University of Dayton Law Review

Volume 15 | Number 2 Article 4

4-1-1990

The Impeachment Process: Still Functional after All These Years

Steven I. Friedland
Nova University

The Impeachment Process: Still Functional after All These Years

Cover Page Footnote

The author wishes to express his thanks and appreciation to Shirley DeLuna, Brenda Pagliaro, Leslie Deckelbaum, and Betty Brunyon for their useful suggestions and their able assistance in the drafts of this article.

THE IMPEACHMENT PROCESS: STILL FUNCTIONAL AFTER ALL THESE YEARS?

*Steven I. Friedland**

I. INTRODUCTION

Although there have been only fourteen impeachment trials since the ratification of the United States Constitution,[1] in recent years federal judges have been impeached with greater frequency.[2] One of the consequences of the increased incidence of such impeachment proceedings has been a closer scrutiny of the impeachment process in the political and academic arenas.[3] One particular source of scrutiny has been

---

* Professor of Law, Nova University Center for the Study of Law. B.A., State University of New York at Binghamton, 1978; J.D., Harvard Law School, 1981. The author wishes to express his thanks and appreciation to Shirley DeLuna, Brenda Pagliaro, Leslie Deckelbaum, and Betty Brunyon for their useful suggestions and their able assistance in the drafts of this article.

1. Stewart, *Impeachment By Ignorance*, A.B.A.J., June, 1990 at 55; CONG. RES. SERV., REPORT FOR CONGRESS, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE AND PRACTICE, No. 88-637A (Sept. 1988). The fourteen impeachment trials have included William Blount, United States Senator from Tennessee, whose impeachment proceedings lasted from 1797 through 1799; John Pickering, judge for the United States District Court for the District of New Hampshire, who was impeached from 1803 through 1804; Samuel Chase, Associate Justice of the United States Supreme Court, who was impeached from 1804 to 1805; James Peck, district judge for the United States District Court for the District of Missouri, who was impeached from 1826 through 1831; West Humphreys, Judge for the United States District Court for the District of Tennessee, who was impeached in 1862; Andrew Johnson, President of the United States, whose impeachment proceedings occurred in 1867 through 1868; William Belknap, Secretary of War, who was subjected to impeachment proceedings in 1876; Charles Swain, a district court judge for the Northern District of Florida who was impeached from 1903 through 1905; Robert Archbald, circuit judge of the United States Circuit Court of Appeals for the Third Circuit who was serving as a judge on the United States Commerce Court and was impeached from 1912 through 1913; George English, judge for the United States District Court for the Eastern District of Illinois, whose impeachment lasted from 1925 through 1926; Harold Louderback, a judge in the United States District Court for the Northern District of California, who was impeached from 1932 through 1933; Halstead Ritter, judge for the United States District Court for the Southern District of Florida, who was impeached in 1936. J. BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH Crimes and Misdemeanors in the Federal Courts 221-48 (1963). Harry E. Claiborne, district judge for the District of Nevada, was impeached in 1986. Wash. Post, Oct. 10, 1986, at A1, col. 3. Judge Alcee Hastings, district judge for the Southern District of Florida, was impeached in 1989. *See* Stewart, *supra*, at 52-54.

2. This trend was most recently exhibited in the 1989 impeachment of federal judge Alcee L. Hastings. Prior to Judge Hastings' impeachment, Judge Harry Claiborne of the District of Nevada was removed by impeachment. Wash. Post, Oct. 10, 1986, at A1, col. 3. Judge Walter Nixon of the Southern District of Mississippi was convicted on felony charges in 1986 and impeached in the summer of 1989. Judge Robert Aguilar of California was tried in 1990 on criminal charges and, after a hung jury, will likely be retried. Depending on the outcome of the retrial, he too may be subject to impeachment. J. BORKIN, *supra* note 1, at 199-244.

3. Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L.

the Congress.

Congress has several apparent reasons for re-examining the process. Congress could spend the considerable time required to conduct impeachment proceedings on other important matters. The media attention that follows impeachments has made the issue a matter of public concern, and augments the distractions from other congressional duties. For these reasons, several proposals have been made to alter the existing impeachment process.[4] One of these proposals is currently before a Senate subcommittee.[5]

The 1989 impeachment of Judge Alcee L. Hastings is perhaps the best illustration of the various issues associated with the impeachment process. The *Hastings* case contains several procedural and substantive singularities that distinguish it from previous cases and offers considerable insight into the way the impeachment process works. The impeachment issues raised by the *Hastings* case include the effect on impeachment proceedings of a prior jury acquittal, the propriety of the initiation of charges by fellow judges, and, although *Hastings* was not the first to confront this question, whether a Senate impeachment trial may occur by subcommittee.

This article examines some of the issues relating to the impeachment process using the *Hastings* case as a focal point. In particular, the article focuses on the congressional response to the growing perception that the cumbersome impeachment process needs revision. The article culminates with a review of Senate Bill 1851, a proposal to modify the impeachment process which is currently under consideration by the Senate Courts and Administrative Practice Subcommittee.

II. BACKGROUND

A. The Impeachment of Judge Hastings

The origin of the impeachment of then Federal District Court Judge Alcee Hastings of the Southern District of Florida can be traced to the October, 1981 arrest of William Borders. Borders, a District of Columbia attorney and friend of Hastings, was charged with conspiring with Hastings to accept a bribe regarding a case pending sentencing in Hastings' court.[6] Hastings was subsequently indicted on charges of con-

---

REV. 420, 422 (1987).

4. *Id.* at 428 n.50.

5. *See* S. 1851, 101st Cong., 1st Sess., 135 CONG. REC. S15,268 (1989).

6. The case before Judge Hastings involved two brothers, Thomas and Frank Romano, who had been convicted of racketeering under the Racketeer Influenced and Corrupt Organizations Act. United States v. Romano, 523 F. Supp. 1209, 1209-10 (S.D. Fla. 1981). On May 4, 1981, prior to the sentencing of the Romanos, Judge Hastings entered an order in the case requiring that the Romanos forfeit property valued at $1,162,016. *Id.* at 1210-11. The alleged conspiracy

spiracy to accept a bribe. He was tried by a jury and acquitted of all criminal charges in February, 1983.[7] However, the acquittal proved to be a short-lived victory.

In March, 1983, approximately one month after Hastings' acquittal, two other federal judges charged Hastings with misconduct in office.[8] Although the complaint against Hastings included multiple charges, it primarily concerned the alleged conspiracy between Hastings and Borders, as well as the alleged false statements Hastings made under oath during his trial.[9]

The charges against Judge Hastings were made pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[10] The Act permitted federal judges to initiate complaints and recommend impeachment to the House of Representatives. At each stage of the Judicial Council's proceedings, the members of the decision-making body voted to recommend that Hastings be impeached.[11] Congress agreed with the conclusions reached by the Judicial Council, and the impeachment process culminated with Hastings' conviction by the Senate in October, 1989.[12]

B. The Unusual Nature of the Hastings Case

The *Hastings* case was unusual for several reasons. The culmination of the inquiry into Hastings' conduct in an impeachment trial was itself uncommon.[13] Historically, there have been fourteen impeachment trials involving federal officers since the adoption of the United States Constitution in 1787.[14] Less than half of those trials resulted in convictions.[15]

---

between William Borders and Hastings involved a reduction in the amount to be forfeited. *See generally* Katz, *Double Jeopardy: The Endless Trial Of Judge Alcee Hastings*, 8 REGARDIE'S, Apr., 1988 at 204-08, 262-63.

7. Hastings v. Judicial Conference of United States, 593 F. Supp. 1371, 1376 (1984).

8. *Id.* The federal judges were members of the Eleventh Circuit Judicial Council. Based upon their written charges, then chief judge of the Eleventh Circuit Judicial Council, Judge John Godbold, forwarded the charges for further investigation to the Judicial Council. *Id.* at 1377.

9. *Id.*

10. 28 U.S.C. § 372(c)(1) (1988). This act also permits the judges to discipline and admonish the other members of the judiciary. *See id.* § 37 & (c)(6)(B).

11. The Judicial Conference of the United States unanimously recommended impeachment, and the House voted 413 to 3 in August, 1988 to impeach. Wash. Post, Aug. 4, 1988, at A1.

12. Stewart, *supra* note 1, at 53-55.

13. There have been only fourteen impeachment trials in the entire history of the United States. *See* Stewart, *supra* note 1, at 55.

14. *See supra* note 1 and accompanying text.

15. *See* Note, *supra* note 3, at 427 nn.44-45. Those impeachment proceedings ending in convictions included Judge Pickering, district judge for the District of New Hampshire; Judge Humphreys, of the United States District Court for the District of Tennessee; Judge Archbald, United States Circuit Judge for the Third Circuit Court of Appeals; Judge Ritter, judge for the

The impeachment of a sitting federal judge was even more of a historical rarity. Although Hastings was not the first sitting judge to be impeached, he was the first to be charged with committing a crime while exercising his judicial responsibilities.[16] Judge Harry E. Claiborne of the District of Nevada also was a sitting judge when he was impeached by the House and convicted by the Senate in 1986 after having been previously convicted on criminal felony charges.[17] Judge Hastings, however, had not been previously convicted of a crime. To the contrary, he had been acquitted of all criminal charges arising from substantially the same subject matter on which his impeachment was based.[18]

The *Hastings* impeachment followed *Claiborne* by utilizing a rule permitting a committee of Senators to hear the full evidence at an impeachment trial.[19] At Hastings' trial, only twelve Senators heard all of the evidence. Yet, the entire Senate was responsible for deciding whether to impeach.[20] Furthermore, the recommendation of impeachment was initiated by the Judicial Conference of the United States, a group composed of Hastings' judicial brethren. The recommendation by the group was the first of its kind.[21]

III. ANALYSIS

The *Hastings* case raises a number of provocative legal issues, four of which are discussed below. The first issue is whether the double jeopardy prohibition protects a federal judge from being impeached following a criminal acquittal. The second issue is whether an impeachment in the Congress may only follow a criminal prosecution on the same subject matter or whether it may precede it. The third issue involves the propriety and legality of using the federal judiciary to initi-

---

United States District Court for the Southern District of Florida. J. BORKIN, *supra* note 1, at 199-244. Also ending in a conviction was the impeachment of Judge Claiborne of the District of Nevada. Wash. Post, Oct. 10, 1986, at A1, col. 3. The impeachment of Judge Hastings of the Southern District of Florida ended in a conviction as well. Stewart, *supra* note 1, at 52-54.

16. Katz, *supra* note 6, at 205. Actually, Judge Otto Kerner, Jr. of the Seventh Circuit Court of Appeals was prosecuted while sitting as a federal judge. The crimes Judge Kerner was charged with, however, related to matters that took place prior to his becoming a judge. *See* United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *see also* Note, *supra* note 3, at 422 n.18.

17. Judge Claiborne was convicted of tax fraud and sentenced to two years in an Alabama Federal Penitentiary. *See* Note, *supra* note 3, at 420.

18. Judge Hastings was acquitted on criminal charges, including conspiracy to take a bribe, in February, 1983. He was tried separately from his alleged co-conspirator, attorney William Borders, who was convicted of conspiracy to accept a bribe. Wash. Post, Aug. 4, 1989, at A5.

19. *See* Stewart, *supra* note 1, at 52-54.

20. *Id.* at 52.

21. *See* Note, *supra* note 3, at 422 n.18.

ate impeachments against other federal judges. The fourth issue concerns the legitimacy of using a Senate subcommittee to hear impeachment evidence instead of the entire Senate.

A. Double Jeopardy

The double jeopardy clause of the fifth amendment states: "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[22] While it may appear that this clause prohibits a retrial on impeachment charges, it appears fairly settled that the double jeopardy clause does not prohibit the impeachment of a judge after an acquittal on criminal charges concerning the same subject matter does not constitute double jeopardy.[23]

When James Madison first proposed the double jeopardy provision of the fifth amendment on June 8, 1789, he suggested that the clause include the prohibition of re-trial of the same offense "except in cases of impeachment."[24] This addition did not survive the amendment. Madison's reference to impeachment shows that his original intent was to preclude only additional criminal proceedings from re-trial. Subsequent interpretations of the double jeopardy clause have reaffirmed this view.[25]

Yet it can be argued that impeachment is similar to and should be included in the category of "criminal proceedings," for which re-trial is prohibited. The deletion of Madison's "except in cases of impeachment" language suggests that impeachment was intended by the framers to be included in the double jeopardy prohibition. Moreover, the Constitution states that " [t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury,"[26] thereby grouping impeachment proceedings with criminal matters. Furthermore, the language used in the Constitution permits impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors,"[27] all of which are criminal offenses. Finally, an impeached federal officer is pronounced "convicted," which is

---

22. U.S. CONST. amend. V.

23. *See* Hastings v. United States Senate, Impeachment Trial Comm. 716 F. Supp. 38, 41-42 (D.D.C. 1989); *see also* United States v. Isaacs, 493 F. 2d 1124, 1142 (7th Cir. 1979).

24. *See* CONG. RES. SERV., REPORT FOR CONGRESS, THE POSSIBLE INTERACTION BETWEEN THE IMPEACHMENT PROCESS AND THE DOUBLE JEOPARDY CLAUSE, No. 89-112A, 6 (Feb. 15, 1989) (hereinafter REPORT FOR CONGRESS).

25. *See, e.g.*, Green v. United States, 355 U.S. 184, 187 (1957).
("The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.").

26. U.S. CONST. art. III, § 2, cl. 3.

27. U.S. CONST. art. II, § 4. Article II, § 4 states that "[t]he 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." *Id.*

the same term used to describe the recipient of a guilty verdict in a criminal trial.

Nonetheless, despite these arguments based on the Framers' likely intent, it is generally believed that impeachment proceedings are essentially remedial in nature, and therefore civil.[28] Impeachments do not generally have any criminal or punitive consequences; instead, the impeached official is removed from office.[29] In addition, while impeachment proceedings may be based upon what otherwise could be prosecuted as criminal acts, impeachment is also appropriate for non-criminal misconduct in office that breaches the public's trust. For example, a judge may be impeached and convicted for incompetently presiding over a case.[30] Thus, the lack of a criminal act requirement for impeachment further suggests that the purpose of impeachment is different than that of a criminal trial. Consequently, impeachment should not be prohibited after a criminal prosecution results in an acquittal regarding the same subject matter.

B. Impeachment Following Criminal Proceedings

The impeachment of a federal judge following a criminal proceeding can create more than an awkward, untenable situation. It may result in a major constitutional dilemma. In the *Hastings* case, the initiation of impeachment proceedings only one month[31] after his acquittal created the appearance that the impeachment proceedings were retaliatory. The impeachment of Judge Harry Claiborne after his conviction, however, created a more serious problem.[32] Even after Claiborne had been sentenced and had begun serving a prison term for his criminal conviction, he technically remained a sitting federal judge.[33] Claiborne's refusal to resign fueled the absurd possibility that Judge Claiborne might hear cases from behind bars.[34]

---

28. REPORT FOR CONGRESS, *supra* note 24, at 17-18.

29. U.S. CONST. art. II, § 4. Article II, § 4 states that upon impeachment a civil officer "shall be removed from Office." *Id.*

30. *See* J. BORKIN, *supra* note 1, at 199-200, 243-44. Judge Ritter of the United States District Court for the Southern District of Florida was impeached in 1936 for improperly handling a case before him. *Id.*

31. Hastings was acquitted on criminal charges in February, 1983, and the initial Judicial Conference complaint about his conduct involving the alleged conspiracy, as well as statements he made at trial, was initiated in March, 1983. Hastings v. Judicial Conference of United States, 593 F. Supp. 1371, 1376 (1984).

32. *See* Note, *supra* note 3, at 420.

33. Claiborne remained a judge until he was convicted by the Senate on October 9, 1986, almost six months after having been convicted of felony charges. *See* Wall St. J., Oct. 10, 1986, at A14, col. 1; *see also* Wash. Post, Oct. 10, 1986, at A1, col. 3.

34. In the appeal of the *Claiborne* decision, Judge Kosinsky stated that it would be possible to permit the prison inmate to continue to perform some judicial functions. United States v. Clai-

The criminal prosecution and imprisonment of a federal judge prior to impeachment creates the dilemma of what to do with an incapacitated but still-sitting judge. It may be argued that a federal judge who has been convicted and imprisoned on felony charges is not fit to continue serving as a federal judge. However, impeachment is the only constitutional mechanism for the removal of federal judges who are granted life-tenure. Federal judges may remain in office as long as they maintain "good behavior."[35] Thus, prosecution prior to impeachment effectively achieves what the Constitution does not permit the Congress or the President to do—remove a federal judge from office without impeachment proceedings. The short answer to this problem, of course, would be to reintroduce the longstanding practice of impeachment prior to criminal prosecution. Otherwise, the *Claiborne* dilemma may recur.

C. *Impeachment Initiated by the Judiciary*

Another troubling issue raised in the *Hastings* case is the use of the judiciary to recommend impeachment to the House of Representatives.[36] In addition to the awkwardness created by judges initiating the impeachment process of one of their own, the question has been raised as to whether the use of the judiciary constitutes an improper delegation of congressional power.[37] Until recently, it had been the common practice for a prosecutor, the Attorney General of the United States, or the state legislature to recommend to the House of Representatives that impeachment proceedings be initiated.[38]

The key question relating to the use of judges to institute impeachment complaints is whether the independence of the federal judiciary,

---

borne, 790 F.2d 1355, 1360 (9th Cir. 1986). Judge Kosinsky also said that:

> [t]he spectacle of a federal judge serving jail time between sittings is not materially more grotesque than having a judge resume judicial duties after serving a prison sentence. Our sense of discomfort with either of these scenarios stems from the fact that Congress has not chosen to remove Judge Claiborne through the impeachment process.

Id. at 1360 n.4.

35. Article III, § 1 of the U.S. Constitution states that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ." U.S. CONST. art. III, § 1.

36. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c)(8) (1988). The procedure by which the Judicial Conference may recommend impeachment first requires a Circuit Judicial Council Investigating Committee to certify to that Conference that impeachment is appropriate. The Conference then has to agree with that conclusion and certify its conclusion to the entire House of Representatives. The Judicial Conference, pursuant to 28 U.S.C. § 331 (1988), is charged with overseeing the Federal Judiciary, and the rules and procedures by which it operates. *Id.*

37. The delegation doctrine is a component of the separation of powers requirement. The Constitution grants Congress the sole power to impeach. U.S. CONST. art. I, § 3, cl. 6.

38. *See* Note, *supra* note 3, at 427; *see also* J. BORKIN, *supra* note 1, at 44.

so important to the doctrine of the separation of powers, would be compromised by such a system. Even if Congress makes the decision to impeach, there still may be an appearance of improper delegation when the legislative branch does not perform the initial investigation. The potential unconstitutionality increases if the use of the Judicial Conference to recommend impeachment in effect requires Congress to act. Challenges to this procedural framework have been rebuffed to date.[39] However, the validity of this process should be reviewed in court, or by the legislators who created it.

D. Impeachment Trial By Senate Subcommittee

The use of a subcommittee to hear the evidence in an impeachment trial, instead of the entire Senate, is a relatively recent procedural development. The Senate subcommittee was first used in the 1986 impeachment trial of Judge Harry Claiborne.[40] The rules authorizing this procedure had been in existence for several years.[41] Yet the rules had not been used prior to the *Claiborne* case, and were modified for Claiborne's trial.[42]

The use of a Senate subcommittee possesses the virtue of being expeditious,[43] but appears potentially unconstitutional. The underlying premises of the Constitution are not shaped solely or even significantly by expediency.[44] In fact, the Constitution often requires slow, deliberative decision making. For example, the Constitution requires that bills be presented to both houses for approval prior to being presented to the President,[45] and that an impeachment conviction have the support of two-thirds of the Senate.[46]

---

39. *See generally* McConnell, *Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change*, 76 KY. L.J. 739, 752-60 (1987); Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 446-54 (1987).

40. *See* Note, *supra* note 3, at 427. *See also* J. BORKIN, *supra* note 1, at 44.

41. The rules are known as the Rules of Procedure and Practice in the Senate When Sitting on an Impeachment Trial. *See* S. Doc. No. 33, 99th Cong., 2nd Sess. (1986).

42. Stewart, *supra* note 1, at 52.

43. As Senator Howell Heflin stated, "A jury of 100 is totally unworkable," referring to having the entire Senate try cases of impeachment. Lauter, *Will Claiborne's Impeachment Spur Overhaul of Process?*, Nat'l L. J., Oct. 20, 1986, at 8, col. 1.

44. Note, *supra* note 3, at 423 (Impeachment standards are designed to be cumbersome to protect the judiciary.).

45. The presentment clause, as it is known, requires that all bills be approved by both houses of Congress and then presented to the President of the United States for approval. U.S. CONST. art. I, § 7, cl. 3. The clause states in pertinent part that "[e]very Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him . . . ." *Id.*

46. 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

The strict requirements for the removal of federal judges safeguard the independence of the federal judiciary from the other branches of government.[47] The importance of judicial independence is reflected in various Constitutional requirements such as the life tenure afforded to federal judges.[48] In addition the impeachment process involves separate hearings in both the House and Senate, and requires two-thirds of the Senators present to vote for conviction. These mechanisms indicate that the Constitution is intentionally highly protective of the judiciary. If a Senate subcommittee compromises this protection simply to improve the efficiency of a slow and deliberate component of constitutional machinery, the use of the subcommittee would appear to directly clash with the intent of the Framers. Furthermore, the use of the subcommittee may transform the extraordinary nature of an important constitutional proceeding into the equivalent of ordinary Congressional committee work.

The use of a subcommittee to hear the evidence also may sacrifice the accuracy of the proceeding. In the *Hastings, Claiborne,* and *Nixon* impeachment proceedings, the subcommittee members who heard all the evidence invariably voted to convict less often than non-subcommittee members.[49] Whether this differential reflects on the fairness of the proceeding cannot be positively gainsaid from the data.[50] At the very least, direct exposure to the evidence in an impeachment trial should have a perceptible impact on the receiving Senators, an impact that may likely be sufficient to influence the outcome of the proceeding. One commentator has alleged that because of this impact, a "trial by committee cheats the accused of a fair trial."[51]

Nevertheless, an impeachment proceeding and trial place great pressure upon the Senate to be expeditious.[52] During the time devoted to impeachment, important affairs of the State may be left unattended.[53]

The resolution is not obvious. To illustrate, the language of the Constitution is not dispositive. The Constitution states only that "[t]he

---

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." *Id.*

47. Note, *supra* note 3, at 439.

48. U.S. CONST. art. III, § 1.

49. *See* Stewart, *supra* note 1, at 54.

50. *Id.*

51. *Id.*

52. N.Y. Times, Apr. 2, 1986, at A16, col. 3; Nunn, *Judicial Tenure*, 54 CHI.-KENT L. REV. 29, 31 (1977). *See also* Note, *supra* note 3, at 421.

53. As one commentator has noted, "[t]he Claiborne trial took seven days, Hastings took 18 trial days, and Nixon consumed four trial days, for an average trial length of 10 days." Stewart, *supra* note 1, at 55.

Senate shall have the sole Power to try all Impeachments."[54] There is no language specifying whether the entire Senate must receive all of the evidence. If the impeachment proceeding is treated as the equivalent of a regular criminal proceeding, the language should be construed in favor of the defendant under the principle of strict construction.[55] Even if it is not deemed to be the equivalent of a criminal case, the potential loss resulting from an impeachment, compounded by the infrequency of its use, indicates that the constitutional language should be construed to promote fairness to the defendant in the course of the proceedings.[56] Even in civil cases, jurors cannot be absent during the proceedings. Rather, alternates are chosen to protect against the possibility of juror absence. Also, the fact that a criminal conviction has already been rendered in these recent impeachment proceedings suggests that even greater diligence should be taken to avoid a rush to judgment. Finally, a House of Representatives vote for impeachment is an independent question that should not be used as a proxy for a de novo Senate trial.[57]

The express delegation of the impeachment process to Congress is indicative of its importance to the framework of the Constitution. In light of its importance to the Constitutional structure as well as to the individual defendant, the entire Senate should hear all the evidence and decide as a governing body. Due process concerns should not allow the impeachment of a sitting federal judge to be recast as a secondary matter by a delegation to a subcommittee.

IV. THE LEGISLATIVE RESPONSE—S. 1851

The future of the impeachment process is being reviewed by Congress. The responses by Congress may prove instrumental in reaching an accommodation between the constitutional safeguards of the impeachment process and the need for expediency in the hearings. In particular, the United States Senate is considering S. 1851, a bill which would alter current impeachment practices.[58] The bill, called the "Judi-

54. U.S. CONST. art. I, § 3, cl. 6.

55. *See In re* Winship, 397 U.S. 358, 364 (1970).

56. As one commentator noted, "Surely, when we 'doom to honor or to infamy the most confidential and the most distinguished characters of the community' we must be at least as careful to provide a fair hearing and informed jurors." Stewart, *supra* note 1, at 55.

57. The trial by subcommittee issue will certainly become more volatile if the House of Representatives tries to streamline its impeachment procedures as well. Several members of Congress have proposed constitutional amendments that would modify the existing procedures. For example, members of the subcommittee on the Constitution of the Senate Judiciary Committee discussed several proposed amendments in an April 1987 hearing. CONG. RES. SERV., REPORT FOR CONGRESS, AN ANALYSIS OF S.J. RES. 113, A PROPOSED CONSTITUTIONAL AMENDMENT RELATING TO THE REMOVAL OF FEDERAL JUDGES, No. 87-764A (Sept. 14, 1987).

58. S. 1851 in pertinent part states:

cial Integrity and Independence Act of 1989,"[59] is presently in the Senate Judiciary Committee and has been referred for review to the Courts and Administrative Practice Subcommittee.[60]

This bill, if passed, would streamline the existing impeachment mechanism. Its purpose is "[t]o supplement the impeachment remedy for removing federal judges for misbehavior."[61] The bill relies on a review by federal judges who may decide that the accused judge's behavior warrants removal. The bill provides for a removal process that appears to be totally independent of the current impeachment process.[62]

While the bill serves to free up the Senate as well as the House from lengthy time-consuming impeachment proceedings, it also appears to circumvent the protective shield that the existing impeachment mechanism provides for judges. In addition, the bill proposes the use of federal judges to police their own. Using the judiciary is unwise and may be attacked on several grounds. First, it is hard to imagine how federal judges, under general recusal rules, would not have some conflict of interest in determining the fate of another federal judge, particularly one in the same circuit. For example, a three-judge panel might

---

SEC. 2. PETITION.

The attorney general is authorized, in his discretion, to petition the Chief Justice of the United States to appoint 3 judges within the Federal judiciary to determine whether a Federal judge (other than the Chief Justice of the United States or an Associate Justice of the Supreme Court of the United States) has engaged in conduct constituting a felony under the laws of the United States, and should be removed from office for lack of good behavior. The Chief Justice shall make the requested appointments within 30 days after receipt of the petition.

SEC. 3. CIVIL ACTION.

After appointment of the 3-judge court under section 2, the Attorney General, within thirty days after receiving notification of such appointments from the Chief Justice, may file a civil action to remove the accused judge before the 3-judge court in conformity with the Federal Rules of Civil Procedure, consistent with this Act.

SEC. 4. REMOVAL.

A Federal judge is removable under this Act only by the unanimous vote of the 3-judge court that he has engaged in conduct constituting felony under the laws of the United States and should be removed from office for lack of good behavior. The decision of the 3-judge court shall be final and unreviewable in any other judicial forum.

SEC. 5. PROCEEDINGS ABATE.

Any civil removal action filed under section 3 shall be permanently ended if, at any time during its pendency, the House of Representatives votes an article of impeachment against the accused judge.

SEC. 6. NOT APPLICABLE TO JUSTICES OF THE UNITED STATES SUPREME COURT.

The civil removal powers of this Act are not applicable to Justices of the United States Supreme Court.

S. 1851, 101st Cong., 1st Sess., 135 CONG. REC. S15,268 (1989).

59. *Id.* at S15,268, § 1.

60. The bill was referred on December 11, 1989. *Id.*

61. *Id.*

62. *Id.* at S15,268, §§ 2-6.

have to assess whether a federal judge had committed a felony after a jury had concluded that he had not. The three-judge panel would have to decide what weight or deference it should give to the jury's findings, and whether it should use the same standard of proof, which is beyond a reasonable doubt. Also, the three-judge panel would have to exclude evidence not properly before it.

The bill also provides that the decision of the three-judge panel "shall be final and unreviewable in any other judicial forum."[63] While this rule eliminates the potential for endless litigation and review,[64] the complete insulation of the new tribunal's decision is contrary to common judicial principles and may be a violation of due process. The three-judge panel's decision may be based on an error of fact, law, or other improper prejudice. The significance of the panel's decision to continuing judicial independence mandates some form of review, even if it is assumed that the rest of the bill is constitutional.

V. CONCLUSION

The impeachment process has remained virtually unchanged for more than two hundred years. While the impeachment device is rarely used, the considerable amount of time it requires of Congress has created calls for change. Attempts by Congress to streamline the process undermine the extraordinary nature of the impeachment remedy, and may violate principles of separation of powers and the independence of the judiciary. Thus, while a streamlined process is very appealing to those who may have to participate in it, and delegation appears to be a preferable alternative, these measures do not appear to comply with fundamental notions of due process.

63. *Id.* at S15,268, § 4.

64. *Id.*