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"The Awful Discretion": The Impeachment Experience in the States

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Commentary

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I. INTRODUCTION

> It is not surprising that in these uncertain times the processes of government should break down or that numerous public officials should yield to corruption and faithlessness in office. The remarkable thing is that in times like these we have had so few instances of individual apostasy among our public men.[1]

These words, written over forty years before the recent phenomenon known as "Watergate," illustrate an enduring problem of American government. If this is a nation where no one is above the law, there must be some procedure available to bring about the removal of a public official who is incompetent or corrupt. This need must be balanced against the necessary independence of the officeholder and his freedom from partisan, unjust accusations.

The procedure adopted by the framers of the Federal Constitution, and ultimately by forty-nine states, was impeachment,[2] a two-stage process. First, a member of the lower house of the legislature who thinks an officer has committed acts warranting his impeachment proposes this to the house, which then reviews the evidence. If a sufficient number of the representatives concur, articles of impeachment are drawn up setting out the charges. The vote required to impeach varies from state to state,[3] but if the

1. Limbaugh, *Impeachment*, 2 Mo. B.J. 5, 6 (1931) [hereinafter cited as Limbaugh, *Impeachment*].
2. Oregon is the only state which has no constitutional provision for impeachment. The constitution does provide as follows:
   > Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law.

   ORE. CONST. art. 7, § 6.
3. The constitutions of Alaska, Delaware, Florida, Indiana, Mississippi, Rhode Island, South Carolina, Utah, and Vermont require a two-thirds vote of the legislators to impeach. *See* ALAS. CONST. art. II, § 20; DEL.

necessary number of representatives concur on any article, the officer has at that point been impeached. The second stage consists of a trial, generally conducted before the upper house of the legislature,[4] whose members act as judges and are under oath.[5] The proceedings are conducted substantially like a judicial trial.[6]

Following presentation of the evidence and the closing argu-

CONST. art. V, § 1; FLA. CONST. art. III, § 17; IND. CONST. art. VI, § 7; MISS. CONST. art. IV, § 49; R.I. CONST. art. XI, § 1; S.C. CONST. art. XV, § 1; UTAH CONST. art. VI, § 17; VT. CONST. ch. II, § 53.

The following state constitutional provisions require a majority vote of the legislators to impeach: ARIZ. CONST. art. VIII, pt. 2, § 1; COLO. CONST. art. XIII, § 1; ILL. CONST. art. IV, § 14; MD. CONST. art. III, § 26; MICH. CONST. art. XI, § 7; MINN. CONST. art. IV, § 14; MONT. CONST. art. V, § 16; NEB. CONST. art. III, § 17; NEV. CONST. art. VII, § 1; N.J. CONST. art. VII, § 3, cl. 2; N.M. CONST. art. IV, § 35; N.Y. CONST. art. VI, § 24; N.D. CONST. art. XIV, § 194; OHIO CONST. art. II, § 23; S.D. CONST. art. XVI, § 1; WASH. CONST. art. V, § 1; WIS. CONST. art. VII, § 1; WYO. CONST. art. III, § 17.

The following state constitutional provisions contain no requirement as to the vote needed to impeach: ALA. CONST. art. VII, § 173; ARK. CONST. art. XV, § 2; CAL. CONST. art. IV, § 17; CONN. CONST. art. IX, §§ 1-2; GA. CONST. § 2-1803; HAWAII CONST. art. III, § 20; IDAHO CONST. art. V, § 4; IOWA CONST. art. III, § 19; KAN. CONST. art. II, § 27; KY. CONST. §§ 66, 67; LA. CONST. art. IX, § 2; ME. CONST. art. IV, pt. 1, § 8; MASS. CONST. art. VIII, pt. 2, ch. 1, § 2; MO. CONST. art. VII, §§ 1-3; N.H. CONST. art. XVII, pt. 2; N.C. CONST. art. IV, §4; OKLA. CONST. art. VIII, §§ 1-5; PA. CONST. art. VI, §§ 4-5; TENN. CONST. art. V, §§1-4; TEX. CONST. art. XV, §§ 1-5; VA. CONST. art. IV, § 17; W. VA. CONST. art. IV, §9.

4. In four states the court of impeachment is a body other than the upper house of the legislature. ALAS. CONST. art. II, § 20 provides that impeachment trials shall be conducted by the house of representatives. MO. CONST. art. 7, § 2 provides that the state supreme court shall try impeachments; when the governor or a supreme court justice is on trial, the senate selects a body of seven eminent jurists to conduct the trial. NEB. CONST. art. 3, § 17 provides that the court of impeachment shall consist of the state supreme court; when a supreme court justice is on trial, the impeachment court will consist of all of the district judges of the state. N.Y. CONST. art. 6, § 24 provides that the court of impeachment shall consist of the senate and the judges of the court of appeals.
5. The form of oath administered to the senators in the impeachment trial of Governor David Butler is set out in IMPEACHMENT TRIAL OF DAVID BUTLER, GOVERNOR OF NEBRASKA (Tribune Steam Book and Job Printing House 1871) [hereinafter cited as IMPEACHMENT TRIAL OF DAVID BUTLER].
6. "Although the location, the judges and the atmosphere in an impeachment trial are somewhat different than in a criminal proceeding, it has been argued that all of the procedural matters necessary for a fair trial are applicable." Story, *Joseph Story on the Impeachment of Public Officials*, 19 ILL. L. REV. 45 (1924) [hereinafter cited as Story, *Public Officials*].

ments, the senate votes upon each of the articles of impeachment.[7] If any one receives the necessary vote, the official is declared convicted. The senate then declares its judgment. This is limited by most constitutions to removing the official from office and disqualifying him from holding any office of trust in the state again.[8]

State constitutional provisions relating to impeachment are important, but have not been the source of a great amount of litigation. However, some specific questions have arisen in nearly every proceeding and understanding them provides a clearer comprehension of the impeachment process. This article will focus upon six such questions: Is resignation or the end of a term a bar to impeachment? What are impeachable offenses? Do the limitations on the subject matter of legislation and the time of the sessions apply to impeachments? Does the pardoning power apply to impeachments? Can an official be impeached for acts committed during a previous term of office? Is an impeached officer suspended from office?

II. HISTORICAL BACKGROUND

To better understand the American impeachment process it must be looked at in its historical perspective. It was an adaptation of a procedure which was used in Great Britain in the late 14th century. The House of Commons had the power of impeachment; the House of Lords had the duty to try the case and render judgment.[9]

Impeachment in Great Britain was similar to indictment by grand jury or by information[10] and the trials were criminal pro-

7. The following constitutional provisions specify that a two-thirds vote of the members present is required to convict an official: CONN. CONST. art. IX, § 2; FLA. CONST. art. III, § 17; GA. CONST. § 2-1704; IOWA CONST. art. III, § 19; KY. CONST. § 67; ME. CONST. art. IV, pt. 2, § 6; MINN. CONST. art. IV, § 14; MISS. CONST. art. IV, § 52; N.Y. CONST. art. VI, § 24; N.C. CONST. art. IV, § 4; OKLA. CONST. art. VIII, § 4; TEX. CONST. art. XV, § 3; VT. CONST. ch. II, § 54; WIS. CONST. art. VII, § 1.

   In Missouri, a five-sevenths vote of either the supreme court or the special commission is required to convict. *See* MO. CONST. art. VII, § 2.

8. The judgment of the court of impeachment is limited to removal from office in the following state constitutional provisions: ALAS. CONST. art. II, § 20; IND. CONST. art. 6, § 7; MICH. CONST. art. XI, § 7; MO. CONST. art. VII, § 3; OKLA. CONST. art. VIII, § 5; R.I. CONST. art. XI, § 3; S.C. CONST. art. XV, § 3. ALA. CONST. art. 7, § 176 limits the judgment to removal and disqualification for the term for which the officer was elected or appointed.

9. Limbaugh, *Impeachment, supra* note 1, at 6.

10. The nature of the proceeding in Great Britain has been examined and the conclusion reached that:

ceedings, since the House of Lords had the power to remove the official from office, and to impose stiff fines, prison sentences, or even death.[11]

The framers of the American Constitution had the English experience in mind when they drafted the sections dealing with impeachment. The terms "impeachment" and "treason, bribery, or other high crimes and misdemeanors" were borrowed from the English law.[12] The English division of functions in the impeachment process was incorporated into the American scheme; the House of Representatives and the Senate fulfill the same roles as the Houses of Commons and Lords, respectively.[13]

The American framers made several revisions in the process. First, and foremost, they separated impeachment from any subsequent criminal prosecution. Noting the heated, partisan nature of most of the British proceedings, they believed it best to limit the judgment of the Senate to removal from office and disqualification, and to leave any further punishment, such as fines or imprisonment, to the regular criminal justice system.[14] Second, a change was

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> [t]he effect of an impeachment, like that of an indictment, is simply that there is apparent reason to believe that there has been a criminal violation of the laws by the individual impeached. He may in proper cases be arrested and held in custody or required to give security. The law still presumes his innocence, and can do no more than to take such steps as may be necessary to render his attendance at the trial certain. The trial must be conducted in accordance with the rules of evidence observed in the ordinary courts; the person impeached can only be convicted of a crime known to the law; the punishment follows that attached to the same crime by the ordinary courts. Forfeiture of rights can occur only after conviction. Impeachments, like indictments, are methods of procedure in criminal cases, and nothing more.

Dwight, *Trial By Impeachment*, 6 AM. L. REG. (n.s.) 257, 261 (1867) [hereinafter cited as Dwight, *Trial By Impeachment*].

11. Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 12 (1926) [hereinafter cited as Potts, *Impeachment as a Remedy*].
12. "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." U.S. CONST. art. II, § 4.
13. Although there was no provision for impeachment in the Articles of Confederation, by the time of the Constitutional Convention, several states had provided for the impeachment of certain officers. The impeachment took place in the lower legislative house, with the trials to be conducted in the upper house. *See* 1 D. WATSON, THE CONSTITUTION OF THE UNITED STATES—ITS HISTORY, APPLICATION AND CONSTRUCTION 207 (1910).
14. "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 con-

made in the vote required to convict. Whereas a majority vote of the Lords was required in Great Britain, most American state constitutions require a two-thirds vote.[15] If a simple majority were sufficient to convict, the official would be placed too much at the mercy of the opposition party. At common law, unanimity in a jury verdict is required. Therefore, a two-thirds vote seems a reasonable intermediate position between unanimity and a mere majority.[16]

In summary, the American framers adopted some of the structural and procedural aspects of the British impeachment process but also made significant changes in seeking to avoid abuses and shortcomings they saw in the process, the most significant of which was to separate impeachment from any regular criminal proceedings. Despite the arguments of various defendants, impeachment in the United States is not a criminal proceeding, but a procedure for removing an unfit person from office.[17]

III. THE FEDERAL IMPEACHMENT EXPERIENCE

The House of Representatives has adopted articles of impeachment against twelve federal officers.[18] The trials of eleven were

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victed shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law." U.S. CONST. art. I, § 3, cl. 7.

15. "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." U.S. CONST. art. I, § 3, cl. 6. *See also* note 7 *supra.*
16. It has been argued that if the evidence of wrongdoing is not sufficient to convince two-thirds of the court of impeachment, it is too infirm to justify a conviction. Story, *Public Officials, supra* note 6, at 50.
17. The subjects of numerous impeachment proceedings, the most recent example being former President Richard Nixon, have sought to blur the distinctions between impeachment in Great Britain and the United States, most often in terms of the "criminal" nature of the proceeding and the issue of what constitutes impeachable offenses. Theodore Dwight and others have been used as sources for a "conservative" or "strict constructionist" view of the impeachment process as a strictly criminal proceeding, requiring the showing of indictable offenses. This point of view has not won wide acceptance. *See* note 50 and accompanying text *infra.*
18. A thirteenth official, Judge Mark Delahay, was reportedly impeached by the House in 1873. The House voted to impeach him for improper personal habits without adopting any specific articles of impeachment. The articles were to have been drawn and presented during the next session of Congress, but no further proceedings ever took place.

conducted by the Senate. The first American ever impeached was William Blount, a Tennessee Senator. Following his impeachment by the House in 1797, the Senate voted to expel him, but concluded that it lacked jurisdiction to convict him. From this evolved the general principle that judges and certain executive officers, but not legislators, are subject to impeachment. Nine federal judges have been impeached, four were convicted,[19] four acquitted,[20] and one allowed to resign to escape trial.[21] Two executive officers have been impeached, President Johnson in 1868 and Secretary of War Belknap in 1876, but both were acquitted.

On the state level, seven governors have been impeached and removed from office.[22] Charles Robinson of Kansas was brought to trial in 1862, but was acquitted. Governor Ames of Mississippi was impeached in 1876, but was allowed to resign to escape trial. Following the Civil War, impeachment seemed to be developing into a tool for subordinating the executive to a dominant legislative faction. Governors Harrison Reed of Florida, Powell Clayton of Arkansas, and Henry Warmoth of Louisiana were impeached during the reconstruction period, but were not removed from office since their trials were not carried out.[23]

In 1929 the Louisiana house adopted articles of impeachment against Governor Huey P. Long. Two days after the trial began in the senate, the charges were suddenly dropped after fifteen senators signed a document stating that they would vote for acquittal regardless of the evidence.[24]

Oklahoma is the one state where impeachment has gained the most practice and acceptance. In its first twenty-three years of statehood, thirteen impeachment messages were sent from the house to the senate. Governor Williams, who held office from 1914 to 1918, was the only one of six elected governors in a row against

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Therefore, it is questionable whether Delahay was actually impeached. *See* 65 NW. L. REV. 719 n.2 (1970).

19. John Pickering (1803); West H. Humphreys (1862); Robert W. Archbald (1912); Halsted L. Ritter (1936). *See* I. BRANT, IMPEACHMENT—TRIALS AND ERRORS 201-02 (1972).
20. Samuel Chase (1804); James H. Peck (1826); Charles Swayne (1903); Harold Louderback (1932). *Id.*
21. George W. English (1926). *Id.* at 201.
22. William Holden, North Carolina (1871); David Butler, Nebraska (1871); Alexander H. Davis, Mississippi (1876); William Sulzer, New York (1913); James E. Ferguson, Texas (1917); John C. Walton, Oklahoma (1923); Henry S. Johnston, Oklahoma (1929). J. KALLENBACH, THE AMERICAN CHIEF EXECUTIVE 205-08 (1966).
23. *Id.* at 206-08.
24. *Id.* at 206.

whom investigations were not ordered, and he may have been spared by the unusual house of representatives rule which declared any members guilty of perjury who swore to charges that were not substantiated in an investigation.[25]

The Oklahoma experience is clearly the exception and not the rule. Indeed, the relatively infrequent use of the impeachment procedure over the past two hundred years has led to uncertainty about it.

IV. THE FERGUSON IMPEACHMENT

The political career of James E. Ferguson of Texas is an excellent case study of the impeachment process in the states since many of the questions and controversies concerning impeachment were dealt with by the courts at some time during his career.[26]

He was first elected governor in 1914 and was re-elected in 1916. His major political troubles lay in his policies toward the state university. Viewing his own sixth-grade education as having been sufficient, Ferguson believed it more advantageous to spend large amounts of money on a general education to help many citizens than to spend it on a higher education, which would benefit only a minority.[27]

Even more disturbing from the university's viewpoint was Ferguson's idea of its "political" position. He disagreed with the philosophies of several instructors and attempted to have them dismissed; he removed one member of the board of regents, and forced two others to resign; and he vetoed the university appropriations bill.

On July 23, 1917, the house speaker issued a call to assemble the representatives on August 1 to consider the governor's impeach-

25. For an interesting examination of the unusual impeachment experience in Oklahoma, see Ewing, *Impeachment of Oklahoma Governors*, 24 AM. POL. SCI. REV. 648-52 (1930) [hereinafter cited as Ewing, *Impeachment of Oklahoma Governors*].

26. Ferguson gave substance to the popular American illusion of the equality of opportunity, and proved, beyond reasonable doubt, that a man might make his mark in the world without the pampering and enervating influences of wealth and social position, if only he had the will to succeed.
Ewing, *The Impeachment of James E. Ferguson*, 48 POL. SCI. Q. 184 (1933) [hereinafter cited as Ewing, *Impeachment of Ferguson*]. The governor began his life as a laborer, and later had a career in banking and ranching. When he was elected governor, it appeared that at last the common man had a champion.

27. *Id.* at 185.

ment. Ferguson labeled this proposed assembly unconstitutional, since neither the speaker nor a member of either house had the legal power to convene the legislature, which could only be called into special session by the governor. He claimed that any actions taken would be invalid. When it seemed apparent that his opponents would assemble in numbers sufficient to constitute a quorum, he issued a call for a special session of the legislature to meet on the same day as the one called by the house speaker[28] in order to consider the university appropriations bill which he had vetoed a month earlier. The legislature convened pursuant to both calls and immediately instituted impeachment proceedings.[29]

By issuing his own call for a special session, the governor avoided the constitutional issue as to whether the legislature could assemble upon its own call to consider the impeachment of a public official. The assistant attorney general for Texas issued an opinion during the Ferguson proceedings which dealt with this issue and implied that the judicial powers of the house in regard to impeachment were not controlled by limitations regarding legislative sessions.[30]

The opposing view was presented by the Oklahoma Supreme Court in *Simpson v. Hill*,[31] the only case which directly involved an attempt by a state legislature to convene itself to consider the impeachment of an officer. That court held that just as a group of individuals cannot "convene" themselves as a grand jury, so too the house had no inherent authority to convene itself to consider impeachment.[32] This decision was based not only on an interpreta-

28. Ogg, *Impeachment of Governor Ferguson*, 12 AM. POL. SCI. REV. 112 (1918).

29. Ewing, *Impeachment of Ferguson, supra* note 26, at 198.

30. If therefore, the power is judicial, and the Houses act as independent units of the Legislature, it would be difficult to imagine any reason why this independent judicial power should be in any wise controlled by an agency of the legislative power, or any agency of the executive power, and yet this would be the inevitable result if it were true that the House may act for impeachment purposes only upon submission by the Governor.

[1916-1918] TEX. ATT'Y GEN. BIENNIAL REP. 433.

31. 128 Okla. 269, 263 P. 635 (1927). A petition had been signed by a majority of the members of the Oklahoma house calling for such a special session. John A. Simpson, a resident taxpayer, sought an injunction prohibiting the house from convening itself and incurring any expenses.

32. The House of Representatives, as one of the co-ordinate branches of the legislative department of the state government, when the Legislature is convened and organized as provided by law, can exercise inquisitorial powers, and at no other time, and the charges, if any are preferred, must be preferred by such House of Representatives.

Id. at 272, 263 P. at 639.

tion of the constitutionally granted powers of the legislative and executive branches, but also upon the precedent of previous impeachment proceedings.[33]

Although not directly involving the question of a legislature convening itself for the purposes of impeachment, *Walker v. Baker*[34] has been cited as authority for denying the assembly that power. In that case, the Texas Senate convened itself in 1946 into special session to consider recess appointments made by the governor. Walker had a contract with the state to print the senate journal and he printed it for this special session. The state refused to pay for the printing costs, claiming that the senate had no power to convene itself. Walker brought suit to compel the state to pay. The Texas Supreme Court held that since the senate had no authority to convene itself, the session was invalid, and the state could not be compelled to pay Walker for the journals printed. Walker had cited the distinction made in *Ferguson v. Maddox*[35] between legislative and judicial functions,[36] arguing that neither impeachment nor the confirmation of appointees was a legislative function, but a judicial one, and the house could convene itself to consider these matters. The court dismissed this argument as not determinative of the issue involved.[37] The general consensus now is that without statutory or constitutional provision,[38] the house has no

33. During the lengthy oral argument, in the instant case, several times able counsel were asked if, during the history of the government of the American states, any Legislature was ever convened in extraordinary session for inquisitorial purposes or otherwise except upon order of the chief executive. No case was cited by counsel where inquisitorial authority was exercised by the Legislature in extraordinary session, except when it had been convened by the proclamation of the Governor.
Id. at 274, 263 P. at 640.

34. 145 Tex. 121, 196 S.W.2d 324 (1946).

35. 114 Tex. 85, 263 S.W. 888 (1924).

36. For a discussion of this distinction, see note 55 *infra*.

37. Chief Justice Alexander in his dissent expressed the belief that constitutional restrictions on the subject matter and calling of special sessions did not apply to non-legislative matters. This remains a minority viewpoint. "The fact that the Constitution provides that the legislature may meet for legislative purposes only at certain intervals is by no means a limitation upon the authority of the Senate to meet at other times for the purpose of performing a non-legislative function." 145 Tex. at 139, 196 S.W.2d at 334.

38. If at any time when the Legislature is not in session, a majority of all the members elected to the house of representatives shall certify in writing to the secretary of state their desire to meet to consider the impeachment of the governor, lieutenant-governor, or other officer administering the office of governor, it shall be the duty of the secretary of state immediately to notify the speaker of the house, who shall within ten days after the receipt of such notice, summon the members

power to convene itself to consider impeachment.[39]

In the case of Governor Ferguson, after he was impeached at a special session called by him for another purpose, the senate convicted him on ten of twenty-one charges. He attempted to avoid this judgment by resigning on September 24, 1917. The senate nevertheless rendered its judgment on the next day, declaring that he was removed from the governorship and disqualified from ever again holding an office of public trust in Texas.

Ferguson did not cease his political activity. Seven years after his impeachment and removal from office, he announced his candidacy for the Texas governorship. Members of the state Democratic Executive Committee filed suit to enjoin placing his name on the primary ballot. On his part, Ferguson claimed that four aspects of his impeachment and conviction had been unlawful, thus making the entire proceeding void: 1) the senate's judgment of disqualification had occurred after he had resigned from office; 2) the constitution did not specify what were impeachable offenses; 3) the proceeding took place at a special legislative session called by him for another purpose; and 4) the time of the session ran out before the completion of the trial, and conviction came at a subsequent special session. The court rejected each of the claims.[40] In the following sections the court's decision will be reviewed, and the cases of other jurisdictions will be examined in relation to the claims made by Ferguson.

A. Is Resignation or the End of a Term a Bar to Impeachment?[41]

Although the court rejected this issue, in any consideration of it a distinction must be drawn between those jurisdictions where con-

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of the house, by publication in some newspaper published at the Capitol, to assemble at the Capitol on a day to be fixed by the speaker.

ALA. CONST. art. 7, § 173.

39. For a discussion of this question see Van Hecke, *Impeachment of Governor at Special Session*, 3 WIS. L. REV. 155 (1925).

40. 114 Tex. 85, 263 S.W. 888 (1924).

41. On no admissible theory could this resignation impair the jurisdiction or power of the court to render judgment. The subject matter was within its jurisdiction. It had jurisdiction of the person of the Governor; it had heard the evidence and declared him guilty. Its power to conclude the proceedings and enter judgment was not dependent upon the will or act of the Governor. . . . If the Senate only had the power to remove from office, it might be said, with some show of reason, that it should not have proceeded further when the Governor, by anticipation performed, as it were, its impending judgment. But under the Constitution the Senate may not only remove the offending official; it may disqualify him from

viction can result in removal and disqualification and those in which conviction brings only removal from office.[42] Generally, where the judgment goes no further than removal from office, resignation or the end of a term ends the proceeding, since the offender can no longer be removed from office.[43] This position is consistent with the theory that the most important objective of impeachment is removal of the official from his position of public trust. In most constitutions, however, the judgment of the senate carries with it an additional penalty, disqualification from ever again holding office in that particular state. In this situation, resignation or the end of a term would not terminate an impeachment proceeding, since disqualification is an additional goal of the process.[44]

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holding further office, and with relation to this latter matter his resignation is wholly immaterial. For their protection the people should have the right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time. The purpose of the constitutional provision may not be thwarted by an eleventh-hour resignation.

Id. at 99, 263 S.W. 893.

42. From the tenor of current discussions it would appear that many members of Congress, to say nothing of the general public, assume that the liability of an official to impeachment somehow terminates the instant he leaves office, whether through expiration of his term or through resignation. Such an assumption has no substantial historical foundation and is not supported by a single authoritative and unequivocable decision of recent times.

Bestor, Book Review, 49 WASH. L. REV. 255, 277 (1973).

43. If then there must be a judgment of removal from office, it would seem to follow that the Constitution contemplated that the party was still in office at the time of the impeachment. If he was not, his offense was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued, with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offense, when the most important object for which the remedy was given was no longer necessary or attainable.

1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 586 (1891) [hereinafter cited as STORY, COMMENTARIES].

44. Nebraska has had no cases involving a resignation or the end of a term of office during an impeachment proceeding, but there have been three instances of impeachment proceedings begun after the expiration of the official's term. In April, 1893, articles of impeachment were adopted by the house against John E. Hill, former state treasurer, and Thomas H. Benton, former auditor of public accounts, whose terms of office had already expired. The cases were consolidated, since they presented the same question. In dismissing the proceedings, the court held that "[e]x-officials are not civil officers within the meaning of the Constitution. Jurisdiction to impeach attaches at the time the offense is committed and continues during the time the offender remains in office, but not longer." State v. Hill, 37 Neb. 80, 86, 55 N.W. 794,

In summary, an impeachment proceeding, once begun, cannot be thwarted by a resignation or the end of a term of office, if the house or senate wishes to continue, and if the judgment of the court includes both removal from office and disqualification. Once an official's term has ended, however, and he returns to private life, few would grant the house the power to initiate impeachment proceedings.[45]

B. What are Impeachable Offenses?

Ferguson alleged that the judgment of the senate was invalid because at the time it was rendered, neither the Texas Constitution nor any Texas statute defined the specific acts for which an individual could be impeached.

The question of what constitutes an impeachable offense has been central to nearly every impeachment proceeding in the United States. There are two basic points of view on this.[46] At one extreme is the contention that impeachment is limited to indictable criminal offenses. This point of view has been expressed primarily by those who are the subjects of an impeachment proceeding. James D. St. Clair and other attorneys for President Nixon argued for this "strict" interpretation of the grounds for impeachment.

> The acquittal of President Johnson over a century ago strongly indicates that the Senate has refused to adopt a broad view of 'other high crimes and misdemeanors' as a basis for impeaching a President. The most salient lesson to be learned from the Johnson trial is that impeachment of a President should be resorted to only for cases of the gravest kind—the commission of a crime named in the Constitution or a criminal offense against the laws of the United States. If there is any doubt as to the gravity of an offense or as to a President's conduct or motives, the doubt should be resolved in his favor. This is the necessary price for having an independent Executive.[47]

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796 (1893). In the same year, the Nebraska Supreme Court dismissed impeachment proceedings against William Leese, a former attorney general. State v. Leese, 37 Neb. 92, 55 N.W. 798 (1893). When the articles were adopted, he had been out of office for more than two years, since his term had expired. The court held that Leese was not subject to impeachment for misdemeanors which he may have committed while in office over two years earlier.

45. Rankin, *Is There a Time Limit for Impeachments?*, 28 AM. POL. SCI. REV. 868 (1934) [hereinafter cited as Rankin, *Is There a Time Limit for Impeachment?*].
46. Morgan, Eastman, Gale & Areen, *Impeachment: An Historical Overview*, 5 SETON HALL L. REV. 689, 712 (1974) [hereinafter cited as Morgan, *Impeachment: An Historical Overview*].
47. St. Clair, *An Analysis of the Constitutional Standard for Presidential Impeachment*, 10 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 283 (1974).

At the other extreme is the comment made by Gerald Ford, when he was proposing the impeachment of Supreme Court Justice Douglas.

> I have studied the principal impeachment actions that have been initiated over the years and frankly, there are too few cases to make very good law. About the only thing the authorities can agree upon in recent history, though it was hotly argued up to President Johnson's impeachment and the trial of Judge Swayne, is that an offense need not be indictable to be impeachable. In other words, something less than a criminal act or criminal dereliction of duty may nevertheless be sufficient grounds for impeachment and removal from public office.
>
> What, then, is an impeachable offense?
>
> The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history: conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.[48]

Most impeachment proceedings inevitably narrow to this question of what constitutes an impeachable offense. Since the Texas Constitution contained no specific grounds for removal, nor any definition of impeachable offenses, Ferguson in his case argued that an impeachment under such a situation was *ex post facto*, since an officer could not know in advance that his acts would come within the scope of impeachable offenses, and since the senate was the sole judge of its own jurisdiction. The court in rejecting this argument did not see itself as unleashing a legislative monster which would forever place the judicial and executive branches at its feet. Rather, they interpreted the constitutional provisions and the historical precedents as evidence that impeachment does not require an indictable offense.[49]

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48. 116 CONG. REC. 11913 (1970) (remarks of Rep. Gerald Ford). Ford reaffirmed his belief in this "broad" definition of impeachable offenses at the time of his confirmation hearings upon nomination to the Vice Presidency, but as the impeachment of President Nixon became more of a possibility, Ford's views changed markedly. *See Hearings on the Nomination of Gerald R. Ford to the Office of Vice President Before the House Committee on the Judiciary*, 93d CONG., 1st Sess., at 140-41 (1973). *But see* N.Y. Times, July 28, 1974, at 37, col. 3-4. Then Vice President Ford's previously expressed belief in whatever the majority considered to be an impeachable offense was abandoned following a 27-11 vote of the House Judiciary Committee, recommending the impeachment of President Nixon. The majority vote included six Republican congressmen. Charging that the impeachment inquiry had become a partisan issue, Ford argued that the facts as he knew them did not reveal any impeachable offenses.

49. [W]hile impeachable offenses are not defined in the Constitu-

Those who adopt the view that impeachment requires an indictable offense[50] arguably have failed to distinguish properly the impeachment experience in the United States, where the judgment of the impeachment court is limited to removal from office and disqualification, from that in Great Britain,[51] where impeachment was another mode of criminal procedure.

The Nebraska Supreme Court accepted the "broad" view of the

> tion, they are very clearly designated or pointed out by the term 'impeachment,' which at once connotes the offenses to be considered and the procedure for the trial thereof. . . . It was designed, primarily, to reach those in high places guilty of official delinquencies or maladministration. It was settled that the wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law. Generally speaking, they were designated as high crimes and misdemeanors which, in effect, meant nothing more than grave official wrongs.

114 Tex. at 96, 263 S.W. at 892.

50. Professor Theodore W. Dwight of Columbia Law School and Justice Benjamin R. Curtis, who served for six years on the United States Supreme Court under Chief Justice Taney, are the two most prominent sources for this position and are often referred to by defendants in impeachment proceedings. In comparing impeachment in Great Britain and the United States, Dwight concluded:

> [M]any seem to think that a public officer can be impeached for a mere act of indecorum. On the contrary, he must have committed a true crime, not against the law of England but against the law of the United States. An impeachment is nothing but a mode of trial, the Constitution only adopts it as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law.

Dwight, *Trial by Impeachment, supra* note 10, at 268.

Justice Curtis, after retiring from the Supreme Court, served as an attorney for President Johnson during his impeachment trial. Curtis felt that since the phrase "other high crimes and misdemeanors" was included with treason and bribery as grounds for impeachment, it must signify an indictable crime as serious as treason or bribery. "There can be no crime, there can be no misdemeanor, without a law. . . . . There must be some law; otherwise there is no crime." Ethridge, *The Law of Impeachment*, 8 MISS. L.J. 301 (1936).

One weakness in Curtis' argument is that the same words can be used to portray a vastly different point of view. The same constitutional provisions have been interpreted in another light:

> [I]t appears that the phrase 'high crimes and misdemeanors' means only that such offenses are high in the sense that they are perpetrated against the highest interests of the State and by persons occupying high places in its service; for any person can commit a heinous crime, but only a person holding a high place can commit a high crime. Therefore the act may be a high crime though not even criminal nor unusual.

Jackson, *The Swayne Impeachment Proceedings*, 10 VA. L. REG. 1077 (1905).

51. *See* Lawrence, *The Law of Impeachment*, 6 AM. L. REG. (n.s.) 641 (1867) [hereinafter cited as Lawrence, *The Law of Impeachment*].

grounds for impeachment in *State v. Hastings.*[52] Justifying this position is the fact that many of the impeachment trials in the states have been based in whole or in part on offenses which are not punishable by law.[53]

The conclusion to be reached by examining federal and state cases is that impeachable offenses need not be indictable offenses. If this were not so, it would be impossible to foresee and define in advance by statute all of the possible subjects of impeachment. This does not mean that the senate has unlimited and arbitrary freedom to destroy the careers of honest public servants. It may do nothing until the house acts. Then its members are under oath to perform their duties with fairness, and conviction requires a two-

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52. 37 Neb. 96, 55 N.W. 774 (1893).

> It is sufficient for our purpose at present to say that we are constrained to reject the views of Professor Dwight, Judge Curtis, and other advocates of the doctrine that an impeachable misdemeanor is necessarily an indictable offense, as too narrow and tending to defeat rather than promote the end for which impeachment as a remedy was designed and not in harmony with the fundamental rules of constitutional construction.

Id. at 114, 55 N.W. at 780.

53. Nearly half of the charges brought against Governor Ferguson involved something less than a criminal violation. Governor Walton of Oklahoma was convicted and removed from office in 1923 for such "political" offenses as abuse of the pardoning power, abuse of the power to declare martial law, and the improper use of the militia to prevent the assembling of the legislature. Potts, *Impeachment as a Remedy, supra* note 11, at 25.

In 1929, the Oklahoma House had adopted eleven articles of impeachment against Governor Johnston. Ten contain specific charges; one was an article of "general incompetency." The general article was presented first and received the necessary two-thirds vote; none of the ten remaining specific articles were adopted. He was thus impeached because of "general incompetency," yet no specific act received the necessary two-thirds vote. Ewing, *Impeachment of Oklahoma Governors, supra* note 25, at 651.

The impeachment of former Federal Judge Halsted Ritter followed a similar pattern. He was acquitted by the Senate of charges involving income tax evasion, but was convicted under an article charging that his conduct had brought the court into scandal and disrepute to the prejudice of public confidence in the judiciary. Ritter was convicted and removed from office despite the fact that no specific allegation received a two-thirds vote of the Senate. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 56-57 (1973) [hereinafter cited as BERGER].

Of the twelve federal officers impeached by the House of Representatives, only one was impeached solely on grounds which constitute a criminal offense. Morgan, *Impeachment: An Historical Overview, supra* note 46, at 718. *See also* Potts, *Impeachment as a Remedy, supra* note 11, at 32-33.

thirds vote. The defendant is granted all of the procedural guarantees necessary for a fair trial. Therefore, although strictly speaking, an impeachable offense is whatever a majority of the house and two-thirds of the senate think it is, it is much more.[54]

C. Do the Limitations on the Legislation and Time of Sessions Apply to Impeachments?

James Ferguson alleged that his impeachment was invalid since it occurred at a special session called by him to consider the University of Texas appropriations bill and that at a special session the house could consider only those matters presented to it by the governor. The court rejected this argument by drawing a distinction between the legislative and judicial functions of the house and senate.[55] The court also held that the house and senate could exercise their impeachment powers at all times when they were convened. No one had argued that these powers could not be exercised during a regular session; therefore, the court ruled that unless the constitution expressly forbade it, the impeachment powers could also be exercised at a special session, whatever the purpose for its call.[56]

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54. [A]n impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.

Lawrence, *The Law of Impeachment, supra* note 51, at 680.

55. Each, in the plainest language, is given separate plenary power and jurisdiction in relation to matters of impeachment: the House, the power to 'impeach,' that is, to prefer charges; the Senate the power to 'try' those charges. These powers are essentially judicial in their nature. Their proper exercise does not, in the remotest degree, involve any legislative function.

114 Tex. at 93-94, 263 S.W. at 890.

56. A Texas Attorney General Opinion issued at the same time reached the conclusions the court did. It argued that the framers understood that the governor would be slow to recommend his own impeachment; therefore, they would not have placed control of the time and circumstances of such a proceeding in his hands. It also focused on the distinction between the legislative and judicial functions of the assembly.

> The fact that this general jurisdiction is proposed to be exercised at a special session and the fact that the subject thereof has not been submitted by the Governor, we think, do not at all detract from the power of the House. This proceeds, inevitably, we think, from the grant of power in all-embracing terms plus the necessarily incidental authority to do what may be essential to the complete exercise of the power expressly granted. That the limitations placed upon the activity of either or both of the two Houses, at a special session, by the Constitution refer to the exercise of the power of legisla-

Ferguson also advanced the position that his impeachment and removal were invalid because the senate proceedings were divided between two special sessions.[57] The Court held that this did not invalidate them.[58]

In most state constitutions, restrictions on the time limits and the subjects of sessions of the legislature refer not to the "house" and "senate" individually, but to the "legislature" and "legislative functions." Arguably these restrictions apply only to the legislature as a whole, when acting in a legislative capacity, and not to the non-legislative matter of impeachment.

Generally, although neither house of the legislature can convene itself to consider the impeachment of an officer, impeachment can be a subject for consideration at any special session as well as any regular session of the legislature and the time limits on legislative sessions do not apply to impeachment proceedings.

D. Does the Pardoning Power Apply to Impeachments?

In *Ferguson v. Maddox*, the Texas court upheld the decision of Democratic party officials to keep Ferguson's name off the primary ballot for the 1924 election. Shortly afterward, his wife became a candidate for governor. Charles M. Dickson, a Texas voter, filed a suit to enjoin the placing of her name on the general election ballot. He alleged that she was ineligible as the wife of the impeached governor, because if elected, she would be a figurehead and her husband would actually be making public policy.

The court rejected these claims,[59] holding that the evidence was insufficient to establish any conspiracy to use Mrs. Ferguson's name as a subterfuge to escape the effect of the impeachment decree. Subsequently, she was elected and one of her first accomplishments was passage of the Amnesty Act of 1925, which provided for a release of all offenses for which any officer was impeached and con-

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tion and have no application to the use of the impeaching authority, we think, is clear from a consideration of the nature of the power and of the machinery provided for its exercise. [1916-1918] TEXAS ATT'Y GEN. BIENNIAL REP. 431.

57. The proceedings began at the special session called by the governor, but the time for this session expired on August 30, 1917. The acting governor issued a call for another special session, which convened on August 31, 1917 and resumed the impeachment inquiry.

58. "The Constitution creates the court; it does not prescribe for it any particular tenure, or limit the time of its existence. By indubitable reason and logic it must have power and authority to sit until the full and complete accomplishment of the purpose for which it was created." 114 Tex. at 96, 263 S.W. at 891.

59. 114 Tex. 176, 265 S.W. 1012 (1924).

victed by the Texas Senate and cancellation of any punishment resulting from impeachment.[60]

Several years later, Ferguson filed a petition for mandamus to compel the state Democratic Executive Committee to certify him as a candidate for governor. The Texas Supreme Court, in *Ferguson v. Wilcox*,[61] denied this request, and in so doing, declared the Amnesty Act of 1925 unconstitutional for two reasons.[62] The power to grant pardons was constitutionally vested with the executive and could not be assumed by another branch of the government, and impeachments were expressly excepted from the pardoning power.[63]

Whereas in Great Britain the sentence upon conviction in an impeachment trial often included fines, imprisonment, or in rare cases, death, the judgment in the United States results in removal from office and disqualification; thus there is little "humane" need for clemency. Furthermore, if the power to pardon were extended to impeachments, they might become ineffective as a protection against political offenses.[64]

V. THE SULZER AND BUTLER IMPEACHMENTS

The impeachment proceedings against Governor Sulzer of New

60. Law of March 31, 1925, ch. 184, §§ 1-2, [1925] TEX. ACTS 454-55. There was little question as to the intent of the lawmakers in approving this act. "As a matter of fact, Ferguson was the only person to whom the release could apply." Ewing, *Impeachment of Ferguson, supra* note 26, at 209.

61. 119 Tex. 280, 28 S.W.2d 526 (1930).

62. > It is unreasonable, if not unbelievable, in our opinion, that the convention, after providing for the disqualification of a convicted officer in impeachment to thereafter hold any office of honor, trust, or profit under the state, and after excepting from the pardon power granted to the chief executive those convicted of impeachment, ever intended that the legislature by mere implication could wholly abrogate and render nugatory the plain provisions of the Constitution providing for such disqualification.

Id. at 296-97, 28 S.W.2d at 534.

63. Five of the original state constitutions specifically granted the general assembly the power to pardon in cases of impeachment. Van Hecke, *Pardons in Impeachment Cases*, 24 MICH. L. REV. 657, 665 (1926) [hereinafter cited as Van Hecke, *Pardons in Impeachment Cases*]. Only Tennessee has such a provision at the present time. "The Legislature now has, and shall continue to have, power to relieve from the penalties imposed, any person disqualified from holding office by the judgment of a Court of Impeachment." TENN. CONST. art. 5, § 4. No state constitution grants such a power to the governor; indeed, most deny the power to pardon in such cases.

64. *See* Van Hecke, *Pardons in Impeachment Cases, supra* note 63, at 659-60.

York and Governor Butler of Nebraska illustrate two other important questions about the process of impeachment: Can an official be impeached for acts committed during a previous term of office? Does the adoption of articles of impeachment by the house mean the automatic suspension of the accused from his position? Each of these questions was answered affirmatively by the New York and Nebraska courts.

A. Can an Official be Impeached for Acts Committed During a Previous Term of Office?[65]

When David Butler of Nebraska was impeached, several of the articles dealt with acts committed during his first term as governor. His attorneys argued that he could not be impeached for such acts because the people, in re-electing him, had acquitted him of his alleged misdeeds. The house, nevertheless, declared that its authority to impeach was not limited to acts committed during the instant term, because the objective to be attained by an impeachment was still valid.[66]

The concept of an officer's liability for misdeeds in a previous term of office was carried even further in the impeachment of Governor Sulzer. Of the eight articles of impeachment adopted, three related to alleged conduct engaged in while he was a candidate for the office, or after his election but before the beginning of his term.[67] His eventual conviction meant that he was removed from office for acts committed before the beginning of his term.

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65. There have been at least three examples of state officials impeached during their second term for offenses committed during their first term of office. In 1853, Judge Hubbell of Wisconsin was impeached for offenses committed during his first term; in 1875, George C. Barnard was re-elected a justice of the highest tribunal in New York and immediately thereafter was impeached partially on the basis of misconduct during a previous term. Rankin, *Is There a Time Limit in Impeachment Cases?*, *supra* note 45, at 659-60.

66. "This same man, David Butler, is still in the office which he has held for five or six years. He is still in the office, from which you can remove him. Is it reasonable to hold that the mere swinging of a pendulum past a certain hour, on a certain day, is to determine this matter?" IMPEACHMENT TRIAL OF DAVID BUTLER, *supra* note 5, at 43. Butler was convicted only upon the article charging him with unlawfully appropriating $16,881.26 of state money for his own use during his first term of office.

    A section of the Enabling Act of 1864 promised to the State of Nebraska five percent of all the proceeds of the sale of federal lands within the state boundaries. A draft was issued by the federal government, payable to David Butler, Governor, in the amount of $16,881.26. The senate concluded that this amount had been unlawfully appropriated by the governor.

67. Thurber & Thomas, *Some Legal Questions Involved in the Impeach-*

The Iowa Supreme Court has also held that election or re-election does not acquit an official of previous misdeeds.[68]

> The very object of removal is to rid the community of a corrupt, incapable, or unworthy official. His acts during his previous term quite as effectually stamp him as much as those of that he may be serving. Re-election does not condone the offense. Misconduct may not have been discovered prior to the election.[69]

The Alabama Constitution may present a possible exception to this general rule by limiting the judgment of the senate to removal and disqualification only for the term for which the officer was elected. In *State ex rel. Attorney General v. Hasty*,[70] the Alabama Supreme Court said:

> If an officer is impeached and removed, there is nothing to prevent his being elected to the identical office from which he was removed for a subsequent term, and, this being true, a re-election to the office would operate as a condonation under the Constitution of the officer's conduct during the previous term, to the extent of cutting off the right to remove him from the subsequent term for said conduct during this previous term.[71]

In states other than Alabama, removal and disqualification are permanent. The objective of impeachment in these situations is to insure that a faithless official is prevented from again holding office. Re-election cannot serve as endorsement or condonation of unlawful acts in a previous term. To hold this would undercut the objective of the impeachment process.[72]

B. Is an Impeached Officer Suspended from Office?

A major controversy arose following the impeachment of Governor Sulzer concerning who was to exercise the powers of the office, with Lieutenant Governor Glynn arguing that they immediately devolved upon him. Sulzer, using the precedent of Andrew Johnson, claimed that he was not relieved of his powers as governor until convicted.[73] New York's Attorney General issued an opinion

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ment of Governor Sulzer, 6 BENCH & B. 1 (1913).

68. State v. Welsh, 109 Iowa 19, 79 N.W. 370 (1899).
69. *Id.* at 21, 79 N.W. at 371.
70. 184 Ala. 121, 63 So. 559 (1941).
71. *Id.* at 125, 63 So. at 561.
72. "The obvious purpose of the provisions for impeachment would fail to a considerable degree if such misconduct or mal-administration in a previous term was not a ground for impeachment." Opinion of the Justices to the House of Representatives, 308 Mass. 619, 627-28, 33 N.E.2d 275, 279 (1941).
73. He ordered all records of the executive branch placed under lock and key. The great seal was secured by a chain, and armed guards were stationed in the corridor adjoining the governor's office. "And so, un-

before the senate trial declaring that Glynn was "acting governor," pending the outcome of the trial. Thereafter, one agency after another gradually transferred its allegiance to Glynn, while Sulzer remained in his office.

Problems resulting from this contest over who was to exercise the powers of office during an impeachment proceeding are illustrated in *People ex rel. Robin v. Hayes, Warden of Penitentiary.*[74] Robin, a prisoner in a New York penitentiary, seeking release through habeas corpus proceedings, had a pardon signed by Sulzer, but it had been signed during the period of the impeachment proceeding against Sulzer. The court had to determine if Sulzer had the authority to grant this pardon. In holding that he did not, the court quoted the section of the New York Constitution which provides that when a governor is impeached or removed from office, his powers and duties devolve upon the lieutenant governor, and explained that this did not infringe on the presumption of innocence. Instead, it was a temporary period of suspension from office, wherein the accused has the chance to clear his name.

Robin appealed, contending that Sulzer had actual physical possession of the office, and that his powers remained with him until a conviction by the senate. In affirming the previous decision, the court held that mere physical possession of the office was not enough.[75]

When the Nebraska House prepared articles of impeachment against Governor Butler, it requested an advisory opinion from the Nebraska Supreme Court as to whether this suspended the governor from office. The court stated that since the question did not result from actual litigation before it, any informal opinion would not have the weight of an authoritative opinion; however, it concluded "that it is the law that all the functions of the Governor are entirely suspended, and devolve upon the secretary of state,

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til the Court of Impeachment met, five weeks later, and decided that the impeachment was legal, there existed the anomalous situation of a divided state, two men claiming to be the governor and exercising such duties of the Chief Executive as came within their reach." J. FRIEDMAN, THE IMPEACHMENT OF GOVERNOR WILLIAM SULZER 185 (1939).

74. 143 N.Y.S. 325 (Sup. Ct. 1913).

75. "William Sulzer was Governor *de jure*, or of right, until he was removed from office; but from the moment of the adoption of the articles of impeachment he became *functus officio*; he had discharged all of the duties permitted by the Constitution; and his powers were at an end, until the Court for Impeachments had passed upon the charges. The attempted pardon was issued subsequent to the impeachment, and could not, therefore, give relator any rights." People *ex rel.* Robin v. Hayes, Warden of Penitentiary, 149 N.Y.S. 250, 254 (Sup. Ct. 1914).

from the time of his impeachment by the House of Representatives, and during the trial thereof by the Senate."[76]

The Oklahoma court was confronted with a unique situation in this area. Upon the impeachment of Governor Walton, the powers and responsibilities of the office devolved upon Lieutenant Governor Trapp. Following Walton's conviction and removal, Trapp held the office for over two years. He subsequently desired to seek election to the office, but the Oklahoma Constitution provided that the governor could not immediately succeed himself. He argued that he was merely "acting governor," and that as such, he was not disqualified from running for the office. In *Fitzpatrick v. McAlister*[77] the court held that Trapp was the actual constitutional governor and thus could not run for the office.

The constitutions of fourteen states[78] specifically provide that in the event of the impeachment of an official, he is immediately suspended from office until such time as he is acquitted of all charges by the senate. Even in states having no such provision, most agree that the best interests of the public demand such a suspension since an officer involved in an impeachment proceeding cannot maintain the confidence, respect or legitimacy necessary to function effectively, nor can any branch of government run smoothly with clouds of uncertainty surrounding it.

This is one aspect of the impeachment process in which the states have not followed the example of the Federal Government, since the Federal Constitution contains no provision for the suspension or removal of an impeached president.[79] Andrew Johnson, the only president ever impeached, remained in office throughout the proceedings, as did most of the federal judges against whom

76. Opinion of the Judges, 3 Neb. 463 (1872).

77. 121 Okla. 83, 248 P. 569 (1926).

78. FLA. CONST. art. III, § 17; HAWAII CONST. art. IV, § 4; LA. CONST. art. IX, § 2; MICH. CONST. art. XI, § 7; MINN. CONST. art. XIII, § 3; NEB. CONST. art. III, § 17; N.M. CONST. art. IV, § 36; N.Y. CONST. art. VI, § 24; R.I. CONST. art. XI, § 1; S.C. CONST. art. XV, § 1; S.D. CONST. art. XVI, § 5; TEX. CONST. art. XV, § 5; UTAH CONST. art. VI, § 20; WIS. CONST. art. VII, § 1.

79. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

U.S. CONST. art. II, § 1, cl. 5.

impeachment proceedings took place.[80]

VI. CONCLUSION

Alexander Hamilton spoke of the "awful discretion" of the court of impeachment in such a "national inquest into the conduct of public men."[81] Impeachment was not intended as a device for attacking a political party or philosophy, or for making the executive and judiciary subservient to a dominant, partisan legislature. Rather, it is a last resort means for removing an officer who has violated the public trust. It is not a "criminal" proceeding, but a political one.[82] The defendant is not tried before a judge or a jury of his peers, but usually before the upper house of the legislature. If convicted, he cannot be fined or imprisoned by the court of impeachment. There is no procedure for appealing this court's decision,[83]

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80. *See* Potts, *Impeachment as a Remedy, supra* note 11, at 15-38.

81. THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 359-60 (E. Scott ed. 1894).

82. The judgment of a court of impeachment is limited to removal from office and disqualification; any fines or prison sentences to be imposed must come from an independent criminal proceeding. The independent nature of the two proceedings was emphasized in Dauphin County Grant Jury Investigation Proceedings (No. 2), 332 Pa. 342, 2 A.2d 802 (1938). A Pennsylvania law had provided that in the event of an impeachment investigation, any other investigation of the same charges by another court was to be suspended until the completion of the house investigation. This act was declared unconstitutional.

> The delegation to the House of Representatives of the sole power of impeachment did not have the effect of depriving the court of its power to continue the investigation in the existing proceeding of crimes constituting misdemeanor in office. . . . The two proceedings are independent of each other and, as the Declaration of Rights shows, were intended to be kept independent proceedings. The provision that the accused shall be liable to indictment 'whether convicted or acquitted' does not require halting criminal proceedings until after the impeachment. The provision was probably inserted so that there might be no doubt that the result of a trial in either proceeding should not be a bar to the trial in the other.

Id. at 354-55, 2 A.2d at 808.

83. Following his impeachment and conviction, former Federal Judge Halsted Ritter brought suit in the Court of Claims to recover his salary, contending that his conviction was void because the article in question did not constitute an impeachable offense. In dismissing the suit, the court ruled:

> We think that when the provision that the Senate should have 'the *sole* power to try all impeachments' was inserted in the Constitution, the word 'sole' was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment.

Ritter v. United States, 84 Ct. Cl. 293, 296 (1936).

and most constitutions exclude impeachments from the pardoning power. Critics argue that the process is too slow and cumbersome,[84] too expensive,[85] and too often subject to partisan political influences. Despite these criticisms,[86] there has been no serious, widespread effort to alter significantly this method of removal. Speculation about alternatives, such as a vote of confidence, are not taken seriously, for there is an historical support for even those parts of the constitution which at times seem awkward or ineffective.[87] Perhaps the imperfect, infrequently applied process of impeachment serves its best purpose by just being available when needed.

Impeachment is one of the "checks and balances" incorporated into the American constitutional scheme. The framers feared a monarchical executive, not subject to the rule of law; therefore, they provided that the president, as well as other civil officers, was subject to removal by impeachment. Conviction means removal

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Some writers, however, question the final and absolute authority of the court of impeachment. *See* Rezneck, *Is Judicial Review of Impeachment Coming?*, 60 A.B.A.J. 681-85 (1974). Citing the changing 'political questions doctrine', Rezneck argues that the Supreme Court could someday be faced with a constitutional impasse between the Congress and the President over such a question as impeachment.

84. The most extreme case of delay occurred during the impeachment of Warren Hastings in Great Britain. The entire proceeding took seven years, and in the interval between the beginning and the conclusion, a large majority of the Lords hearing the case died. The proceedings against Federal Judges English and Peck took two and four years, respectively. *See* Potts, *Impeachment as a Remedy, supra* note 11, at 32-33.
85. The State of Texas appropriated a total of $325,000 for the Ferguson impeachment. New York appropriated nearly $250,000 for the Sulzer impeachment. *See* Limbaugh, *Impeachment, supra* note 1, at 6.
86. See note 4 and accompanying text *supra*. The original Nebraska Constitution (1866) provided that the senate would conduct the impeachment trials, which it did during the proceedings against Governor David Butler. Four years later the constitution was amended, placing the responsibility for conducting the trial with the Nebraska Supreme Court. In 1877, by a joint resolution of the legislature, the records of Butler's impeachment were expunged from the journals of the house and senate. The Nebraska court was thus given the power to try impeachments over sixty years before the state adopted a one-house legislature, the Unicameral.
87. The controversy surrounding the Electoral College serves as an excellent example. Although there is some discussion at almost every session in Congress about altering the method of presidential election, little of substance is ever done. There seems to be a hesitancy on the part of many Americans, legislators included, to make any drastic changes in the Constitution which has served us for nearly two centuries.

from office and disqualification from again holding office. An officer cannot escape impeachment by resignation or the end of his term, if the legislature is inclined to continue the proceeding, unless it is in a jurisdiction where the judgment of the senate is limited to removal only.

There is no magical barrier which prevents officials from being impeached for their actions in any previous term. Re-election does not condone or excuse any misdeeds.

Although not the case under the Federal Constitution, in most states an impeached official is automatically suspended from his office, pending resolution of the inquiry. The controversy over who was to exercise the powers of the governor's office during the Sulzer proceeding, as well as the speculation about who, if anyone, was running the executive branch during the last days of the Nixon administration, serve as examples of why this should be the practice. No branch of government, nor any individual officer therein, can function effectively during such a tense, uncertain, controversial period.

To guard against "legislative tyranny," lawmakers have no absolute power to remove officials at will. The legislature cannot convene itself, or meet at any time it wishes, to consider the impeachment of an officer. The proceedings must take place at a regular legislative session, or at a duly called special session. Articles of impeachment must be adopted by at least a majority vote of the people's representatives, and conviction requires at least a two-thirds vote. The judgment is limited to removal from office and in some cases disqualification from again holding office. Impeachment touches neither the individual's person nor his property, but simply divests him of his political responsibility.[88]

One of the most controversial questions in an impeachment proceeding is what constitutes an impeachable offense. Although the precedents and the authorities supporting the necessity for requiring that there be an indictable offense are few and generally unpersuasive, such a viewpoint will continue to be espoused so long as an official is the subject of an impeachment inquiry. The courts have repeatedly accepted non-indictable offenses as grounds for impeachment. As has been shown, the impeachment device is not a grant to the legislature of absolute power to remove officials at will. Nor is it a criminal proceeding, requiring evidence of an indictable offense.

> To confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the

88. BERGER, *supra* note 53, at 80.

> most grievous offenses against our constitutional form of government may not entail violations of the criminal law. . . A requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve; to fulfill this function it must be flexible enough to cope with exigencies not now foreseeable.[89]

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89. STAFF OF HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 25 (Comm. Print 1974).

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