

William & Mary Bill of Rights Journal

Volume 18 (2009-2010)
Issue 3

Article 3

March 2010

Impeachment as Judicial Selection?

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IMPEACHMENT AS JUDICIAL SELECTION?

Tuan Samahon*

Ideological judicial selection encompasses more than the affirmative nominating, confirming, and appointing of judges who pre-commit to particular legal interpretations and constructions of constitutional text. It may also include deselection by way of impeachment and removal (or at least its threat) of judges subscribing to interpretations and constructions of the Constitution that one disapproves. This negative tactic may be particularly effective when deployed against judges on closely divided collegial courts, such as the U.S. Supreme Court and the U.S. courts of appeals, where personnel determine voting majorities and, in turn, majorities determine case outcomes. The Pickering-Chase, Fortas-Douglas, and Christian Coalition impeachments and threats of impeachment illustrate that the use or threat of this tactic is more common than might be supposed. Indeed, recent calls for the removal of Circuit Judge Jay Bybee demonstrate the continuing allure of impeachment as judicial selection.

This Article examines the phenomenon of impeachment as judicial selection through Professors Tushnet's and Balkin's framework of "constitutional hardball." In the case of impeachment as judicial selection, Congress plays constitutional hardball by claiming that it is an appropriate tool for political control and a fraternal twin to the modern appointments process. This Article details prior episodes of impeachment as judicial selection. It explains why the idea of impeachment as an *ex post* selection tool proves so tempting. It then considers those legal arguments that justify and contest the claims of this variety of constitutional hardball. Further, the Article makes the case that, contrary to conventional wisdom, constitutional and political developments make impeachment a closer alternative to transformative, affirmative selection than in the past. This relative feasibility heightens the fool's gold allure of impeachment as judicial selection. Actually impeaching for judicial selection, however, would yield results that many would consider as untoward and unacceptably intruding on judicial independence and the rule of law. This Article briefly considers those significant costs.

* Associate Professor, Villanova University School of Law. This Article benefited from the feedback of faculty workshop participants at Florida State, Loyola Los Angeles, Pepperdine, SEALS 2008, Villanova, and UNLV. In particular, I thank Todd Aagaard, Steve Chanenson, Tim Cory, Rick Hasen, Nicole Huberfeld, Mike Guttentag, Kurt Lash, Jim Pfander, Nancy Rapoport, Chaim Saiman, Lindsey Samahon, Dveera Segal, Mark Seidenfeld, Ted Seto, Jeff Stempel, Jean Sternlight, David Tanenhaus, Carl Tobias, Mark Tushnet, and Lauren Willis for their comments and Kelly Dove, Tushar Abhay Gurjal, Jason Javie, Bret Meich, Michael Murphy, Amy Spare, and Chris Stein for research assistance.

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INTRODUCTION

Consider the two following scenarios. In the first, a President is bent on reshaping the judiciary during a period of divided government.¹ The President campaigned on the promise of remaking the Supreme Court by appointing “strict constructionists.” The administration hoped to appoint a new Justice who would not obligate law enforcement to comply with new procedural rights and safeguards, but no vacancy is forthcoming. The President suspects that the incumbents are timing their resignations to benefit the opposition political party. Even if there were a vacancy to fill, no transformative nomination would survive the Senate absent a filibuster-proof supermajority. The modern era of divided government almost guarantees confirmation controversy.

In the second scenario, a House Representative has grown frustrated with the Court’s decisions striking down federal legislation. When the prior administration’s party controlled the Senate, it packed the Court with jurists deaf to the contemporary commands of the “Living Constitution.”² The Court’s five-four majorities on several federalism cases reflected cramped interpretations of national power. Now this House Representative’s party controls both chambers of Congress. No vacancy, however, is forthcoming. Even were there one, the Congressman would have no say. The Constitution excludes the House from formally participating in the judicial appointments process. The Congressman chafes at the votes his moderate Senate colleagues have cast to confirm judges and Justices who have proven, in retrospect, to be “mistakes.”

What is a President or a legislator to do if appointment is unavailable to change the judiciary’s composition?

There may be another instrument available to secure the ends of judicial selection: the use of impeachment as a tool of judicial selection. Typically, “judicial selection” is used interchangeably with “appointments process.” The President nominates; the Senate confirms (or not); and the President appoints.³ Affirmative appointments, however, are only one side of the judicial selection coin. Although the elected branches act as if they are writing with political indelible ink when they nominate, confirm, and appoint, Article III judges hold their offices during “good Behaviour,”⁴

¹ See, e.g., *infra* Part I.B.2 and discussion of President Richard M. Nixon.

² See generally William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23, 27 (Jack N. Rakove ed., 1990) (endorsing the “Living Constitution” interpretation).

³ U.S. CONST. art. II, § 2, cl. 2.

⁴ *Id.* at art. III, § 1.

a term only interpretively glossed as “for life.” But it is not for life if the judge misbehaves—or at least opponents can make a plausible argument to that effect—and Congress removes the jurist, or at least threatens to remove the judge.⁵ In such a case “judicial selection” might encompass the tactical use of impeachment to deselect judges. Alternatively, proponents of using impeachment as a tool of judicial selection might drop the pretext of “misbehavior” when invoking it (or at least broadly expand the traditional understanding of what constitutes actionable misbehavior). Such advocates might reconceptualize impeachment, in plain view, as a tool for judicial selection.

Why might impeachment be used in this way? Both appointment and impeachment may be used to affect membership on a collegial court. When appointment is unavailable, impeachment may be resorted to as a complementary tactic to secure a change in court personnel. Not only does impeachment rid one of a disfavored adjudicator, it creates room for the appointment of a favored one. This Article suggests that, as a judicial selection tool, impeachment as judicial selection boasts several important advantages over appointment and that, contrary to what might be supposed, impeachment is becoming a closer alternative to appointment.

This Article develops its argument in five parts. In Part I, this Article frames the phenomenon of impeachment as judicial selection as a tactic of constitutional hardball, i.e., the framework suggested by Professor Mark Tushnet for understanding how parties or movements secure rapid change between constitutional orders.⁶ Part I also discusses several of the prominent instances of resort to this tactic, including the Jeffersonian, Nixonian, and Christian Coalition impeachments or threats of impeachment. It also considers the recent Democratic calls to impeach Circuit Judge Jay Bybee as an instance of the impeachment as judicial selection phenomenon.

⁵ Impeachment for treason, bribery, and other high crimes and misdemeanors on the one hand along with failure to abide by the “good behaviour” condition on the other, are quite arguably distinct and unrelated grounds upon which an Article III judge may be removed from office. Compare *id.* at art. II, § 4, with *id.* at art. III, § 1. For an elaboration of this argument, see generally Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006) (arguing that the “good behaviour” clause permits federal judges to remove other federal judges pursuant to writ of *scire facias*). Their argument advances an interpretation of good behavior previously advocated during the Nixon administration by none other than William Rehnquist, then-Assistant Attorney General for the Department of Justice’s Office of Legal Counsel. See *The Independence of Federal Judges: Hearing Before the Subcomm. on the Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 330–51 (1971) (statement of William H. Rehnquist, Assistant Att’y Gen. of the United States). Except where otherwise noted, this Article adopts, for simplicity’s sake, the conventional view that impeachment is the exclusive means by which an Article III judge may be removed from office. The availability of a writ of *scire facias* to remove incumbent judges would increase the opportunities to “deselect” judges by other means. For a critique of the Prakash-Smith thesis, see James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1228 (2007) (rejecting the view that “good behavior” tenure allows federal judges to be removed by any mechanism other than that of impeachment and conviction).

⁶ See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

Part II explains the allure of impeachment as judicial selection. If ideological judicial selection really is one's object, impeachment may be a superior tool for that purpose. Impeachment, as an *ex post* confirmation tool, permits better information about jurists and thereby obviates concerns about stealth nominees and jurisprudential drift. Moreover, whereas appointment often results in only status quo replacement due to strategic retirement, impeachment may be used to make transformative appointments to the vacated judicial office. Further, impeachment also permits Congress, and not the President, to initiate the selection process.

During constitutional hardball, parties make competing legal claims about what the Constitution means or does not mean. Part III examines what textual, structural, historical, and purpose-based arguments might be advanced to defend or to contest ideological selection. It illustrates that colorable, nonfrivolous arguments are available to support the parties' constitutional hardball. In particular, Part III observes that the argumentative strategies used to justify ideological appointment parallel those used to justify impeachment as judicial selection and that both rely on the paramount functional need to check the federal judiciary.

Part IV explains why the risk of impeachment as judicial selection has grown. Impeachment and appointment have become closer mechanisms for judicial selection because legal and political developments have leveled the barriers to impeachment and elevated the barriers to appointment. First, direct election of senators has weakened the Senate's cooling function by making both congressional chambers directly elected and thereby facilitating partisan unity. The era of inter-branch divided government has accompanied this development, thereby making transformative appointment more difficult than in the past. Second, the filibuster and senatorial courtesy have made transformative judicial appointments more difficult to obtain. At the same time, the silent operation of impeachment, including *in terrorem* resignation and discipline, may obviate the need to obtain the supermajority necessary to impeach. Third, the Court's rationale in *Walter Nixon v. United States*⁷ concerning the nonjusticiability of impeachment proceedings has effectively broadened the traditionally limited grounds for invoking impeachment. Finally, appointment has become more procedurally inefficient over time as impeachment procedure has simultaneously become more streamlined.

Part V considers the cost of using impeachment as a tool of judicial selection, especially its effect on the decisional independence of the Article III judiciary and on the rule of law. Part V concludes by suggesting several areas for possible reform that might avoid impeachment as judicial selection, or at least make its invocation less appealing.

I. THE PHENOMENON OF IMPEACHMENT AS JUDICIAL SELECTION

The phenomenon of impeachment as judicial selection occurs during the course of American constitutional history in sporadic episodes. Part I situates this phenomenon

⁷ 506 U.S. 224 (1993).

as a species of “constitutional hardball” and details several instances where parties resorted to the tactic in order to secure rapid change between constitutional orders.

A. Impeachment as Constitutional Hardball

1. The Theory and Practice of Constitutional Hardball

Professor Mark Tushnet has proposed the phenomenon of “constitutional hardball” to explain how political parties and movements secure rapid change between constitutional orders without resort to formal amendment.⁸ Constitutional hardball occurs when competing arguments, within the bounds of existing constitutional norms, are made about what the Constitution permits.⁹ Executive or legislative tactics are proposed, or justified, that are in “tension with existing *pre*-constitutional understandings.”¹⁰ The new proposal about what the Constitution permits would “displace settled processes with ones that would make it easier” for partisans or movements “to put in place the new institutional arrangements they favor,”¹¹ or possibly as a by-product, “to establish that the Constitution means one thing rather than another.”¹² The new arrangements would make it easier for a dominant power, for example, to become further entrenched, or for a minor power to secure an upper hand.¹³ Constitutional hardball need not actually attain its end to be successful. Short of outright victory, one team might secure a “brushback,” i.e., a constitutional political pitch that intimidates the batter and thereby secures an advantage.¹⁴ Tushnet suggests the stakes are high in hardball, separating the phenomenon from ordinary constitutional politics.¹⁵

Constitutional hardball may not always occur in plain view. Parties may engage in a game of “stealth constitutional hardball” where “practices of entrenchment . . . fly below the radar of public recognition.”¹⁶ The stealthiness of such practices may result from partisans employing public justificatory arguments that disguise novel claims in terms familiar to the existing constitutional order. In contrast, plain view

⁸ See Tushnet, *supra* note 6, at 523.

⁹ *Id.*

¹⁰ *Id.* Professor Jack Balkin offers several friendly amendments to Tushnet. Among others, he suggests that there may not be a settled, pre-constitutional understanding on the matter at all. Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 585 (2008). Partisans may not conceive of their positions as a change from prior practice, but a “best interpretation of existing conventions with respect to a question that has never been clearly decided.” *Id.* Further, he suggests that constitutional hardball may be either a tactic or a goal, or both. *Id.* at 581–82.

¹¹ Tushnet, *supra* note 6, at 533.

¹² Balkin, *supra* note 10, at 584.

¹³ Tushnet, *supra* note 6, at 530.

¹⁴ See *id.* at 545.

¹⁵ See *id.* at 523.

¹⁶ Balkin, *supra* note 10, at 596.

hardball engages in public justificatory argument that does not attempt to conform to the existing constitutional order's settled understandings and assumptions. The stealthy version of constitutional hardball might prove more effective than its plain view alternative, in part, because of its familiarity and/or because of the public's unawareness of motivations underlying the claims.

For example, Tushnet proposes President Franklin Delano Roosevelt's court-packing plan as an episode of constitutional hardball.¹⁷ The traditional story is that a libertarian Supreme Court had repeatedly thwarted FDR's New Deal programs by striking down key legislation as unconstitutional.¹⁸ FDR capitalized on the Constitution's silence about the Court's size when he proposed Congress legislatively increase the number of authorized seats.¹⁹ There was precedent for so doing. Prior to 1869, the Court had been both larger and smaller than the familiar nine-Justice Court.²⁰ FDR's court-packing plan initially was touted as an effort to aid a geriatric Court that, in light of its aging jurists and a supposedly crushing caseload, required additional manpower.²¹ This stealthy constitutional hardball—admittedly ill disguised—offered a public justification that appeared to concern itself only with the efficient administration of justice. In reality, FDR would appoint new Justices to these newly authorized seats. In turn, these additional Justices would serve to dilute the voting power of the Court incumbents, and FDR's New Deal programs would be sustained.²²

The Court eventually forced the stealth constitutional hardball into plain view by rejecting the claim that its caseload was particularly burdensome. Perhaps as a result of that fact, the Senate rejected the plan.²³ But although the inning was lost, the game was won when Justice Owen Roberts, who formerly voted with the anti-New

¹⁷ Tushnet, *supra* note 6, at 544–45.

¹⁸ *See, e.g.,* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935) (unanimously reversing criminal convictions under provisions of “Poultry Code” of National Industrial Recovery Act, because they impermissibly delegated legislative power and exceeded congressional power to regulate interstate commerce).

¹⁹ The Judiciary Reorganization Bill of 1937 would have authorized a new judgeship on the Supreme Court, and every other federal court, for every judge who attained the age of seventy and had neither resigned nor retired within six months of that date. 81 CONG. REC. 880 (1937).

²⁰ CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 66–67 (2006). Since 1869, the authorized number of seats on the Court had been nine. 28 U.S.C. § 1 (2000) (providing for eight associate Justices and one Chief Justice); *see also* John V. Orth, *How Many Judges Does it Take to Make a Supreme Court?*, 19 CONST. COMMENT. 681, 682 (2002).

²¹ *See* MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 283–84 (2002).

²² *See* Tushnet, *supra* note 6, at 544.

²³ MCKENNA, *supra* note 21, at 519–21. Although the bill was never enacted, the concept of court packing remains with us. *See, e.g.,* Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111 (1994) (describing two presidential campaigns to appoint conservative federal judges).

Deal majority, began to vote to uphold the New Deal.²⁴ His changed voting behavior, which was secured by a brushback and obviated the need for any court-packing plan, has been traditionally characterized as “the switch in time that saved nine.”²⁵ The result ushered in a new constitutional order that presumed the constitutional validity of federal economic regulation²⁶ and greatly diminished the restraining capacity of structural constitutional law.²⁷ Thus, Roosevelt obtained rapid constitutional change through his (unsuccessful) court-packing plan and thereby entrenched his parties’ views about government for decades to come.

2. The Tactic of Impeachment as Judicial Selection

Constitutional hardball has instantiations beyond court-packing, including the related tactic of “court-depacking,” or what this Article terms “impeachment as judicial selection.” That tactic seeks a similar end—i.e., a court composed of like-minded jurists—but seeks to do so through a mechanism of deselection. It recognizes that ideological “judicial selection” encompasses more than the affirmative nominating, confirming, and appointing of judges who pre-commit to particular legal interpretations and constructions of constitutional text. It also includes deselection, by way of impeachment and removal (or at least their threat), of those judges subscribing to constitutional interpretations and constructions with which one disapproves. This negative strategy may prove particularly effective when deployed against judges on closely divided collegial courts who were appointed by a President of an opposing political party. Such courts might include the U.S. Supreme Court and the U.S. courts of appeals. The hyperrealist jurisprudential premise of this approach is that the identity of judicial personnel determines voting majorities and, in turn, majorities determine case outcomes.

Both the stealthy and plain view versions of this constitutional hardball tactic require impeachment’s machinery to remove an Article III judge. The stealthy version of this hardball, while harboring ideological, political, or partisan motivations, must make its claim in terms traditionally recognized as impeachable offenses. Because

²⁴ See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (5-4 decision) (upholding state minimum wage regulation against a Fourteenth Amendment substantive due process challenge), *overruling* *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923); see also GEYH, *supra* note 20, at 79–80.

²⁵ See GEYH, *supra* note 20, at 80; Tushnet, *supra* note 6, at 545. For a persuasive explanation of why this traditional account is inaccurate, see G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094 (2005) (questioning externalist “switch in time” explanation as a *post hoc ergo propter hoc* fallacy).

²⁶ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, 153 n.4 (1938) (presuming the constitutionality of economic regulation).

²⁷ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (permitting congressional power to regulate interstate commerce to reach wholly intrastate grain production, not for sale in commerce, that taken in aggregate, would affect interstate commerce).

impeachment extends only to “Treason, Bribery, or other high Crimes and Misdemeanors,”²⁸ would-be impeachers select a target and then search for justificatory grounds to remove. Overcriminalization and the possibility of ethical lapses by the target aid this effort.²⁹ As former Attorney General Robert Jackson observed:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.³⁰

The unhappy coincidence of colorably bad conduct in an ideological opponent allows stealth constitutional hardball to be played.³¹ The constitutional hardballer stealthily deselected the opponent because of jurisprudential differences, by appealing to the traditional grounds for impeachment.³²

²⁸ U.S. CONST. art. II, § 4.

²⁹ Overcriminalization has increased the possibility of charging a foot fault. The phenomenon of overcriminalization has been described by a number of commentators. *See, e.g.*, Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43–56 (Timothy Lynch ed., 2009); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

³⁰ Robert H. Jackson, Att’y Gen., U.S. Dep’t of Justice, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUDICATURE SOC’Y. 18, 19 (1940).

³¹ *See* Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 162 (2007) (describing partisan impeachment in disguise).

³² The criminality need not directly relate to the abuse of office. During the impeachment of President Bill Clinton, some commentators advocated limiting the scope of impeachable conduct by advancing an “executive function theory” of impeachment, i.e., a claim that a President may only be impeached for criminal conduct directly related to the executive function or the use of executive authority. Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 100–02 (1999) (rejecting such a narrow view, but describing executive function theory advanced by testifying legal academics). Contemporary impeachment practice of judges, at least, undermines any analogous “judicial function theory” of the Impeachment Clauses. The House impeached and the Senate convicted U.S. District Judge Harry Claiborne for tax fraud that occurred during his judicial tenure, even though it was unrelated to the exercise of his judicial authority. ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 296, 300–01 (1992).

Alternatively, the plain view version of the tactic requires only a reading of the Constitution that allows Congress to impeach judicial officers on grounds broader than traditionally thought permitted by the Impeachment Grounds Clause.³³ On the one hand, this hardball variation is transparent; it avoids the need to establish odious or criminally blameworthy conduct. In other words, “this wolf comes as a wolf.”³⁴ On the other hand, it may fail to bridge ideological and partisan divides and therefore prove less effective.

The tactic of impeaching judicial opponents constitutes a species of constitutional hardball. Its object is disentanglement of opponents followed by partisan entrenchment of allies, or in the case of brushbacks, *in terrorem* discipline of opponent adjudicators and their fellow jurisprudential travelers. Further, its use might also establish that the impeacher’s constitutional principles are right and that the target’s views, or those of jurisprudential confederates, are in some sense wrong.³⁵ Impeachment so used to influence court membership and thereby secure constitutional change creates a tension with several pre-constitutional understandings: (1) that formal constitutional amendment and not a change in personnel appropriately serves the office of constitutional change; (2) that impeachment was a legal tool for criminal and quasi-criminal malfeasance by officeholders, not a tool for ideological or partisan cross-branch control; and (3) that the domain of law and policy are separate. The stakes are high in this match of constitutional hardball. Successful use of impeachment tips court balances. Unsuccessful use can result in making the tool unusable for that purpose for some period of time, as failure would establish (or re-establish) a non-judicial precedent rejecting impeachment on the basis of ideology.

B. The Re-emerging Tactic of Impeachment as Judicial Selection

Several episodes of impeachment as judicial selection—both stealthy and plain view—pepper the history of the federal judiciary. Below, this Article details the salient examples of this constitutional hardball tactic.

1. Judge John Pickering and Justice Samuel Chase

In 1800, President Adams used the power to appoint in order to pack the court. Thus, the Federalists “retreated into the judiciary as a stronghold” as they lost their grip in Congress.³⁶ Thomas Jefferson and the Jeffersonians embarked on a campaign to

³³ See *infra* Part III.A.1.

³⁴ *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

³⁵ Cf. Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111 (1998) (discussing the impeachment of judges for constitutionally faithless decisions).

³⁶ Letter from Thomas Jefferson to Joel Barlow (Mar. 14, 1801), in 10 THE WRITINGS OF THOMAS JEFFERSON 223 (Albert Ellery Bergh ed., 1905).

remove the Federalists by successfully impeaching U.S. District Judge John Pickering and then attempting to impeach Associate Justice Samuel Chase.

The Pickering episode was the first judicial impeachment.³⁷ The charges against him included “mental derangement and chronic intoxication,” which Congress considered to be “high crimes and misdemeanors.”³⁸ The House impeached, and the Senate convicted.³⁹ As evidence of partisanship, all Democratic-Republicans voted “guilty” and all Federalists voted “not guilty.”⁴⁰

This modest effort to remove a derelict precluded the pursuit of bigger bounty. The close timing of the two impeachments fairly creates an inference that the two events were connected. The day after Judge Pickering was convicted and removed, the House voted to impeach Justice Chase.⁴¹ Jeffersonians charged that Justice Chase had breached judicial impartiality by making brazenly partisan statements from the bench.⁴² As a result, they attempted his removal by impeachment. This public justification, however, thinly veiled naked partisan and ideological motivation. Chase’s impeachment was a landmark as the first attempt to impeach a Supreme Court Justice.⁴³ Although the impeachment is often remembered as unsuccessful, a partisan House majority did impeach Chase and a partisan Senate majority did vote in favor of conviction on three of the eight articles.⁴⁴ Moreover, the six Democratic-Republican senators who voted against conviction did not necessarily reject the legitimacy of ideological impeachment.⁴⁵ In the end, this plain view constitutional hardball failed.

2. Justices Abe Fortas and William Douglas

In 1969, Richard Nixon instigated a subterranean Jefferson-style campaign to unpack the Court by targeting Associate Justice Abe Fortas. This “impeachment” is often missed because although congressional surrogates threatened impeachment,⁴⁶

³⁷ Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 486 (1949).

³⁸ See William H. Rehnquist, *Judicial Independence*, 38 U. RICHMOND L. REV. 579, 583 (2004).

³⁹ See *id.*; Turner, *supra* note 37, at 494–505 (describing the impeachment and conviction of Judge Pickering).

⁴⁰ Rehnquist, *supra* note 38, at 583; Turner, *supra* note 37, at 505.

⁴¹ Turner, *supra* note 37, at 506.

⁴² See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 225–26 (1973) (arguing that impeachment was a “natural recoil from the gross partisanship of the judiciary”).

⁴³ See Fitschen, *supra* note 35, at 137.

⁴⁴ 14 ANNALS OF CONG. 666–69 (1805) (reporting 18-16, 18-16, and 19-15 votes to convict Chase on House impeachment articles three, four, and eight, respectively).

⁴⁵ The defense lawyers’ *ad misericordiam* appeals and their personal antipathy for John Randolph, the leader of the impeachment in the House, might have motivated their “no” votes. See BERGER, *supra* note 42, at 227 & n.16.

⁴⁶ See LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 372 (1990).

they never actually introduced a House resolution calling for Fortas's impeachment or articles of impeachment.⁴⁷ The Mitchell Justice Department investigated Fortas's financial dealings with convicted securities manipulator Louis Wolfson with an eye to commencing impeachment proceedings, or at least an eye to precipitating Fortas's resignation.⁴⁸ The pretext of Fortas's alleged criminal wrongdoing shrouded Nixon's game of stealthy constitutional hardball. Although academic commentators claim in hindsight that Fortas broke no law (and therefore committed no indictable high crime and misdemeanor),⁴⁹ Nixon's efforts yielded dividends. Fortas resigned and created a vacancy for Nixon to fill.⁵⁰ The change aided Nixon in refashioning the Warren Court.

Nixon did not wait long before attempting impeachment as judicial selection again. On April 8, 1970, the Senate rejected Harrold Carswell, 51-45, as Richard Nixon's nominee to the vacancy created by the forced resignation of Justice Fortas.⁵¹ On April 15, 1970, then-Congressman Gerald Ford delivered a lengthy House address calling for Justice William Douglas's impeachment.⁵² The two events—the failed appointment and the attempted impeachment—were apparently linked in Nixon's mind,⁵³ but not merely as partisan payback as some have suggested.⁵⁴ Nixon recognized that appointment and impeachment are two sides of the judicial selection coin and that there is more than one way to influence a collegial court's work product.

⁴⁷ None of the leading legal treatises on impeachment mentions the Fortas resignation or the circumstances surrounding it. *See generally* BERGER, *supra* note 42; CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* (1974); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (1996). David E. Kyvig addresses at length the Fortas impeachment in his historical work on impeachment, but mistakenly states that Congressman Harold Royce Gross (R-IA) had actually introduced “a bill calling for Fortas’s impeachment.” DAVID E. KYVIG, *THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960*, at 82 (2008). In fact, no bill was introduced. Gross had merely *claimed* to have prepared a resolution calling for Fortas’s impeachment and threatened to introduce it if Fortas did not resign. 115 CONG. REC. 12,771–72 (1969) (statement of Rep. Harold R. Gross) (inserting into record a *Des Moines Register* article quoting Rep. Gross as saying “he has an impeachment resolution prepared and will file it this week, or will co-operate with others in forcing immediate action in the House.”). Interestingly, Gross’s personal papers at the Herbert Hoover Library do not include any impeachment resolution, if indeed one ever existed. If no document existed, it might suggest that the threat was mere bluffing intended to force Fortas to resign. *See infra* Part IV.B.2.

⁴⁸ *See* KALMAN, *supra* note 46, at 359–70.

⁴⁹ *See, e.g., id.* at 372.

⁵⁰ *See id.* at 370–76.

⁵¹ 116 CONG. REC. 10,769 (1970). The Senate had previously rejected the nomination of Clement Haynsworth, 55-45, to the same seat. 115 CONG. REC. 35,396 (1969).

⁵² 116 CONG. REC. 11,915–17 (1970).

⁵³ *See, e.g.,* BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 429–30 (2003) (describing coupling of Nixon’s request that Ford proceed with impeachment of Douglas and Nixon’s failure to fill the vacated seat on the Court).

⁵⁴ *See id.* (arguing that Nixon’s push to impeach Douglas began as “preemptive revenge” for failed nomination of Clement Haynsworth).

On the one hand, a President may appoint judges.⁵⁵ On the other hand, Congress, occasionally at a President's behest or with his tacit approval, may attempt to deselect incumbent judicial officers by impeaching them.

Together with then-Congressman Gerald Ford, Nixon coordinated this unsuccessful campaign to impeach Justice Douglas for myriad peccadilloes,⁵⁶ including his pursuit of serial monogamy and receipt of money from a questionable foundation.⁵⁷ As with Fortas, there was a pretext. Here, however, that pretext was transparent. Then-Representative Gerald Ford placed Nixon's game of constitutional hardball in plain view when he famously declared that an "impeachable offense is whatever a majority of the House of Representatives considers [it] 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."⁵⁸ The formal removal process ended when Democrats outwitted Republicans procedurally and killed the impeachment effort in the House Judiciary Committee.⁵⁹ Nixon's political opponents understood that membership matters and played constitutional hardball defensively.

3. Judges Baer, Sarokin, and Other Democratic Judges

Beginning with the landslide November 1994 Republican congressional victory,⁶⁰ House Republicans began playing constitutional hardball in a bid to disentrench Democratic judicial appointees. Initially, impeachment talk was limited to Senator Bob Dole's presidential bid. It singled out Judge Harold Baer, a recent Clinton appointee, in order to portray the President as soft on crime.⁶¹ The criticism of Judge Baer centered on his decision in a drug case to suppress evidence on the grounds that it violated the Fourth Amendment.⁶² Eventually, that criticism snowballed into congressional calls for his resignation.⁶³ Dole escalated that rhetoric further by calling

⁵⁵ U.S. CONST. art. II, § 2, cl. 2.

⁵⁶ See GERHARDT, *supra* note 47, at 29.

⁵⁷ See *id.*; MURPHY, *supra* note 53, at 429–34.

⁵⁸ 116 CONG. REC. 11,912–13 (1970).

⁵⁹ See *id.* at 11,912.

⁶⁰ The 1994 congressional election marked the first time since 1952 that Republicans had won a majority in both chambers of Congress. See UNITED STATES SENATE, PARTY DIVISION IN THE SENATE, 1789–PRESENT, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm [hereinafter PARTY DIVISION IN THE SENATE]; OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, PARTY DIVISIONS OF THE HOUSE OF REPRESENTATIVES (1789 TO PRESENT), http://clerk.house.gov/art_history/house_history/partyDiv.html [hereinafter PARTY DIVISIONS OF THE HOUSE].

⁶¹ 142 CONG. REC. 1603–04 (1996) (statement of Sen. Robert Dole).

⁶² See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996), *aff'd*, 201 F.3d 116 (2d Cir. 2000), *cert. denied*, 529 U.S. 1061 (2000).

⁶³ See Letter from Congressmen Fred Upton et al. to President William Jefferson Clinton (Mar. 20, 1996), in Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 156–57

for Baer's impeachment.⁶⁴ In response to this constitutional hardball—calling for a judge's impeachment based on a judicial opinion—the Second Circuit took the exceptional step of publicly defending Judge Baer.⁶⁵ Nonetheless, Judge Baer reconsidered his decision and reversed himself.⁶⁶ Although the call for Baer's impeachment never went anywhere, Dole's threat may have secured the reversal by brushback.⁶⁷

Perhaps emboldened by the March 1996 Baer brushback, Dole broadened his criticism to name several more Democratic judges. He named several recent appointees to "Clinton's Hall of Shame" on the basis of their judicial work product.⁶⁸ One of these judges, Third Circuit Judge Lee Sarokin, resigned in protest at the criticism.⁶⁹ Sarokin's resignation amounted to an apparent victory for Republicans. It emboldened critics to demand the resignation or impeachment of alleged judicial activists.⁷⁰ Properly or not, Republicans could claim a resignation and a brushback as fruits of their impeachment campaign.

Outside of Congress, the rhetoric of this brand of constitutional hardball broadened to the Supreme Court. Religious conservatives, angered by the gay rights case *Romer v. Evans*,⁷¹ called for impeachment of the *Romer* majority.⁷² No further serious threat to impeach federal judges, however, was taken until after Republicans lost the 1996 presidential election.

(1997). The White House, rather than back the appointee, initially intimated President Clinton might seek Baer's resignation himself if Baer did not reverse himself. Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 157 (1997).

⁶⁴ Katharine Q. Seelye, *Bob Dole: A Get-Tough Message at California's Death Row*, N.Y. TIMES, Mar. 24, 1996, at 29.

⁶⁵ Newman, *supra* note 63, at 158–59.

⁶⁶ See *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996), *aff'd* 201 F.3d 116 (2d Cir. 2000), *cert. denied*, 529 U.S. 1061 (2000). Judge Baer cited the government's supplemental evidence, and not political pressure, as the reason for changing his opinion. *Id.* at 216. He also apologized for dicta in his prior opinion that impugned law enforcement. *Id.* at 217.

⁶⁷ See Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1.

⁶⁸ Laurie Kellman, *Dole Salvo Scorches 'Liberal' Clinton Judges, Declares 'Real Beginning' of Campaign*, WASH. TIMES, April 20, 1996, at A1.

⁶⁹ Joan Biskupic, *Blaming Politics, Judge Quits*, WASH. POST, June 5, 1996, at A21. Sarokin's resignation may have had more to do with the recent denial of his request to relocate his judicial chambers to California than Dole's heated political rhetoric. *Judge Attacked by Dole to Quit Federal Post*, ALBANY TIMES UNION, June 5, 1996, at A4.

⁷⁰ See Rocco Cammarere, *Sarokin Concedes Quitting Backfired*, N.J. LAW., Oct. 20, 1997, at 1.

⁷¹ 517 U.S. 620 (1996).

⁷² DAVID BARTON, IMPEACHMENT! RESTRAINING AN OVERACTIVE JUDICIARY 8, 28 (1996); see also Fitschen, *supra* note 35, at 113–14. It is evident that Barton's short political tract advocating ideological impeachment was influential with conservative Republican House Representatives. See, e.g., 143 CONG. REC. 5689 (1997) (statement of Rep. Sam Johnson) (quoting from Barton's tract).

Republicans broadened and deepened their plain view constitutional hardball efforts during the 105th Congress. In March 1997, Representative Tom DeLay named three federal judges as potential targets for impeachment and candidly cited the ground for impeachment as their judicial opinions in particular cases.⁷³ He noted that he was collecting names of other possible candidates for the first impeachment.⁷⁴ DeLay followed up his call for impeachment with a House Judiciary Committee hearing in May 1997 that sought to justify ideological impeachment of judges.⁷⁵ There, he expressed his view that impeachment did not require an indictable offense: “when judges exercise power not delegated to them by the Constitution, impeachment is a proper tool.”⁷⁶ Subsequently, he explained what he perceived to be the virtue of issuing impeachment threats. “The judges need to be intimidated. They need to uphold the Constitution. . . . [W]e’re going to go after them in a big way.”⁷⁷ Republican senators were initially chilly toward their House colleagues’ proposal.⁷⁸ Ultimately, the Republican controlled House never voted any article of impeachment against these federal judges.⁷⁹

After the unsuccessful attempt to impeach Clinton and after the contested election of President George W. Bush in 2000, congressional Republicans refocused their efforts on appointing Republican federal judges rather than impeaching Democratic appointees. Republicans controlled both the White House and Congress.⁸⁰ This ability to change the composition of the federal judiciary abated the impeachment talk and 2000–2002 was relatively free of explicit impeachment threats.

⁷³ Katharine Q. Seelye, *House G.O.P. Begins Listing A Few Judges to Impeach*, N.Y. TIMES, Mar. 14, 1997, at A24; see also Laurie Kellman, *Republicans Rally ‘Round Judge-Impeachment Idea, Constitution Would Be Violated, Foes Say*, WASH. TIMES, Mar. 13, 1997, at A1 (listing Judges Baer, Biery, and Henderson as potential targets).

⁷⁴ Seelye, *supra* note 73.

⁷⁵ See *Judicial Misconduct and Discipline, Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. (1997) (debating scope of impeachment power and permissibility of impeaching federal judges on the basis of their judicial decisions).

⁷⁶ *Id.* at 18 (statement of Rep. Tom DeLay).

⁷⁷ Joan Biskupic, *Hill Republicans Target ‘Judicial Activism’; Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1.

⁷⁸ See, e.g., Brian Blomquist, *Lott Won’t Use Rulings To Topple Federal Judges; Impeachment Requires Crime, Senate Leader Says*, WASH. TIMES, Mar. 18, 1997, at A4 (expressing Senate disagreement over conviction for nonindictable grounds). This reaction might reflect the comparative insulation of senators from popular passion and their broader state-wide constituencies. In addition, it reflects the alacrity and ease with which the House can threaten and adopt articles of impeachment. See *infra* Part IV.B. Senators, however, shoulder a far greater opportunity cost than their House colleagues in actually trying the impeached.

⁷⁹ This inaction might have been a byproduct of House Republicans redirecting their zeal toward the impeachment of President Bill Clinton.

⁸⁰ See PARTY DIVISION IN THE SENATE, *supra* note 60; PARTY DIVISIONS OF THE HOUSE, *supra* note 60.

Beginning with the 108th Congress, however, implicit threats of impeachment returned. Although Republicans regained a Senate majority during the 2002 election,⁸¹ Democratic Senate filibusters thwarted their attempts to appoint nominees to the influential circuit courts in early 2003.⁸² When the appointments stalled, Republicans again began to threaten Democratic judicial incumbents with impeachment.⁸³ Like their prior impeachment threats, this constitutional hardball occurred in plain view. Congress tightened control over judicial discretion in sentencing when it enacted the PROTECT Act in 2003, which requires the reporting of the names of judges who authorize downward departures in criminal sentencing.⁸⁴ Chief Judge James Rosenbaum of the District of Minnesota had testified against the Act in May 2002.⁸⁵ In March 2003, Chairman James Sensenbrenner (R-WI) threatened to subpoena Rosenbaum's judicial records for those instances in which he departed from sentencing guidelines—a very rare request outside of an impeachment proceeding.⁸⁶ Chief Judge Rosenbaum was obligated to retain private counsel to defend himself and negotiate a settlement.⁸⁷

The Rosenbaum incident and statistical monitoring intimidated other federal judges who might have chosen to depart downward from the criminal sentencing guidelines. Senior Judge Paul Magnuson declined to depart downward and cited, in part, his fear of congressional reprisal.

There is another reason why the Court will not depart [downward] in this matter. The Court believes that the day of the downward departure is past. Congress and the Attorney General have instituted policies designed to intimidate and threaten judges into refusing to depart downward, and those policies are working. . . . [T]he Court is intimidated, and the Court is scared to depart.⁸⁸

The threat evidently worked and “disciplined” Magnuson's adjudication.

⁸¹ See PARTY DIVISION IN THE SENATE, *supra* note 60.

⁸² See, e.g., Nick Anderson, *Democratic Senators Block Pickering's Confirmation*, L.A. TIMES, Oct. 31, 2003, at A26.

⁸³ Cf. Ron Chernow, *Chopping off the Weakest Branch*, N.Y. TIMES, May 6, 2005, at A27.

⁸⁴ 28 U.S.C. § 994(w) (2006).

⁸⁵ See *Fairness in Sentencing Act of 2002: Hearing on H.R. 4689 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. 17–22 (2002) (statement of James Rosenbaum, Chief Judge of U.S. District Court of Minnesota).

⁸⁶ Rob Hotakainen, *Sentencing Leeway—Or Leniency? Congress Has Limited Federal Judges' Ability to Stray From Sentencing Guidelines; Critics Say the Law Meddles With the Judiciary*, STAR TRIB., May 8, 2003, at 16A.

⁸⁷ See *id.*

⁸⁸ *United States v. Kirsch*, 287 F. Supp. 2d 1005, 1006–07 (D. Minn. 2003).

Judge John Martin resigned from the Southern District of New York to protest the reporting provision rather than comply.⁸⁹ The perceived threat to judicial independence—felt keenly by Judges Rosenbaum, Magnuson, and Martin—so concerned Chief Justice William Rehnquist that he raised the issue of the PROTECT Act in his 2003 and then 2004 Annual Report on the Judiciary.⁹⁰ Rehnquist squarely rejected the notion of ideological impeachment: “a judge’s *judicial* acts may not serve as a basis for impeachment.”⁹¹

During the 109th Congress, the federal court’s resolution of the Terri Schiavo case provided another flash point for conservative Christians.⁹² A federal special bill provided for federal court jurisdiction over the Schiavo family’s dispute about whether Theresa Schiavo might be removed from her feeding tubes.⁹³ When federal judges James Whitmore and Stanley Birch denied relief, DeLay called for their impeachments.⁹⁴ Michael Schwartz, chief of staff for Senator Tom Coburn (R-OK), threatened “mass impeachment” of judges⁹⁵ and used violent anti-judicial rhetoric: “I’m a radical! I’m a real extremist. I don’t want to impeach judges. I want to impale them!”⁹⁶ Conservative author Edwin Vieira used Stalinist rhetoric to advocate judicial impeachment: “No man, no problem.”⁹⁷ Beyond the verbal threats, Chairman Sensenbrenner proposed the creation of an office of inspector general within the

⁸⁹ See Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1. As with the Sarokin resignation, a protest resignation likely would have emboldened, rather than shamed, opponents. See *supra* note 70 and accompanying text.

⁹⁰ WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2005) [hereinafter REHNQUIST, 2004 YEAR-END REPORT], available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>; WILLIAM H. REHNQUIST, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2004), available at <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html>. Chief Justice Rehnquist, an authority on impeachment who authored GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992), relied extensively on the Samuel Chase impeachment as a precedent against impeachment for ideological ends. See REHNQUIST, 2004 YEAR-END REPORT, *supra*, at 6.

⁹¹ REHNQUIST, 2004 YEAR-END REPORT, *supra* note 90, at 6.

⁹² An extended discussion of the Schiavo case is beyond this Article’s scope. For a discussion of the case, see Mark C. Rahdert, *The Schiavo Litigation: A Case Study for Federalism*, 15 TEMP. POL. & CIV. RTS. L. REV. 423, 428–34 (2006).

⁹³ See *id.* at 429–34.

⁹⁴ See Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has ‘Run Amok,’ Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21.

⁹⁵ *Id.* But see Coburn Disavows Aides’ Call for Judicial Impeachments, CONG. DAILY, Apr. 13, 2005 (calling “mass impeachment” comments “inappropriate” and not “represent[ing] my views”).

⁹⁶ Max Blumenthal, *In Contempt of Courts*, THE NATION, Apr. 11, 2005, available at <http://www.thenation.com/doc/20050425/blumenthal>.

⁹⁷ *Id.*

judiciary to investigate ethics complaints lodged against judges.⁹⁸ The proposal was again a thinly masked threat to judges and rebuffed by Chief Justice John Roberts.⁹⁹

This Republican constitutional hardball, however, soon ceased before it could gain further steam. DeLay, an animating force behind the movement to impeach as judicial selection, was forced to resign from House leadership due to a criminal indictment¹⁰⁰ and the 2006 congressional elections stripped Republicans of their bicameral majorities.¹⁰¹

4. Judge Jay Bybee

In January 2009, President Barack Obama assumed office with bicameral majorities in Congress.¹⁰² Soon afterward, congressional Democrats called for the impeachment of U.S. Court of Appeals Judge Jay Bybee. Prior to his judicial appointment by President George W. Bush in March 2003, Assistant Attorney General Bybee headed the Justice Department's Office of Legal Counsel (OLC).¹⁰³ During his tenure there, the White House and CIA asked OLC to advise them on whether certain interrogation methods constituted "torture" within the meaning of federal statutes implementing the Convention Against Torture.¹⁰⁴ In August 2002, OLC produced two memoranda that defined torture narrowly and qualifiedly approved specific interrogation methods.¹⁰⁵

⁹⁸ See Judicial Transparency and Ethics Enhancement Act of 2007, H.R. 785, 110th Cong. (2007) (proposing an Inspector General for judicial branch).

⁹⁹ See *House Judiciary Committee Passes IG Bill*, 38 THE THIRD BRANCH Oct. 2006, available at <http://www.uscourts.gov/ttb/10-06/igbill/index.html> (quoting Chief Justice John Roberts as criticizing inspector general proposals as "dangerous intrusions by other branches").

¹⁰⁰ STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* 7–8 (2007). DeLay used other constitutional hardball tactics, such as aggressive congressional redistricting, to entrench Republican majorities. *Id.* at 8–9, 11.

¹⁰¹ See PARTY DIVISION IN THE SENATE, *supra* note 60; PARTY DIVISIONS OF THE HOUSE, *supra* note 60.

¹⁰² See PARTY DIVISION IN THE SENATE, *supra* note 60; PARTY DIVISIONS OF THE HOUSE, *supra* note 60.

¹⁰³ Carol J. Williams, *Bybee is Silent on Interrogation Memos*, L.A. TIMES, May 1, 2009, at A30.

¹⁰⁴ Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (fifty-page memorandum concerning definition of "torture"); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel to John Rizzo, Acting General Counsel of the Central Intelligence Agency, Interrogation of al Qaeda Operative, (Aug. 1, 2002), available at <http://i.cdn.turner.com/cnn/2009/images/05/22/bybee.pdf> (eighteen-page memorandum memorializing advice concerning the legal permissibility of "ten techniques" to be used during the interrogation of Abu Zubaydah).

¹⁰⁵ See memoranda cited *supra* note 104.

These top secret memoranda concerning the “War on Terror” remained undisclosed during Judge Bybee’s March 2003 Senate confirmation hearing.¹⁰⁶ Although key members of the House and Senate had apparently received briefings on these memoranda prior to Judge Bybee’s confirmation,¹⁰⁷ the *Washington Post* did not publish the memoranda until June 2004.¹⁰⁸ Five years later, in April 2009, during the early months of the Obama administration, Representative Jerrold Nadler (D-NY) and Senator Russ Feingold (D-WI) called for Bybee’s impeachment.¹⁰⁹ Similarly, Senator Patrick Leahy (D-VT) asked Bybee to resign.¹¹⁰ They cited his pre-confirmation legal advice while at OLC as the basis for impeachment.

Unlike the plain view constitutional hardball Republicans played previously, the threat to impeach Bybee is principally stealthy and not plain view, constitutional hardball. These calls for his impeachment do not fault particular judicial opinions or his jurisprudence per se (at least since appointment to judicial office). Instead, they characterize Bybee’s former OLC advice as possibly constituting indictable criminal conduct under domestic and international law,¹¹¹ or alternatively unethical advice amounting to a high crime and misdemeanor.¹¹² Thus, the threat attempts to situate the ground for removal into the traditional category of “other high crimes and misdemeanors.”

Notwithstanding the traditional characterization, the threat to impeach Bybee is constitutional hardball. Although any impeachment would turn on Bybee’s legal analysis at OLC, that work product arose from a *different* office, i.e., the proposed ground for impeachment would entail removing him from an office he no longer holds. Such an impeachment becomes meaningful to advocates for removal only if any impeachment judgment of conviction were to disqualify Bybee from holding “any office of honor, trust, or profit under the United States”—including by happenstance his present federal judgeship.¹¹³ Indeed, had Bybee returned to legal academia,

¹⁰⁶ See Karl Vick, *Amid Outcry on Memo, Signer’s Private Regret: Friends Say Judge Wasn’t Proud of Outcome*, WASH. POST, Apr. 25, 2009, at A1.

¹⁰⁷ The CIA claims that it briefed Speaker of the House Nancy Pelosi (D-CA) on waterboarding and other techniques it used to interrogate detainees. See Greg Miller, *Leaders Were Told of CIA’s Methods*, L.A. TIMES, May 8, 2009, at A23.

¹⁰⁸ Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1.

¹⁰⁹ Sam Stein, *Feingold Sought Bybee’s Torture Memo Back In ‘03, Suggests Impeachment Now*, THE HUFFINGTON POST, Apr. 21, 2009, http://www.huffingtonpost.com/2009/04/21/feingold-called-for-relea_n_189544.html; Ryan Grim, *Nadler: Impeach Torture Memo Author*, THE HUFFINGTON POST, Apr. 20, 2009, http://www.huffingtonpost.com/2009/04/20/senior-judiciary-committe_n_189026.html.

¹¹⁰ Vick, *supra* note 106.

¹¹¹ Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6.

¹¹² See, e.g., Stein, *supra* note 109; Grim, *supra* note 109.

¹¹³ That outcome is not a foregone conclusion. Judge Alcee Hastings was impeached, convicted, and removed from judicial office, but not disqualified from occupying “any office

it is unlikely critics would have sought to impeach him from his OLC office.¹¹⁴ Impeachment employed in this mode serves principally as a post-confirmation opportunity for (de)selection, a confirmation do-over.¹¹⁵

II. THE TEMPTATION OF IMPEACHMENT AS JUDICIAL SELECTION

What motivates the pathology of impeachment as judicial selection? Control over how officers exercise power is the shared central concern of appointment to and removal from office. As a species of removal power, impeachment can claim important advantages over appointment as a tool of control. Given this common end, impeachment as judicial selection might prove a tempting—even if wrong-headed—alternative to appointment.

This section elaborates the allure of deselection as a species of constitutional hardball. First, as an *ex post* appointment tool, impeachment boasts informational advantages. Whereas appointment is forward looking and relies on political actors' mere projections of a prospective appointee's future performance, impeachment has the benefit of hindsight. Second, impeachment facilitates transformative appointments. It permits the political branches to initiate judicial deselection without the need to wait for judges to create a vacancy. Finally, successful deselection rebalances the selection playing field in favor of Congress. It curtails the appointments leverage that a President as first mover usually enjoys over Congress.

A. Ex Post Appointment Informational Advantage

There is wide dissatisfaction with the modern appointments process because Presidents, senators, and interest groups must rely on incomplete, imperfect, or otherwise inadequate pre-confirmation information about nominees. A President and his advisors may incorrectly forecast the future voting behavior of a stealth nominee, i.e., a jurist nominated because his or her limited or dated paper trail will permit flying under senatorial confirmation radar.¹¹⁶ In such a case, stealth proves a double-edged sword. Issues not of contemporary concern at a nominee's confirmation occasionally

of honor, trust, or profit under the United States." GERHARDT, *supra* note 47, at 60. Thus, he was eligible to be elected to Congress. The Senate "vote[s] separately or not at all on whether to disqualify the convicted official from holding future office." *Id.* at 35.

¹¹⁴ No one has sought to impeach John Yoo, who was also an officer of the United States at the time OLC advised on interrogation and torture. *See* Vick, *supra* note 106, at A4.

¹¹⁵ Yale law professor Bruce Ackerman's call for Bybee's impeachment cited the fact that at confirmation the Senate knew little about his advice at OLC. Bruce Ackerman, *Impeach Jay Bybee*, SLATE, Jan. 13, 2009, <http://www.slate.com/id/2208517/>.

¹¹⁶ For example, George H.W. Bush's Chief of Staff John Sununu boasted famously that stealth nominee Justice David Souter would be a "home run" for conservatives. David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAG., Sept. 25, 1994, at 52.

become important during his or her tenure.¹¹⁷ A nominee's views may evolve.¹¹⁸ Alternatively, a nominee may misrepresent or conceal views to curry favor and secure presidential nomination.¹¹⁹ To be sure, nominee voting behavior may differ from partisan or ideological expectations because a President selected a nominee for short-term tactical, rather than long-term strategic, considerations.¹²⁰ Nonetheless, it remains that appointments do occur under conditions of imperfect information. The resultant uncertainty may prove more of a political risk to a President than a tool to successfully advance his agenda.¹²¹

Senators too may not know enough to “intelligently fulfill their constitutional role in the appointment process without knowing where Supreme Court nominees stand on important precedents and issues.”¹²² It is a common complaint that the Senate confirmation process does not elicit “enough about nominees’ legal ideologies to give meaningful, informed consent to Supreme Court nominations.”¹²³ This lack of information may result from a President choosing a stealth nominee.¹²⁴ In addition, the

¹¹⁷ In 1986, the Court upheld a state statute criminalizing adult consensual sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1986). It probably was not foreseen at the time of Justice Kennedy's appointment to the Court in 1988 that a then-settled question eventually would be revisited and overruled in a new political and cultural climate. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (majority opinion written by Kennedy, J.).

¹¹⁸ Compare, e.g., *Furman v. Georgia*, 408 U.S. 238, 405–14 (1972) (Blackmun, J., dissenting) (joining the dissenters in declining to rule the death penalty unconstitutional), with *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of cert.) (declaring that “[f]rom this day forward, I no longer shall tinker with the machinery of death”).

¹¹⁹ Prospective nominee Sandra Day O'Connor reportedly offered to Ronald Reagan that she believed “the regulation of abortions was in fact a legitimate subject for legislative action.” DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 140 (1999). But see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (Justice O'Connor writing for majority and reaffirming “essential holding of *Roe v. Wade*”).

¹²⁰ For instance, President Dwight Eisenhower's selection of Justice William Brennan may have “had more to do with [electoral] politics than with philosophical compatibility.” LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 52 (1985).

¹²¹ After all, many Justices typically described as “liberal” were Republican appointees from an era predating the Reagan presidency: Earl Warren (Eisenhower), William Brennan (Eisenhower), Harry Blackmun (Nixon), and John Paul Stevens (Ford). To this list, social conservatives may add post-Reagan Republican appointees Sandra Day O'Connor (Reagan), Anthony Kennedy (Reagan), and David Souter (G.H.W. Bush). See SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, <http://www.supremecourtus.gov/about/members.pdf> (last visited Feb. 24, 2010); THE WHITE HOUSE, THE PRESIDENTS, <http://www.whitehouse.gov/about/presidents> (last visited Feb. 24, 2010).

¹²² TRIBE, *supra* note 120, at 100.

¹²³ MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 134 (2004) (describing position of those who subscribe to this view).

¹²⁴ See, e.g., *Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 187 (2005) [hereinafter *Roberts*

nomination of former executive branch officials means that nominees increasingly cite executive privilege and decline to answer senators' questions.¹²⁵ Nominees may also distance themselves from prior positions,¹²⁶ modulate,¹²⁷ evade,¹²⁸ and (occasionally) prevaricate.¹²⁹ This possibility of stealthy nominees problematizes the exercise of senatorial advice and consent.

Nomination] (statement of J. Roberts) (citing Justice Ginsburg's declination to respond to certain types of inquiries). On the other hand, some political scientists have suggested that, notwithstanding these tactics, the public can still accurately forecast voting behavior. See, e.g., Jeffrey A. Segal et al., *The Role of Ideology in Senate Confirmation of Supreme Court Justices*, 77 KY. L.J. 485, 495–97 (1989) (categorizing statements found in newspaper editorials from *New York Times*, *Washington Post*, *L.A. Times*, and *Chicago Tribune* from nomination until Senate confirmation and concluding that correlation between Justices' voting behavior and the editorials was 0.80 in civil rights and liberties cases).

¹²⁵ JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 282, 284 (2007) (noting Harriet Miers's pretextual invocation of executive privilege).

¹²⁶ See, e.g., *Nomination of Judge Sonia Sotomayor to be an Associate Justice of the United States Supreme Court: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Sotomayor Nomination*] (statement of J. Sotomayor) (rejecting President Obama's empathy criterion for appointments); *Roberts Nomination*, *supra* note 124, at 146–47 (statement of J. Roberts) (distancing himself from comments in 1981 memo to Attorney General William French Smith in which he referred to "so-called right to privacy").

¹²⁷ Justice Sotomayor described her statement that a "wise Latina" jurist would often reach better decisions than a white male counterpart as a "rhetorical flourish that fell flat." *Sotomayor Nomination*, *supra* note 126 (statement of J. Sotomayor). Similarly, Justice Alito had previously declared that he "believe[d] very strongly in the supremacy of the elected branches of Government." *Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 346 (2006) [hereinafter *Alito Nomination*] (statement of J. Alito). He later retreated and described that statement as a "very inapt phrase." *Id.* When pressed by Senator Kennedy, he explained that he had not changed his mind but that his "phrasing" was "very misleading and incorrect." *Id.*

¹²⁸ *Alito Nomination*, *supra* note 127, at 454–55 (statement of J. Alito) (evading answering whether *Roe v. Wade*, 410 U.S. 113 (1973), is "the settled law of the land").

¹²⁹ Compare, e.g., *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the S. Comm. on the Judiciary*, 90th Cong. 104 (1968) (statement of J. Fortas) ("Let me say in the first place—and make this absolutely clear—that since I have been a Justice, the President of the United States has never, directly or indirectly, approximately or remotely, talked to me about anything before the Court or that might come before the Court. I want to make that absolutely clear."), with Audio tape: Recording of Telephone Conversation between President Lyndon B. Johnson and Justice Abe Fortas (Oct. 6, 1966) (Recordings and Transcripts of Conversations and Meetings #10929, LBJ Library) (preserving conversation between President Johnson and Justice Fortas discussing *Black v. United States*, 385 U.S. 26 (1966), then pending before Court) (on file with author). Although nominees may occasionally lie during confirmation hearings, it is likely infrequent. After all, it has long been a felony to knowingly and willfully "make[] any materially false . . . statement or representation" in any "matter within the jurisdiction of the . . . legislative . . . branch of the Government of the United States." 18 U.S.C. § 1001(a)(2) (2006).

Even interest groups, who are among the best-informed actors in the appointments process, stumble in their assessment of nominees. They occasionally have challenged nominees who would prove friendly or reliable votes in favor of their positions on issues of interest. The National Organization of Women opposed nominee John Paul Stevens's nomination to the Court,¹³⁰ but Justice Stevens has reliably supported women's rights.¹³¹ The National Gay and Lesbian Task Force challenged nominee Anthony Kennedy.¹³² Citing the Supreme Court's *Bowers v. Hardwick* decision, Executive Director Jeffrey Levi similarly suggested that Kennedy had "a far too narrow definition of the universe of Americans entitled to the rights guaranteed under the Constitution."¹³³ Justice Kennedy authored the opinion that *overruled Bowers*.¹³⁴ The National Abortion Rights Action League inveighed against nominee David Souter and expressed its concern that "if confirmed, Judge Souter would destroy 17 years of precedent and cast the deciding vote to overrule *Roe v. Wade*."¹³⁵ Instead, Justice Souter cast a deciding vote to *preserve* "the essential holding of *Roe v. Wade*."¹³⁶ Leaders of NARAL and NOW Legal Defense and Educational Fund expressed their concern about Ruth Bader Ginsburg's criticism of the legal reasoning relied on in *Roe v. Wade*.¹³⁷ These examples of confirmation friendly fire illustrate the imperfection of *ex ante* information.

The difference between vertical and horizontal precedent compounds the difficulty for all political actors in discerning nominees' views before appointment. Nominees to lower federal courts—where vertical precedent carries the command of a superior court's edict—may declare that *Roe v. Wade* is "settled law."¹³⁸ However, how

¹³⁰ *Nomination of John Paul Stevens to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 94th Cong. 78 (1975) (testimony of Margaret Drachler, National Organization for Women) (expressing NOW's "grave concern" about nomination of Justice Stevens).

¹³¹ *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 220–23 (1991) (Stevens, J., dissenting) (dissenting from the opinion upholding federal regulations that prohibited abortion counseling with Title X funds).

¹³² *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 426–27 (1989) (statement of Jeffrey Levi, Executive Director, National Gay & Lesbian Task Force).

¹³³ *Id.* at 427.

¹³⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³⁵ *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 363 (1991) (statement of Kate Michelman, Executive Director, NARAL).

¹³⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion) (O'Connor, Kennedy, Souter, JJ., lead opinion).

¹³⁷ *See* Linda Greenhouse, *On Privacy and Equality: Judge Ginsburg Still Voices Strong Doubts on Rationale Behind Roe v. Wade Ruling*, N.Y. TIMES, June 16, 1993, at A1.

¹³⁸ *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary*, 108th Cong. Pt. 3, 56 (2003) (statement of John Roberts, Nominee to be Circuit Judge for the District of Columbia Circuit).

probative is such a statement when the lower federal court judge is to be appointed to the Court, where precedent holds only a prudential claim on the Court's future action? The problem becomes more acute in areas such as abortion regulation where one suspects that precedent, protestations to the contrary notwithstanding, has little relationship with case outcomes and more to do with Justices' policy preferences.¹³⁹

In contrast, an *ex post* strategy of impeachment as judicial selection overcomes difficulties with stealth nominees, or at least becomes a parachute if an appointment should not work out. The President, the Senate, and interest groups will have better information on how a judge will perform after a judge has actually performed on the court. *Ex post* selection obviates the need to forecast how judges will vote on legal issues unforeseeable at the time of appointment. It removes some of the guesswork from judicial selection and promotes democratic constitutionalism in the same way that ill-informed, *ex ante* ideological appointment does.

In addition, impeachment would permit the President or the Senate to enforce representations made to it by a nominee under oath that later turned out to be false.¹⁴⁰ This *ex post* appointment check would function similarly to an electoral recall petition where the appointed officer betrays the political trust that secured his office.¹⁴¹ Even if not actually used, impeachment so threatened would promote nominee veracity, not mendacity.

B. Transformative Change in Judicial Personnel

Although the U.S. Constitution's formal description of the appointment power suggests the President initiates the process when he nominates,¹⁴² individual members of the judiciary actually control the commencement of the process—at least when it comes to the Court or inferior courts where Congress is unwilling to authorize additional judgeships. The traditional regime of ideological appointment results in the President and Congress waiting more or less passively for a judge to retire.¹⁴³

¹³⁹ See generally Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519 (2008) (describing meandering path to *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007) from *Roe*, *Casey*, and *Stenberg v. Carhart*, 530 U.S. 914 (2000)).

¹⁴⁰ CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* 202 (2000) (proposing that Congress impeach Justice Clarence Thomas on the basis that they allege his confirmation testimony was not truthful); Neumann, *supra* note 31, at 301–12 (suggesting grounds for impeaching Justice Thomas).

¹⁴¹ Unlike recall, it would not suffer from the collective action problem that stymies any effort to organize large numbers of voters to remove an incumbent.

¹⁴² U.S. CONST. art. II, § 2, cl. 2.

¹⁴³ John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 435 n.1 (1996).

Retirement creates a vacancy that the elected branches may then fill to affect votes on a collegial court. This sit-and-wait strategy could mean that a lengthy period transpires before a President is able to steer the court in his or her direction.¹⁴⁴

Moreover, some political scientists subscribe to the strategic retirement thesis, i.e., that Justices and judges politically calculate their retirements from the bench. These holdout judges may time their retirements to help or hinder a President with whom they agree or disagree on matters of law and public policy.¹⁴⁵ Health and personal circumstances permitting, a judge's politically timed retirement may mean that a President is more likely to have an opportunity to appoint someone ideologically close to him, as judicial opponents hold out and as judicial allies retire auspiciously to create vacancies.¹⁴⁶ This phenomenon may limit a President to the modest goals of prolonging the Court's jurisprudential status quo with the appointment of younger

¹⁴⁴ The Court experienced an eleven-year period of stability in its membership from August 1994 until September 2005. During that period, neither Clinton nor George W. Bush could appoint any Justice to the Court. United States Senate, Supreme Court Nominations, present-1789, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [hereinafter Supreme Court Nominations] (last visited Feb. 24, 2009).

¹⁴⁵ See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 36-40 (2005) (noting anecdotal evidence of politically timed retirements); ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 12 (2003) (arguing that retirement process has become more partisan over time due to generous retirement benefits and light case load); Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900-1987*, 52 J. POL. 457, 472-73 (1990) (observing consistent association between presidential elections and judicial retirement in lower federal courts); Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25, 36-37 (1993) (concluding that choice to retire is not independent of political events); James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RES. Q. 573, 592 (1995) (concluding that judges "delay their departure until the appropriate party enters office and then leave fairly quickly"). But see, e.g., David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 WASH. U. L. Q. 1397, 1433-35 (2005) (critiquing strategic retirement thesis, Hagle's study, and use of anecdotal evidence susceptible to multiple interpretations); Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8 AM. L. & ECON. REV. 143 (2006) (concluding Article III judges time their retirements from active service based on when they qualify for their judicial pensions).

¹⁴⁶ Justice David Souter's resignation might provide another example of an auspicious vacancy. Although Souter reportedly had wanted to resign in disgust after the Court's decision in *Bush v. Gore* in 2000, JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 177 (2007), he remained in office until a Democratic administration. The leaks of Souter's intent to resign came within the first hundred days of the Obama presidency, see Nina Totenberg, *Supreme Court Justice Souter to Retire*, NATIONAL PUBLIC RADIO, Apr. 30, 2009, and within two days of the announcement that Senator Arlen Specter (R-PA) would become a Democrat, providing President Obama with a sixty-vote filibuster-proof majority with which to confirm a replacement for Souter. Carl Hulse & Adam Nagourney, *Specter Switches Parties; More Heft for Democrats*, N.Y. TIMES, Apr. 29, 2009, at A1.

jurists and securing incremental change in only a few, low visibility areas of law.¹⁴⁷ Thus, the passive wait-and-appoint strategy may result in few occasions for transformative appointments.

In contrast, impeaching a judicial opponent who would not otherwise retire creates not only a vacancy where there was none before, but enables a President to affect a collegial court's status quo voting balance by defeating holdout efforts. It avoids inaction when no voluntary retirement or serendipitous vacancy is forthcoming. Moreover, a President (or the Senate) could maximize the effect of an impeachment by "deselecting" that Justice who is most ideologically distant, rather than pursuing the passive appointments scenario where a President's allies retire. Thus, a President during united government could seek to initiate impeachment of ideologically opposed or distant Justices, such as those who might hold out for another administration before retiring.¹⁴⁸

On the other hand, during periods of divided government, Congress might attempt to impeach a President's allies on the Court, forcing the nomination of more moderate Justices to secure confirmation. In either case, ideological selection would not halt simply because judges refuse to initiate the appointments process by creating vacancies. This particular example illustrates what may be yet another temptation of ideological impeachment: denying a President the first-mover advantage in appointments.

C. Shifting First-Mover Advantage: Congress as First Mover

The appointments process favors the nominating President over the Senate and over competing interest groups by granting to the President a first-mover advantage. A first-mover advantage describes those situations where a party gains a special advantage from acting first.¹⁴⁹ The Appointments Clause grants the President the right to act first by giving him the initial and sole power to nominate.¹⁵⁰ Alexander Hamilton correctly intuited that it would not be "probable, that [the President's] nomination would often be overruled."¹⁵¹ If senators reject a nomination, they "could not

¹⁴⁷ For a proposal to defeat the strategy by limiting the length of judicial tenures by way of fixed, nonrenewable terms, see Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 801–07, 822–24 (2006).

¹⁴⁸ On the basis of the Segal-Cover perceived ideology scale, Ruth Bader Ginsburg has been characterized as the most liberal sitting Justice. See EPSTEIN & SEGAL, *supra* note 145, at 110. On the other hand, a Democratic Congress could seek to initiate impeachment proceedings against Antonin Scalia, the most conservative sitting Justice according to that same measure. *Id.*

¹⁴⁹ ERIC RASMUSEN, GAMES AND INFORMATION, AN INTRODUCTION TO GAME THEORY 29 (3d ed. 2001).

¹⁵⁰ See U.S. CONST. art. II, § 2, cl. 2.

¹⁵¹ THE FEDERALIST NO. 76, at 394 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

even be certain, that a future nomination would present a candidate in any degree more acceptable to them.”¹⁵² Although the Senate has handed Presidents spectacular defeats in the past, there is an advantage to moving first in the selection process: recent presidential administrations boast judicial confirmation rates exceeding seventy-five percent.¹⁵³ That is not to say that the President’s first-mover advantage by itself entirely accounts for the high confirmation success rate. It doubtless results in part from the “silent operation” of the Senate’s power to confirm, i.e., the *in terrorem* effect of an administration anticipating Senate opposition and then moderating its choice of nominee to secure approval.¹⁵⁴

In contrast, impeachment as a judicial selection tool may confer on congressional majorities an important first-mover advantage, allowing them to match the President’s own first-mover advantage in the field of appointments. While executive-legislative divided government has become more commonplace in the latter half of the twentieth century, intra-legislative division has declined.¹⁵⁵ Thus, the increase in divided government and the concurrent decline in intra-legislative division give Congress not only the principal role in initiating impeachment, but strengthen its ability to obtain it.¹⁵⁶ To be sure, a President can initiate impeachments, for example, by collaborating with congressional allies to secure or threaten impeachment. Moreover, executive action—criminal investigation, prosecution, and imprisonment upon conviction—often has precluded several modern judicial impeachments¹⁵⁷ and therefore an inert Congress may have come to depend on the Executive to do its dirty work before acting itself. But Congress has impeached judges on the basis of *nonindictable* grounds,¹⁵⁸ and

¹⁵² *Id.*

¹⁵³ The lower court confirmation rates for five prior administrations are: Carter (91.9%), Reagan (93.1%), G.H.W. Bush (79.3%), Clinton (84.0%), and G.W. Bush (78.1%). DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977–2003, at 13 tbl.2(b) (2004), available at <http://www.senate.gov/reference/resources/pdf/RL31635.pdf>. Nominees to the Supreme Court have been confirmed 77.4% of the time (123 confirmed out of 159 nominations). See Supreme Court Nominations, *supra* note 144.

¹⁵⁴ EPSTEIN & SEGAL, *supra* note 145, at 21 (quoting THE FEDERALIST NO. 76).

¹⁵⁵ See *infra* Part IV.A.

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., *United States v. Claiborne*, 727 F.2d 842 (9th Cir.) (holding that a sitting judge was not immune to criminal prosecution before removal through impeachment) *cert. denied*, 469 U.S. 829 (1984); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.) (upholding criminal conviction of Judge Otto Kerner prior to impeachment), *cert. denied*, 417 U.S. 976 (1974).

¹⁵⁸ District Judge Halsted Ritter was impeached and convicted on the basis of a non-indictable offense. See *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937) (finding no jurisdiction to entertain challenge to conviction and removal on basis that article of impeachment did not allege a high crime or misdemeanor). Ritter’s impeachment conviction appears to be an example of ideological deselection. See *infra* note 340 and accompanying text.

nothing in the Constitution requires conviction to precede impeachment.¹⁵⁹ Further, frequent divided government limits a President's ability to use impeachment ideologically, unless clear independent grounds exist for impeachment, such as bribery, treason, or high crimes and misdemeanors. If the political context is favorable—divided government with adequate votes to transform a collegial court—Congress may choose to act first. Rather than using criminal investigation as a means of fact-finding, Congress may use its own investigative powers.

Additionally, ideological use of impeachment may assist the Senate in obtaining better leverage over a President than it would enjoy otherwise in the appointments process. Impeachment gives the Senate two bites at the selection apple. First, it removes an existing jurist—presumably one of the judges most ideologically distant from the congressional majority—and thereby immediately affects the voting balance on the collegial court. Second, when the President attempts to fill the vacancy, the Senate may use its advice-and-consent power to complement its impeachment power by moderating or even directing the President's choice of nominee. Alternately, the Senate may opt to prevent any further appointment altogether and maintain the short-staffed court balance until an ideologically allied administration assumes office.¹⁶⁰ Either approach would permit the Senate to take advantage of a process Congress would initiate.

Thus, impeachment offers important practical advantages over appointment. It is more accurate as a judicial selection tool due to its availability *ex post* confirmation. It is more flexible than nomination in response to passive resignation. Its results are potentially far more dramatic, particularly when no opponent's vacancy is forthcoming. Finally, impeachment allows Congress to participate in judicial selection as a first mover.

III. THE LEGAL ARGUMENTS FOR AND AGAINST IMPEACHMENT AS JUDICIAL SELECTION

According to Mark Tushnet, a defining feature of constitutional hardball is the availability to each side of colorable legal arguments.¹⁶¹ These hardball arguments

¹⁵⁹ Some commentators have argued that criminal conviction, or at least imprisonment pursuant to a conviction, must not precede removal by impeachment. *See, e.g.*, Melissa H. Maxman, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 431 (1987) (arguing that imprisonment pursuant to a criminal conviction is at odds with Article III tenure).

¹⁶⁰ On October 1, 1968, during the final months of President Johnson's administration, twenty-four Senate Republicans and nineteen Senate Democrats pursued an analogous strategy. Together they blocked a confirmation vote on the proposed elevation of Abe Fortas to be Chief Justice Earl Warren's successor. 114 CONG. REC. 28,933 (1968). The blocked confirmation prevented Johnson from filling the vacancy and permitted Richard Nixon, elected just over a month later, to fill it. *See supra* note 50 and accompanying text.

¹⁶¹ *See* Tushnet, *supra* note 6, at 531.

might be strained, but they must not be frivolous.¹⁶² These arguments, however, necessarily question a pre-constitutional understanding. In this situation, the hard-ballers seek to upset the settled understanding that federal judges are not impeachable on the basis of their ideology or judicial work product. They propose replacing that understanding with an impeachment power that may serve as an *ex post* appointment tool for judicial deselection, a recall mechanism.

The stealthy version of this constitutional hardball targets nominees on the basis of ideology or work product, but pretextually claims that the target's alleged misconduct falls within traditionally accepted grounds for impeachment. Thus, the stealthy tool requires the coincidence of bad, or at least questionable, behavior on the part of the target that may be characterized as "impeachable" in the traditionally accepted sense. As such, the stealthy tactic requires no wholesale reworking of impeachment's scope, only (perhaps) its piecemeal, incremental expansion.

By contrast, the plain view tactic openly targets an officer selected on the basis of ideology or work product and seeks removal on grounds traditionally thought beyond impeachment's reach. Because it does not claim to operate within the traditionally accepted categories, it must offer colorable justifications for the broader grounds for impeachment. Part III examines those arguments that might seek to justify plain view ideological impeachment and their counterarguments. They rely on arguments from constitutional text, structure, historical practice, and purpose.

A. Arguments for Impeachment as Judicial Selection

1. Constitutional Text

Proponents of impeachment as a tool of judicial selection might argue that the Impeachment,¹⁶³ Impeachment Trial,¹⁶⁴ Impeachment Judgment,¹⁶⁵ and Impeachment Grounds¹⁶⁶ Clauses (collectively, "the Impeachment Clauses") do not prevent deselection of judges because impeachment is not limited to indictable offenses. The Impeachment Grounds Clause provides, in relevant part, that a civil officer of the United States may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors."¹⁶⁷ As judges are civil officers of the United States, they are subject to impeachment under this general provision. Bribery and treason are indictable offenses that must be proved to the Senate's satisfaction in order to convict. However, the English common law term of art "high crimes and misdemeanors" had "no

¹⁶² *Id.*

¹⁶³ U.S. CONST. art. I, § 2, cl. 5 (describing House power to impeach).

¹⁶⁴ *Id.* at art. I, § 3, cl. 6 (describing Senate power to try impeachments).

¹⁶⁵ *Id.* at art. I, § 3, cl. 7 (describing permissible judgments pursuant to an impeachment conviction).

¹⁶⁶ *Id.* at art. II, § 4 (describing permissible grounds for impeachment).

¹⁶⁷ *Id.*

relation to whether an indictment would lie in the particular circumstances.”¹⁶⁸ Professor Raoul Berger offered the interpretation that, as applied to federal judges, the phrase did “not limit the common law scope of ‘high crimes and misdemeanors’ when the subject of impeachment is a judge.”¹⁶⁹ This approach is consistent with views expressed during the Virginia ratifying convention.¹⁷⁰

The ratification era understanding of “high crimes and misdemeanors,” though mixed, encompasses the impeachment of judges for their work product. Hamilton responded to an objection that under the Constitution the judiciary could claim supremacy to Congress and usurp its prerogative by claiming the power to “constru[e] the laws according to the *spirit* of the constitution.”¹⁷¹ He cited impeachment of such jurists, who repeatedly and willfully engage in such conduct, as a ready remedy for mischievous work product.¹⁷² Similarly, George Mason expressed his view that a President’s “attempts to subvert the Constitution” were grounds for impeachment,¹⁷³ which *a fortiori* would apply to judges, the removal of which would prove less traumatic to the nation as a whole. On the other hand, James Wilson questioned whether it would be proper for the House to impeach judges for the performance of their duties.¹⁷⁴

In any case, the interpretation of the phrase “high crimes and misdemeanors” might present a nonjusticiable question. The Court in *Walter Nixon v. United States*¹⁷⁵ concluded that the Impeachment Trial Clause’s assignment to the Senate of the “sole” power to try constituted a “textually demonstrable” commitment of the matter.¹⁷⁶ Indeed, it stated more broadly that “[j]udicial involvement in impeachment proceedings . . . would eviscerate the ‘important constitutional check’ placed on the Judiciary by the Framers.”¹⁷⁷ Analogously, the Impeachment Clause grants to the House the “sole” power to impeach, or indict.¹⁷⁸ Per *Nixon*’s rationale, whether “high crimes and misdemeanors” may encompass dissatisfaction with the manner in which, for example, a judge discharges his duties likely lies beyond judicial cognizance.

2. Structure

Hardballers may argue the place of Article III judges in our constitutional structure justifies Congress in using impeachment as a mechanism to control the substantive

¹⁶⁸ BERGER, *supra* note 42, at 62.

¹⁶⁹ *Id.* at 93.

¹⁷⁰ *Cf.* GERHARDT, *supra* note 47, at 19.

¹⁷¹ THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 151, at 417.

¹⁷² *Id.* at 420.

¹⁷³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1937) [hereinafter CONVENTION RECORDS] (statement of George Mason).

¹⁷⁴ 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 481 (Jonathan Elliot ed., reprint ed., AYER Co. 1987) (1888).

¹⁷⁵ 506 U.S. 224 (1993).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 235.

¹⁷⁸ U.S. CONST. art. I, § 2, cl. 5.

work product of the judiciary. Located in Article II, the Impeachment Grounds Clause, which applies to “the President, Vice President, and all civil Officers of the United States,”¹⁷⁹ may be read together with Article III as holding federal judges to a more exacting standard than other officers, but still using the same impeachment procedural machinery.¹⁸⁰ The Impeachment Grounds Clause permits removal upon conviction for “Treason, Bribery, or other high Crimes and Misdemeanors.”¹⁸¹ By contrast, Article III requires only “good Behaviour” as a condition for continuing to hold office.¹⁸² It may be reconciled with the Impeachment Grounds Clause by invoking the canon that more specific provisions govern over more general ones.¹⁸³ Whereas the Impeachment Grounds Clause governs civil officers of the United States in general and is located in Article II, “good Behaviour” covers judicial officers specifically and is located in Article III.¹⁸⁴ On this account, “good behaviour” does not simply cross-reference the Impeachment Grounds Clause,¹⁸⁵ but requires a higher standard of conduct. Judges must avoid not only the affirmatively bad behavior of treason, bribery, and similar offenses; their behavior must be affirmatively good. This interpretation still requires impeachment’s procedural machinery—indictment by the House, trial by the Senate—to remove a judge. But what constitutes “not-good” behavior could prove as discretionary as what grounds Congress may appropriately consider in discharging its power to advise and consent in the appointments context. Thus, this interpretation may give Congress the additional discretionary space it needs to impeach expressly on the basis of ideology. After all, when “good” modifies behavior, it does not describe an objective characteristic inhering in a judge, but the observer’s subjective judgment.

What constitutes “not-good” behavior may prove slippery and provide wiggle room for ideologically motivated impeachment of judges. Impeachable conduct may prove to be whatever Congress says it is.¹⁸⁶ And so long as the Senate does not resort

¹⁷⁹ *Id.* at art. II, § 4.

¹⁸⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 64 n.7 (2d ed. 1988). Another possibility is that the Impeachment and Good Behaviour Clauses constitute unrelated mechanisms for the removal of federal judges. On this minority interpretation, the Impeachment Clause represents a tool for congressionally initiated removals whereas the good behavior condition serves as a second and separate avenue for the removal of federal judges. For a discussion of this mechanism, see Prakash & Smith, *supra* note 5 (elaborating the interpretation that “good behavior” is a separate mechanism for removal).

¹⁸¹ U.S. CONST. art. II, § 4.

¹⁸² *Id.* at art. III, § 1.

¹⁸³ See, e.g., *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228–29 (1957).

¹⁸⁴ U.S. CONST. art. III, § 1.

¹⁸⁵ See *id.*

¹⁸⁶ 116 CONG. REC. 11,912–13 (1970) (statement of Rep. Ford) (advocating the impeachment of Justice Douglas and stating that “an impeachable offense is whatever a majority of the House of Representatives considers [it] 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”).

to a coin toss to resolve whether to remove, it is unclear that it would be justiciable.¹⁸⁷ Consider how a congressional majority playing constitutional hardball and seeking to remove an incumbent jurist could define “not-good” behavior. For example, impeachment could be employed against judicial opponents who deride law enforcement in dicta;¹⁸⁸ rely on or cite to foreign law;¹⁸⁹ delegate substantial decision making authority to law clerks;¹⁹⁰ attend judicial education conferences at expensive vacation resorts;¹⁹¹ duck hunt with a party named in his official capacity in a pending case;¹⁹² accept generous honoraria paid by former clients for a lecture series;¹⁹³ manipulate panel composition to favor particular outcomes in pending cases;¹⁹⁴ engage in serial monogamy and extramarital affairs;¹⁹⁵ or repeatedly stay an execution in disobedience to a hierarchically superior court.¹⁹⁶ This constitutional hardball standard would require only that Congress determine that a judge has violated the good behavior condition; the judge need not engage in indictable conduct or in nonindictable grave political offenses. Reading the Article II Impeachment Grounds Clause together with Article III allows constitutional hardballers to apply a more exacting (and elastic) standard to the judiciary than to non-Article III officers.

3. Post-ratification Historical Practice

Defenders of ideological impeachment can claim post-ratification historical practice to justify viewpoint-conscious judicial impeachment. This approach may justify ideological selection as “no new *thing* under the sun,”¹⁹⁷ but a venerable continuation

¹⁸⁷ Cf. *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (discussing, in the context of “high Crimes and Misdemeanors,” the limits of nonjusticiability); see also *infra* Part IV.C.

¹⁸⁸ See *supra* notes 61–66 and accompanying text.

¹⁸⁹ See Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. §§ 201–302 (2005).

¹⁹⁰ See, e.g., Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2129 (1992) (defending, as a former law clerk, Marshall against charges of laziness while acknowledging that “[h]e delegated much of his office’s work to his law clerks”).

¹⁹¹ Douglas T. Kendall & Eric Sorkin, *Nothing For Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public’s Trust*, 25 HARV. ENVTL. L. REV. 405 (2001).

¹⁹² Motion to Recuse at 2, *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004) (No. 03-475).

¹⁹³ HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 219 (1999).

¹⁹⁴ Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 2–3 (2008) (describing charges that Chief Judge Boyce Martin manipulated Sixth Circuit panel composition to direct outcomes).

¹⁹⁵ MURPHY, *supra* note 53 (detailing Justice Douglas’s colorful personal life).

¹⁹⁶ Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205 (1992).

¹⁹⁷ *Ecclesiastes* 1:9.

of politics by other means. Because these provisions are nonjusticiable, the non-judicial precedents provide an interpretive “gloss which life has written upon them”¹⁹⁸ as to what “other high Crimes and Misdemeanors” or “good Behaviour” mean.

Ideological impeachment, at least several good attempts, can boast a venerable pedigree stretching back to the Ninth Congress. As previously mentioned, Congress impeached and convicted Judge John Pickering for grounds that were not treason, bribery, or a high crime and misdemeanor—his probable insanity and alcoholism—and it did so by partisan margins. Soon after, the Jeffersonians targeted Justice Samuel Chase.¹⁹⁹ Opponents of ideological impeachment cite Justice Chase’s failed impeachment as establishing the principle that judges may not be impeached for their work product.²⁰⁰ Of course, as a non-judicial precedent, it is unclear what proposition the Samuel Chase impeachment exactly stands for. Beyond its place of anecdotal priority, one can draw opposite inferences from the Chase episode. The failure to impeach Chase may have demonstrated only a lack of supermajority congressional will, not congressional incapacity. It may be simply a historical accident Congress does not regularly impeach judges for opinions and conduct it considers “activist.”

Further, the Chase episode was neither the alpha nor the omega of ideological impeachment. It is not the most recent precedent. Congress impeached and convicted Judges Robert W. Archbald and Halsted Ritter in 1912 and 1936, respectively, for *nonindictable* offenses,²⁰¹ even if not for judicial opinions. Later, President Richard Nixon successfully precipitated the resignation of Justice Fortas and helped marginalize Justice Douglas.²⁰² With the hindsight of historical research, it is clear that the jurists’ ideologies motivated the efforts to prosecute and/or impeach them and that no traditionally accepted “high Crime or Misdemeanor” supported impeachment.²⁰³ If there is a principle barring the impeachment of judges based on ideology, it is honored in the breach.

¹⁹⁸ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (describing congressional acquiescence to executive practice).

¹⁹⁹ See *supra* Part I.B.1.

²⁰⁰ “The political precedent set by Chase’s acquittal has governed the use of impeachment to remove federal judges from that day to this: a judge’s *judicial* acts may not serve as a basis for impeachment.” REHNQUIST, 2004 YEAR-END REPORT, *supra* note 90; see also Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 49 (1960) (characterizing the failed impeachment attempt as “political *stare decisis*” against partisan impeachment).

²⁰¹ See *supra* note 158 and accompanying text for discussion of Ritter’s impeachment; *infra* notes 241–42 and accompanying text for discussion of Archbald’s impeachment.

²⁰² See, e.g., JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 1–12 (2001) (describing Nixon campaign to unseat Justice Fortas); MURPHY, *supra* note 53, at 429–30 (describing Nixon campaign to unseat Justice Douglas).

²⁰³ MURPHY, *supra* note 53, at 437, 441; ROBERT SHOGAN, *A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT* 263 (1972).

4. Purpose—Democratic Constitutionalism

To justify deselecting judges, proponents of ideological appointment may characterize the purpose of the impeachment clauses as safeguarding democratic constitutionalism. Because the Court claims the final word in interpreting the Constitution and because Article V amendment is cumbersome,²⁰⁴ American democracy lacks any effective check against a countermajoritarian judiciary. Alternatively, impeachment or its threat might help discipline adjudicators to secure amendments by judicial fiat without the need for the formal process. Thus, for example, rather than ratify the Equal Rights Amendment, create judicial majorities—through appointment and selective impeachment—who are willing to interpret the Equal Protection Clause to require the same results.²⁰⁵ Rather than ratify an Equal Protection Clause that applies to the national government, retain those Justices that “reverse” incorporate it by judicial fiat.²⁰⁶

Impeachment as judicial selection may even claim a democratic pedigree superior to appointment. Impeachment, unlike appointment, is a function of the House of Representatives.²⁰⁷ This more numerous body has the strongest democratic mandate, elected as it is every two years in proportion to population.²⁰⁸ The Senate, by contrast, is relatively insulated with its six-year staggered terms and bias for sparsely populated states.²⁰⁹ By initiating a judicial “deselection” process, the more democratic House can force the Senate to accountability.

B. Arguments Against Impeachment as Judicial Selection

1. Constitutional Text

Defenders will respond that Congress may not employ impeachment as a tool to ideologically deselect federal judges. They may attempt to make the strong claim that impeachment extends only to criminal offenses. This argument relies principally on textual arguments. The Impeachment Grounds Clause limits the permissible basis for removal from office to “Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”²¹⁰ Article III, section 3 narrowly defines

²⁰⁴ U.S. CONST. art. V (describing constitutional amendment process).

²⁰⁵ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1324 (2006) (“When President Reagan proposed a nominee to the Supreme Court who argued that the original understanding of the Fourteenth Amendment allowed government to discriminate between the sexes, the Senate rejected his nomination.”).

²⁰⁶ See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that racial segregation in public schools of the District of Columbia violated equal protection).

²⁰⁷ U.S. CONST. art. I, § 2, cl. 5.

²⁰⁸ *Id.* at art. I, § 2, cl. 1, 3.

²⁰⁹ *Id.* at art. I, § 3, cl. 1.

²¹⁰ *Id.* at art. II, § 4.

“treason” as “consist[ing] only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.”²¹¹ The First Congress codified the definition of “bribery” with resort to its well-known common law definition as a judge’s acceptance of money, “or any other bribe,” to influence judgment in a case.²¹² Neither ground could be used to deselect jurisprudential enemies, except where members of Congress fortuitously discover their opponent to have committed treason or have participated in bribery, or at least engaged in conduct suggestive of those crimes.²¹³

Proponents of ideological impeachment as constitutional hardball, therefore, must assert the woolly catchall category of “*other high Crimes and Misdemeanors*” as the ground for deselection. The context of the catchall category, however, suggests a more limited reading. “[H]igh Crimes and Misdemeanors” is best interpreted in context, *noscitur a sociis*, with other words “of the same kind,” *ejusdem generis*.²¹⁴ The words immediately preceding “high Crimes and Misdemeanor” are “Treason” and “Bribery,” which are serious indictable crimes. This usage allows the reasonable inference that the Framers “remained focused on the common attribute” of indictable criminality when employing the general words “other high Crimes.”²¹⁵ Accordingly, the text suggests that Congress should construe “other high Crimes” to apply only to indictable criminal conduct of the same general nature or kind as treason and bribery. To be sure, a misdemeanor was understood to be an “offence; ill behaviour; something less than an atrocious crime.”²¹⁶ If “Misdemeanor” is understood in its usual sense rather than as a legal term of art, it may allow the impeachable conduct to be a less serious offense, but still a criminal one.

Moreover, intratextually, other clauses in the Constitution may be read to categorize impeachable offenses as a subset of indictable crimes. The Criminal Jury Trial Clause provides that “[t]he Trial of *all Crimes, except in Cases of Impeachment*, shall be by Jury.”²¹⁷ The Clause’s jury trial right for “all Crimes” extends only to criminal offenses; that cases of impeachment are a subset suggests that they too are criminal in nature. Similarly, the Pardon Clause grants to the President “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”²¹⁸ Again, the pardon power, which extends only to criminal

²¹¹ *Id.* at art. III, § 3.

²¹² Act of April 30, 1790, ch. 9, § 21 (1st Cong. 2d Sess.), 1 Stat. 112, 117; BERGER, *supra* note 42, at 176 & n.243.

²¹³ *See supra* Part I.A.2.

²¹⁴ *See, e.g.*, *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 224–25 (2008) (describing application of *ejusdem generis* in the statutory context to “a list of specific items separated by commas and followed by a general or collective term”).

²¹⁵ *See id.*

²¹⁶ SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (definition of “misdemeanor”).

²¹⁷ U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

²¹⁸ *Id.* at art. II, § 2, cl. 1.

“Offences against the United States,” treats impeachment as a subset of offenses exempt from its operation.²¹⁹

Reasonable persons at the Federal Convention indicated that the language “other high Crimes and Misdemeanors” was not understood as an open-ended invitation to impeach on any ground that Congress fancied, or for that matter, political offenses not of a criminally indictable nature. George Mason proposed that the Impeachment Grounds Clause include the broad term “maladministration” after treason and bribery as enumerated bases for impeachment.²²⁰ He expressed concern that the categories of treason and bribery were too narrow and did not capture the corruption allegations that formed the basis for the contemporaneous English impeachment inquiry into Warren Hastings.²²¹ James Madison, however, objected to the term “maladministration.”²²² He cited the possibility that the Senate, with its right to try impeachments, might interpret the term too broadly and thereby subordinate the President (or any other officer, for that matter) to it.²²³ “So vague a term will be equivalent to a tenure during pleasure of the Senate.”²²⁴ Focusing on the particular office of President (and not considering the situation of life tenured judges), Gouverneur Morris thought the term would do no harm because the regular remedy of election every four years would prevent maladministration.²²⁵ George Mason, however, revised his original proposal and instead substituted the phrase “other high Crimes and Misdemeanors against the State,” which was adopted.²²⁶ This exchange reinforces the plain meaning that “other high crimes and misdemeanors” is not a broad catchall but is cabined in its potential reach.²²⁷

²¹⁹ See, e.g., *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (describing a pardon as “an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed”).

²²⁰ THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 535 (Gaillard Hunt & James Brown Scott eds., 1920) [hereinafter DEBATES].

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 535–36.

²²⁶ *Id.* at 535.

²²⁷ *But cf.* 1 ANNALS OF CONG. 518 (Joseph Gales ed., 1834) (statement of Rep. James Madison) (“[The executive officer] will be impeachable by this House, before the Senate for such an act of *mal-administration*; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from [office].” (emphasis added)). Congressman Madison’s position favored a broad reading of the impeachment power that conflicted with Framers Madison’s position when, located in an “original position” and behind a “veil of ignorance” as to where in a future government he might sit, JOHN RAWLS, A THEORY OF JUSTICE 118 (rev. ed. 1999), he objected to the addition of “maladministration,” leading to the addition of the narrower term “other high Crimes and Misdemeanors.” See DEBATES, *supra* note 220, at 535.

What should be made of the broad characterizations of the scope of “other high Crimes and Misdemeanors” in English common law, Federalist No. 81, the state ratifying conventions, and the First Congress? The broadest of these characterizations would extend to nonindictable offenses where an officer engaged in a “wilful mistake of the heart” as opposed to a “fault of the head.”²²⁸ Defenders might begin by noting the large number of opinions supporting the conclusion that the giving of an “opinion” was not grounds for impeachment.²²⁹ They might follow those citations with the reasonable explanation that some commentators failed to read the Impeachment Clause’s language in the context of American separated powers. Joseph Story’s survey of English impeachments led him to conclude that “many offences, not easily definable by law, and many of purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy.”²³⁰ But the United States, unlike England, embraced a trinity of separated powers. In an English parliamentary system, it is not alien to allow impeachment for any number of offenses.²³¹ No matter how broad, they could not tread on the separation of powers in such a unitary system. In an American system, however, such broad understandings of the impeachment power would permit the legislative power to swallow the judicial power.

2. Structure

Structurally, an interpretation of the Impeachment Clauses that permits ideological deselection potentially allows the limited, cross-branch check of impeachment to swallow the separation of powers. The Article I, II, and III vesting clauses grant the legislative, executive, and judicial powers, respectively, to separate departments of government.²³² This basic plan of organization, to which impeachment is only a limited exception, aimed to limit the possibility of tyranny by dividing powers among different political actors. If Congress were capable of exercising broad removal power over the judiciary, beyond the limited grounds provided, it would raise the specter of legislative control of the judicial function.²³³ The capacity to remove is a potent tool for control²³⁴ and as discretionary power to remove becomes broader, so too does the potency of control.

²²⁸ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 401 (Jonathan Elliot ed., reprint ed. 1987) (statement of Edmund Randolph).

²²⁹ *See id.*

²³⁰ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 800, at 556 (3d ed. 1858).

²³¹ *See id.* § 800, at 556–57.

²³² *See* U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

²³³ *Cf.* 1 CONVENTION RECORDS, *supra* note 173, at 71 (statement of Edmund Randolph) (claiming broad impeachment power would make the President “dependent on the Legislature—such an Unity w[oul]d be ag[ainst] the fixed Genius of America.”).

²³⁴ *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (characterizing qualified power to remove as creating “here-and-now subservience”).

Similarly, a claim that the Good Behaviour Clause provides a more exacting standard for impeaching judges is inconsistent with the separation of powers. Thus, Congress could come to control the exercise of executive and judicial power by virtue of its control of executive and judicial officers. Instead, from a separation-of-powers perspective, the Clause is best understood as either a shorthand cross-reference to the usual grounds for impeachment or else an entirely different and separate mechanism for removal in which the judiciary polices and removes its own members.²³⁵

3. Post-ratification Historical Practice

To defend against the constitutional hardball, defenders rely on the most famous judicial impeachment precedent: the failed attempt to impeach Justice Chase on the basis of his courtroom conduct and Federalist political ideology.²³⁶ The judiciary and legal establishment cite the Chase impeachment as an inviolable super-precedent. It stands for the proposition that “a judge’s *judicial* acts may not serve as a basis for impeachment.”²³⁷ The naked partisan attempt to impeach Chase was defeated, and defenders emphasize the outcome rather than the closeness of the vote.²³⁸

Unlike Pickering before him, Chase was capable of carrying out the duties of his office. Pickering suffered from an indisputable incapacity to fulfill the duties of his office.²³⁹ To be sure, he was a target for Democratic-Republicans.²⁴⁰ Pickering’s ideological impeachment, however, was stealthy and not expressly on account of his party affiliation.

Supporters of ideological impeachment might rely on prior impeachments and convictions, for example those of Judges Robert Archbald and Halsted Ritter, which appeared to rely on nonindictable grounds. In Judge Archbald’s case, commentators have characterized his removal as predicated upon nonindictable conduct.²⁴¹ Although the impeachment articles did not explicitly charge bribery or name a particular indictable offense, Congress described a pattern of conduct with a very strong whiff of quid-pro-quo bribery and extortion of litigants appearing before him.²⁴² The repeated theme throughout his articles of impeachment is litigants appeared before Archbald, and he extracted special business favors from those litigants.²⁴³ Given the uncertainty of

²³⁵ Prakash & Smith, *supra* note 5, at 75.

²³⁶ *See generally supra* notes 41–45 and accompanying text.

²³⁷ REHNQUIST, 2004 YEAR-END REPORT, *supra* note 90, at 6.

²³⁸ *See id.*

²³⁹ *See* Turner, *supra* note 37, at 487.

²⁴⁰ *Id.*

²⁴¹ GERHARDT, *supra* note 47, at 53.

²⁴² ALEX SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS 207–13 (1916) (reprinting text of the articles of impeachment against Judge Archbald).

²⁴³ *See id.* at 208.

the prescribed evidentiary standard for impeachment,²⁴⁴ Congress might have *sub silentio* impeached Archbald for bribery without specifying it. It might have strongly suspected further undetected evidence of explicitly criminal conduct.²⁴⁵

In Judge Halsted Ritter's case, Congress predicated his impeachment conviction upon what might seem to be a nonindictable offense. Of the seven articles against him, Ritter was convicted on the seventh article by a single vote and acquitted on all others, which involved criminal malfeasance in office.²⁴⁶ That article provided he was being impeached because his judicial conduct brought his court "into scandal and disrepute."²⁴⁷ Specifically, Ritter had explicitly conditioned a ruling to recuse himself in a case upon the City of Miami taking action favorable to him outside of court, viz., passing a resolution expressing its confidence in Ritter.²⁴⁸

Although defenders arguing for narrow impeachment grounds might have difficulty maintaining that the article was only for indictable criminal conduct (even if there was arguably a quid pro quo offer to exchange a ruling for something valuable to the judge), it is clear what was not at issue in Ritter: Congress was not asserting that Ritter had decided a case incorrectly through an act of judicial activism, or even the selection of an incorrect interpretive methodology exercised in good faith, etc.

In any case, the application of the Ritter or Archbald "precedents" or any of these other non-judicial cases is objectionable for reasons beyond their applicability. Unlike a judicial precedent, no single voice speaks for the House or Senate authoritatively or clearly. These non-judicial precedents, even more so than judicial precedents, are susceptible to multiple and inconsistent characterization. In an impeachment, no majority opinion limits the precedential effect by stating a holding. The rationale for particular outcomes is indiscernible.²⁴⁹ The four corners of an article of impeachment and the vote indicate an outcome. The outcome is a Spartan civilian announcement of a

²⁴⁴ Congress has discretion under the rules of proceedings clause to craft rules governing its own procedure, U.S. CONST. art. I, § 5, cl. 2, including its impeachment procedure and governing burdens of proof.

²⁴⁵ Similarly, Judge West H. Humphreys is often characterized as being impeached for a non-criminal offense. GERHARDT, *supra* note 47, at 53. In fact, Humphreys provided material support to the confederacy in its armed conflict with the United States. SIMPSON, *supra* note 242, at 197–99 (reprinting articles of impeachment, including several alleging that he "organize[d] armed rebellion against the Unites States, and lev[ied] war against them"). That conduct met the constitutional definition for treason. U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in *levying War* against them, or in adhering to their Enemies, giving them Aid and Comfort."(emphasis added)).

²⁴⁶ BUSHNELL, *supra* note 32, at 273, 282–83.

²⁴⁷ GERHARDT, *supra* note 47, at 53.

²⁴⁸ See Frank O. Bowman, III & Stephen L. Sepinuck, "High Crimes & Misdemeanors": *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1589 (1999).

²⁴⁹ That senators lack any right to debate during the on-the-record open session amplifies this point. SENATE IMPEACHMENT RULE XXIV, SENATE MANUAL, S. DOC. NO. 101-1, at 189 (1989).

case outcome rather than a common law opinion providing a *ratio decidendi*. Moreover, the softness of impeachment's political *stare decisis* means that the Senate has no effective mechanism for overruling an aberrant prior case's potential precedential effect. Over time, the result will be a loosening of the grounds for impeachment. That is, there could be ten cases where impeachment on a nonindictable offense was not permitted, but a single instance where it is. That one case, which arguably ignored the other "precedents," now displaces the ten prior cases by creating a precedent that may be cited in preference to the others and in favor of broader congressional prerogative. Thus, disputants may pick impeachment precedents they prefer and ignore the others.

Defenders of narrow grounds for removal will argue that past impeachment proceedings, such as Ritter's case, do not merit the acquiescence of the other branches—at least to the extent they suggest the impeachability of nonindictable conduct. Although Justice Frankfurter allowed that "[d]eeply embedded traditional ways of conducting government . . . give meaning to the words of a text or supply them," he doubted that "three isolated instances" could "add up, either in number, scope, duration or contemporaneous legal justification" to such a construction.²⁵⁰ Further, it is unclear whether Justice Frankfurter's acquiescence analysis ought to apply. Unlike legislation, impeachment is not a two-branch proceeding where another branch even has the opportunity and capacity to resist the intrusion of another branch. If Congress were to decide unilaterally that its impeachment power reached executive or judicial conduct it considered undesirable, the other branches would have no resort to a veto or other mechanism to fight the power grab.

4. Purpose

Defenders of narrow grounds for impeachment will argue that the purpose of the impeachment power is *not* the promotion of the democratic process by allowing the removal of officers who might issue rulings at odds with transient majorities. The impeachment power constitutes only a limited exception to the usual separation of powers for the purpose of removing officers in enumerated circumstances.

It would be a slippery slope to allow impeachment to extend to so-called "political offenses." Such offenses could reach good faith reasoning expressed in judicial work product that opponents find objectionable. Even assuming all reasonable jurists agreed that there is only one fixed, knowable, best interpretation of each provision of the Constitution to resolve ambiguity (and most do not), many originalists would acknowledge that adjudication also involves the separate act of *construction* to resolve the problem of vagueness.²⁵¹ As such, even stringent methodological adherence

²⁵⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610, 613 (1952) (Frankfurter, J., concurring).

²⁵¹ *See, e.g.,* Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 973 (2009) (drawing a distinction between constitutional interpretation and construction in the context of the Second Amendment).

to the most formal models of adjudication leaves leeway for discretion. The exercise of this discretion, in turn, may become an opponent's hook for impeachment. After all, reversal on the basis of discretion is considered "an abuse of discretion." There really is no limiting principle between what might fairly be characterized a political offense from judicial usurpation of legislative prerogative. It is a small matter to say that a decision with which one disagrees is "activist" and impeachable.

Professor Gerhardt argues that the Constitution's vesting of the sole power to try in the Senate, an elected body, means the Framers intended impeachment to be a political process, and not a legal one.²⁵² The Federal Convention record does not support such a claim. First, the Convention members initially contemplated vesting the trial of impeachments in the Supreme Court as yet another enumerated ground for federal court jurisdiction.²⁵³ This power was not removed from the Court and placed with the Senate because the character of the legal proceeding was being reconstituted as a political one. There was no discussion of any felt need that impeachment needed to be a "political" proceeding. Instead, the reason given was a concern that the Court was to be "too few in number and might be warped or corrupted" more easily than a numerous body and that it might have a conflict of interest if called upon to impeach a President because judges are presidentially appointed.²⁵⁴ Other delegates expressed that if impeachment were to be tried in the judiciary, judges might "be drawn into intrigues with the Legislature *and an impartial trial would be frustrated.*"²⁵⁵ Ironically, at least for some, the concern for an impartial trial motivated the reassignment of the impeachment trial to the Senate.

Further, the Constitution requires that senators trying an impeachment "shall be on Oath or Affirmation."²⁵⁶ What is the meaning of being under the oath? Gouverneur Morris characterized the oath as a safeguard against senators untruthfully concluding that a crime had been committed or finding that a state of affairs was the case, when it was not.²⁵⁷ "[T]here could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out."²⁵⁸ Morris recognized that the appeal to high motives (e.g., honoring an oath) might need to be tempered with an acknowledgment of low ones, i.e., the

²⁵² See GERHARDT, *supra* note 47, at 127–29. Professor Gerhardt has argued that the courts should not second guess an impeachment conviction by exercising judicial review to reverse a judgment of conviction by observing that the Senate convicts only by supermajority vote. *Id.* at 56. But the fact of supermajority action does not exclude the judiciary from reviewing legislation enacted by bicameral supermajorities overriding a presidential veto. Judicial review does not regard supermajority enactments as entitled to any more deference than simple majority ones.

²⁵³ DEBATES, *supra* note 220, at 279.

²⁵⁴ *Id.* at 535–36.

²⁵⁵ 2 CONVENTION RECORDS, *supra* note 173, at 42 (emphasis added).

²⁵⁶ U.S. CONST. art. I, § 3, cl. 6.

²⁵⁷ DEBATES, *supra* note 220, at 535–36.

²⁵⁸ *Id.*

pragmatic motive that lying would be unnecessary given the regular republican remedy of election. This oath taking is consistent with the extensive practice of the Senate referring to itself as a “court” of impeachment.²⁵⁹

Second, impeachment is “political” in the sense that legislators are elected representatives, but the proceeding is not “political” in the sense that there are no legal standards and that it could be a free-ranging inquiry into political offenses. Of course, legislators could engage in the impeachment equivalent of jury bias (a non-merits conviction) or jury nullification (a non-merits acquittal). Every criminal trial in America is “political” in this sense. But that does not imply there are no controlling legal standards.

IV. THE GROWING RISK OF IMPEACHMENT AS JUDICIAL SELECTION

Notwithstanding the temptation of deselection, impeachment has historically been cumbersome and its ideological use circumscribed. If that were not the case, would not legislators have resorted to it more frequently than they have? One English observer likened it to a “hundred-ton gun” that is “so heavy it is unfit for ordinary use” and “which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.”²⁶⁰ The description is apt. Traditionally, impeachment has had many hedges about it including the necessity of bicameral action, the requirement of a supermajority vote to convict, its limited and enumerated grounds for invocation, and the legalistic procedural inefficiency and resultant opportunity cost.²⁶¹

The risk that this strategy might become more commonplace, however, is growing. The confluence of several constitutional and political developments has lowered these traditional barriers to impeachment while simultaneously raising them to transformative appointment, the chief alternative. This section elaborates the changes afoot that might transform the traditional preference for appointment over impeachment. Although the two “selection” tools are not substitutes, the remaining obstacles may be eroded as ongoing changes bring the two mechanisms to equilibrium.

A. The Necessity of Bicameral Action

1. Lowering the Bar to Impeachment: The Loss of Intra-legislative Division

The Framers divided the impeachment power across two legislative chambers to safeguard against its abuse, providing “a complete security” against Congress retaliating

²⁵⁹ See SIMPSON, *supra* note 242, at 21–28.

²⁶⁰ 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 208 (2d ed. 1891).

²⁶¹ See GERHARDT, *supra* note 47, at 25–46 (describing the impeachment process in both the House and the Senate).

against the judiciary.²⁶² By “assigning to one [chamber] the right of accusing, to the other the right of judging, [the Constitution] avoids the inconvenience of making the same persons both accusers and judges.”²⁶³ The theory was that the popularly elected House would impeach or indict with a simple majority, while the more deliberative Senate would adjudge and convict with a two-thirds supermajority.²⁶⁴ This division of labor resulted in cautious deliberation—an internal checking function—as both bodies, selected by different constituencies, would have to agree to convict and remove.²⁶⁵ Senators answered to their state legislatures and reflected their partisan divisions.²⁶⁶ They were relatively insulated and thought to be the “well-educated, wealthier, more virtuous citizens.”²⁶⁷ They were neither accountable directly to interest groups nor dependent on their campaign largesse for expensive direct election campaigns.²⁶⁸ In contrast, the directly elected House responded to popular passion.²⁶⁹ It represented parochial interests that were thought to be “more subject to factions and more inclined than the Senate to hasty and intemperate action.”²⁷⁰ By dividing the impeachment power between the two chambers, the Framers pitted the Senate against the House, two chambers elected by, and representing, different constituencies.

The governmental engineering generally worked. Different constituencies elected Senators than elected their House counterparts: state legislatures elected Senators,²⁷¹ individual voters elected House Representatives.²⁷² The result was that the House and Senate majorities were occasionally divided one against the other.²⁷³ Bicameralism thereby provided a cooling function, with the republican Senate thought to act as a “cooling saucer” for the democratic passion of the House.²⁷⁴

However, the direct election of U.S. senators, formalized and mandated by the Seventeenth Amendment,²⁷⁵ diminished this internal check. Direct election provided

²⁶² THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 151, at 420.

²⁶³ THE FEDERALIST NO. 66 (Alexander Hamilton), *supra* note 151, at 343.

²⁶⁴ *See id.*

²⁶⁵ *See id.* at 344.

²⁶⁶ Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 518, 551 (1997).

²⁶⁷ GERHARDT, *supra* note 47, at 9–10.

²⁶⁸ Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1034 (1994).

²⁶⁹ *See* GERHARDT, *supra* note 47, at 10.

²⁷⁰ *Id.*

²⁷¹ U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

²⁷² *Id.* at art. I, § 2, cl. 1.

²⁷³ Prior to direct election of the whole Senate, the control of the House and Senate was divided twelve out of sixty-five congresses (18%). They have been divided only three out of forty-six congresses since the Seventeenth Amendment required direct election (6%). *See* PARTY DIVISION IN THE SENATE, *supra* note 60; PARTY DIVISIONS OF THE HOUSE, *supra* note 60.

²⁷⁴ RICHARD F. FENNO, JR., *THE UNITED STATES SENATE: A BICAMERAL PERSPECTIVE* 5 (1982).

²⁷⁵ U.S. CONST. amend. XVII.

for the same constituencies—individual voters—to elect the House and the Senate.²⁷⁶ This identity of electors meant, in turn, that there was an increased likelihood of alignment in partisan preference (and control) across legislative chambers. Thus, there is less deliberative cooling and a greater risk of united partisan exercise of power with those functions that are divided between chambers, such as legislating and impeachment.

Indeed, control of the two chambers now generally moves in lockstep. Since direct election of the Senate began in 1914, the same political party has controlled both chambers of Congress with only the rare exception.²⁷⁷ Direct election of senators has reduced intra-legislative division. Majority control of the chambers now generally moves in tandem, except notably when there is a *post-election* party defection, resignation, or death.²⁷⁸

The increased likelihood of legislative unity now means that it is easier for a House and Senate controlled by the same party to impeach (i.e., indict), try, and convict. Bicameral coordination by political confederates is easier and may result in less deliberation and more convictions.

2. Raising the Appointments Bar: More Inter-branch Division

At the same time that impeachment as judicial selection has become marginally easier for Congress, transformative appointment has become more difficult for

²⁷⁶ At present, these House and Senate constituencies are exactly identical in seven out of the fifty states. These states have only one House Representative-at-Large who is elected by the whole state. See LORRAINE C. MILLER, OFFICIAL LIST OF MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES AND THEIR PLACES OF RESIDENCE (2009), http://clerk.house.gov/member_info/olm_111.pdf (listing Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming as states with only one House Representative). In the other forty-three states, there is more than one House Representative for each state. *Id.* Their House districts, particularly with aggressive gerrymandering, might create constituencies with marginally different partisan preferences when taken as a whole than the statewide senatorial districts that cannot be gerrymandered. See Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 10–12, 42–43 n.117 (2008).

²⁷⁷ From 1789 through the 1916 election, there were fifty-three instances of intra-legislative unity with twelve instances of intra-legislative disunity. From 1918 (the first year the entire Senate was directly elected) through the 2008 election, there have been forty-three instances of intra-legislative unity with only three contiguous instances of intra-legislative division. See PARTY DIVISION IN THE SENATE, *supra* note 60; PARTY DIVISIONS OF THE HOUSE, *supra* note 60. Moreover, these contiguous Congresses—the 97th through the 99th—were closely divided with a small Republican majority controlling the Senate at a time of party realignment as Republicans won the votes of conservative southern Democrats.

²⁷⁸ The 107th Congress briefly featured a divided Congress, but only because of then-Republican Senator Jim Jefford's post-election defection to caucus with Senate Democrats, thereby switching control of the Senate. 147 CONG. REC. 9792–93 (2001) (statement of Sen. Specter) (lamenting Senator Jefford's decision to caucus with Senate Democrats). The Congress elected to office in November 2000 was unified. PARTY DIVISION IN THE SENATE, *supra* note 60.

Presidents as they are more likely to confront divided government than their predecessors. Political scientists have observed that, notwithstanding the present unity of government, we live in a period where inter-branch divided government—i.e., a President and a Congress held by different parties—is a regularly occurring feature of the political landscape.²⁷⁹ During the last fifty-six years, there has been President-Senate division in fourteen out of twenty-nine congresses, or almost fifty percent of the time.²⁸⁰ That frequency contrasts with the relative non-occurrence of President-Senate division prior to the election of 1952.²⁸¹ During the 163-year period from 1789 to 1952, President-Senate division occurred only nine times or eleven percent of the time.²⁸² Whatever the causes, today a nominating President more frequently encounters a confirming Senate controlled by an opposing party.

These judicial nominations during periods of divided government are less likely to prove transformative. Either the nominations process will prove particularly contentious or a President will obligatorily, in order to secure confirmation, moderate his choices.²⁸³ For example, the confirmation hearings of Robert Bork, Clarence Thomas, the post-1994 election Clinton nominees, and the post-2006 election George W. Bush nominees were particularly contentious.²⁸⁴ In such cases, it is unlikely any appointment would prove transformative. This is not to say a President could resort to impeachment as an alternative selection tool during divided government—that would place the process in the hands of political opponents and render the President relatively impuissant. It does, however, suggest that a united Congress gains an improved hand in judicial selection, relative to the President, when government is divided, at least with respect to transformative appointment.

B. Supermajority Requirement

Impeachment as judicial selection also requires larger majorities than appointment. The process requires not only a simple House majority to impeach, but also a two-thirds Senate supermajority, or sixty-seven votes in the presently constituted hundred-senator chamber, to convict.²⁸⁵ In contrast, appointment requires a simple Senate

²⁷⁹ David Menefee-Libey, *Divided Government As Scapegoat*, 24 PS: POL. SCI. & POL. 643, 643 (1991).

²⁸⁰ See CONGRESSIONAL QUARTERLY PRESS, *THE PRESIDENCY A TO Z* 607–09 (Gerhard Peters et al. eds., 4th ed. 2008).

²⁸¹ See *id.*

²⁸² Overall, President-Senate divided government has occurred only twenty-one percent of the time from 1789 to the present. See *id.*

²⁸³ THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 151, at 394 (describing influence of Senate's advice and consent over President's choice of nominees).

²⁸⁴ GEYH, *supra* note 20, at 203–08.

²⁸⁵ “[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.” U.S. CONST. art. I, § 3, cl. 6.

majority to confirm.²⁸⁶ The use of the filibuster against the confirmation of judicial nominees, however, has raised the bar to transformative appointments at the same time that barriers to impeachment have been lowered.

1. Raising the Bar to Appointment

Transformative appointments to the courts have become more difficult as senators have deployed procedural tools to thwart simple majority rule. First, the use of Senate filibusters to block judicial confirmation votes has made transformative appointments more difficult. A filibuster is a senator's ability to obstruct legislative action, typically by wielding the traditional privilege to engage in unlimited and (thereby) dilatory speech.²⁸⁷ Ordinarily, a vote to confirm requires only a simple majority vote, or presently fifty-one senators. But when a senator decides to filibuster a confirmation, he or she may block a vote absent a successful supermajority vote to invoke the limitation of debate, or cloture.²⁸⁸ Senate Rule 22 defines that supermajority as three-fifths of senators "duly chosen and sworn," or in a complete complement of the presently constituted Senate, sixty senators.²⁸⁹

Filibusters have become increasingly commonplace as a senator's tool of choice for obstruction. Once upon a time, filibustering carried heavy costs, both the physical exertion of holding the floor²⁹⁰ and the foregone opportunity to engage in other legislative activity.²⁹¹ The modern filibuster, however, is "virtually costless."²⁹² Majorities short of sixty senators are unwilling to "engage in wars of attrition and incur the attendant [opportunity] costs," thereby rendering "filibustering costless for minorities."²⁹³ The multi-tracking system devised by Senators Robert Byrd and Mike Mansfield exemplifies this unwillingness to challenge filibusters.²⁹⁴ The multi-track

²⁸⁶ The Appointments Clause does not explicitly provide for a Senate majority in order to confirm. U.S. CONST. art. II, § 2, cl. 2. By contrast, the Treaty Clause requires a Senate two-thirds supermajority to "make Treaties." *Id.* Thus, simple majority voting to confirm appointees assumes a default background rule in the absence of an explicit constitutional rule to the contrary, Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 802–03 & n.90 (2006), an assumption buttressed by 220 years of confirmation practice.

²⁸⁷ Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 804.

²⁸⁸ SENATE RULE XXII, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 15–17 (2000).

²⁸⁹ *Id.*

²⁹⁰ *See, e.g.*, 103 CONG. REC. 16,263–84, 16,383–459 (1957) (reporting filibuster of 1957 Civil Rights Act by Sen. Thurmond).

²⁹¹ GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 18 (2006).

²⁹² *Id.* at 260.

²⁹³ *Id.* at 262.

²⁹⁴ *Id.* at 261.

system obviates the need for a filibustering senator to hold the floor. An obstructed measure is “moved” to a separate track, thereby enabling other legislative action and lessening collateral damage to the Senate’s work.²⁹⁵

This preference for the filibuster extends to judicial nominations. Where opponents perceive an appointment to be high stakes, such as when it may transform a collegial court or prelude such an appointment, a filibuster is an almost costless and low visibility way to scuttle an appointment, particularly when used against lower court nominees.²⁹⁶ Both Senate Democrats and Republicans have wielded this procedural weapon to block confirmation votes for transformative nominees to the U.S. courts of appeals and U.S. Supreme Court.²⁹⁷

The use of judicial filibusters narrows the gap between appointment and impeachment and makes the two selection tools closer substitutes. When comparing appointment and impeachment as competing selection strategies, ideological impeachment most appropriately compares with transformative appointment disputes, not run-of-the-mill appointments. These appointments most likely would incite a minority’s use of the filibuster.²⁹⁸ Impeachments, used as judicial selection, would likely be reserved for attempts at transforming a collegial court. While there is a gap between the two methods to choosing judges, the difference between impeachment and a transformative appointment is not quite the chasm one may imagine.²⁹⁹ The real distance is not the sixteen-vote span between a sixty-seven-vote supermajority to convict an incumbent jurist and the fifty-one-vote simple majority to confirm a nominee; it is the seven-vote span between the sixty-seven-vote supermajority necessary to convict and the sixty-vote supermajority required to invoke cloture to a filibuster.³⁰⁰

²⁹⁵ *Id.* at 261–62.

²⁹⁶ *See, e.g.*, Memorandum on Members Meeting with Leader Daschle (Jan. 30, 2003) (on file with author) (strategizing opposition to Miguel Estrada’s nomination to D.C. Circuit for fear he later would be nominated for elevation to Supreme Court).

²⁹⁷ *See, e.g.*, 114 CONG. REC. 28,933 (1968) (failing to invoke cloture on confirmation vote of Abe Fortas); *see also* WAWRO & SCHICKLER, *supra* note 291, at 4–5.

²⁹⁸ *See, e.g.*, 152 CONG. REC. S235 (daily ed. Jan. 27, 2006) (statement of Sen. Sessions) (criticizing filibuster of Samuel Alito’s nomination to replace Justice O’Connor).

²⁹⁹ Historically, absenteeism during Senate votes to convict has lowered the number of votes required to impeach at the margins. At least one commentator has noted senators’ poor attendance at impeachment proceedings. GERHARDT, *supra* note 47, at 38–39. Impeachment requires “the Concurrence of two thirds of the [senators] *present*” to convict, U.S. CONST. art. I, § 3, cl. 6 (emphasis added), not the accord of two thirds of all senators *elected*. Thus, senators who might be unwilling to vote for impeachment might yet be encouraged to “take a walk” and not show up for a vote, thereby lowering the bar to impeachment. In contrast, “three-fifths of the Senators *duly chosen and sworn*” must vote to invoke cloture to a filibuster of a judicial confirmation. SENATE RULE XXII, *supra* note 288 (emphasis added). Barring a vacancy in a Senate seat due to death or resignation, this requirement presently requires the votes of sixty senators, regardless of actual attendance during cloture votes.

³⁰⁰ SENATE RULE XXII, *supra* note 288.

Second, the Senate tradition of “blue slips” enables senators to delay or block transformative judicial appointments to federal judgeships.³⁰¹ Although formally the President retains the power to nominate judges, senators effectively control the nomination of those judges from their states. The “blue slip” senatorial courtesy authorizes a senator to place a hold on a judicial nominee from his or her home state, whether a district court judge or a circuit judge, whose seat is traditionally allotted to a particular state.³⁰² If a senator returns a “blue slip” on a nomination marked “objection,” a full committee hearing on the nomination may not go forward.³⁰³ Thus, this hold permits a senator to veto a judicial nominee of whom he or she does not approve. To be sure, the “blue slip” tradition has recently come under reconsideration (or at least revision),³⁰⁴ and a senator could attempt to release a nomination from committee by way of a discharge motion.³⁰⁵ But in light of senatorial comity, it is neither likely the “blue slip” will disappear entirely nor that discharge petitions will become commonplace.

2. Lowering the Bar to Impeachment

Unlike appointment, which must be consummated to achieve its end, impeachment does not need to actually culminate in conviction and removal to be effective as an instrument of deselection. A supermajority vote to convict may prove altogether unnecessary. If the judge resigns office prior to trial in the Senate, a simple House majority suffices to “impeach” as a tool of judicial selection.³⁰⁶ In such cases, removal would be easier to obtain than transformative appointment: the House, unlike the Senate, does not permit filibusters or senatorial holds. The Impeachment Clause requires only a bare House majority.³⁰⁷ That bare majority may also act precipitously and with only a minimal amount of evidence heard. Indeed, “the House now seems comfortable in disposing of its obligation to accuse rather promptly. It may, in fact, now discharge its duties as accuser too quickly and too easily, acting much like a grand jury that simply rubber stamps the presentation of the prosecutor with an indictment.”³⁰⁸

³⁰¹ MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 147 (2000).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 *J.L. & POL.* 341, 364 (2006).

³⁰⁵ SENATE RULE XVII, *STANDING RULES OF THE SENATE*, S. DOC. NO. 106-15, at 12–13 (2000). *But see* FORREST MALTZMAN, *COMPETING PRINCIPALS: COMMITTEES, PARTIES, AND THE ORGANIZATION OF CONGRESS* 135 (1998) (describing abysmal success rate for Senate discharge motions due to the availability of filibuster).

³⁰⁶ *See infra* note 329 and accompanying text.

³⁰⁷ U.S. CONST. art. I, § 2, cl. 5.

³⁰⁸ MARY L. VOLCANSEK, *JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE* 165 (1993).

As a result, impeachment, like appointment, may have a “silent operation.”³⁰⁹ A successful impeachment vote alone, or even a colorable threat of a successful impeachment vote, may have a potent *in terrorem* effect that makes completion of the impeachment process unnecessary and pressures targeted jurists to resign.³¹⁰ Judges may fear running the impeachment gauntlet for a combination of many reasons: negative publicity and harm to their reputations;³¹¹ unreimbursed legal defense bills;³¹² the possible revelation of further humiliating and embarrassing information;³¹³ the uncovering of more legally consequential missteps;³¹⁴ the loss of pensions if impeached and convicted;³¹⁵ altruistic concern for political damage to the judiciary as an institution (or at least lip service to that altruism);³¹⁶ the inevitability of impeachment itself;³¹⁷ and the ability to be pardoned for ordinary criminal conduct but not impeachment.³¹⁸ If a judge sufficiently fears the consequences of formal impeachment and removal, even if innocent, he or she may voluntarily resign.³¹⁹ The Senate’s supermajority vote then proves unnecessary, and thus the impeachment process, or at least its threat, becomes a closer alternative to appointment.

Simply counting formally impeached and convicted judges results in a gross undercount of the tool’s potency. It neglects the many who resigned when in impeachment’s

³⁰⁹ Cf. THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 151, at 394 (describing influence of Senate’s advice and consent over President’s initial choice of nominees).

³¹⁰ See, e.g., Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 653–54 & n.53 (1988) (observing mere threat of impeachment can precipitate resignations).

³¹¹ KALMAN, *supra* note 46, at 372 (noting Carol Agger’s urging her husband Justice Fortas to resign in light of extreme discomfort from negative publicity).

³¹² GERHARDT, *supra* note 47, at 62–63. It is possible that the inconvenience of nonmeritorious proceedings may raise a jurist’s legal defense costs and thereby become a means of competing with jurisprudential competitors; cf. Steven C. Salop & David T. Scheffman, *Raising Rivals’ Costs*, 73 AM. ECON. REV. 267, 267 (1983) (describing exclusionary strategy in antitrust context). Cost sensitive individual jurists may opt to resign rather than fight impeachment, as they are institutionally ill-equipped to defend themselves. Most judges do not have permanent, experienced legal staff, only inexperienced law clerks, who attend to only official judicial business. The defense costs of hiring experienced counsel may prove prohibitive.

³¹³ See, e.g., Tuan Samahon, *The ‘Outing’ of Abe Fortas: Removal Without Impeachment* (Sept. 8, 2009) (unpublished manuscript on file with author) (describing FBI’s collection and leaks of embarrassing personal information about Abe Fortas).

³¹⁴ See *id.*

³¹⁵ GERHARDT, *supra* note 47, at 99.

³¹⁶ Letter from Abe Fortas to Earl Warren (May 14, 1969), in SHOGAN, *supra* note 203, at 279 (explaining that he was “resign[ing] in order that the Court may not continue to be subjected to extraneous stress which may adversely affect the performance of its important functions”).

³¹⁷ See *infra* note 328.

³¹⁸ Nixon is a prominent example of this effect. Ford could pardon him for federal criminal charges, but not in “Cases of Impeachment.” U.S. CONST. art. II, § 2, cl. 1.

³¹⁹ Cf. e.g., Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) (describing problem of innocent people rationally plea bargaining).

shadow.³²⁰ Although only seven federal judges have been both impeached and convicted, almost four times as many have resigned under its shadow.³²¹ These cases constitute a crypto-history of impeachment that has escaped inclusion in the traditional canon. What has been characterized as impeachment's "disuse" may simply be the evidence of its shadow's success.³²²

Prominent among these resignations was Justice Fortas. President Richard Nixon had campaigned for the presidency by running against the Warren Court, advocating law and order, and promising to appoint "strict constructionists who saw their duty as interpreting law and not making law."³²³ To transform the Court, however, Nixon would require several appointments beyond the seat of Chief Justice Earl Warren.³²⁴ Fortas provided a convenient target for judicial deselection when *Life* journalist William Lambert picked up the trail of a rumor that Fortas had financial dealings with convicted securities manipulator Louis Wolfson.³²⁵ Although commentators opine that he likely broke no law,³²⁶ he resigned under pressure from the Nixon administration, Congress, and the media.³²⁷ His resignation eliminated a jurist ideologically distant from Nixon and allowed Nixon an opportunity for another appointment.

To be sure, it is easier to precipitate resignations from jurists who have actually broken the law, or who have otherwise engaged in politically or ethically questionable conduct. Judges have resigned after a criminal conviction without any House vote of impeachment³²⁸ and others have resigned after House impeachment alone.³²⁹ Criminal

³²⁰ See *infra* Table 1.

³²¹ See *infra* Table 1.

³²² GERHARDT, *supra* note 47, at 30, 173 (noting failure to impeach Judges Collins and Aguilar).

³²³ DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT 181 (1999).

³²⁴ See KALMAN, *supra* note 46, at 370–76. Warren announced his contingent resignation under President Lyndon Johnson. *Id.*, at 328.

³²⁵ William Lambert, *Fortas of the Supreme Court: a Question of Ethics, The Justice . . . and the Stock Manipulator*, LIFE, May 9, 1969, at 32.

³²⁶ For example, David Kyvig has claimed that "[n]either Fortas's American University seminar nor his Wolfson Family Foundation involvement presented a prima facie case of unethical conduct." KYVIG, *supra* note 47, at 83. *But see* Fred Graham, *Abe Fortas*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 3015, 3027 (Leon Friedman & Fred L. Israel eds., 1997) (noting determination of ABA's Committee on Professional Ethics that Fortas's association with Wolfson was "clearly contrary to the Canons of Judicial Ethics" and violated eight separate canons).

³²⁷ See, e.g., KALMAN, *supra* note 46, at 369, 374–75.

³²⁸ For example, Carter appointee Judge Robert F. Collins was prosecuted and criminally convicted of an impeachable offense. *United States v. Collins*, 972 F.2d 1385, 1395 (5th Cir. 1992). He resigned without the House voting on articles of impeachment. See KYVIG, *supra* note 47, at 304. Likewise, Seventh Circuit Judge Otto Kerner, Jr. was convicted of criminal action, *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), but resigned before the House voted to impeach him. See Neumann, *supra* note 31, at 251.

³²⁹ Wilson appointee U.S. District Court Judge George English resigned after he was impeached, but before the Senate removed him. 68 CONG. REC. 297 (1926).

wrongdoing by a judge that a President may investigate and prosecute prior to impeachment surely assists in precipitating resignations.³³⁰

But resignation is not strictly necessary. A naked threat of impeachment may have the effect of disciplining adjudication even absent *in terrorem* resignation. “[T]he prospect of occasional impeachments could greatly increase accountability.”³³¹ Indeed, impeachment may be “more potent in its threat than in its practice.”³³² Consider the analogous case of President Franklin Roosevelt’s court-packing plan.³³³ FDR did not actually carry out his infamous plan. Still, Justice Owen Roberts’s alleged “switch-in-time that saved nine” may evidence the possibility of *in terrorem* discipline.³³⁴ Such brushbacks may domesticate jurists without the need to remove them.³³⁵

Notwithstanding the smaller seven-vote gap between impeachment and closing filibuster debate on a transformative appointment, seven votes can still make the difference between removal and continued incumbency. Several proposals to change the numbers of votes to confirm might have the unwitting effect of incentivizing impeachment against now-incumbent judges or Justices. For example, Professor John Ferejohn has suggested amending the Constitution to require a Senate supermajority to confirm an appointee.³³⁶ He reasons that the requirement “would mean that newly appointed judges would have to be acceptable across party and ideological lines. This would tend to discourage the appointment of ideologically extreme judges and would probably tend to lead to a court filled with judicial moderates.”³³⁷ This outcome results from the need to capture the votes of a larger number of senators spanning a broader ideological spectrum. If the formalization of a supermajority were to raise the confirmation requirement above that already required for cloture to sixty-seven votes, then, at least as vote count is concerned, it would be no more trouble to secure judicial deselection through impeachment than to secure transformative appointment. Impeachment would be more tempting because of its advantages as a backward looking tool that benefits from hindsight. Although such a proposal might make it less likely that impeachment would be employed prospectively to deselect jurists (on the theory

³³⁰ Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809; Maxman, *supra* note 159, at 424; Maria Simon, Note, *Bribery and Other Not So “Good Behavior”: Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617 (1994).

³³¹ Michael Abramowicz, Book Note, *Impeaching Judges at the Fringe*, 106 YALE L.J. 2293, 2298 (1997) (reviewing GERHARDT, *supra* note 47).

³³² VOLCANSEK, *supra* note 308, at 156.

³³³ See *supra* notes 17–27 and accompanying text.

³³⁴ It is possible that the assertion of a switch in time is no more than a *post hoc ergo propter hoc* fallacy. See *supra* note 25.

³³⁵ See *supra* note 11 and accompanying text; see also Fitschen, *supra* note 35, at 144 (claiming that “the mere threat of impeachment will have a salutary effect on the federal judiciary”).

³³⁶ John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 66–67 (2002).

³³⁷ *Id.*

that *ex ante* information was adequate to allow informed voting that reflected senatorial ideological preferences), it might have a different effect for existing court members. For these jurists, in terms of vote counting, it would be no more difficult to appoint a transformative replacement than to remove an incumbent.

C. *Its Limited Grounds for Invocation*

The limited grounds for impeachment have traditionally formed another obstacle to the congressional invocation of impeachment. Treason, bribery, and other high crimes and misdemeanors define the universe of impeachable conduct. Although these grounds sound in the criminal law and suggest criminally indictable conduct, or at least serious noncriminal political offenses, Congress has at least once in the past impeached and convicted a judicial officer for nonindictable conduct.³³⁸ Moreover, as Part III previously described, Article III's "good Behaviour" language can be interpreted non-frivolously to articulate a higher standard of conduct for judges, such that conduct short of a high crime or misdemeanor might serve as a hook for impeachment.³³⁹

Moreover, partisan impeachments have occasionally succeeded. There is a relationship between partisan affiliation and votes to convict/acquit in the impeachment trials of Judge Ritter in 1936 (all counts) and Judge Archbald in 1913 (counts 4, 7, 8, and 9).³⁴⁰ Alexander Hamilton recognized the potential danger that "the comparative strength of parties" might prove more important than "the real demonstrations of innocence or guilt."³⁴¹ Still, it will not be often that partisan impeachment attempts succeed.

The Court's holding that impeachment might be broadly nonjusticiable further lowers the impeachment bar. In *Walter Nixon v. United States*, the Court held it to be a nonjusticiable political question whether the Senate trial procedure violated the Impeachment Trial Clause.³⁴² At issue was Senate Impeachment Rule XI, which permitted a subset of the Senate to receive evidence and hear arguments and then to prepare a report for the rest of the body.³⁴³ The Senate would then rely on the report to make its determination whether to convict or not. The Senate found Walter Nixon guilty and convicted him.³⁴⁴ Chief Justice Rehnquist, writing for the Court, placed significant weight on the Impeachment Trial Clause's language that it granted the Senate "the sole power to try all impeachments." The words "sole power" constituted "a textually demonstrable constitutional commitment of the issue" of impeachment

³³⁸ See *supra* notes 247–49 for discussion of the impeachment of Halsted Ritter.

³³⁹ See *supra* Part III.A.2.

³⁴⁰ See Jacobus ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185 (1939) (tabulating impeachment votes and observing partisan patterns).

³⁴¹ THE FEDERALIST NO. 65 (Alexander Hamilton), *supra* note 151, at 338.

³⁴² *Nixon v. United States*, 506 U.S. 224, 226 (1993).

³⁴³ *Id.* at 227.

³⁴⁴ *Id.* at 228.

“to a coordinate political department.”³⁴⁵ As such, the Senate became the final arbiter of what procedure the Impeachment Trial Clause required. In addition, Rehnquist concluded that, as a structural matter, the Court ought not to interfere with one of the few checks-and-balances available to discipline the judiciary.³⁴⁶ If the Court could exercise its powers of judicial review to strike down an impeachment conviction, then it could thwart one of the few checks against the judiciary available to the political branches.

Although *Nixon* concerned only the Senate’s power over trial procedure, its rationale also supports a maximalist reading that what constitutes an impeachable offense is also nonjusticiable.³⁴⁷ Significantly, the Constitution similarly commits to the House the “sole Power of Impeachment.”³⁴⁸ Court review of the House’s power could interfere with this congressional check-and-balance against the judiciary. In *Ritter v. United States*, which pre-dated *Nixon*, the Court of Claims concluded that whether nonindictable conduct constituted grounds for removal was a nonjusticiable political question.³⁴⁹ *Nixon*’s rationale strengthens the likelihood that the Court would agree that the grounds for impeachment are not subject to judicial review. The result is that the Senate’s “interpretation is final and unreviewable by the courts.”³⁵⁰

This nonjusticiability means that Congress enjoys broader latitude to impeach, at least as a legal matter. A host of complaints could be characterized as an abuse of judicial power.³⁵¹ Indeed, the Framers may have countenanced the availability of impeachment for the liberal (i.e., generous) reading of statutes and constitutional provisions—conduct they anticipated would be exceptional rather than commonplace.³⁵²

Granted, prevailing political norms dictate that Congress not impeach as a recall mechanism. These norms might result from several considerations. First, the act of hiring and firing are asymmetric due to a sense in which an office-holder is entitled to continue holding office. This sentiment might result from a legislator perceiving the office as something to which the office-holder is entitled. That is, senators might regret that they had ever consented to the appointment of a particular office-holder, but they would not act now to impeach. Second, the deselection of tenured judges might

³⁴⁵ *Id.* at 228–29 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

³⁴⁶ *Id.* at 234–35.

³⁴⁷ *See id.* at 233 (“The parties do not offer evidence of 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.”).

³⁴⁸ U.S. CONST. art. I, § 2, cl. 5 (emphasis added).

³⁴⁹ *Ritter v. United States*, 84 Ct. Cl. 293 (1936).

³⁵⁰ Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1392 (1996). *But see* BERGER, *supra* note 42, at 103–21 (arguing that grounds for impeachment have discernible meanings and therefore are justiciable).

³⁵¹ *See supra* notes 186–96 and accompanying text. Inferior court judges are reviewed all the time under the standard of “abuse of discretion.”

³⁵² *See supra* note 171–72 and accompanying text.

be disfavored in a congressional body trained (in large part) as lawyers and who have traditionally been professionally obligated to defend, and not to criticize the courts.³⁵³ Third, legislators might appreciate that impeachment as a recall mechanism could lead to reciprocal tit-for-tat retaliation against appointees of the legislator's party once political winds inevitably change.³⁵⁴

But if there are such "norms" about the proper uses of impeachment—assuming they can even exist with respect to a procedure so rarely invoked—they are mutable over time, much in the same way that the norms for judicial appointment have changed over time.³⁵⁵ Moreover, Congress can remove bias from behavioral asymmetries by pre-committing itself to certain courses of conduct. For example, it might choose to codify particular conduct as "impeachable," particularly if jurisprudential opponents are more likely to undertake it.³⁵⁶ Such pre-commitments would not limit congressional discretion to impeach, but they do legitimate a future congressional judgment of instances in which the impeachment power is appropriate.

D. Procedural Inefficiency

1. Raising the Barrier to Appointment

The last century of appointments witnessed a tremendous growth in the process and time surrounding nomination and confirmation. The Senate initially held no public hearings on judicial nominees. By 1916, the Senate held hearings for Louis Brandeis but without his being present.³⁵⁷ In 1925, Harlan Fiske Stone appeared at his own insistence and the hearing, contrary to usual practice, was opened to the public.³⁵⁸ By 1950, the Senate Judiciary Committee asked all nominees to the Court to appear.³⁵⁹ Interest groups increasingly testified during the hearings for and against the confirmation of particular nominees.³⁶⁰ Accompanying media and "grassroots" campaigns in

³⁵³ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.2, R. 8.2 cmt. 3 (2008) (encouraging attorneys to defend judges against unfair criticism).

³⁵⁴ The retaliation could not be personal to the legislators as Congress concluded during the failed impeachment of Senator Blount that legislators are not "officers" of the United States subject to impeachment. GERHARDT, *supra* note 47, at 49–50.

³⁵⁵ See *infra* Part IV.D.1.

³⁵⁶ See, e.g., Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005) (providing, in part, that "[i]n interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state" and providing that it is an impeachable offense to do so).

³⁵⁷ GERHARDT, *supra* note 301, at 67.

³⁵⁸ *Id.*

³⁵⁹ EPSTEIN & SEGAL, *supra* note 145, at 88.

³⁶⁰ *Id.* at 96 fig.4.1.

key senators' states have made the process increasingly resemble political campaigns for elective office.³⁶¹

As part of the modern nomination process, the Office of White House Counsel and the Justice Department's Office of Legal Counsel screen and interview prospective nominees to the courts.³⁶² Following the appointment of Chief Justice Earl Warren, the FBI had conducted background and security checks on nominees to the Court,³⁶³ and, until March 2001³⁶⁴ and again since January 2009,³⁶⁵ the ABA evaluated prospective nominees pre-nomination. In addition, once nominated, judges, especially Justices, participate in a confirmation campaign that often begins with a ceremonial nomination at the White House for nominees to the Circuit and Supreme Courts.³⁶⁶ For Supreme Court nominees, the process involves meeting every U.S. Senator who may vote on the confirmation;³⁶⁷ participating in preparatory "murder boards";³⁶⁸ and withstanding scrutiny during multi-day televised confirmation hearings.³⁶⁹ Then the confirmation goes to a vote following debate, subject to the possibility of filibuster.³⁷⁰

As a consequence of the foregoing, the time required to appoint a judge has grown longer and longer. During the 105th Congress, it took on average 205 days from nomination to confirm a federal judge.³⁷¹ By comparison, it took only an average of 14.5 days to confirm a federal judge during the 82nd Congress.³⁷² From 1947 to 1998, the average time from nomination to confirmation was 92 days.³⁷³ Moreover, in comparing appointment and impeachment, it is important to distinguish the transformative from the run of the mill. Transformative appointments may result in filibusters and blue slip holds that delay or block confirmation altogether.³⁷⁴ Appointment to a swing vote seat

³⁶¹ RICHARD DAVIS, *ELECTING JUSTICES: FIXING THE SUPREME COURT NOMINATION PROCESS* 112–27 (2005).

³⁶² YALOF, *supra* note 119, at 12–13.

³⁶³ ALEXANDER CHARNS, *CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT* 11 (1992).

³⁶⁴ Letter from Alberto R. Gonzales, Counsel to the President, to Martha W. Barnett, President, American Bar Association (Mar. 22, 2001), *available at* <http://www.presidency.ucsb.edu/ws/?pid=78756>.

³⁶⁵ Tony Mauro & David Ingram, *White House Invites ABA Back Into the Fold*, *LEGAL TIMES*, Mar. 23, 2009, at 14.

³⁶⁶ DAVIS, *supra* note 361, at 33, 139.

³⁶⁷ *See* GREENBURG, *supra* note 125, at 301–03 (describing process of meeting with senators prior to confirmation of Justice Alito).

³⁶⁸ DAVIS, *supra* note 361, at 118–19 (describing practice question-and-answer sessions).

³⁶⁹ *Id.*

³⁷⁰ Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *STAN. L. REV.* 181 (1997).

³⁷¹ Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 *AM. J. POL. SCI.* 190, 194 (2002).

³⁷² *Id.*

³⁷³ *Id.* at 195 tbl.1.

³⁷⁴ *See supra* notes 297–306 and accompanying text.

on a collegial court will likely consume more Senate time than a status quo appointment, for example, to the district courts. Further, if the judge is well qualified and the appointment viewed as transformative, it may precipitate opposition and delay.³⁷⁵

2. Lowering the Bar to Impeachment: Increasing Efficiency

The time and effort required to impeach create another obstacle to the use of impeachment. Impeachment has been called the “hundred-ton gun” partially in recognition of how slowly its machinery operates.³⁷⁶ A determined House majority may vote articles of impeachment with relative dispatch.³⁷⁷ The Senate, however, acting as a trial court, may take much longer to admit the evidence, weigh it, and hear argument of counsel.³⁷⁸

Senate Rule XI for impeachment proceedings, however, has streamlined the process relative to prior trial practice by authorizing the use of subdelegation. The Senate subdelegates to a committee of senators the tasks of trying the impeachment, namely, receiving evidence, hearing argument of counsel, and recommending a course of action.³⁷⁹ Acting on an impeachment no longer consumes the Senate’s undivided attention by requiring trial by the full body.³⁸⁰ After the subcommittee proceedings, the full Senate—with opportunity for debate—votes whether to convict.³⁸¹ Thus, post-Rule XI, impeachment resembles the Senate’s delegation of nominations matters to the Senate Judiciary Committee: after hearings and consideration of testimony, the Committee recommends action to the full Senate; following the recommendation, the full Senate may debate the matter and vote to appoint. The process still takes longer than a contested confirmation hearing, but proposals for reform might shorten the process further.³⁸²

Nixon has liberated the Senate to consider a broad array of novel trial procedures that would expedite impeachment. For example, issue preclusion in impeachment

³⁷⁵ See, e.g., John R. Lott, Jr., *The Judicial Confirmation Process: The Difficulty With Being Smart*, 2 J. EMPIRICAL LEGAL STUD. 407, 434 (2005) (noting “a 1 percent increase in judicial quality increases the length of the confirmation process by between 1 and 3 percent”).

³⁷⁶ BRYCE, *supra* note 260, at 208.

³⁷⁷ See VOLCANSEK, *supra* note 308, at 165.

³⁷⁸ See, e.g., GERHARDT, *supra* note 47, at 36 (reporting it took eighteen days to receive evidence in the Senate trial of Judge Hastings).

³⁷⁹ SENATE IMPEACHMENT RULE XI, SENATE MANUAL, S. DOC. NO. 101-1, at 180 (1989).

³⁸⁰ Walter Nixon unsuccessfully challenged the constitutionality of Senate Rule XI for Impeachment Proceedings in litigation. See *supra* notes 342–46.

³⁸¹ For those seeking impeachment, Senate Rule XI for Impeachment Proceedings has the apparent advantage of promoting conviction. Non-committee members who have not personally heard all the evidence to convict have a propensity to vote to convict, thereby lowering the bar to conviction. See GERHARDT, *supra* note 47, at 116.

³⁸² *Id.* at 154–56 (discussing a proposal to delegate evidentiary process to body of non-Senator experts).

would trim the expense and effort involved in trying impeachments. Also, the Senate at present not only makes the judgment to convict; it must hear the House impeachment managers develop the factual record.³⁸³ But if a factual record were created during a prior successful criminal prosecution or judicial investigation, this latter task needlessly duplicates that which a federal judge and jury have already determined.³⁸⁴ The prosecuting House Managers would invoke issue preclusion—non-mutual offensive collateral estoppel in impeachment—to prevent “relitigation” of the charge in the Senate.³⁸⁵ The evidence of criminal conviction could serve as adequate evidence for impeachment without requiring de novo development of the record. Of course, the Senate could refuse to rely on the prior conviction, vote not to convict on the basis of criminal conviction, or establish a record of nonindictable conduct that might serve as the basis for impeachment; but those senators who were willing to rely on conviction to impeach could do so.

This approach would curb the time-consuming and redundant development of the factual record and make the impeachment process more (ruthlessly) efficient and speedy. But assuming political opponents of judges have not been lucky enough to uncover indictable conduct by their ideological targets, issue preclusion would be of limited use as a tool of ideological selection. Instead, issue preclusion would be of greatest use in pursuing judges who were convicted for indictable conduct. To be sure, any factual finding from a prior criminal case that reflects poorly on a judge may be helpful to an opponent in an impeachment proceeding. But unless these discrete findings are necessary elements of a criminal offense, it may be difficult to identify what factual findings have been established in the prior prosecution.

Notwithstanding the movement toward a closer equilibrium, legislators have a high opportunity cost in foregone legislative activity for taking the time to impeach. *Nixon*, however, has given the Senate broad latitude for further procedural innovation.

³⁸³ GERHARDT, *supra* note 47, at 26.

³⁸⁴ Michael J. Broyde, *Expediting Impeachment: Removing Article III Federal Judges After Criminal Conviction*, 17 HARV. J.L. & PUB. POL’Y 157, 169–70 (1994).

³⁸⁵ *Id.* This approach also has risks for House managers, as reported by Timothy Cory, former impeachment trial counsel for Judge Harry Claiborne. Telephone Interview with Timothy S. Cory, Partner, Timothy S. Cory & Associates (Aug. 19, 2009). Although the government had successfully criminally prosecuted Claiborne for tax evasion, *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984), the House impeachment managers communicated informally to the Senate to vote *against* impeachment article three, which invoked collateral estoppel against Claiborne. Interview with Cory, *supra*. That article argued that, because Claiborne had been criminally convicted, he had per se committed a high crime and misdemeanor. The House managers took this position because Claiborne’s friend and fellow impeachment target Judge Alcee Hastings had recently been acquitted during his criminal trial. *Id.* The House managers realized that if they had established non-mutual collateral estoppel as a precedent, Judge Hastings could have plausibly invoked it *defensively* against impeachment in his case. *Id.* This account complements the traditional explanations for Senate inaction on article three. See GERHARDT, *supra* note 47, at 43.

Subdelegation has already made impeachment more efficient and therefore more expeditious. Eventually, the limitation of issue scope might similarly hasten removal. Finally, the Senate might curb the formality of its proceedings. It could move away from a legal model of a criminal trial with its thicket of evidentiary and procedural safeguards toward a more informal approach, i.e., a political model that resembles a Senate confirmation hearing. Witnesses still testify under oath, legislators still examine and cross-examine witnesses, but the committee dispenses with rules of evidence and other procedural formalities.

V. THE TRAGEDY OF IMPEACHMENT AS JUDICIAL SELECTION

The choice to employ impeachment as judicial selection is not costless. In particular, decisional independence and the rule of law suffer. Part V briefly discusses these costs and measures to avoid the constitutional hardball tactic, or at least mitigate some of the harm.

A. *The Cost of Impeachment as Judicial Selection*

1. Decisional Independence

Impeachment used to deselect jurists on the basis of their work product or ideology undermines decisional independence, which is the principal means by which adjudicative impartiality is secured. Although ideological appointment exerts pressure on judicial nominees *ex ante* appointment (including nominees who might already be sitting Article III judges who exercise the judicial power), *ex post* impeachment threats permit political actors far greater opportunity to discipline judges. The *in terrorem* effect of impeachment—both *in terrorem* discipline and *in terrorem* resignation—results in greater judicial deference to Congress. That effect would tend to undermine the countermajoritarian structure of judicial review.

Of course, Article III judicial independence as presently understood is not the only model for decisional independence. It is the minority approach to securing judicial independence among American state court judges. Four-fifths of the states retain an *ex post* electoral check on their judges.³⁸⁶ Moreover, increasingly the process for appointing federal judges, especially Supreme Court Justices, resembles a political campaign for elected office. There are media campaigns, fund-raising, organized pressure groups, “grassroots” efforts, and the hurly-burly of politics as usual.³⁸⁷ In this context, ideological impeachment looks somewhat like a republican version of that democratic *ex post* electoral device, the recall petition. Whether such a fundamental

³⁸⁶ Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1.

³⁸⁷ DAVIS, *supra* note 361, at 112–27.

change, however, is desirable, it is not without its tradeoffs in lost adjudicative impartiality. That tradeoff is properly the product of a formalizing amendment process subject to democratic ratification by the usual Article V supermajorities.³⁸⁸

2. Rule of Law

An ideological selection process also has costs for the rule of law. The rule of law, defined here as the impartial adjudication of disputes by reference to rules and standards articulated in advance, requires that similarly situated parties be treated similarly without regard to their identities.³⁸⁹ The rules and standards should remain predictably in force and change only in accordance with the rules for changing rules. The identity of the adjudicator should matter little. To the extent it matters, it should principally influence construction, and not interpretation.³⁹⁰ The rule of law may be undermined if political actors are able to use impeachment to obtain constitutional amendment by judicial fiat rather than by resort to Article V's amendment procedure. Ideological impeachment, like ideological appointment, raises the concern that political actors will attempt to revise the Constitution under the guise of interpretation. Such changes will reflect the concerns and preoccupations of legal elites and not the considered democratic input of supermajorities.

B. The Prevention of Impeachment as Judicial Selection

Given the costs of the tactic, planning for its prevention, or at least its mitigation, is in order. Although the hyperrealist genie animating the tactic is unlikely to be rebottled, there is institutional insulation to help shield against it.

1. Appointment-Side Fixes

If the appointments-side problems are fixed, resort to impeachment as judicial selection is less likely to occur on the back end. Two proposals are in order. First, the nomination and confirmation processes need to generate better records about the professionalism and ethics of nominees. The Senate should reverse its prior practice of presuming confirmation.³⁹¹ It should presume non-confirmation or inaction. Such a presumption would create incentives for a President and his nominee to create a record supporting confirmation.

³⁸⁸ U.S. CONST. art. V.

³⁸⁹ See generally, RONALD H. CASS, *THE RULE OF LAW IN AMERICA XI* (2001).

³⁹⁰ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108–09 (2001).

³⁹¹ GERHARDT, *supra* note 301, at 41.

Second, Congress and the States should amend Article III to provide for fixed, nonrenewable, lengthy terms on the Court.³⁹² Such an amendment should stagger these terms to avoid the usual holdout problems. This proposal lowers the relative stakes for each seat by making the Court appropriately responsive to the usual appointments process.

2. Impeachment-Side Fixes

Two impeachment-side fixes concern the grounds for impeachment and the costs of defending against threats of impeachment. First, as to the grounds for impeachment, it is an open invitation to difficulties to entertain a strong form of *Walter Nixon* political question nonjusticiability. Only ambiguous nonjudicial precedents interpret the scope of the capacious phrase “other high Crimes and misdemeanors.” Given the currency of realism and hyperrealism, legislators are almost entirely unconstrained in their exercise of impeachment power. A more modest reading of *Walter Nixon*—one that extends the nonjusticiability only to House and Senate procedure, but not to the particular grounds for removal—would more effectively backstop the power’s exercise.

Second, judicial officers are vulnerable to constitutional hardball tactics that invoke marginally colorable grounds for impeachment. To reduce the *in terrorem* effects of impeachment threats and inquiries, Congress might consider the reimbursement of legal fees incurred in defending against judicial removal. Alternatively, Congress could authorize attorney fee shifting to allow jurists to be reimbursed their fees and costs when they prevail. Such a provision would diminish the likelihood that opponents could use the threat of litigation costs to secure resignation.

CONCLUSION

This Article identified the phenomenon of impeachment as judicial selection as a tactic of constitutional hardball. Its persistent invocation suggests that the claims supporting the phenomenon are unlikely to disappear. Likely, this persistence reflects the continued attraction of an *ex post* confirmation tool that would give the political branches improved information about judges. That information, coupled with the capacity to initiate selection outside the judiciary, would grant Congress superior control over the Court’s direction.

The justificatory task for this constitutional hardball is made easier by appeal to the paramount functional need to check a countermajoritarian federal judiciary. Counter-arguments defending the traditional reading of impeachment must rely principally on claims about text and structure to overcome the inertia of ambiguous impeachment precedent. This task is made all the more difficult by the related obstacle of nonjusticiability.

³⁹² Calabresi & Lindgren, *supra* note 147, at 822–24.

The legal arguments for and against impeachment as judicial selection are becoming more significant because the risk of the tactic's successful use has grown. Impeachment and appointment have become closer alternatives for judicial selection as legal and political developments erode the barriers to impeachment and build the barriers to appointment. The importance of Court membership and the hydraulics of checks and balances mean that an increasingly difficult process for appointing judges makes removal on the back end all the more likely.

These developments, however, are not costless. This Article concluded with a brief consideration of the costs both for judicial independence and the rule of law. The Article suggested avenues for possible reform that, by differentiating the functions, might avoid the dangerous resort to impeachment as a tool of judicial selection.

Table 1: *In Terrorem* Resignations Without Senate Trial³⁹³

	Judge	Year	Court
1	William Stephens	1818	D. Ga.
2	Matthias Burnett Tallmadge	1819	D.N.Y.
3	Thomas Irwin	1859	W.D. Pa.
4	Charles Taylor Sherman	1873	N.D. Ohio
5	Richard Busteed	1874	M.D. Ala.
6	Edward Henry Durrell	1874	E.D. La.
7	William Story	1875	W.D. Ark.
8	Peter Stenger Grosscup	1911	7th Cir.
9	Cornelius H. Hanford	1912	W.D. Wash.
10	Daniel Thew Wright	1914	D.D.C.
11	John A. Marshall	1915	D. Utah
12	Kenesaw M. Landis	1922	D.N.J.
13	Francis Asbury Winslow	1929	S.D.N.Y.
14	Joseph Buffington	1938	3d Cir.
15	Edwin Stark Thomas	1939	D. Conn.
16	Martin Thomas Manton	1939	2d Cir.
17	John Warren Davis	1941	3d Cir.
18	Albert Williams Johnson	1945	M.D. Pa.
19	Grover Moscowitz	1947	E.D.N.Y.
20	Abe Fortas	1969	S. Ct.
21	Otto Kerner	1974	7th Cir.
22	Herbert Allen Fogel	1978	E.D. Pa.
23	Robert Frederick Collins ³⁹⁴	1993	E.D. La.
24	Robert Peter Aguilar ³⁹⁵	1996	N.D. Cal.
25	Samuel B. Kent ³⁹⁶	2009	S.D. Tex.

³⁹³ The data from 1789 to 1992 is taken from Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 408 tbl.1 (1993).

³⁹⁴ See GERHARDT, *supra* note 47, at 188 n.36 (noting that Judge Collins resigned after Judicial Conference of United States certified to House that he “engaged in conduct which might constitute one or more grounds for impeachment”).

³⁹⁵ *Id.* at 187 n.34 (classifying Judge Fogel’s resignation as part of a deal to avoid prosecution).

³⁹⁶ 155 CONG. REC. S7832 (daily ed. July 22, 2009) (announcing Judge Kent’s resignation following criminal conviction and House impeachment).