The Legislature's Prerogative to Determine Impeachable Offenses

Mathew Paulose Jr.

In *United States v. Bayless*,[1] United States Judge Harold Baer of the Southern District of New York held – contrary to a significant amount of later criticism – that two New York City police officers had violated an alleged drug trafficker's right to be free from an unwarranted search and seizure.[2] Disbelieving the incredible testimonies of the police officers,[3] he found no other recourse but to suppress the cocaine and heroine seized by the officers.[4]

Criticism of Judge Baer's decision came first from the United States Congress, where two hundred legislators demanded Judge Baer's resignation.[5] Criticism came next from the Executive Branch, where, according to news reports, the White House "put [Judge Baer] on public notice . . . that if he did not reverse [his] decision . . . the President might seek his resignation."[6] Robert Dole, then-Senate Majority Leader and Presidential candidate, added, notwithstanding the President's message, that Judge Baer "ought to be impeached."[7]

Response from Judge Baer's defenders was immediate. First came a statement from the judiciary, where four judges on the Second Circuit Court of Appeals stated that the criticism of Judge Baer had "gone too far."[8] Chief Justice William Rehnquist issued a similar statement: "[T]here are a very few essentials that are vital to the functioning of the federal court system . . . . Surely one of these essentials is the independence of the judges who sit on these courts."[9] Finally, the leaders of seventy-six bar associations issued a statement, holding that the threats imperiled the entire United States system of government.[10]

The lines had clearly been drawn – on one side were the Legislative and Executive branches, on the other was the Judicial Branch. But the lines would eventually unravel. On March 11, 1997, House Majority Whip Tom DeLay proposed that the Congress should turn to the impeachment process against federal judges like Judge Baer.[11] He defined impeachable offenses as "whatever a majority of the House of Representatives consider[ed] it to be."[12] Unlike the previous remarks of legislators, DeLay's proposal, particularly his definition, evoked animosity from both sides of the discussion.

Footnotes

1. 913 F. Supp. 232 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).
2. *See id*. at 234.
3. *See id*. at 239 ("The testimony offered by Officer Carroll about how the events . . . unfolded . . . is at best suspect."); *see also id*. at 239-40 ("[O]ne cannot keep from finding [Officer] Carroll's story incredible").
4. *See id*. at 243 (ruling that because of the Fourth Amendment violation, "seizure of the drugs from the trunk and defendant's post arrest statements being the fruits of a tainted search must and will be suppressed").
5. *See* Letter from Congressman Fred Upton to President Bill Clinton (Mar. 20, 1996), *available at* 1996 WL 8784817 (stating Judge Baer "demonstrated a level of ideological blindness that render[ed] him unfit for the proper discharge of his judicial duties").
6. Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1 (quoting White House Spokesman Michael McCurry).
7. Katharine Q. Seelye, *A Get-Tough Message at California's Death Row*, N.Y. TIMES, Mar. 24, 1996, at 29 (quoting Sen. Robert Dole).
8. *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L.J., Mar. 29, 1996, at 4 (quoting statement of present and former Chief Judges Jon O. Newman, J. Edward Lumbard, Wilfred Feinberg, and James L. Oakes).
9. William H. Rehnquist, address at Washington College of Law, American University (April 9, 1996), *in* VITAL SPEECHES, May 1, 1996, at 418.
10. *See Bar Urges Protection of Judges' Decisions*, N.Y. TIMES, April 7, 1997, at A11 (reporting statement of bar associations).
11. *See* Ralph Z. Hallow, *Republicans Out to Impeach 'Activist' Jurists*, WASH. TIMES, March 12, 1997, at A1.
12. Rep. Tom DeLay, *Letter to the Editor: Impeachment Is a Valid Answer to a Judiciary Run Amok*, N.Y. Times, April 6, 1997, § 4, at 18. Rep. DeLay borrowed the definition from Gerald Ford. *See* 116 CONG. REC. 11913 (1970) (reporting then-Rep. Ford's urging impeachment of Justice William Douglas).

Critics called DeLay's proposal and definition of impeachable offenses "dangerous,"[13] "callous,"[14] and "a passing fantasy."[15]

What had begun as a political discourse evolved into a contentious debate – focusing on whether the Congress could define impeachable offenses as whatever they considered them to be. Scholars have consistently stated that when it comes to the province of judicial independence, a fine line exists between appropriate criticism and interference,[16] and that, therefore, any person advancing a threat as "dangerous" as DeLay's should do so with extreme caution. At the same time, however, scholars also have argued that there are, indeed, several constitutionally proper ways of controlling judicial independence,[17] one among them, the impeachment process. Given this last premise, then, it would seem that if DeLay's definition – that an impeachable offense is whatever the Congress considers it to be – is constitutionally proper, then DeLay's proposal to use the impeachment process is likewise proper.

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

JUDICIAL INDEPENDENCE

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

Judicial independence is a judge's ability to decide a case free from outside influence.[18] It has been described as a "principle,"[19] a "theme,"[20] a "notion,"[21] and a "crown jewel."[22] While it may be one of the "least understood concepts"[23] in law, it also has been said that "we all know what it means."[24]

Judicial independence originated in England during the Seventeenth Century, at a time when English kings had the authority to summarily dismiss their judges.[25] The most celebrated abuse of this authority involved King James I and Lord Coke, the chief justice of the King's Bench.[26] Displeased with one of the chief justice's decisions, the King summarily dismissed the justice and forced the decision in his favor.[27] Two subsequent kings inherited similar penchants for summary dismissals.[28]

The kings, however, were eventually deposed and, with them, the practice of summary dismissals.[29] Instead, the practice of life tenure, coupled with the guarantee of undiminishable compensation, was instituted and eventually codified.[30] The rationale behind the new practice was to prevent encroachment upon the judicial decision-making authority, as it had happened in the case of Lord Coke.[31]

In the United States, judicial independence originated during the development of the Constitution.[32] Like the English

13. Hallow, *supra* note 11, at A1 (quoting Laura W. Murphy, director of the Washington Office of the American Civil Liberties Union).
14. Laurie Kellman, *Republicans Rally 'Round Judge Impeachment Idea*, WASH. TIMES, Mar. 13, 1997, at A1 (quoting U.S. Rep. James P. Moran).
15. Katherine Q. Seelye, *House GOP Begins Listing a Few Judges to Impeach*, N.Y. TIMES, Mar. 14, 1997, at A24 (quoting N. Lee Cooper, president of the American Bar Association).
16. *See e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions*, 72 N.Y.U. L REV. 308 (1997) (distinguishing between fair criticism and intimidation of judges).
17. *See, e.g.*, Paul A Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988) (reviewing history of appointment process's influence over judicial independence).
18. *See* L. Ralph Mecham, *Introduction to Mercer Law Review Symposium on Federal Judicial Independence*, 46 MERCER L. REV. 637, 638 (1995) (defining judicial independence as a "judge's ability to decide a case free from pressures or inducements").
19. *See* Penny J. White, *Judges and Public Opinion*, CURRENT, June 1, 1997, at 35 (defining judicial independence as "the principle that judges must be free to decide individual cases according to the judge's view of the law, not public opinion about it").
20. *See* Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996) (defining judicial independence as the "theme of how to assure that judges decide according to the law, rather than according to their own whims or to the will of the political branches of government").
21. *See* Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 130 (1994) (defining judicial independence as the "notion that judges must have physical and emotional space to render impartial decisions, without fear of retribution (either formal or informal) for unpopular, yet sound, decisions").
22. *See* Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A4 (quoting Chief Justice William Rehnquist).
23. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 607 (1996).
24. THEODORE BECKER, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF COURTS 1-8 (1970).
25. *See* White, *supra* note 19, at 35 (discussing origin of judicial independence).
26. *See* BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 121-22 (1967) (discussing controversy between King James I and Lord Coke).
27. *See id.* at 122 (discussing discharge of Lord Coke).
28. *See id.* at 190 (discussing Charles II and James II's "free use" of summary dismissal).
29. *See* White, *supra* note 19, at 35 (discussing Glorious Revolution of 1688); Schwratz, *supra* note 25, at 199 (discussing repeal of appointing judges at king's pleasure).
30. *See* Act of Settlement 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.) ("Judge's Commission be made Quam diu se bene Gesserint and their Salaries ascertained and established . . . ."), *quoted in* Schwartz, *supra* note 26, at 199.
31. *See* Schwartz, *supra* note 26, at 199 ("Thus was definitely ended the Crown's power to dismiss judges who withstood the royal will – a power that too often had made the Stuart judges mere servile creatures of the king.").
32. *See* Breyer, *supra* note 20, at 989 (finding the "primary basis" of judicial independence in Article III of the Constitution).

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codification of judicial independence, Article III of the Constitution provided for life tenure and undiminishable compensation.[33] The similarity between the English and United States versions demonstrates a commensurate similarity in rationales, that is, to prevent encroachment upon the judicial decision-making authority.[34]

B. The Importance of Judicial Independence

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

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

C. Traditional Methods of Controlling Judicial Independence

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

D. The Appointment Process

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

E. The Compensation Process

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

33. *See* U.S. CONST., Art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").
34. *See* Douglas W. Hillman, *Judicial Independece: Linchpin of Our Constitutional Democracy*, 76 Mich. B.J. 1300, 1300-01 (1997) (arguing that similarity between codifications of judicial independence demonstrates hereditary origin); *see also* Breyer, *supra* note 19, at 989 (stating that provisions of life tenure and undiminishable salary assure that "Congress or the executive cannot directly affect the outcome of judicial proceedings by threatening removal or reduction of salary").
35. The Federalist No. 78, at 230 (Alexander Hamilton) (Robert Maynard Hutchins, ed. 1952).
36. 80 U.S. (13 Wall.) 335 (1871).
37. *Id*. at 347.
38. *See* Charles Warren, The Supreme Court in United States History 31-32 (1926) (quoting George Washington).
39. The Federalist No. 17, at 70 (Alexander Hamilton) (Robert Maynard Hutchins, ed. 1952).
40. *See* Gerald E. Rosen, address at Kalamazoo College (Nov. 21, 1996), *in* Vital Speeches, Jan. 15, 1997, at 194 (stating that framers were fearful of providing Judges with unlimited indepen-dece).
41. *See* Burkeley N. Riggs & Tamera D. Westerberg, *Judicial Independence: An Historical Perspective the Independence of Judges Is . . . Requisite to Guard the Constitution and the Rights of the Individuals. ..*, 74 DENV. U. L. REV. 337, 340 (1997) (stating that the processes of appointment, tenure and compensation, impeachment, and jurisdiction "most affect" judicial independence).
42. *See* U.S. CONST., Art. II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States. . . .").
43. *See* John D. Feerick, *Judicial Independence and the Impartial Administration of Justice*, N.Y.L.J., Apr. 3, 1996, at 2 (1996) ("Candidates for national office have criticized judges whose determinations they disagree with and have made campaign promises to exercise the power of appointment by choosing their own judges.").
44. *See* Riggs & Westerberg, *supra* 41, at 341 (discussing influence of appointment power on direction of Supreme Court).
45. *Id.*
46 *See* U.S. CONST., Art. III, § 1 ("Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished . . . .").
47. *See* Thomas A. Curtis, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1765-66 (1984) (arguing that undiminishable compensation is essential element of judicial independence).

sation clause is an essential element of judicial independence.[47] At the same time, however, at least one scholar has argued that the clause may alternatively function as a control on judicial independence.[48]

The argument is that while the Constitution prohibits diminishing compensation, the Constitution does not prohibit diminishing support services, such as law clerks and secretarial services.[49] Thus, Congress could diminish support services to such an extent that a judge would have to struggle to perform his judicial function.[50] The argument continues that the Constitution also does not prohibit failing to increase compensation.[51] Under this view, Congress could refuse to increase compensation for such an extended period that a judge would have to struggle to maintain his judicial position.[52] Both methods function as controls on judicial independence because a judge would be forced to comply with legislative demands to avoid the decrease in services or to obtain the increase in compensation.

F. The Jurisdiction Process

Article III, Section 1, of the Constitution provides that Congress has the sole power to create the lower federal courts.[53] This provision functions as a control on judicial independence by providing Congress with the ability to not create federal courts, or, if created, to end them.[54] The provision also provides Congress with some ability to remove from federal courts some of the jurisdiction provided for under the Constitution.[55]

G. The Impeachment Process

Article I, Section 2, clause 5, of the Constitution provides that the House of Representatives shall have the power to approve a judge for impeachment.[56] Section 3, clause 6, provides that the Senate shall have the power to try the judge for impeachment.[57] Section 3, clause 6, also provides that no judge shall be impeached without a two-thirds vote of the Senate.[58] Article II, section 4, provides that a judge may be impeached on two-thirds vote only for treason, bribery, or high crimes and misdemeanors.[59] Article I, Section 3, clause 7, provides that any judge impeached shall face the sanction of removal from office and no further sanction.[60]

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These five provisions provide the sole process for removing a federal judge from office.[61] The impeachment process is a clear method of controlling judicial independence. If a judge is found guilty of treason, bribery, or any other high crime and misdemeanor – in essence, exercising unfettered independence – then the Legislative Branch may confiscate the judge's independence and remove him from office.

Scholars assert that the framers intended the legislature to use the impeachment process sparingly.[62] As of 1997, the House had subjected only forty-seven federal judges to impeachment proceedings. The Senate had tried fourteen and convicted only seven of the forty-seven. The Senate had never impeached a judge for his rulings.[63]

THE NEW ATTEMPT AT CONTROLLING JUDICIAL INDEPENDENCE

On March 11, 1997, House Majority Whip Tom DeLay, announced that Congress would begin using the impeachment process to remove federal judges who exceeded their constitutional authority.[64] DeLay explained that the Constitution provided federal judges with the power to decide cases and con-

48. *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 700-06 (1995) (discussing Compensation Clause's affect on judicial independence).
49. *See id.* at 702 (arguing that since framers never contemplated concept of support services, they did not intend Compensation Clause to encompass such services).
50. *See id.* at 702-03 (arguing that the legislature "could so drastically reduce judicial support services so as to render impossible performance of the judicial function").
51. *See id.* at 704 (arguing that refusal to increase compensation does not violate the Constitution).
52. *See id.* (stating "if judges' salaries are not increased, their real incomes decline").
53. *See* U.S. CONST., Art. III, § 1 ("The judicial Power of the United States , shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
54. *See* Lawrence Gene Sager, *Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17, 23 (1981) (discussing constitutional provision of Congress' power to create lower federal courts).
55. *See id.* at 25-26. *See also* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.10 (1992 & Supp. 1999).
56. *See* U.S. CONST., Art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").
57. *See* U.S. CONST., Art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").
58. *See id.* ("[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.").
59. *See* U.S. CONST., Art. II, § 4 ("[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").
60. *See* U.S. CONST., Art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . .").
61. *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 83-86 (1996) (arguing that judges may not be removed by any other means).
62. *See* Carl E. Stewart, *Contemporary Challenges to Judicial Independence*, 43 LOY. L. REV. 293, 304 (1997) (stating that framers "intended removal of judges to be a rare occurrence").
63. *See id.*
64. *See* Hallow, *supra* note 11, at A1 (discussing conversation of Mar. 11, 1997, between Rep. DeLay and editors of Washington Times).

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troversies, not the power to make political decisions. DeLay argued that federal judges were ignoring their restricted power and were instead accelerating their way into the legislative province.[65] DeLay cited as an example United States District Judge Fred Biery, who indefinitely postponed the swearing-in of two Republicans who had won their respective races for sheriff and county commissioner. DeLay also cited Judge Thelton Henderson, who blocked a voter-approved ban on race and sex preferences in state hiring and college admissions. DeLay argued that the judges' actions were legislative in nature, beyond the scope of their constitutional authority.[66]

Critics denounced DeLay's announcement. The White House argued that DeLay's proposal was an improper form of influence by one government branch over another.[67] The American Bar Association argued that DeLay's proposal was constitutionally unsupportable. Then-ABA President N. Lee Cooper said that the Constitution's impeachment power did not encompass impeachment for "political correctness or incorrectness."[68] Several constitutional scholars agreed, arguing that DeLay's proposal was "bizarre," that it would "go nowhere," and that its use was merely "to intimidate the judiciary."[69]

DeLay responded with a letter to the *New York Times*.[70] He argued in more detail that precedent supported the use of the impeachment power to remove judges for exceeding their constitutional authority. For example, he argued, Chief Justice Marshall observed that "a Judge giving opinion contrary to the opinion of the legislature is liable to impeachment."[71] He also cited Gerald Ford, who observed that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."[72]

DeLay's critics countered that DeLay had taken Marshall's and Ford's statements out of context.[73] Others continued to argue that, even if the legislature could define an impeachable offense, using the impeachment power to remove judges for individual decisions threatened to destroy the United States system of government.[74] DeLay, meanwhile, continued to maintain his position: "It is my opinion that anybody can be impeached for anything."[75]

THE VALIDITY OF DELAY'S DEFINITION

Congress can, indeed, define an impeachable offense as whatever it considers it to be. Several premises, however, are required to come to that conclusion. First, the Constitution provides that the legislature shall have the "sole" power to try an impeachment. The general weight of authority agrees that by using the word "sole," the framers of the Constitution intended that no other body possess the power to try an impeachment.[76]

Second, the Constitution provides that the legislature shall try an impeachment only for treason, bribery, or high crimes and misdemeanors, and that the legislature shall convict for such offenses only upon two-thirds of a supermajority vote. The Constitution also provides that the legislature shall try an impeachment under oath or affirmation, and that the legislature may not punish a judge further than removal. The Constitution provides for no other procedural rules regarding impeachment. Here, the general weight of authority agrees that by the inclusion of such few procedures, the framers intended for the legislature to fill the gaps through the legislature's Rules of Proceedings Clause.[77]

Next, the Constitution provides that the judiciary shall have no authority to review the legislature's use of the Rules of Proceedings Clause. It follows naturally that the Constitution therefore provides the judiciary with no authority to review the procedures installed by the legislature to try an impeachment. The general weight of authority agrees that by including the Speech and Debate Clause, which protects legislative activities

65. *See id*. (quoting Rep. DeLay as stating that "[i]f judges are going to make political decisions, it is within the precedent of this country and the precedent of Congress to impeach them for making political decisions").
66. *See id*. (listing Rep. DeLay's examples of judges exercising legislative rather than judicial authority).
67. *See* Kellman, *supra* note 14, at A1 (reporting that the White House denounced DeLay's statements as improper influence of the judiciary).
68. *See* Hallow, *supra* note 11, at A1 (quoting N. Lee Cooper).
69. Herman Schwartz, *The War Against Judicial Independence*, L.A. TIMES, May 11, 1997, at 2.
70. *See* DeLay, *supra* 12, at 18.
71. *Id*. (quoting Chief Justice Marshall).
72. *Id*. (quoting Gerald Ford).
73. *See, e.g.*, Anthoney Lewis, Destroy the Guardians, N.Y. TIMES, Apr. 7, 1997, at A15 (analyzing context of Marshall's and Ford's statements and arguing that DeLay used them improperly).
74. *See, e.g.*, *Bar Urges Protection of Judges' Decisions*, *supra* note 10, at A11 ("Moving to impeach judges for individual decisions . . . threatens to destroy [the] delicately crafted balance [of separation of powers].").
75. *See* Greg McDonald, *Some Republicans Mull Impeachment*, HOUS. CHRON., Jan. 30, 1998, at 12 (1998) (quoting Rep. DeLay).
76. *See, e.g.*, Merrill E. Otis, A PROPOSED TRIBUNAL: IS IT CONSTITUTIONAL? 29-30 (1939) ("The Framers certainly would not have been so meticulous in the use of words, so careful to use this particularly strong word in the vesting of the impeachment power, unless they had in mind . . . to make it clear to all forever that, in the American system, no significance should be given to any English precedent, if there were any, whereby the power to charge misconduct for the purpose of obtaining removal of a civil officer from office was held to be lodged in any other than that legislative body directly representing the whole people.").
77. *See* U.S. CONST., Art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."); *see, e.g.*, Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 TEX. L. REV. 1, 94 (1989) ("The gap that is left as to the rest of the specifics of the Senate's trial is to be filled according to the discretion of the Senate, as provided in article I, section 5 . . . .").

from judicial review, and by vesting the "sole" power of impeachment in the legislative branch, the framers intended the judiciary to remain out of the impeachment process.[78] The Supreme Court agreed in *Nixon v. United States*,[79] in which the Court held that the Constitution provided the judiciary with no authority to review the legislature's impeachment process. The Court stated that there was not "a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers . . . . This silence is quite meaningful . . . ."[80]

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

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

Precedent supports the syllogism. Scholars have stated that the framers intentionally phrased "high crimes and misdemeanors" abstractly to reach any attempt to subvert the Constitution.[81] Given the abstract quality of the phrase, scholars have agreed that the framers intended "the delineation of the [impeachment] offense"[82] to rest with the legislature.[83] This is because the framers viewed the legislature as better equipped than any other body to deal with the political issues raised in impeachments.[84] DeLay's definition, thus, is consistent with the framers' intentions.

[T]he framers intended the judiciary to remain out of the impeachment process.

CONCLUSION

Although this article has argued that Representative DeLay's definition of impeachable offenses is constitutionally valid, the author takes no position as to whether DeLay and his colleagues actually should define as an impeachable offense a disagreed-with decision, such as in the cases of Judges Baer, Biery, and Henderson. It is one thing to be able to define a constitutional offense, but it is entirely another thing to abuse that ability. That abuse, hopefully, will never pan out. For as DeLay himself has stated, his strategy was only to "intimidate" the judiciary.[85]

Mathew Paulose Jr. wrote this article for the American Judges Association's law student writing competition. He is a 1998 graduate of Fordham University Law School and is currently working in New York City.

78. *See id*. at 97-101 (discussing constitutional proscription of judicial review of impeachment process).
79. 506 U.S. 224 (1993).
80. *Id.* at 233.
81. *See* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 722-24 (1987-1988) (discussing Convention debate defining impeachment).
82. The Federalist No. 65, at 199 (Alexander Hamilton) (Robert Maynard Hutchins, ed. 1952).
83. *See* Rotunda, *supra* note 81, at 723-24 (arguing for exclusion of Supreme Court from impeachment process).
84. *See* Michael J. Gerhardt, *Rediscovering Nonjusticiabiliy: Judicial Review of Impeachment After Nixon*, 44 Duke L.J. 231, 255-56 (1994) (discussing framer's views of impeachment process).
85. *See* John Aloysius Farrell, *Republicans Take Aim at Federal Judiciary*, Boston Globe, Sept. 24, 1997, at A1 (quoting Rep. DeLay).