The Legislature’s Prerogative to Determine Impeachable Offenses

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In United States v. Bayless, United States Judge Harold Baer of the Southern District of New York held—contrary to a significant amount of later criticism—that two New York City police officers had violated an alleged drug trafficker’s right to be free from an unwarranted search and seizure. Disbelieving the incredible testimonies of the police officers, he found no other recourse but to suppress the cocaine and heroine seized by the officers.

Criticism of Judge Baer’s decision came first from the United States Congress, where two hundred legislators demanded Judge Baer’s resignation. Criticism came next from the Executive Branch, where, according to news reports, the White House “put [Judge Baer] on public notice . . . that if he did not reverse [his] decision . . . the President might seek his resignation.” Robert Dole, then-Senate Majority Leader and Presidential candidate, added, notwithstanding the President’s message, that Judge Baer “ought to be impeached.”

Response from Judge Baer’s defenders was immediate. First came a statement from the judiciary, where four judges on the Second Circuit Court of Appeals stated that the criticism of Judge Baer had “gone too far.” Chief Justice William Rehnquist issued a similar statement: “[T]here are a very few essentials that are vital to the functioning of the federal court system . . . Surely one of these essentials is the independence of the judges who sit on these courts.” Finally, the leaders of seventy-six bar associations issued a statement, holding that the threats imperiled the entire United States system of government.

The lines had clearly been drawn—on one side were the Legislative and Executive branches, on the other was the Judicial Branch. But the lines would eventually unravel. On March 11, 1997, House Majority Whip Tom DeLay proposed that the Congress should turn to the impeachment process against federal judges like Judge Baer. He defined impeachable offenses as “whatever a majority of the House of Representatives consider[ed] it to be.” Unlike the previous remarks of legislators, DeLay’s proposal, particularly his definition, evoked animosity from both sides of the discussion.
Critics called DeLay’s proposal and definition of impeachable offenses “dangerous,”13 “callous,”14 and “a passing fantasy.”15 What had begun as a political discourse evolved into a contentious debate – focusing on whether the Congress could define impeachable offenses as whatever they considered them to be. Scholars have consistently stated that when it comes to defining impeachable offenses as whatever they considered them to be, the province of judicial independence, a fine line exists to be. Scholars have consistently stated that when it comes to defining impeachable offenses as whatever they considered them to be, the province of judicial independence, a fine line exists to be. Between appropriate criticism and interference,16 and that, therefore, any person advancing a threat as “dangerous” as DeLay’s should do so with extreme caution. At the same time, however, scholars also have argued that there are, indeed, several constitutionally proper ways of controlling judicial independence,17 one among them, the impeachment process. Given this last premise, then, it would seem that if DeLay’s definition – that an impeachable offense is whatever the Congress considers it to be – is constitutionally proper, then DeLay’s proposal to use the impeachment process is likewise proper.

This article argues that DeLay’s definition is constitutionally proper. Part I discusses the definition, origin, purpose, and importance of judicial independence. Part II also discusses that, notwithstanding the importance of judicial independence, there are several constitutionally proper ways of controlling judicial independence. Part I discusses the definition, origin, purpose, and importance of judicial independence. Part II elaborates on DeLay’s proposal and its criticisms. Part III concludes that DeLay’s definition is constitutionally proper and that his proposal to use the impeachment process is likewise proper.

JUDICIAL INDEPENDENCE

A. The Definition, Origin, and Purpose of Judicial Independence

Judicial independence is a judge’s ability to decide a case free from outside influence.18 It has been described as a “principle,”19 a “theme,”20 a “notion,”21 and a “crown jewel.”22 While it may be one of the “least understood concepts”23 in law, it also has been said that “we all know what it means.”24 Judicial independence originated in England during the Seventeenth Century, at a time when English kings had the authority to summarily dismiss their judges.25 The most celebrated abuse of this authority involved King James I and Lord Coke, the chief justice of the King’s Bench.26 Displeased with one of the chief justice’s decisions, the King summarily dismissed the justice and forced the decision in his favor.27 Two subsequent kings inherited similar panchets for summary dismissals.28 The kings, however, were eventually deposed and, with them, the practice of summary dismissals.29 Instead, the practice of life tenure, coupled with the guarantee of undiminishing compensation, was instituted and eventually codified.30 The rationale behind the new practice was to prevent encroachment upon the judicial decision-making authority, as it had happened in the case of Lord Coke.31 In the United States, judicial independence originated during the development of the Constitution.32 Like the English

13. Hallow, supra note 11, at A1 (quoting Laura W. Murphy, director of the Washington Office of the American Civil Liberties Union).
19. See Penny J. White, Judges and Public Opinion, CURRENT, June 1, 1997, at 35 (defining judicial independence as “the principle that judges must be free to decide individual cases according to the judge’s view of the law, not public opinion about it”).
20. See Stephen G. Breyer, Judicial Independence in the United States, 40 ST. LOUIS U. L.J. 889, 899 (1996) (defining judicial independence as the “theme of how to assure that judges decide according to the law, rather than according to their own whims or to the will of the political branches of government”).
21. See Roger Handberg, Judicial Accountability and Independence: Balancing Incompatibles?, 49 U. MIAMI L. REV. 127, 130 (1994) (defining judicial independence as the “notion that judges must have physical and emotional space to render impartial decisions, without fear of retribution (ether formal or informal) for unpopular, yet sound, decisions”).
25. See White, supra note 19, at 35 (discussing origin of judicial independence).
27. See id. at 122 (discussing discharge of Lord Coke).
28. See id. at 190 (discussing Charles II and James II’s “free use” of summary dismissal).
29. See White, supra note 19, at 35 (discussing Glorious Revolution of 1688); Schwartz, supra note 25, at 199 (discussing repeal of appointing judges at king’s pleasure).
30. See Act of Settlement 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.) (“Judges Commission be made Quam diu se bene Gesserint and their Salaries ascertained and established . . . .”), quoted in Schwartz, supra note 26, at 199.
31. See Schwartz, supra note 26, at 199 (“Thus was definitely ended the Crown’s power to dismiss judges who withheld the royal will – a power that too often had made the Stuart judges mere servile creatures of the king.”).
32. See Breyer, supra note 20, at 898 (finding the “primary basis” of judicial independence in Article III of the Constitution).
B. The Importance of Judicial Independence

Preventing encroachments upon the judicial decision-making authority is vital to maintaining an impartial administration of the law. As Alexander Hamilton said, preventing encroachment is "the best expedient . . . to secure a steady, upright, and impartial administration of the laws."35 Likewise, in Bradley v. Fisher,36 the Supreme Court observed that judicial independence was a "principle of the highest importance to the proper administration of justice."37

With the proper administration of justice secured by judicial independence, the public's faith in the government is correspondingly secured. George Washington said that "the true administration of justice is the firmest pillar of good government."38 Similarly, Alexander Hamilton argued that "the ordinary administration of criminal and civil justice . . . contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government."39 Judicial independence, being the linchpin to the impartial administration of the law, is vital to secure the public's faith in government.

C. Traditional Methods of Controlling Judicial Independence

Given the importance of judicial independence, the framers nevertheless instituted several methods of controlling it.40 Limits on jurisdiction, which for lower federal courts are established by statute, and the impeachment process are two examples. The framers did not intend other methods to function as checks on the judiciary, but, through historical use, these have become tantamount to checks. These include the appointment and compensation processes. These four processes constitute the most effective methods of controlling judicial independence.41

D. The Appointment Process

Article II, Section 2, clause 2, of the United States Constitution provides that the President, with the consent of the Senate, shall have the power to appoint federal judges.42 With the power to appoint judges comes a proportionate power to control judicial independence. This is because the President and Senate generally appoint an individual with similar views and ideals, whether moral or political.43 A judge with similar views and ideals will generally decide a case in a manner consistent with the way the President and Senate that appointed the judge would have decided the case.44 Thus, while a judge may appear to be independent, he is actually under an indirect form of political influence. The appointment process, consequently, as one scholar has found, may be "the most striking intrusion" on judicial independence.45

E. The Compensation Process

Article III, Section 1, of the Constitution provides that federal judges shall receive an undiminishable compensation.46 Scholars generally conclude that the undiminishable compen-

33. See U.S. CONST., Art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").
34. See Douglas W. Hillman, Judicial Independence: Linchpin of Our Constitutional Democracy, 76 Mich. B.J. 1300, 1300-01 (1997) (arguing that similarity between codifications of judicial independence demonstrates hereditary origin); see also Breyer, supra note 19, at 989 (stating that provisions of life tenure and undiminishable salary assure that "Congress or the executive cannot directly affect the outcome of judicial proceedings by threatening removal or reduction of salary").
36. 80 U.S. (13 Wall.) 335 (1871).
37. Id. at 347.
40. See Gerald E. Rosen, address at Kalamazoo College (Nov. 21, 1996), in Vital Speeches, Jan. 15, 1997, at 194 (stating that framers were fearful of providing Judges with unlimited indepen-
41. See Burkel N. Riggs & Tamera D. Westerberg, Judicial Independence: An Historical Perspective the Independence of Judges Is . . . Requisite to Guard the Constitution and the Rights of the Individuals .., 74 DENN. U. L. REV. 337, 340 (1997) (stating that the processes of appointment, tenure and compensation, impeachment, and jurisdiction "most affect" judicial indepen-
42. See U.S. CONST., Art. II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, . . . ").
43. See John D. Feerick, Judicial Independence and the Impartial Administration of Justice, N.Y.L.J., Apr. 3, 1996, at 2 (1996) ("Candidates for national office have criticized judges whose determinations they disagree with and have made campaign promises to exercise the power of appointment by choosing their own judges.").
44. See Riggs & Westerberg, supra 41, at 341 (discussing influence of appointment power on direction of Supreme Court).
45. Id.
46. See U.S. CONST., Art. III, § 1 ("Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished . . .").
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F. The Jurisdiction Process

Article III, Section 1, of the Constitution provides that Congress has the sole power to create the lower federal courts. This provision functions as a control on judicial independence by providing Congress with the authority to not create federal courts, or, if created, to end them. The provision also provides Congress with some ability to remove from federal courts some of the jurisdiction provided for under the Constitution.

G. The Impeachment Process

Article I, Section 2, clause 5, of the Constitution provides that the House of Representatives shall have the power to impeach a judge. Section 3, clause 6, provides that the Senate shall have the power to try the judge for impeachment. Section 3, clause 7, provides that any judge impeached shall face the sanction of removal from office and no further sanction.

These five provisions provide the sole process for removing a federal judge from office. The impeachment process is a clear method of controlling judicial independence. If a judge is found guilty of treason, bribery, or any other high crime and misdemeanor—in essence, exercising unfettered independence—then the Legislative Branch may confiscate the judge’s independence and remove him from office.

Scholars assert that the framers intended the legislature to use the impeachment process sparingly. As of 1997, the House had subjected only forty-seven federal judges to impeachment proceedings. The Senate had tried fourteen and convicted only seven of the forty-seven. The Senate had never impeached a judge for his rulings.

THE NEW ATTEMPT AT CONTROLLING JUDICIAL INDEPENDENCE

On March 11, 1997, House Majority Whip Tom DeLay, announced that Congress would begin using the impeachment process to remove federal judges who exceeded their constitutional authority. DeLay explained that the Constitution provided federal judges with the power to decide cases and con-

49. See id. at 702 (arguing that since framers never contemplated concept of support services, they did not intend Compensation Clause to encompass such services).
50. See id. at 702-03 (arguing that the legislature “could so drastically reduce judicial support services so as to render impossible performance of the judicial function.”).
51. See id. at 704 (arguing that refusal to increase compensation does not violate the Constitution).
52. See id. (stating “if judges’ salaries are not increased, their real incomes decline”).
53. See U.S. Const., Art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).
56. See U.S. Const., Art. I, § 2, cl. 5 (“The House of Representatives shall have the sole Power of Impeachment.”).
57. See U.S. Const., Art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).
58. See id. ("[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.")
59. See U.S. Const., Art. II, § 4 ("[A]ll 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.").
60. See U.S. Const., Art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . ").
63. See id.
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troveries, not the power to make political decisions. DeLay argued that federal judges were ignoring their restricted power and were instead accelerating their way into the legislative province. DeLay cited as an example United States District Judge Fred Biery, who indefinitely postponed the swearing-in of two Republicans who had won their respective races for sheriff and county commissioner. DeLay also cited Judge Thelton Henderson, who blocked a voter-approved ban on race and sex preferences in state hiring and college admissions. DeLay argued that the judges’ actions were legislative in nature, beyond the scope of their constitutional authority.

Critics denounced DeLay’s announcement. The White House argued that DeLay’s proposal was an improper form of influence by one government branch over another. The American Bar Association argued that DeLay’s proposal was constitutionally unsustainable. Then-ABA President N. Lee Cooper said that the Constitution’s impeachment power did not encompass impeachment for “political correctness or incorrect-ness.” Several constitutional scholars agreed, arguing that DeLay’s proposal was “bizarre,” that it would “go nowhere,” and that its use was merely “to intimidate the judiciary.”

DeLay responded with a letter to the New York Times. He argued in more detail that precedent supported the use of the impeachment power to remove judges for exceeding their constitutional authority. For example, he argued, Chief Justice Marshall observed that “a judge giving opinion contrary to the opinion of the legislature is liable to impeachment.” He also cited Gerald Ford, who observed that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”

DeLay’s critics countered that DeLay had taken Marshall’s and Ford’s statements out of context. Others continued to argue that, even if the legislature could define an impeachable offense, using the impeachment power to remove judges for individual decisions threatened to destroy the United States system of government. DeLay, meanwhile, continued to maintain his position: “It is my opinion that anybody can be impeached for anything.”

THE VALIDITY OF DELAY’S DEFINITION
Congress can, indeed, define an impeachable offense as whatever it considers it to be. Several premises, however, are required to come to that conclusion. First, the Constitution provides that the legislature shall have the “sole” power to try an impeachment. The general weight of authority agrees that by using the word “sole,” the framers of the Constitution intended that no other body possess the power to try an impeachment.

Second, the Constitution provides that the legislature shall try an impeachment only for treason, bribery, or high crimes and misdemeanors, and that the legislature shall convict for such offenses only upon two-thirds of a supermajority vote. The Constitution also provides that the legislature shall try an impeachment under oath or affirmation, and that the legislature may not punish a judge further than removal. The Constitution provides for no other procedural rules regarding impeachment. Here, the general weight of authority agrees that by the inclusion of such few procedures, the framers intended for the legislature to fill the gaps through the legislature’s Rules of Proceedings Clause.

Next, the Constitution provides that the judiciary shall have no authority to review the legislature’s use of the Rules of Proceedings Clause. It follows naturally that the Constitution therefore provides the judiciary with no authority to review the procedures installed by the legislature to try an impeachment. The general weight of authority agrees that by including the Speech and Debate Clause, which protects legislative activities...
from judicial review, and by vesting the “sole” power of impeachment in the legislative branch, the framers intended the judiciary to remain out of the impeachment process. The Supreme Court agreed in Nixon v. United States, in which the Court held that the Constitution provided the judiciary with no authority to review the legislature’s impeachment process. The Court stated that there was not “a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers . . . . This silence is quite meaningful . . . .”

The argument, then, is that if (1) the legislature has the sole power to try an impeachment, along with (2) the sole power to establish the procedures relating to an impeachment, and (3) the appropriateness of the procedures are nonjusticiable, then the legislature must also have the power to establish the procedure that define an “impeachable offense.”

DeLay’s proposal that “an impeachable offense is whatever a majority of the House of Representatives considers it to be” is thus proper. DeLay’s proposal is merely a legislative procedure that defines an impeachable offense, which is well within the sole province of the legislature and removed from judicial review.

Precedent supports the syllogism. Scholars have stated that the framers intentionally phrased “high crimes and misdemeanors” abstractly to reach any attempt to subvert the Constitution. Given the abstract quality of the phrase, scholars have agreed that the framers intended “the delineation of the [impeachment] offense” to rest with the legislature. This is because the framers viewed the legislature as better equipped than any other body to deal with the political issues raised in impeachments. DeLay’s definition, thus, is consistent with the framers’ intentions.

CONCLUSION

Although this article has argued that Representative DeLay’s definition of impeachable offenses is constitutionally valid, the author takes no position as to whether DeLay and his colleagues actually should define as an impeachable offense a disagreed-with decision, such as in the cases of Judges Baer, Biery, and Henderson. It is one thing to be able to define a constitutional offense, but it is entirely another thing to abuse that ability. That abuse, hopefully, will never pan out. For as DeLay himself has stated, his strategy was only to “intimidate” the judiciary.

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78. See id. at 97-101 (discussing constitutional proscription of judicial review of impeachment process).
80. Id. at 233.
83. See Rotunda, supra note 81, at 723-24 (arguing for exclusion of Supreme Court from impeachment process).