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## Comments on Professor Rotunda's Essay

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# Comments on Professor Rotunda's Essay

BY RICHARD H. UNDERWOOD\*

Why have a discussion of impeachment and judicial discipline? Is the discussion timely? I believe it is. The subject of impeachment is at least as worthy of our attention as the date of Pat Robertson's marriage. In terms of current events, we have the case of Judge Harry Claiborne of the District of Nevada; he has now been impeached but should not be disbarred according to the highest court in Nevada.<sup>1</sup> While I must admit that I do not want to get too much at odds with our Kentucky Senator,<sup>2</sup> I am not totally out of sorts because the Senate Judiciary Committee had a say in the recent Supreme Court appointment process of Judge Robert Bork. Whatever one thinks about the Committee's role, the process was educational, and it ties into our present discussion. The fact that the hearings were educational is apparent. When I try to have a discussion with an insurance agent or adjuster, he or she will inevitably support his or her position with constitutional precedent. I trace this constitutional awareness directly to the hearings.

Although I have not cracked the constitutional law books for a long time, even I could follow the arguments in the Bork hearings. I remembered the cases. Indeed, I followed the discussions at least as well as Senator Kennedy. Moreover, my efforts to bone up on the law of impeachment reaffirmed my belief

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<sup>1</sup> See McConnell, *Reflections on the Senate's Role in the Impeachment Process and Proposals for Change*, 76 Ky. L.J. 739, 739-40 (1987-88).

<sup>2</sup> During his remarks at this Symposium, Sen. Mitch McConnell argued that the Senate Judiciary Committee politicized the confirmation hearings of Supreme Court nominee Judge Robert Bork.

that discerning original intent is difficult. It is an exercise in futility—sort of a long range psychoanalysis.

Professor Rotunda addresses the classic questions of impeachment law in *An Essay on The Constitutional Parameters of Federal Impeachment*. His Essay is a thorough discussion of the major issues. Of particular interest is his short brief against judicial review, which diverges from Raoul Berger's views, as I understand them. I think Professor Rotunda has the better argument.

As the proverbial "Bat Boy at the World Series," I can do little more than confirm his views based on my review of the available authorities. For further reading, I would recommend *Impeachment* by Raoul Berger<sup>3</sup> *Impeachment in America, 1635-1805* by Hoffer and Hull is also a very interesting book for late-night reading when there is nothing good on HBO<sup>4</sup> Also, I found useful a very old but very short book by Alexander Simpson, a Philadelphia trial lawyer.<sup>5</sup> He said much of what Berger said in fewer pages and in words of one syllable or less. As I recall, he worked on some aspect of Judge Archbald's impeachment, which occurred before World War I.<sup>6</sup>

Turning to the merits of Professor Rotunda's Essay, I have to support the view that the phrase "high Crimes and Misdemeanors"<sup>7</sup> allows for impeachment for noncriminal acts. Of course, when someone is faced with impeachment, he or she will come up with the "plain English" and contrary argument. It has certainly been raised enough times in the House and in the Senate at the "trial" stage. It has always been rejected, however, as far as I can tell. The phrase appears in the English documents called something like "articles or bills of impeachment." An examination of these sources reveals many successful pleas for impeachment that involved noncriminal conduct.

Furthermore, Hoffer and Hull provide considerable evidence that the framers were at least as familiar with colonial and state impeachment precedents as they were with the older "British"

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<sup>3</sup> R. BERGER, *IMPEACHMENT: THE CONSTITUTION PROBLEMS* (1973).

<sup>4</sup> P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805* (1984).

<sup>5</sup> A. SIMPSON, *A TREATISE ON FEDERAL IMPEACHMENTS* (1916).

<sup>6</sup> See *Judge Archbald's Conviction*, 1 Ky. L.J. 15 (1913).

<sup>7</sup> U.S. CONST. art. II, § 4.

cases. The framers had arrived at something of a consensus, wherein they were defining impeachment "for cause" that involved "willful" or "corrupt" conduct. Nevertheless, their definition of impeachment extended to noncriminal conduct. If we credit the evidence tendered by Hoffer and Hull, many of the framers were impeachment lawyers in the sense that they had participated in impeachments, or something like impeachments, at the state level.<sup>8</sup>

I also agree with Professor Rotunda that Madison's request to substitute the familiar "high Crimes and Misdemeanors"<sup>9</sup> for Mason's "maladministration" was acceptable because both framers were basically on the same wavelength. Perhaps Mason's choice of words was a bit overbroad: "maladministration" might have been interpreted to have a meaning that the framers did not want, such as impeachment for "bad advice." "Bad advice" impeachment had some support in England; however, the framers did not want to impeach someone for bad judgment. On the other hand, the framers did seem to intend that impeachment cover some noncriminal conduct; one could argue that the ratifiers were familiar with the concept of impeachment for cause for noncriminal acts.

Finally, I think Professor Rotunda is correct that "crimes only" impeachment does not really follow from simple construction of the Constitution's language in terms of the "plain English" as spoken and understood at the time the document was written. This point has also been made by Berger and Simpson.<sup>10</sup>

I find particularly interesting Senator McConnell's concerns about the politicizing of the confirmation hearings. I think it is fair to say that Senator McConnell thinks that the process got out of hand during the Bork hearings.<sup>11</sup> On the other hand, a tour of history is interesting. During the early impeachment process, Republicans—not GOP Republicans but the folks who called themselves Republicans way back when Mr. Jefferson was laying out digs for his basketball team—were toying with the idea of impeachment for every willful and corrupt act. The

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<sup>8</sup> See P. HOFFER & N. HULL, *supra* note 4.

<sup>9</sup> U.S. CONST. art. II, § 4.

<sup>10</sup> See R. BERGER, *supra* note 3; A. SIMPSON, *supra* note 5.

<sup>11</sup> See *supra* note 2.

Republicans thought about expanding impeachment, and the first thing they did was float a trial balloon styled "popular will" impeachment. How "democratic"! Ironically, this sounds very much like what Congressman (later President) Gerald Ford was thinking about when he suggested "bad behavior" impeachment for Justice Douglas. Even Jefferson's party gave up on that idea.

Nevertheless, these "Republicans" were clever devils. They did not like the Federalists, whom they found elitist and reactionary because the Federalists wrote those nasty Alien and Sedition Acts and the like. The Republicans tried to use the Federalist "dangerous tendency" test to impeach Federalist judges, but this test was also abandoned. We dropped these theories in the course of the development of congressional impeachment precedent. My point is that there is nothing new under the sun.

Judge Pickering's case is still on the books, but he was impeached because he was nuts; Congress did not know what else to do with him. Moreover, Pickering did not give Congress any way out. Someone (his son, I think) even showed up and said that Pickering could not be tried because he was too nuts to stand trial. Therefore, he should be permitted to remain in office. Only a lawyer could find merit in that argument. Now we take care of the incapacity problem through statutory law, as one of the earlier speakers pointed out. The Pickering case is not precedent; we are still looking for willful, corrupt, and serious misconduct, even if the conduct is not criminal.

I agree, both on the basis of construction and precedent, that "high Crimes and Misdemeanors"<sup>12</sup> must have the same meaning when we are talking about judges as when we are talking about the President. Despite the Ford-Douglas incident, I think that even Congress is capable of stifling its worst instincts. The House of Representatives will limit the reach of impeachment, for practical reasons if for no other, by turning to the substantial body of precedent that Professor Rotunda has collected. Partly for that reason, I lean in favor of Professor Rotunda's views on judicial review

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<sup>12</sup> U.S. CONST. art. II, § 4.

I reject the linkage between the "good Behaviour" language<sup>13</sup> and "high Crimes and Misdemeanors" language<sup>14</sup> for the reasons Professor Rotunda sets forth. Indeed, the absence of linkage was admitted in Congress as early as 1802 and again in the early twentieth century in the Archbald Impeachment.<sup>15</sup>

Other issues remain. Professor Rotunda alluded to them this morning, and I hope we can twist Professor Rotunda's arm once more and get him to address these issues in a follow-up article. The issue of judicial branch policing of bad behavior via statutes passed pursuant to the necessary and proper clause<sup>16</sup> is among them. Other issues involve the modification of trial procedures. This is Senator McConnell's turf. His work in connection with the Special Committee implemented some sensible ideas.<sup>17</sup> Are they "constitutional"?

I am less convinced than some of the other Symposium speakers that judicial branch removal of judges necessarily threatens the independence of the judiciary, as opposed to the independence of a particular judge. I had not thought that the threat to judicial independence is as iron-clad as has been suggested.

In closing, I must say that seeing what happens if the Supreme Court ever reviews a judicial-branch removal statute will be interesting. I noticed in my readings that an attorney by the name of William Rehnquist once opined on behalf of the Justice Department, and before Congress, that judicial-branch removal would be constitutional. I do not know if he would be of that mind today as the Chief Justice.

I thank Professor Rotunda for participating and sharing his scholarship with us. I urge you to explore these issues further.

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<sup>13</sup> *Id.* at art. III, § 1.

<sup>14</sup> *Id.* at art. II, § 4.

<sup>15</sup> See generally *Judge Archbald's Conviction*, *supra* note 6, at 15.

<sup>16</sup> U.S. CONST. art. I, § 8.

<sup>17</sup> See McConnell, *supra* note 1 at 741-44.