalties for bribery in Section 6 were also applicable to members of Congress. The committee, however, made a significant change to Section 6: it modified the bill so that the removal provisions did not apply to members of Congress. Senator Badger offered their reasoning:

> [A]s the House bill stood, it undertook to declare that if a member of this House or of the other House were guilty of this offense, in addition to the punishment as prescribed, he should forfeit his place; and we did not believe that we had any constitutional power over that subject, as a member of this House or of the other House can only be expelled or lose his place by a vote of the House to which he belongs. The object was to strike out the provision which we thought we had no right to make, and substitute one which we thought we had a right to make.[216]

The committee did not believe Congress had the power to mandate the forfeiture of the office of a member of Congress, apart from the constitutionally established mechanism of a vote by the members of the relevant House.[217] It did believe, however, that Congress had the power to apply such a penalty to an executive or judicial officer. The Senate and the House both accepted this amendment.[218] Senator Badger's reasoning and the ultimate language of the Act indicate that Congress was well aware of limits on its power to impose removal as a criminal sanction.

In sum, the First Congress did not consider the impeachment mechanism to preclude removal and disqualification of federal officers who had betrayed the public trust. Indeed, it frequently provided for removal and disqualification of executive officers through criminal prosecution and conviction. It also provided for the disqualification of judges convicted of bribery. Furthermore, the most sensible reading of these early statutes indicates that the penalty of disqualification necessarily included removal when applied to a sitting officer. A later Congress, in the Act to Prevent Frauds on the Treasury,[219] did explicitly provide for both the removal and disqualification of a judicial officer convicted of bribery or fraudulent destruction of official documents.

III. "GOOD BEHAVIOR" AS A GUIDELINE TO IDENTIFYING UNACCEPTABLE JUDICIAL CONDUCT

The early statutes that applied to judges suggest that removal and disqualification through criminal conviction existed as a supplement to impeachment of judicial officers. It can be, and has been, argued that these statutes are unconstitutional because the Impeachment Clause has

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strengthened section 5 by raising the category of the offense from misdemeanor to felony. See id. at 391–92.

216. Id. at 392.

217. Members of Congress were not "civil officers" and thus the constitutional means of removal differed from that of executive and judicial officers.

218. See id. at 620.

219. Act of Feb. 26, 1853, ch. 81, 10 Stat. 170.

a different and exclusive application to federal judges because of the Good Behavior Clause in Article III.[220] By placing these statutes within the pattern of statutory enactments, this Note has argued that the penalties of disqualification and removal are less exceptional and less prone to the charge of unconstitutionality than previously thought.

However, in an effort to confront the charge of unconstitutionality directly, this Part investigates the meaning and purpose of the Good Behavior Clause. Although the Impeachment Clause applies equally to both executive and judicial officers, there exists one critical distinction between the tenure of executive and judicial officers: the Constitution conditions the tenure of federal judges on their "good behavior."[221] As seen in the previous examination of the early statutes, the Impeachment Clause did not bar other mechanisms for removing executive officers—officers were also removable by the President under some circumstances and by criminal conviction. Thus, if impeachment exists as the only means of divesting a federal judge of her position of trust and eligibility for federal office, it is the phrase "good behavior" which mandates that result and not the Impeachment Clause itself.

The meaning of "good behavior" has proven hard to pin down, though legal scholars have tried.[222] The arguments put forth here seek to demonstrate two ideas. In Section A, it is argued that the exclusivity of impeachment as applied to judges is not mandated by any textual or structural link between "good behavior" and impeachment in the Constitution. Instead, "good behavior" can be understood to mark the boundaries of acceptable official conduct. Section B presents evidence of the early American legal community's understanding of the content of "good behavior" as it is reflected in case law, references to English authority, and early state statutes. These sources identify both unacceptable behavior and the available means of redress and, ultimately, support the position that removal through criminal conviction is a constitutionally permissible option.

A. *"Good Behavior" Placed Within the Text and Structure of the Constitution*

The Constitution sets forth removal mechanisms for each of the three branches of government. Under Article I, each House of the Legislature is responsible for disciplining its own members, and "with the

220. See Roundtable, supra note 1, at 354 (Walter Dellinger); Shane, supra note 14, at 18.

221. See Roundtable, supra note 1, at 354 (Dellinger identified the Good Behavior Clause as the "core provision" and argued that it meant "life tenure subject to impeachment"); id. at 356 (Kurland stated, "I do agree that good behavior is the important term that the Commission should address itself to."); id. at 383 (Amar focused the discussion on the Good Behavior Clause rather than the Impeachment Clause to determine whether there is an alternate means of removing judges); id. at 386 (Shane acknowledged the crucial role of the Good Behavior Clause).

222. See, e.g., Berger, supra note 31, at 125–26; Shartel, supra note 37, at 900–03.

Concurrence of two thirds," a House can expel a member.[223] Article I also establishes terms of office for Representatives and Senators.[224] Article II, Section 1, establishes a four-year term of office for the President and Vice President, and Section 3, Clause 4, provides for removal through impeachment. Article III, by comparison, does not limit the tenure of judges to any number of years: "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."[225] Furthermore, Article III sets forth no method of removal. The impeachment mechanism set out in Article II, however, has been held to apply to federal judges because they are "civil officers."[226] In sum, while Congress is governed by a wholly different removal mechanism, both the executive and the judiciary share the impeachment mechanism. Additionally, a federal judge enjoys tenure "during good Behavior," and thus is set apart from the executive, whose tenure is limited to four years.

The Framers considered judicial independence to be of paramount importance to the success of the new government. By investing federal judges with tenure during "good behavior," they sought to insulate the judicial branch from the political pressures of the other branches. To this end, they adopted the English innovation of *quamdiu se bene gesserit*, or tenure during good behavior, which Parliament had substituted for judicial tenure at the pleasure of the king, or *durante bene placito*,[227] in the Settlement Act of 1701.[228] Hamilton articulated the benefits of judicial tenure during good behavior in *The Federalist*, No. 78:

> According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices *during good behavior*; which is conformable to the most approved of the State constitutions . . . . The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representa-

223. See U.S. Const. art. I, § 5, cl. 2.

224. See U.S. Const. art. I, § 2, cl. 1 (two years for Representatives) and § 3, cl. 1 (six years for Senators).

225. U.S. Const. art. III, § 1, cl. 1.

226. See supra note 14.

227. See 1 Blackstone, Commentaries, supra note 132, at 258.

228. 12 & 13 Will. III, c. 2, § 3 (1701); see also Ervin, supra note 34, at 111 (Reprinting the pertinent section of the Establishment Act: "Judges' commissions be made *quamdiu se bene gesserit* and their salaries ascertained and established but on the Address of both Houses of Parliament it may be lawful to remove them."). But see Barbara A. Black, Massachusetts and the Judges: Judicial Independence in Perspective, 3 Law & Hist. Rev. 101, 104–08 (1985) (suggesting that, because the Act of Settlement allowed removal upon address, it did not end politically motivated removal, but instead divided authority between King and Parliament).

> tive body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.[229]

Records of the Constitutional Convention also indicate that the delegates sought to further the independence of the judiciary by rejecting means of removal, other than impeachment, by the executive or the legislative branch.[230]

After acknowledging the importance of an independent judiciary and the role of "good behavior" in establishing that independence, one might ask, what does "good behavior" mean? Efforts to understand the qualification of "good behavior" usually consider two possible meanings: (1) it establishes the tenure of judges, or (2) it indicates the scope of the substantive conduct outside of which judges can be removed.[231]

The structure of the Constitution would seem to support the first proposition. "Good behavior" appears in Article III where specific terms of office appear in the other two Articles. Thus, one could argue that Article III's guarantee that judges "shall hold their offices during good behavior" simply sets forth the length of the term of judicial office. Some who argue that "good behavior" reflects tenure argue further that the term implied is life tenure subject only to impeachment.[232] They would deny the possibility that some substantive meaning is contained in "good behavior."

The text of the Constitution, however, does not support this implication of life tenure subject only to impeachment. First, the Good Behavior Clause is not directly linked to the Impeachment Clause in the text of the Constitution. Hamilton, who strongly favored removal by impeachment alone, had prepared a clause that did expressly link the two by providing that judges were to hold office during "good behavior, removable only by conviction on impeachment for some crime or misdemeanor."[233] It is unclear whether Hamilton actually put this proposal before the Convention. If he did and the Convention explicitly rejected it, this would offer strong support for finding that the framers did not intend impeachment to be the exclusive means of removal.[234] If, however, as

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229. The Federalist No. 78, supra note 18, at 465 (Alexander Hamilton).

230. See supra notes 38–43 and accompanying text.

231. See Gerhardt, supra note 2, at 65–67; Shane, supra note 14, at 213. See also Roundtable, supra note 1, at 388–89 (Professor Burbank called a vote on the question: "Do you believe that the good behavior clause is more than a clause that defines the tenure of federal judges?" The results were: Professor Hoffer, "No"; Judge Plager, "No"; Professor Dellinger, "No"; Professor Amar, "Possibly, pursuant to criminal law"; Professor Kurland, "Yes"; Professor Shane, "No.").

232. See, e.g., Ervin, supra note 34, at 117.

233. 3 Farrand, supra note 14, at 625.

234. Berger took this position. See Berger, supra note 31, at 138 n.73; but see Ervin, supra note 34, at 114 (suggesting that Hamilton did introduce his proposal which the Framers embraced).

some suggest, Hamilton did not introduce the proposal,[235] we are left with only the text of the Constitution. Any linkage between the two clauses in the Constitution is made by inference alone. Interestingly, those who seek to draw this inference rely heavily on Hamilton's post-Convention writings.[236] In *The Federalist*, No. 79, Hamilton wrote:

> The precautions for [judges'] 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 which we find in our own Constitution in respect to our own judges.[237]

Clearly Hamilton sought to join the two clauses, but it seems that he succeeded in doing so only in his post-Convention writings and not in his Convention proposals. The absence of a textual link between good behavior and impeachment in the Constitution seriously weakens the contention that the tenure of judges can be terminated only by impeachment.

The second objection to equating service during "good behavior" with "life tenure subject only to impeachment" rests on the different language used in each section. The House may impeach, and the Senate may convict, for "Treason, Bribery, or other high Crimes and Misdemeanors."[238] Article III, in contrast, uses the language of "good behavior." While both phrases—"high crimes and misdemeanors" and "good behavior"—are undefined in the Constitution, it is significant that they are *not* the same phrases and are likely to have different meanings.

Scholars seeking to determine the content of "good behavior" have referred to the English constitutional practice. There, the condition of "good behavior" was considered to be breached "by misconduct in office, neglect of duties, the acceptance of an incompatible office, or conviction

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235. See Committee on Federal Legislation, Ass'n of the Bar of the City of N.Y., The Removal of Federal Judges other than by Impeachment 32 n.75 (Apr. 1, 1977) [hereinafter NYC Bar Association]. The Committee of the NYC Bar Association strongly advanced this position, citing in support 3 Farrand, supra note 14, at 619 (indicating that Hamilton's draft was *not* submitted to Convention). They also report that Hamilton placed another plan before the Convention that provided for impeachment and good behavior in separate sections. Thus, the Committee concluded, "far from suggesting, as Professor Berger does, the rejection by the Convention of an explicit linkage of good behavior and impeachment, the plan Hamilton actually put before the Convention may be read to suggest that Hamilton viewed the linking of impeachment and tenure as unnecessary to accomplish his goal of making impeachment the exclusive means of removal." NYC Bar Association, supra, at 32 n.75.

236. See, e.g., Shane, supra note 14, at 217. But see Burbank, supra note 26, at 668 (pointing out that Hamilton's writings and the records of the Convention are inconclusive).

237. The Federalist No. 79, supra note 18, at 474 (Alexander Hamilton).

238. U.S. Const. art. II, § 4.

of a serious crime."[239] Court of Appeals Judge Harry T. Edwards has described the gap between the standard of "good behavior" and the standard associated with impeachable offenses as a "hiatus."

> If to "hold office during good behavior" under article III simply means that a judge is guaranteed life tenure so long as he or she avoids the commission of treason, bribery, or other high crimes and misdemeanors, then the hiatus does not exist, and the constitutional equation is fairly easy. Good behavior, as a constitutional matter, will be, tautologically, *any* conduct that will not support impeachment. But if "good behavior" is *not* the complete converse of "high crimes and misdemeanors," then a constitutional category of "not good" behavior must exist that is not subject to impeachment. If a judge cannot be impeached for this bad behavior, what kind of discipline may be used?[240]

Judge Edwards was concerned that some offenses might go unpunished if the impeachment process were the only means to address "bad behavior." In the Roundtable discussion, Professor Kurland also commented on the dilemma, stating "[i]t seems quite clear to me . . . that what the founders were aiming at was a method of assuring an independent judiciary, but not assuring a judiciary that was not required to perform its function honorably and legally."[241]

Criminal punishment fills that gap and ensures that federal judges conform to the same laws that they are charged with applying. While few scholars would dispute that federal judges are subject to criminal law,[242] some commentators conclude that removal and disqualification are not among the penalties that the law can levy against a sitting federal judge.[243] The statutes of the early Congresses, which frequently employed those penalties, belie this conclusion.[244] Further, this interpretation does not seem to accord with the understanding of the early American legal community, particularly not with the Senate committee that drafted the Act of 1790.

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239. Shartel, supra note 37, at 900 (citing copious English authority in support). See also Berger, supra note 31, at 125–26 (also citing English sources to the effect that tenure during good behavior is held as long as the officeholder "doth behave himself well").

240. Edwards, supra note 33, at 775 (Judge Edwards concluded that a "hiatus" did exist and that judicial self-regulation provided the appropriate mechanism to address behavior within the "hiatus").

241. Roundtable, supra note 1, at 356.

242. See, e.g., Stephen W. Gold, Note, Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement, 53 Brook. L. Rev. 699, 704–08, 713–15 (1987) (arguing that in order to preserve the independence of the judiciary and guard against malicious prosecutions, judges should enjoy criminal immunity until after they have been impeached).

243. See supra notes 77–94 and accompanying text.

244. See discussion supra Part II.

B. *Judicial "Good Behavior" as Understood in Early American State Statutes and Case Law*

The delegates to the Constitutional Convention and the members of the First Congress brought the wisdom of their own state legal systems to the national gatherings. A glimpse into state law may illuminate some of the premises of these law makers, although any direct comparison is fraught with dangers because of the differences between the state and national systems.[245] The method of appointment and removal of judges varied from state to state as each constitution reached a different accommodation with the English practices of removal by executive, address of Parliament, and impeachment.[246] Despite these differences, state criminal statutes, which provided for removal and disqualification of officeholders upon conviction of certain crimes, strongly indicate that criminal prosecution was an accepted mechanism for removing unfit judges. Case law also suggests that lawyers and judges considered impeachment and indictment alternate means to the same end of removing a corrupt judicial official from office.

The state laws gathered in this Section, from Massachusetts, New Jersey, Pennsylvania, Virginia, and South Carolina, were requested by the Senate committee entrusted with drafting the first crime bill.[247] That bill became the Act of 1790 and included the well-known provision which "forever" disqualified a judge convicted of bribery.[248] The state laws had similar provisions regarding bribery.[249]

In their constitutions, Pennsylvania and Massachusetts prohibited individuals convicted of bribery from holding office. The Pennsylvania

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245. An exhaustive investigation of state procedures, their basis in English precedent, and their ultimate relation to the national law is beyond the scope of this Note. The following evidence is offered as indicative rather than conclusive.

246. See Ben. Pereley Poore, The Federal and State Constitutions, Colonial Charters and other Organic Laws of the United States (Burt Franklin ed., 2d ed., Lenox Hill 1972) (1924) [hereinafter Poore] (compilation of state constitutions in force at the time); see also Ziskind, supra note 33, at 138–47 (organizing the state constitutions along a spectrum of conservative to radical).

247. See Letter from Otis to Roger Alden, July 1, 1789 reprinted in 6 Documentary History, supra note 45, at 1720. The original Senate Committee was made up of John Langdon (N.H.), William S. Johnson (Conn.), Robert Morris (Penn.), Jonathan Elmer (N.J.), Richard Henry Lee (Va.), George Reed (Del.), Tristram Dalton (Mass.) and James Gunn (Ga.). See id. at 1719.

248. See Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117.

249. The state statutes examined here are limited to bribery statutes. However, it appears that the penalties of removal and disqualification were widely used in state criminal statutes. For example, an Alabama session law passed in 1819 stipulated that "any person who may be convicted of bribery, forgery, perjury, or any other high crime or misdemeanor, *shall be disqualified from holding or exercising any office under the authority of this State*, from serving in any case as a juror, and from voting at any election." Act of Nov. 27, 1819, Ala. Acts 67 (emphasis added). For those interested in further research in this area, State Library of Massachusetts, Hand-List of Legislative Sessions and Sessions Laws . . . to May 1912 (1912), is an excellent compilation of indices to early state statutes. I am grateful to Morris Cohen, librarian of the Yale University Law School, for directing me to it.

Constitution of 1776 explicitly disqualified any officer who accepted a bribe from serving in the judiciary: "All courts shall be open . . . . And if any officer shall take greater or other fees than the law allows him, either directly or indirectly, *it shall ever after disqualify him from holding any office in this state.*"[250] This disqualification clause is very similar to Section 21 of the Act of 1790,[251] and it would seem that, in order to fulfill the goal of preserving the integrity of the judiciary, the disqualified officer would also be forced to forfeit his office. Conviction at law for bribery or corruption in obtaining office was also a constitutional bar to holding office in Massachusetts.[252] Furthermore, a state criminal statute, entitled "An Act to Prevent Bribery and Corruption,"[253] explicitly provided for the removal and perpetual disqualification of a convicted officeholder.[254]

Bribery was also outlawed in the colonial session laws of the other states. South Carolina's law against corruption opened, "For the avoiding of corruption which may hereafter happen to be in the officers and ministers of those courts, places, or rooms wherein there is requisite to be had the true administration of justice or services of trust . . . ."[255] Bribery was included among the enumerated violations of the public trust.[256] Punishment included fines, forfeiture of office for the officeholder,[257] and perpetual disqualification for the offeror of the bribe.[258] The South Carolina law, dating 1736–1737, indicates that most of the language was

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250. 2 Poore, supra note 246, at 1546 (emphasis added).

251. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 ("shall forever be disqualified to hold any office of honour, trust or profit under the United States").

252. See 1 Poore, supra note 246, at 972, providing the language of the Mass. Const. of 1780, art. II, cl. 5: "And no person shall ever be admitted to hold a seat in the legislature, or any office of trust or importance under the government of this commonwealth, who shall in the due course of law have been convicted of bribery or corruption in obtaining an election or appointment."

253. 3 Perpetual Laws of the Commonwealth of Massachusetts from the Establishment of its Constitution in the Year 1780 to the End of the Year 1800, at 213, misnumbered as 113 (Boston, Isaiah Thomas & Ebenezer T. Andrews 1801). The law was passed in 1758, and this edition indicates that it was not revised.

254. See id. In addition to providing for a fine, the statute stipulated that "if such offender be in any such office, he shall, on conviction, be disabled from holding the same, and be forever after incapable of sustaining any office or place of trust, within this Province." Id.

255. The Public Laws of the State of South Carolina from its Establishment as a British Province Down to the Year 1790, Inclusive 146–48 (John F. Grimké ed., Philadelphia, R. Aitken 1790).

256. See id. ("to receive, have or take any money, fee, reward or any other profit directly or indirectly").

257. See id. ("shall . . . loose and forfeit all his and their right, interest and estate which such person or persons shall then have of, in, or to any of the said office or offices").

258. See id. at 147 ("shall . . . be adjudged a disabled person in the law to all intents and purposes, to have, occupy or enjoy the said office or offices, deputation or deputations, or any part of any of them, for which such person or persons shall so give or pay any sum of money, fee or reward, or make any promise, covenant, bond or other assurance, to give or pay any sum of money, fee or reward").

taken from English statutes.[259] This is helpful, though not definitive, in understanding New Jersey's law of 1713, which incorporated into its colonial laws the laws on bribery then in force in England. The Act prohibited the "taking of Bribes, Gifts, or any unlawful Fee or Reward, by Judges, Justices of the Peace, or any other Officers either magisterial or ministerial."[260] English law also governed the punishments to be meted out, which would have likely paralleled those in South Carolina: fine, removal, and perpetual disqualification.[261]

Finally, a Virginia law on bribery and extortion stipulated that the convicted judge "shall be amerced and imprisoned at the direction of a jury, and shall be discharged from his office forever."[262] This language mirrors that used by Blackstone, an English authority well known to early American lawyers, in his description of the punishment for bribery in England. According to contemporary English law, the penalty imposed upon a judge convicted of bribery was a fine of three times the amount of the bribe, punishment at the King's will, and "discharge[ ] from the king's service for ever."[263] The phrase "discharge[ ] . . . for ever" encompasses both removal and perpetual disqualification and suggests that a more sensible understanding of perpetual disqualification in early American statutes would include removal.

Thus, the state statutes present a similar interpretative dilemma to the federal statutes because removal is made explicit in some statutes but not in others. Nonetheless, the state statutes appear to support the understanding that perpetual disqualification would operate to remove a sitting officer. Moreover, the consistent use of removal and disqualification to punish bribery supports the conclusion that, regardless of the constitutional arrangement of removal for judges, criminal indictment for bribery resulted in the forfeiture of office.

State case law also suggests that attorneys and judges considered impeachment and indictment to be alternate means to the same end of removing a corrupt official from office. Not unlike today, early cases distinguished between two types of judicial behavior: actions taken within the sphere of judicial authority, which might be challenged as erroneous, and corrupt or illegal actions taken by a judge, which could be prosecuted as criminal. Judges were not personally liable for misjudgments or

259. See id. at 146. The note reads, "Copied nearly from 5 and 6 Ed. 6, c. 16."

260. Acts of the General Assembly of the Province of New Jersey . . . ch. XLI, 23 (Samuel Allinson ed., Burlington, Isaac Collins 1776) (although originally passed on Mar. 11, 1713, this act was listed in the Table of Acts in Force in the 1776 edition).

261. See, e.g., 4 Blackstone, Commentaries, supra note 132, at 139 (indicating the punishment for bribery).

262. Abridgment of the Public Permanent Laws of Virginia 22 (Edmund Randolph ed., Richmond, Augustine Davis 1796). This law was passed in 1792, after the Committee completed their work. Because of the date, it is not directly probative of the lawmakers' thinking in drafting the Act of 1790. Nevertheless, it is notable because it came into force around the same as that Act.

263. 4 Blackstone, Commentaries, supra note 132, at 139.

errors; the proper recourse for the litigant was through an appeal. The Honorable James Kent, Chief Justice of the Supreme Court of New York, once had the opportunity to rule on the issue of the personal liability of a chancellor.[264] His survey of English precedent "conclusively show[s], that judges of all courts of record, from the highest to the lowest, and even jurors, who are judges of fact, were always exempted from prosecution, by action or indictment, for what they did in their judicial character."[265]

A judge who acted corruptly or with malice, however, was not entitled to similar protection. There is evidence that, in corruption cases, redress through indictment or impeachment was appropriate. In *McDowell v. Van Deusen & Delamater*,[266] the court stated, "It is a general principle that a judge cannot be excepted to, or challenged, for corruption; but must be punished by indictment, or impeachment."[267] In a case before the South Carolina Supreme Court in 1796, Justice John F. Grimké wrote that if magistrates, "under color of office, should injure or oppress their fellow citizens, they were liable to be punished in a criminal court for their misconduct."[268]

Early American cases support the conclusion that removal or forfeiture of office was appropriate in cases of abuse of office. In 1823, the Kentucky Supreme Court quoted Sergeant Hawkins in support of this proposition: "It is certain, that an officer is liable to a forfeiture of his office . . . for doing a thing directly contrary to the design of it . . . ."[269] The case concerned an action to dismiss a clerk of the court for neglect of office. The clerk held his office during "good behavior," and his actions were examined according to the concept of conditions implicit in his official duty.[270] In an 1825 case in the Virginia Supreme Court regarding allegations of corruption against two justices of the peace, the court cited Bacon's Abridgements to support a similar proposition. The court asserted that "the acceptance of every office, implies the tacit agree-

264. See J.V.N. Yates v. Lansing, 5 Johns. 282, 286 (N.Y. Sup. Ct. 1810).

265. Id. at 292–93. A later case, also in the Supreme Court of New York, upheld the jury charge in a case alleging extortion by a justice of the peace. The court charged the jury to inquire into the judge's motives; if he had acted "through corrupt motives" then "the judgment would not protect him." If, however, his "error was one of judgment merely, they should acquit." People v. Whaley, 6 Cow. 661, 662 (N.Y. Sup. Ct. 1827).

266. 12 Johns. 356 (N.Y. Sup. Ct. 1815).

267. Id. at 356 (citing Coke's Institutes, 1 Inst. 294, 2 Inst. 422, in support of this "general principle").

268. Hoffer & Hull, supra note 13, at 79 (quoting Lining v. Bentham, 2 S.C.L. (2 Bay) 3, 7 (S.C. Sup. Ct. 1796)). Hoffer and Hull go on to say, "The state presumed they acted without wrongful intention unless proof of such a motive could be added to evidence of irregular conduct. In *Lining*, Charleston justice James Bentham acted 'in his judicial capacity,' and though he may have erred, he did not use his office to knowingly or purposely wrong a litigant." Id.

269. Commonwealth v. Arnold, 13–14 Ky. (3 Litt.) 309, 312 (Ky. 1823) (citations omitted).

270. See id. at 313–14 (court examined evidence of his absences and found that they did not rise to the level of forfeiture).

ment on the part of the incumbent, that he will execute its duties with diligence and fidelity." It continued, "We hold it to be an equally sound doctrine, that all officers are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by Indictment, Attachment, Action at the suit of the party grieved, loss of their offices, &c."[271]

The justification for removing officers due to abuse of the public trust appeared to be grounded in the English idea of an office as a grant of an estate upon "implied condition." Blackstone expressed this understanding in his *Commentaries*. In the chapter "Of Estates upon Condition," he wrote:

> As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person. For an office, either public or private, may be forfeited by *mis-use* or *non-use*; both of which are breaches of this implied condition.[272]

Blackstone used the example of a judge taking a bribe to illustrate "misuse" or abuse which violated the condition implied in the grant of office and resulted in forfeiture.[273] He described oppression and tyranny under color of office[274] and extortion[275] as crimes against the public justice that might also lead to forfeiture of office.[276]

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271. Commonwealth v. Callaghan and Hollaway, 3–4 Va. (2 Va. Cas.) 460, 463 (Va. 1825) (citations omitted).

272. 2 Blackstone, Commentaries, supra note 132, at 152–53.

273. See id. at 153 ("By mis-use or abuse, as if a judge takes a bribe or a park-keeper kills a deer without authority."). The same concept of an office as a grant of an estate upon condition implied is contained in the works of other English authorities, frequently cited in early American cases. In *Coke's Commentary upon Littleton*, Coke affirmed the historic principle of conditions in law and indicated that the offices to which these conditions apply were multiplying. "[F]or example, for offices in any wise touching the administration or execution of justice [an officer guilty of bribery] shall not only forfeit his estate, but also every person so buying, giving or assuring, be adjudged a disabled person to have or enjoy the same office or offices . . . ." 1 Coke's Commentary upon Littleton, bk. 3, c. 5, § 378 (Philadelphia, Robert Small 1853). Sergeant Hawkins wrote, "I take it to be agreed, that in the grant of every office whatsoever, there is this condition implied by common reason, that the grantee ought to execute it diligently and faithfully; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he who either neglects or refuses to answer the end for which this office was ordained, should give way to others, who are both able and willing to take care of it." 1 William Hawkins, A Treatise of the Pleas of the Crown, ch. 27, § 1, at 412 (London, S. Sweet 1824). Hawkins indicated that forfeiture of office was appropriate in such cases.

274. See 4 Blackstone, Commentaries, supra note 132, at 140.

275. See id. at 141.

276. Blackstone indicates that these crimes are to be prosecuted "either by impeachment in parliament, or by information in the court's of the king's bench, (according to the rank of the offender)." 4 Blackstone, Commentaries, supra note 132, at 140–41. Hawkins restated this in his Treatise. See Hawkins, supra note 273, at 413.

The statutes and the case law provide for removal, but a crucial question remains: could the criminal process alone automatically effect a judge's removal or was an additional procedure, like impeachment, needed before imposing a punishment of removal or disqualification? The Massachusetts statute on bribery and corruption explicitly stated that "all offences against this Act shall be heard, tried, and determined before the Superior Court of the Judicature, Court of Assize and the General Gaol Delivery."[277] This statute provided for disqualification and removal, indicating that, at least in Massachusetts, these crimes were to be tried in ordinary courts. There is also evidence that in Virginia, justices of the peace could be removed in the General Court.[278] In Virginia, the rule regarding removal from office—as set down in a nineteenth-century treatise—was:

> Resignation, expiration of term, and removal by competent authority, of course terminate the office *proprio vigore*; but in the other cases of delinquency, the office is not determined, *ipso facto*, by the occurrence of the cause. There must be a *judgment of amotion*, after a *judicial ascertainment* of the fact; which may be by indictment, or information, by writ of *quo warranto*, or by impeachment.[279]

This treatise emphasized the need for some formal action; forfeiture was not automatic upon a misdeed. However, it did not limit such removal to impeachment; instead, indictment was included among the possible means to remove.[280]

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277. 3 Perpetual Laws of the Commonwealth of Massachusetts, supra note 253, at 213.

278. See Commonwealth v. Alexander, 3–4 Va. (1 Va. Cas.) 156, 157–58 (1808) (justice of the peace was convicted in the county court of performing his duties while intoxicated; on a motion to the General Court he was removed); Commonwealth v. Mann, 3–4 Va. (1 Va. Cas.) 308, 309 (1812) (justice of the peace prosecuted in superior court for intoxication and removed on a motion to the General Court). The Virginia Constitution of 1776 identifies the General Court as one of the judicial courts. See 2 Poore, supra 246, at 1911.

279. 2 John B. Minor, Institutes of Common and Statute Law 33 (Richmond, Va., 3d ed. 1882). See also Bland and Giles County Judge Case, 73–74 Va. (33 Gratt.) 443, 450 (1880) (citing same passage of Minor to support determination, on writ of *quo warranto*, that office of county judge was not forfeited by reason of abandonment in the absence of a judicial determination of forfeiture).

280. State courts have affirmed the validity of disqualification provisions against constitutional challenge. In an early New York case, Barker v. The People, 20 Johns. 457 (N.Y. Sup. Ct. 1823), the defendant challenged the constitutionality of an act to suppress duelling which stipulated perpetual disqualification for those convicted under the statute. See id. at 457 ("and, being convicted thereof, shall be incapable of holding, or being elected to any post of profit, trust, or emolument, civil or military, under this state"). The Court considered whether the provision violated the Federal Constitution's Eighth Amendment prohibition on cruel and unusual punishment. It concluded that it did not: "The disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offenses." Id. at 459.

It thus appears from the preceding analysis that state judicial officers were liable to forfeiture of office for official wrongdoing, according to several different proceedings, one of which was criminal prosecution. Although further research is required,[281] these preliminary findings do suggest that the penalties of disqualification and removal were imposed through criminal proceedings on the state level. A further indication that national leaders believed that criminal prosecution was an alternative to removal through impeachment is contained in an opinion rendered by Attorney General Charles Lee in 1796.[282] He responded to an inquiry by the House of Representatives which was considering a petition to impeach Judge George Turner of the Northwest Territory. He explained that a judge holding office during good behavior "may be prosecuted in three modes for official misdemeanors or crimes: by information, or by an indictment before an ordinary court, or by impeachment before the Senate of the United States."[283] In light of the serious charges made, the proper course of action required "some judicial course of proceeding; and if he be convicted thereof, *a removal [f]rom office may and ought to be part of the punishment.*"[284] At the recommendation of the Attorney General, the House of Representatives decided to leave the matter to the local courts.[285] While this is just a snatch of history, the Attorney General's comments suggest a parallel between indictment and impeachment on the national level as well as the state level.

Excursions into history to resolve current problems must be approached with care. The delegates to the Constitutional Convention and the members of the First Congress sought to resolve the pressing issues of their day, often giving little or no indication of how they would address a problem before us today.[286] However, this Note seeks to bring forward evidence of actions these men took in search of an accurate understanding of the legacy that they left. They did include removal and disqualification in early federal statutes to punish official wrongdoing. The "good behavior" qualification of Article III was not explicitly linked to the Impeachment Clause; nor was it understood by the First Congress to prevent the perpetual disqualification of a judge convicted of bribery. Colonial

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281. One place to begin would be to look for federal case law that applied the statutes described supra Part II.

282. See Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 2486 (1907) [hereinafter Hinds' Precedents]. See also Shartel, supra note 37, at 885 n.40 (describing this case).

283. Hinds' Precedents, supra note 282, § 2486.

284. Id. (emphasis added).

285. See id. Attorney General Lee gave the reasons for his opinion, "[I]t will be more advisable, on account of the expense, the delay, the certain difficulty, if not impossibility, of obtaining the attendance here of the witnesses who reside in the Territory northwest of the Ohio, about the distance of 1,500 miles, that the prosecution should not be carried on by impeachment, but by information on indictment before the supreme court of that Territory, which is competent to the trial . . . ." Id.

286. See Shane, supra note 14, at 214.

laws also revealed a widespread practice of including removal, disqualification from office, or both, in bribery statutes. Finally, well-known English legal authorities, like Blackstone, indicated that removal was an appropriate punishment for the abuse of office. This evidence demonstrates a general concern with official accountability and the particular consensus that judges convicted of bribery forfeited their positions. It also suggests that criminal prosecution and conviction was available as a means of removing a corrupt judge in addition to constitutional impeachment.

Let us return to Professor Amar's claim:

> Here, then, is how I read the Constitution's text and structure: Judges like everyone else, must obey the general criminal law, and are subject to criminal prosecution and punishment. Such criminal punishment is often designed to impoverish, deprive, dishonor, and disqualify. It may include—but is not limited to—removal from office, forfeiture of title and salary, stripping of honor and political banishment and disqualification. Because criminal punishment can be so severe, it is subject to a host of constraints. . . . If the Constitution had omitted all references to impeachment, the obvious inference would not have been that judges were immune from all punishment; but, rather, that—like the rest of us—judges were subject to the general criminal law. The impeachment provisions, I submit, are best read as providing a political mechanism for punishing judges that *supplements*, but does not *supplant*, the ordinary modes of criminal punishment. Because of the impeachment provisions, ordinary criminal prosecution is no longer *necessary* to punish judges; but it remains *sufficient*. Indeed, the continued accountability of impeachable officials to ordinary criminal punishment is the basic lesson of Article I, section 3. Notwithstanding the impeachment option, officials "should nevertheless be liable and subject to indictment, Trial, Judgment and Punishment, according to [ordinary, general criminal] Law."[287]

An examination of the early congressional enactments as well as the purpose and intention of the Good Behavior Clause support this understanding of the Impeachment Clause.

IV. Consideration of the Viability of Criminal Prosecution

This Note proposes that Congress can and should enact statutes that provide for removal and disqualification of federal judges for crimes that involve abuse of judicial office. The sanctions of removal and disqualification should only be included in criminal statutes that seek to deter abuse of office as opposed to statutes directed at more general criminal behavior. To the extent that these crimes are also impeachable offenses, there will be at least two mechanisms to remove a corrupt official: impeachment and criminal prosecution. Criminal prosecution under these

287. Amar, On Judicial Impeachment, supra note 22, at 4–5 (footnotes omitted).

statutes would supplement impeachment without upsetting the constitutional arrangement of separation of powers, because such prosecution would not subject the judiciary to the domination of the Executive or the Legislature. Criminal sanctions are implemented by all three branches of government, are accompanied by rigorous constitutional safeguards and, ultimately, depend on the findings of a jury. Any infringement of criminal law on judicial independence would be limited, is historically accepted, and would directly serve another important goal: judicial integrity.

A. *Separation of Powers Issues*

The Constitution establishes the judiciary as the third branch of the federal government, co-equal and co-extensive with the legislative and executive branches. The delegates to the Constitutional Convention carefully built protections into Article III to assure the independence of all federal judges. These protections include the "good behavior" clause and the promise of undiminished salary.[288] The argument could be made that the proposal to remove and disqualify federal judges convicted of certain crimes would violate the separation of powers or impinge upon the independence of the judiciary.[289] Such reasoning suggests that judges would be intimidated and possibly subjugated by the threat of criminal prosecution.[290]

The independence of the federal judiciary is undoubtedly one of the essential aspects of our constitutional order. However, several strong arguments can be made to counter the argument that removal through criminal conviction weakens that independence or violates the separation of powers. First, a threat to the independence of the judicial body as a whole, which is impermissible, should not be confused with an impingement upon the independence of an individual judge. It is true that the independence of an individual federal judge is curtailed by a criminal prosecution; however, all citizens, regardless of their positions, are subject to this check on their ability to commit crimes. Second, because official wrongdoing is not part of a judge's legitimate role, outlawing the misbehavior would not impinge upon the lawful exercise of judicial independence.[291] Third, a judge who is charged with a crime is entitled to the same protection afforded to any defendant in a criminal trial.

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288. See, e.g., The Federalist Nos. 78–79, supra note 18, at 464–75 (Alexander Hamilton) (discussing the importance of tenure during "good behavior" and undiminished salary for the creation of an independent judiciary).

289. See Shane, supra note 14, at 230.

290. See, e.g., Gold, supra note 242, at 708 (suggesting that the potential for an unrelated criminal investigation might bias a judge deciding a case in which the government is a party).

291. See, e.g., United States v. Isaacs, 493 F.2d 1124, 1144 (7th Cir. 1973) ("Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government.").

The principle that "no person is above the law" has long held sway in the United States. As Justice Miller stated in *United States v. Lee*,

> 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.[292]

While the Constitution offers limited immunity for members of Congress attending sessions, no similar exception exists for executive and judicial officers.[293] Delegates to the Convention reached an early decision that federal officials would not be immune to prosecution for common-law crimes.[294] Regular courts of law would hear and decide cases of treason, murder, and felony.[295]

Judges were no exception to the rule. The Impeachment Clause of Article I explicitly states that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law."[296] Professor Burbank has commented, "[C]riminal proceedings were not a threat to judicial independence unknown to the framers, and, I have argued, they were not a threat the framers deemed serious enough to foreclose. I conclude, therefore, that a federal judge can be both prosecuted and imprisoned without prior resort to the impeachment process."[297]

Criminal law can inflict upon an individual the most terrible punishments allowed by society. In order to counterbalance the weight of societal sanctions of the criminal law, the Constitution includes several actors in the criminal process and divides functions among them. The Constitution assigns the principle legislative role to the Congress.[298] This includes an affirmative duty for the House of Representatives and the Senate to explicitly define crimes.[299] Congress's power to criminalize be-

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292. 106 U.S. 196, 220 (1882) (holding that federal official's confiscation of General Lee's property in Virginia was illegal).

293. See U.S. Const. art. I, § 6, cl. 1; see also Amar, On Judicial Impeachment, supra note 22, at 3 (suggesting that only federal legislators enjoyed limited criminal immunity).

294. See Hoffer & Hull, supra note 13, at 101. See also Gerhardt, supra note 2, at 14 (reviewing major decisions regarding judiciary made during the Convention).

295. See Hoffer & Hull, supra note 13, at 101.

296. U.S. Const. art. I, § 3, cl. 7.

297. Burbank, supra note 26, at 672.

298. See U.S. Const. art. I, § 1.

299. In addition to the power of Congress to create law by statute, the existence of federal common law even in criminal matters was widely assumed in the early years of the Nation. However, in 1812, the Supreme Court ruled that there was no federal common law in criminal cases. See United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (in case involving charge of libel against President and Congress for paying off French in order to make treaty with the English, Court held that it had no common law jurisdiction in criminal cases because the federal government is one of limited powers; whatever powers are not expressly given, are reserved to states and people); see also United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816) (finding no federal jurisdiction over common law offenses against United States).

havior is further constrained by the prohibition on bills of attainder and ex post facto laws.[300] Congress must present all laws to the President, who may approve or veto them.[301] The President also has the retrospective power to pardon individuals for "Offenses against the United States, except in Cases of Impeachment."[302]

The Executive is generally entrusted with prosecuting the individual. Recently, courts have held judges to be susceptible to criminal prosecution before they are formally impeached.[303] At least one commentator has suggested that "unrestrained prosecution of federal judges would pose [a threat] to their independence."[304] The potential abuse of prosecutorial discretion does give cause for concern.[305] However, prosecutorial discretion also generally serves a function of limiting prosecutions, theoretically, to the most important and legitimate ones. The constitutional safeguards afforded to any individual in criminal prosecution—indictment, burden of proof, presumption of innocence, and so forth—are equally applicable to judges.[306]

Finally, the Constitution vests the judicial power in the federal judiciary.[307] According to constitutional mandate, "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."[308] By entrusting the jury with the authority to discover and weigh the facts, the framers of the Constitution were ensuring that the people—the ultimate source of sovereign authority—would play a central role in the implementation of the laws.[309]

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300. See U.S. Const. art. I, § 9, cl. 3.

301. See id. § 7, cl. 2.

302. Id. art. II, § 2, cl. 1.

303. See United States v. Claiborne, 727 F.2d 842, 845–49 (9th Cir.), cert. denied, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 710–11 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124, 1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974). See also United States v. Collins, 972 F.2d 1385, 1395 (5th Cir. 1992) (reaffirming that Executive can initiate criminal investigation of federal judge), cert. denied, 113 S. Ct. 1812 (1993).

304. Burbank, supra note 26, at 672.

305. See Shane, supra note 14, at 230 (prosecutors have misused their discretion). But see Burbank, supra note 26, at 672 (prosecutors get involved "only in extreme cases"). Not long ago, there were charges that the investigation and prosecution of Federal District Judge Robert F. Collins were racially motivated. See David Johnson, Federal Judge is Focus of Bribe Inquiry, N.Y. Times, Sept. 27, 1990, at A16.

306. Professor Shane also suggested that special prosecutors might be appointed in the case of an indictment of a judge to free the prosecution of judges from executive control. See Shane, supra note 14, at 231 ("Congress may design a procedure under which prosecutorial decision making regarding sitting judges is vested largely in judicially appointed special prosecutors beyond the policy control of the President.").

307. See U.S. Const. art. III, § 1, § 2, cl. 1.

308. Id. § 2, cl. 3.

309. See Amar, On Judicial Impeachment, supra note 22, at 4 (suggesting that the jury is the most important constraint on the criminal process; "criminal prosecution is *jury*-dependent"); see also Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1182–99 (1991); Alan H. Scheiner, Note, Judicial Assessment of Punitive Damages,

Each branch of the federal government is involved in the criminal process. Thus, removal through the criminal process does not upset the constitutional separation of powers. Nor does the need to protect judicial independence bar this alternative form of removal. Judges have never been shielded from the possibility of criminal sanctions as a check on their independence. The Commission argued that while judicial integrity may be balanced against judicial independence, Congress can only do so to a limited extent and must stop short of removal. Its arguments are considered next.

B. *Objections to Removal Through Criminal Sanctions*

The Commission ultimately concluded that prosecution and imprisonment of a sitting judge could precede impeachment, although it recognized that removal effectively resulted. In order to square this with its central contention that impeachment was the exclusive mechanism to remove a judge, the Commission argued that imprisonment was not the formal equivalent of removal.[310] According to the Commission, "removal" meant anything that stripped the judge of aspects of the office provided for in the Constitution: "namely, the judge's commission of office, with its accompanying eligibility to exercise the judicial power, and nonreducible compensation."[311] Commentators who view impeachment as exclusive argue that these aspects—office and salary—cannot be taken from a judge by any means other than impeachment.

It is helpful to return to the language of the Constitution to untangle this argument. Article III, § 1 provides: "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."[312] According to the language of the Constitution, the judges hold office "*during good Behavior*" and receive undiminished compensation "*for their Services.*" Criminal conviction of certain crimes of official wrongdoing clearly violates the qualification of good behavior. Furthermore, an incarcerated judge is no longer rendering services to the Nation. Therefore, while the Commission accurately states that criminal law as it now

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the Seventh Amendment, and the Politics of Jury Power, 91 Colum. L. Rev. 142, 145–56 (1991) (describing the historical role of civil juries).

310. See Report, supra note 3, at 13.

> Under Article III, federal judicial office has two consequences. First, a judge is legally eligible to exercise judicial power, because the judicial power of the United States is vested in courts made up of judges. Second, a judge is entitled to receive undiminished compensation. Imprisonment does not deprive a judge of either of those accompaniments of office. Even in jail, a judge continues to receive salary and remains eligible to exercise judicial power when circumstances change.

Id.

311. Id. at 17.

312. U.S. Const. art. III, § 1.

stands works only a functional removal of a judge, criminal statutes that explicitly provide for removal, disqualification, or both, would have the "formal" effect of removing such judges. The Good Behavior Clause of the Constitution does not preclude this, but on the contrary it suggests it. The actions of the early Congresses that did enact this type of criminal statute offer additional proof of the constitutionality of this proposal.

Perhaps the Commission's greatest concern regarding removal through criminal conviction was that any such statute would extend to the President.[313] Criminal prosecution of an incumbent President would be undesirable;[314] however, enacting criminal statutes that included the punishment of removal would not necessarily lead to such a result. First, it is possible to draft these statutes so that they apply only to "judicial" abuses of office.[315] Secondly, in his *Handbook on Impeachment*, Professor Charles Black has written, "[A]n *incumbent* president cannot be put on trial in the ordinary courts for [an] ordinary crime . . . ."[316] In case this was not enough, he added that an Act of Congress could clarify that the President was not to be criminally tried while in office.[317] This remains an option. Professor Amar has argued that because the Constitution vests the pardon power with the President,[318] there is little danger of a President enduring a criminal suit. She can simply pardon herself.[319] Finally, the criminal process as it is shaped by the Constitution leaves the discretion to prosecute with the executive, so the danger of vexatious suits against the President would seem minimal or nonexistent.

While this Note argues against the Commission's interpretation that the Impeachment Clause eliminates removal from the list of criminal sanctions that Congress can impose upon judges, the distinction between

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313. See Report, supra note 3, at 19 ("If removal may lawfully follow on conviction for a federal judge, then it may do so for the Vice President of the United States or perhaps even the President."); Shane, supra note 14, at 230 n.72 (addressing the Roundtable discussion about the susceptibility of the President and the Vice President to criminal prosecution).

314. On a practical level, such prosecution would effectively halt the federal government. The unique role of the President further implicates aspects of federalism and separation of powers which are distinct from those confronted by the Judiciary and fall outside the scope of this Note.

315. Recall the early statutes on the Treasury and Customs which stipulated punishments for abuses of the particular offices described in the statute. See supra notes 126–131 and 136–143 and accompanying text.

316. Black, supra note 19, at 40.

317. See id. at 40–41. He offered various means by which the trial could be delayed until after the President's term is over: 1) immediate indictment and a delayed trial following the President's term or 2) tolling the statute of limitations so that the President could be both indicted and tried after her term. See id.

318. See U.S. Const. art II, § 2, cl. 1.

319. See Amar, On Judicial Impeachment, supra note 22, at 4 n.4 ("How could the President be prosecuted criminally if he retains the power to pardon himself?"). The President can pardon herself, or the Vice President for that matter. Also pardons can be granted *ex ante*, as the recent pardon from President Bush to Secretary of Defense Casper Weinberger demonstrates.

the purpose of impeachment and the purpose of the criminal process has valuable implications for the proposal to include removal in criminal sanctions. Not all impeachable offenses will be crimes and not all crimes justify removal from office. As Hoffer and Hull point out, impeachment might serve as the only mechanism to censure the corrupt actions of officials, because offenses of the misuse of power might not be included in the criminal code.[320] Yet, there is some overlap in the crimes that each process addresses. Recognizing this, the task is to identify the crimes that merit both impeachment and criminal prosecution. The principle example of such a crime was bribery which was both an explicit impeachable offense and an explicit statutory offense stipulating perpetual disqualification. Criminal statutes can and should limit the incorporation of the penalties of disqualification and removal to those addressing serious abuses of office.

C. *Crimes Punishable by Removal and Disqualification*

Some scholars argue that if the Act of 1790 was constitutional, it is only because the crime that it punished—bribery—was listed explicitly in the Constitution as an impeachable offense. Thus with bribery, the argument goes, Congress could make a categorical statement without violating the Constitution.[321] Although this Note has shown that Congress's power to define punishment for serious abuse of office in fact extends beyond those offenses listed in the Impeachment Clause, this position does provide a starting point. Treason and bribery, both named in the Impeachment Clause, could be statutorily defined to include disqualification and removal. Given that the recent cases against federal judges have included the charge of bribery, this move alone would do much to ease the congressional burden of post-conviction impeachment.[322]

However, the named offenses in the Impeachment Clause provide only a baseline indication of actions that merit removal from office. The qualification of "good behavior" suggests that other actions that undermine the integrity of the judicial process should also be punished by removal and disqualification. This leads to a distinction between public

320. See Hoffer & Hull, supra note 13, at 82 ("some of these cases of extortion and corruption fell at the edge of illegality; they were not named in statute, or the participant's intention to commit a crime could not be established under the tests required in a regular criminal court").

321. See Gerhardt, supra note 2, at 102; Shane, supra note 14, at 228.

322. See United States v. Collins, 972 F.2d 1385, 1395 (5th Cir. 1992) (holding that Executive does not need a "reasonable suspicion" before it can initiate a criminal investigation of a federal judge), cert. denied, 113 S. Ct. 1812 (1993); United States v. Claiborne, 727 F.2d 842 (9th Cir.) (finding that judge can be subject to criminal prosecution prior to impeachment), cert. denied, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 711 (11th Cir. 1982) (same), cert. denied, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir.) (same), cert. denied, 417 U.S. 976 (1974).

and private crimes made long ago by Blackstone in his *Commentaries*:

> The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.[323]

In disciplining federal judges, Congress should seek to address public crimes, or those crimes that undermine the proper administration of justice. In the public realm, Blackstone listed bribery, oppression and tyranny in office and extortion as sufficiently grievous crimes to warrant forfeiture of office and disqualification. The recent criminal convictions of federal judges have also included charges of "obstruction of justice," the modern equivalent of "oppression and tyranny in office."[324] Certain types of fraud and perjury would also merit the criminal sanctions of removal and disqualification because they undermine the integrity of the judicial system. Thus, it seems that the crimes that should carry the penalties of removal and disqualification share the following characteristics: (1) they are "extremely serious," (2) they involve behavior "which in some way corrupt[s] or subvert[s] the [judicial or] governmental process," and (3) they are "plainly wrong in themselves to a person of honor, or to a good citizen."[325]

Finally, the proposal of incorporating the punishments of removal and disqualification into criminal statutes is a practical one. Congress is not well equipped to handle the "garden variety" impeachment. Impeachment is a political process, designed to be cumbersome and to require the expenditure of political capital. Although removal should not be too easily accomplished, it seems that the criminal process, replete with constitutional safeguards, offers a fair and even-handed alternative to impeachment. In some ways, it is preferable because the court and the jury are located near the evidence of the alleged crime. Recognizing this and the reality of time constraints, the Senate has established a committee of Senators to review evidence in impeachment proceedings according to Rule XI,[326] and has granted presumptive validity to prior criminal convictions. If Congress chooses to ease the strain of impeaching an already convicted federal judge by "rubber-stamping" the prior conviction, would it not be better to build the removal and disqualification penalties into the criminal statutes? As its stands now, the dual procedures, with criminal conviction preceding impeachment, leads to a "Leavenworth

323. 4 Blackstone Commentaries, supra 132, at 5.

324. *Hastings*, 681 F.2d at 707; see also *Collins*, 972 F.2d at 1395 (using same language).

325. Black, supra note 19, at 37. Professor Black made this list to describe impeachable offenses. Here they are modified to become guidelines for criminal offenses.

326. Sen. Manual, 101st Cong., 1st Sess. 186 (1989).

lag"[327] or a period of time in which an imprisoned judge continues to receive a paycheck. This result is corrosive to the public's opinion of the federal judiciary and cannot help but be demoralizing to the general ranks of the federal bench.

CONCLUSION

This Note has focused on the removal of federal judges by means of criminal prosecution and conviction. It is appropriate to step back for a moment and acknowledge the truth of Judge Edwards's assertion: "I have no reason to doubt the integrity of the federal judiciary as a whole. Indeed, I believe that most of my colleagues would agree that corruption is atypical among federal judges."[328] While this is undoubtedly the case, it is also true that the ranks of the federal judiciary have swelled to nearly one thousand. Recent incidents of abuse of office, while few in relation to the total number of judges, are troubling. The integrity of the federal judiciary is undermined by the presence of corrupt officials. This Note has sought to consider the historical validity of criminal sanctions as a supplement to impeachment. Through time, society has tolerated the intrusion of criminal law upon judicial independence in order to insure judicial integrity and accountability. Furthermore, the early federal statutes presented here offer strong evidence that removal and disqualification in criminal statutes existed as a supplement to impeachment at the beginning of the nation.

Maria Simon

327. A phrase coined by Professor Akhil Reed Amar in conversation with him at Columbia Law School on Jan. 21, 1994.

328. Edwards, supra note 33, at 771.