"GOOD BEHAVIOUR" EXPOUNDED*

Federal judges hold office during "good Behaviour" but may be removed for "high Crimes and Misdemeanors." These may be two different standards, one impliedly more capacious than the other. To some, the distinction indicates that judicial removal without an impeachment might be constitutional. And it might also be that noncriminal yet unethical behavior might be grounds for judicial removal.

This Essay gets to the bottom of the standards needed to remove a federal judge. It uses liquidation theory to determine whether a settled meaning exists regarding both the required process and standard for removal, examining history, removal precedents, scholarship, and accepted constitutional practice.

It makes two conclusions. First, that impeachment and subsequent conviction is the mandated process for removal. Second, that most unethical misbehavior could constitute a removable offense given. The exact standard under the operative Clauses, however, has yet to arrive at a liquidated meaning. The burden, then, is on Congress to determine what counts as impeachable and what does not.

The accountability and independence of the judicial branch remains steady in light of this analysis. Judges are accountable not only through the impeachment process, but also by ethical canons and the public themselves. But they also retain their independence and impartiality since only egregious ethical blunders are likely to run the political gauntlet and result in removal.

The resulting liquidation in this Essay solidifies the status quo but does not ignore the continued cries for an ethical judiciary. But more than that, it expounds the meaning of two Clauses of the Constitution vital to the understanding of judicial ethics and obligations.

* Word Count: 14,275, including footnotes.

TABLE OF CONTENTS

INTRODUCTION

Members of the federal judiciary have come under fire for perceived lapses in judicial ethics. A majority of the Supreme Court accepted deals or gifts from, or had connections with, entities that would later appear as interested parties before the Court.[1] And judges on lower courts did the same.[2] These allegations and the debates that follow center on the reasons for judicial ethics: accountability and independence.

Judicial independence "is the ingredient that allows a judge to rise above passion, popular clamor and the politics of the moment."[3] It ensures that a judge will decide cases without pressure or bias, thus providing litigants with faith in rulings and the law. Conflicts of interest and similar evils work against such independence, for judges with something to gain would be more likely to rule in favor of the party that would provide that gain. Independence also insulates federal judges from political and financial pressure from the other branches.[4]

Judicial accountability ensures that judges adhere to their oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties" of an office under the Constitution.[5] This is a broad mandate, separable into sub-species,[6] but it generally serves to protect against various forms of impropriety that could impact a judge's ability to fairly apply the law. And this "justifies public faith and confidence in the courts."[7] The two values can be seen as two sides of the same coin.[8]

---

[1] *See Joshua Kaplan, Justin Elliott & Alex Mierjeski, Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus; Adam Liptak, *Justice Alito Defends Private Jet Travel to Luxury Fishing Trip*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2023/06/21/us/politics/justice-alito-luxury-travel-fishing-trip.html; Giulia Carbonaro, *Amy Coney Barrett Faces Scrutiny Over Real Estate Deal with Religious Group*, NEWSWEEK (June 23, 2023), https://www.newsweek.com/amy-coney-barrett-scrutiny-real-estate-deal-religious-group-1808590; Nicholas Reimann, *Chief Justice Roberts' Wife Made Over $10 Million as Legal Consultant, Report Says*, FORBES (Apr. 28, 2023), https://www.forbes.com/sites/nicholasreimann/2023/04/28/chief-justice-john-roberts-wife-made-over-10-million-as-legal-consultant-report-says/?sh=74a969361e9a; Lucien Bruggeman, *'Inside Baseball': Critics Say Academia has 'Troubling' Influence with the Supreme Court*, ABC NEWS (April 27, 2023), https://abcnews.go.com/US/inside-baseball-critics-academia-troubling-influence-supreme-court/story?id=98849111.

[2] *See, e.g.*, Allison Frankel, *Justice Best Served by Leaving Intact a Conflicted Judge's Ruling: 5th Circuit*, REUTERS (Dec. 9, 2022), https://www.reuters.com/legal/legalindustry/justice-best-served-by-leaving-intact-conflicted-judges-ruling-5th-circuit-2022-12-09/.

[3] Edward D. Re, *Article III Federal Judges*, 14 ST. JOHN'S J. LEGAL COMMENTARY 79, 81 (1999).

[4] *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 220 (1993).

[5] *See* 28 U.S.C. § 453 (2018).

[6] *See* Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 914 (2006) (identifying "institutional accountability, behavioral accountability, and decisional accountability").

[7] AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 12 (2003).

[8] *See* STEPHEN B. BURBANK & BARRY FRIEDMAN, JUDICIAL ETHICS AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9 (2002).

And they exist within a mostly self-regulating judiciary.[9] This is so because "appropriate intrabranch accountability is essential if potentially inappropriate interbranch accountability is to be avoided."[10] Of course, the judiciary is checked by the other branches to some extent.[11] Yet given the rarity of congressional action,[12] "the judicial branch has, ostensibly, the inherent housekeeping authority to discipline judges for misconduct."[13] This mandate has not resulted in many meritorious complaints of late,[14] but maybe federal judges as a group are well-behaved.

Still, corruption should not be underestimated. Federal judges probably *do* have track records of uniting "the requisite integrity with the requisite knowledge."[15] After all, they survive grueling and invasive investigations during their appointments. But "[p]eople predict that they will behave more ethically than they actually do."[16] And given the valid needs to protect judicial independence, accountability is often a secondary concern in practice. As Root Martinez writes, "judges are able to act without fear of meaningful oversight or sanction much of the time."[17] This is a problem, for "[i]f the public begins to believe that judges are above the law in terms of their own personal conduct, it could have dramatic ramifications for the legitimacy of the judicial system and the respect for the rule of law."[18] So internal checks are insufficient.

This Essay deals with an *external* check that could provide greater guardrails—the congressional remedy of removal.[19] Two Clauses of the Constitution inform this endeavor—the Impeachment Clause[20] and the Good Behaviour Clause.[21] Much has been written about the interaction between the two Clauses already, a majority of scholars concluding that the sole method for judicial removal is impeachment. Others view the Good Behavior Clause as providing a

---

[9] *See* Tom C. Clark, *Judicial Self-Regulation—Its Potential*, 35 L. & CONTEMP. PROBS. 37, 41 (1970).

[10] Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 912 (2007).

[11] *See, e.g.*, The Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364 (2018); M.P. Singh, *Securing the Independence of the Judiciary—The Indian Experience*, 10 IND. INT'L & COMP. L. REV. 245, 245 (2000).

[12] *See* S. REP. No. 362, 96th Cong., 2d Sess. 4 (finding that impeachment " has fallen into disuse because the legislature cannot divert time from [its] ever increasing and relatively more important legislative assignments."); *see also* Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 NW. L. REV. 953, 971 (2020) [hereinafter *Judicial Discipline*].

[13] Paula Abrams, *Spare the Rod and Spoil the Judge: Discipline of Federal Judges and the Separation of Powers*, 41 DEPAUL L. REV. 59, 79 (1991). It may even be that broad internal disciplinary power is unconstitutional as it violates the independence of *individual* judges. *See id.* at 96–98.

[14] *See* JUDICIAL CONFERENCE OF THE U.S., TABLE S-22: JUDICIAL COMPLAINTS —COMPLAINTS COMMENCED, TERMINATED, AND PENDING WITH ALLEGATIONS AND ACTIONS TAKEN UNDER AUTHORITY OF 28 U.S.C. 351–364 DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022, at 3 (last visited Feb. 29, 2024).

[15] THE FEDERALIST, No. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[16] Alexander Schuchter & Michael Levi, *The Fraud Triangle Revisited*, 29 SEC. J. 107, 107 (2016).

[17] Martinez, *Judicial Discipline, supra* note 12, at 968.

[18] *Id.* at 969; *see also* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 1–30 (2021).

[19] This Essay only concerns the power to remove Article III judges.

[20] U.S. CONST., art. II, sec. 4.

[21] U.S. CONST., art. III, sec. 1.

less-stringent standard permitting less-stringent removal procedures, writing that "someone with good-behavior tenure could be removed for misbehavior."[22]

The history and text of the Constitution have not yielded a clear answer as to the proper method of removal or the level of misconduct needed to warrant removal. Since "logical arguments can be produced on either side . . . the question [of removal] is in a sense open."[23]

This Essay aims to settle the debate, relying on American tradition to make the following claims and contributions: First, the Good Behavior Clause, whatever its original meaning, has been solidified into a cross reference to impeachment. Second, the Good Behavior Clause's broad scope may inform Congress as to what counts as impeachable offenses. Third, these conclusions are practically and theoretically desirable. It thereby informs the current debate on judicial ethics, for "no issues pertain more directly to the quality of judicial integrity and independence than those of judicial tenure, compensation, discipline, and removal."[24]

Part I reviews the relevant constitutional provisions. The meaning of the Good Behaviour Clause remains disputed as it implicates a broad scope. The Impeachment Clause, meanwhile, is the reigning champion for removal, though its standards remain undefined. Part II argues that the Good Behavior Clause's meaning yields to the longstanding view of impeachment as the sole mechanism for removal, but may still inform the impeachment process. Finally, Part III argues that an ethical judiciary is possible and desirable through a good-behaviour informed impeachments and removals.

I. REMOVING JUDGES FOR MISBEHAVIOR

Both the Good Behavior Clause and the Impeachment Clauses inform Congress's ability to remove a judge for unethical conduct. But it "is significant that, apart from treason, neither 'good [B]ehaviour' nor 'high Crimes and Misdemeanors' are defined in the Constitution."[25]

This Part reviews the interactions between both Clauses, focusing on the Good Behaviour Clause as a source for a constitutional reading that may imply "a constitutional standard of service which would permit removal for lesser degrees of impropriety than those 'high Crimes and Misdemeanors' which justify impeachment."[26] Such a lesser standard leaves open the possibility that ethical issues at issue today could result in removal proceedings.

---

[22] Saikrishna Prakrash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 75 (2006).
[23] Robert Kramer & Jerome A. Barron, *Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good behaviour"*, 35 GEO. WASH. L. REV. 455, 457 (1967).
[24] *See* Shane, *supra* note 4, at 210.
[25] Re, *supra* note 3, at 85.
[26] Kramer & Barron, *supra* note 23, at 455–56.

A. Impeachment

Federal judges are removable by impeachment. The relevant Clause says that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[27] Not only is it generally agreed that this provision covers the judiciary, but it "is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge."[28]

The Framers viewed this check as respectful to judicial independence and recognized its limits on accountability. The reasons for removal by impeachment are enumerated and those enumerations leave out reasons related to various acts of malfeasance. Per Hamilton:

> The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose.[29]

But those wishing to define such misconduct as impeachable still have that option, depending on how broadly the nation's Congress wishes to read the Clause. Judge Edwards writes, "Congress may define and execute the Constitution's impeachment provisions as it sees fit, and the other branches of government have no control over Congress in its exercise of this authority."[30] Yet a good definition should nevertheless track with what the Founders considered to be an impeachable offense.

And those offenses, perceived at the Founding, would likely be considered criminal today, at least in the judicial context. While bribery and treason are self-explanatory, high crimes and misdemeanors referred to "a relatively limited category closely analogous to the great offences impeachable in common law England."[31] The "great offences" were criminal in nature and included "misapplication of funds, abuse of official power, encroachment on or contempt of legislative prerogatives and corruption."[32] But absent a definition, the question remains open, though the original meaning of the Clause—standing alone—suggests that only criminal conduct will suffice for impeachment.

Other limitations to impeachment apply, though only two are named here. First, Congress may not categorize certain, protected conduct as impeachable: to preserve a functioning court system, "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice."[33] To wit, rulings Congress does not agree with. Second, there are practical concerns since

---

[27] U.S. CONST. art. II, sec. 4.
[28] Prakash & Smith, *supra* note 22, at 74.
[29] THE FEDERALIST, No. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[30] Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 770 (1989).
[31] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 290–291 (2d ed. 1988).
[32] *Id.*
[33] *See* Bradley v. Fisher, 80 U.S. 335, 347–49 (1871).

an "impeachment involves significant costs in terms of both time and monetary resources."[34]

Here is the takeaway: impeachment's limits are considerable, judicial application is scarce compared to perceived ethical lapses,[35] and original meaning points only to "great offences." This bodes well for the unethical judge. Still, some say that alternate means of removal for *noncriminal* (but unethical) offenses are claimed to exist in the Constitution, or that a standard for removal is broader than prohibiting office after the commission of crimes. Proponents of such arguments argue their existence originates in the Good Behaviour Clause.

B. Good Behaviour

The Good Behaviour Clause says that "[t]he Judges . . . shall hold their Offices during good Behaviour."[36] According to Hamilton, the Clause administers a valuable "standard" which aims to "secure a steady, upright and impartial administration of the laws."[37]

But while everyone agrees that the Clause implicates judicial accountability, its meaning is unsettled. It could, after all, "sensibly be read either as setting a substantive standard of conduct on which judicial tenure is contingent, or as employing an eighteenth-century term of art signaling that federal judges shall hold life tenure unless impeached."[38] Or even something in between. And if referring to a contingent standard, it "does not admit of easy definition, and scholarly attempts [to define that standard] have been all but futile."[39]

The next two Subsections dig deeper into the Good Behaviour Clause and whether it is best interpreted broadly, implicating non-impeachable conduct that, in turn, suggest a removal method separate from formal impeachment proceedings.

1. Original Understanding

The most notable proponents of a broader reading are Professors Prakash and Smith. They argue that impeachment was not historically "viewed as a means of determining whether someone had forfeited her good-behavior tenure."[40] And so it should not be viewed that way today.

Rather, "the Constitution adopted the then-established view that officers with good-behavior tenure forfeited their offices upon a finding of misbehavior in the ordinary courts."[41] Such court findings are necessary because there "is no reason to suppose that all departures from good behavior would necessarily constitute "high Crimes and Misdemeanors," and misbehavior "seems more general and less

---

[34] Martinez, *Judicial Discipline*, *supra* note 12, at 977.
[35] *See infra* notes 11–13.
[36] U.S. CONST. art. III, sec. 1.
[37] THE FEDERALIST, No. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
[38] Shane, *supra* note 4, at 213.
[39] Edwards, *supra* note 30, at 773.
[40] Prakash & Smith, *supra* note 22, at 76.
[41] *Id.* at 77.

severe" than impeachable acts.[42] Two judicial removal procedures are therefore available, their applicability depending on the level of misbehavior.[43]

They think, moreover, that the impeachment-only view is "contrary to the Constitution's text," for the Clause would be surplusage if conduct and procedure were both set by the impeachment provision.[44]

Professor Redish disagrees, writing that "the good-behavior language must be construed as nothing more than a cross-reference to the availability of impeachment."[45] Broad readings would offend judicial independence from Congress:

> Federal judges are given life tenure to insulate them from external political pressures on their decisionmaking. However, at the same time, Congress may remove federal judges from office any time it finds their behavior to be "bad," in whatever manner Congress wishes to define that vague concept. Such a construction effectively allows one portion of the provision to devour another portion.[46]

Yet Redish accepts that the Clause says nothing "about who gets to determine whether the requirements of good behavior have been violated or what conduct actually constitutes a violation."[47] An absence of such language therefore requires historical analysis to determine whether other methods were connected to misbehavior—and what constitutes misbehavior in the first place.[48]

The term "good behaviour" originated in England. Originally, "the Crown could choose which of several tenures to grant an officer: to an individual and his heirs; for the officer's life; during good behavior or during the Crown's pleasure."[49] Unlike life or hereditary tenure, the two extremes, "good-behavior tenure qualified or limited the otherwise permanent grant of tenure"[50] such that "unless specific instances of misbehavior flagrant enough to render his removal expedient be proved on him in a legal way, he shall have it for his life."[51]

As England became more democratic, Parliament began to engage in "periodic attempts either to encourage or to mandate good-behavior tenure."[52] Parliament's victory came with the 1701 Act of Settlement, which decreed that judges must be given good behaviour tenure.[53] And, as Prakash and Smith note, Parliament did not provide that removal by address or impeachment were the *exclusive* means to remove judges.[54]

---

[42] *Id.* at 86.
[43] *Id.* at 85.
[44] *Id.* at 86.
[45] Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 692 (1999).
[46] *Id.* at 692, 685.
[47] *Id.* at 698.
[48] *See* Prakash & Smith, *supra* note 22, at 76 (The Constitution has no language "hinting that it adopts an idiosyncratic meaning of good behavior tenure.").
[49] *Id.* at 92.
[50] *Id.* at 90.
[51] JEREMY BENTHAM, PANOPTICON: OR THE INSPECTION-HOUSE 38 (1787).
[52] Prakash & Smith, *supra* note 22, at 95.
[53] *See* Act of Settlement, 1701, 12 & 13 Will. 3, c. 2.
[54] Prakash & Smith, *supra* note 22, at 98.

To the contrary, "individuals with good-behavior tenure could have their tenure forfeited only by a judicial process,"[55] which could theoretically happen "upon a conviction of some offense."[56] In other words, a finding of misbehavior in court could result in a forceful removal from judicial office. As Charles Viner wrote in 1793, "[i]f he does contrary to the duty of his office, as if he doth not do right to the parties, this misfeasance is forfeiture."[57] Yet there are "no examples of cases in which these judicial modes were applied to remove superior court judges."[58] But because such proceedings happened—albeit with regard to other officials—in common law, Prakash and Smith reason, why should they not be permitted here, absent constitutional language requiring impeachment as a sole remedy?

Others, however, think that "the seventeenth century world that Prakash and Smith conjure up in their attempt to reclaim the common law background of the good behavior provisions of Article III of the Constitution differs markedly from that in which the framers lived."[59] "Indeed," writes Redish, "while our constitutional structure obviously borrowed much from English political theory, it is also true that much of the political system established in the Constitution was designed specifically to depart from English practice."[60]

Opponents of non-impeachment removals, while casting doubt on the scope of common law removal, focus on early American history—the bread and butter of originalism. Early state constitutions, for example, mention good behaviour and even the ability to find misbehavior in court,[61] but they generally "gave the legislative assembly a role, often exclusive, in the removal of superior court judges."[62] But state practice might overprotect judges relative to the Constituion.

In addition to looking at state practice, opponents write that the Constitutional Convention's records indicate that the Clause described "life tenure subject to impeachment, and was not intended as a separate standard of conduct authorizing removal or discipline by a means other than impeachment."[63] James Wilson said that federal judges "may be removed . . . on conviction of high crimes and misdemeanors,[64] rather than by address from Congress without a high crime or misdemeanor. And an essay in the Antifederalist took the Clause to mean that the "only causes [for which federal judges could] be displaced [would be] conviction of treason, bribery, and high crimes and misdemeanors."[65] Put differently, language from early America hints that novel forms of judicial removal were not contemplated in the Constitution.

---

[55] *Id.* at 91.
[56] Prakash & Smith, *supra* note 22, at 129.
[57] 16 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 121 (1793).
[58] James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1228 (2007). Rather, these proceedings "remained a proper mode of testing the good behavior of inferior judicial officers (such as bailiffs, clerks, and recorders) throughout eighteenth century England." *Id.*
[59] *See id.* at 1249.
[60] Redish, *supra* note 45, at 687.
[61] *See* Prakash & Smith, *supra* note 22, at 103–06.
[62] Pfander, *supra* note 58, at 1228.
[63] Abrams, *supra* note 13, at 75.
[64] 1 THE WORKS OF JAMES WILSON 410 (Callaghan, ed. 1896).
[65] *Essays of Brutus*, in THE ANTI-FEDERALIST 103,163 (Herbert J. Storing ed., 1985).

But no matter which reading is correct, it is surely the case that the good behaviour standard disallows more unethical conduct than high crimes and misdemeanors alone would. Start from the premise that to determine violations of the standard, "one would examine statutes and case law from England, the colonies, and the states and draw from these materials evidence of what constituted misbehavior."[66]

So what does bad behavior historically entail? In *Henry v. Barkley*, Sir Edward Coke "listed three grounds for forfeiture: abuse of office, nonuse of office, and refusal to exercise an office."[67] These grounds are voluminous, consisting not only of "injustice, corruption, or other misdemeanors in an office"[68] but also "any act inconsistent with the office or abuse and nonuse of the office."[69] Similarly, in *Harcourt v. Fox*, it was argued that "injustice, corruption, or other misdemeanors in an office, were sufficient causes for removal and displacing the offender."[70]

Under such a conception, offenses we allege today could be deemed misbehavior subject to removal. Ongoing deals with litigants could be considered a misuse or corruption connected to the office and the public trust it holds. Likewise, unnecessary, prejudicial comments or other courtroom antics could be viewed as inconsistent with the office. Even using the office to make money through teaching or community engagement might fall under the standard of "misuse." As later demonstrated, today's standards could make room for some activity. But the point here is that the good-behaviour standard of misconduct was painted broadly in England. It's scope could better described as an equitable maxim or call for accountability rather than a clear-cut ethical mandate. That expansive scope made its way to Founding-era America.

Hamilton, for one, expressed a similar view but qualifying it by saying that an "abuse or violation of some public trust" would be sufficient grounds for impeachment.[71] And, as addressed later, Congress began removal procedures against judges for conduct that "amounted to misbehavior in office but that from a detached perspective do not look like high crimes or misdemeanors."[72] And, it goes without saying that "Congress may express its views about what constitutes misbehavior, say by listing offenses that it believed would be sufficient to oust a federal judge."[73]

In conclusion, the scholarly debate about whether impeachment is the sole means for the removal of federal judges is at best fuzzy as an originalist matter.[74] History, nevertheless, has "left us with a rough consensus . . . that a constitutional hiatus between 'bad behavior' and impeachable 'high crimes and misdemeanors,' exists."[75] Because "impeachment and good behavior had always involved

---

[66] Prakash & Smith, *supra* note 22, at 135.
[67] *Id.* at 90 (citing Henry v. Barkley, (1596) 79 Eng. Rep. 1223, 1224 (K.B.)).
[68] Harcourt I, (1692) 89 Eng. Rep. 680, 682 (K.B.).
[69] Prakash & Smith, *supra* note 22, at 90. (citing Harcourt I, (1692) 89 Eng. Rep. 680, 682 (K.B.)).
[70] *Harcourt I*, 89 Eng. Rep. at 682.
[71] THE FEDERALIST, No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961)
[72] Prakash & Smith, *supra* note 22, at 123.
[73] *Id.* at 134; Edwards, *supra* note 30, at 773. There remains a debate whether that list may *only* include crimes.
[74] *See* Saikrishna Prakash & Steven D. Smith, *Reply: (Mis)Understanding Good-Behavior Tenure*, 116 YALE L.J. 159, 169 (2006) [hereinafter *Reply*].
[75] Edwards, *supra* note 30, at 778.

determinations of misconduct"[76] that might result in removal, it makes sense that the original, broad meaning should have an impact in modern proceedings. But given the modern view, the Good Behaviour Clause can only live vicariously through the Impeachment Clause, even though the former Clause incorporates standards arguably unremedied by impeachment.

2. Modern Understanding

The modern understanding sides firmly against the alternate forms of judicial removal advanced by Prakash and Smith, but raises an important question. The two scholars admit defeat, saying that "superficial plausibility of the general impeachment-only view perhaps explains why the impeachment-only view still has great currency in the context of federal judges."[77] Even modern precedent sides against alternative remedies; the Supreme Court held that "Article III courts are presided over by judges appointed for life, subject only to removal by impeachment."[78]

But what do "high Crimes and Misdemeanors" mean in the judicial context, and might the "good Behavior" standard help determine a meaning? The modern understanding is uncertain here, and the rest of this Essay aims to answer that question.

Hamilton's writing is a good starting point: "[impeachable offenses] proceed . . . from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."[79]

With that passage in mind, Peter Shane writes that the "purpose of impeachment, therefore, must be understood as the vindication of the public trust" and that "impeachable abuses of the public trust *need not amount to criminal offenses themselves.*"[80] John Feerick agrees, saying that offenses must instead either "violate some known, established law, be of a grave nature, and involve consequences highly detrimental to the United States," but could also "involve *evil*, *corrupt*, *willful*, *malicious or gross conduct* in the discharge of office to the great detriment of the United States."[81] But others take the opposite view, requiring a criminal act to justify impeachment proceedings.[82]

This debate is especially exciting given its implications for the good behaviour standard. Feerick indicates that the Good Behaviour Clause may be implemented *through* the Impeachment Clause.[83] In that sense, good behaviour's wide contours

---

[76] Prakash & Smith, *supra* note 22, at 116.
[77] *Id.* at 81.
[78] United States v. Quarles, 350 U.S. 11, 16 (1955).
[79] THE FEDERALIST, No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis removed).
[80] *See* Shane, *supra* note 4, at 226 (emphasis added) (citing U.S. DEP'T OF JUST. OFF. OF LEGAL COUNSEL, THE LAW OF IMPEACHMENT, APP. I: THE CONCEPT OF IMPEACHABLE OFFENSE 32–57 (1974)).
[81] John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 55 (1970) (emphasis added).
[82] *See, e.g.*, Edwards, *supra* note 30, at 777; Redish, *supra* note 45, at 677.
[83] *See* Feerick, *supra* note 81, at 52–53 (1970); *see also* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternative*s, 68 TEX. L. REV. 1, 36 (1989).

would inform Congress as to which unethical actions warrant impeachment proceedings. And indeed, it seems that ongoing constitutional practice confirms that understanding.

II. INFORMING IMPEACHMENT THROUGH GOOD BEHAVIOUR

This Part has two goals: First, it aims to defend the modern view that only congressional impeachment can constitutionally remove a federal judge. Second, it contends that the Good Behaviour Clause could help Congress determine impeachable offenses. It achieves both by examining the liquidation of the removal procedure.

A. Constitutional Liquidation

When constitutional language or original meaning is indeterminate, the Supreme Court often relies on "postratification practice," and the "practice of the government"[84] in particular, to find the constitutional meaning.[85] If a constitutional norm prevails over time, courts accept it as the settled meaning, for that interpretation "provides strong evidence that the practice contributes to the common good and accords with the spirit and mores of the people."[86] This judicial move is called liquidation.

As described by Will Baude, liquidation tries "to compromise between ideal constitutional interpretation and accepted constitutional interpretation."[87] It originates with the writings of James Madison, who sought a solution for occasions where "difficulties and differences of opinion might occasionally arise in expounding terms [and] phrases necessarily used in [the Constitution.]"[88] For such contentious terms to be correctly expounded, Madison wrote, "it might require a regular course of practice to the meaning of some of them liquidate [and] settle."[89] But settlement could happen "only once indirectly endorsed by the people who had the authority to promulgate binding constitutional norms in the first place."[90] Such a liquidated practice need not originate in the Founding era, but a longstanding tradition of practice like the ones here are good evidence of a liquidated practice.[91] In contexts involving constitutional structure, widespread public acceptance of "political practices" and "judgments of the other branches" satisfies the settlement prong. [92]

Once a court determines a liquidation controls constitutional meaning, Caleb Nelson thinks that interpretation was "expected to be permanent" absent other

---

[84] McCulloch v. Maryland, 17 U.S. 316, 401 (1819).
[85] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Barrett, J., concurring).
[86] Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV.. 665, 683;
[87] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 (2019).
[88] Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)
[89] *Id.* *See also* Baude, *supra* note 87, at 9 ("indeterminacies could and would be settled by subsequent practice.").
[90] *Id.* at 21.
[91] *Id.* at 69–63.
[92] *See* Sherif Gergis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1483 (2023).

"extraordinary and peculiar circumstances."[93] Any emergent circumstances would "require substantial justification and a similar process of deliberation and widespread acceptance" before they could usurp the settled meaning.[94]

There may, however, be faults with original determinations that the Constitution was liquidated. Subsequent interpreters may decide that "the constitutional provision was fully determinate in the first place"[95] or the "previous liquidation was just sufficiently bad on normative grounds."[96] Or, rather than rely on liquidated practice, a court could rely on changing traditions rather than purer forms of originalism.[97]

The Good Behaviour Clause and the impeachment procedures for judges are perfect candidates for constitutional liquidation. There is, after all, no dispositive textual basis supporting a sole remedy of impeachment, no defined standard for removable misconduct, and no reliable historical reason to assume that one interpretation is correct. Rather, "the traditional equilibrium between the federal judiciary and the other branches . . . owes its existence primarily to informal norms and customs."[98]

B. Judicial Removal Liquidated

This Section uses constitutional liquidation to find whether the Constitution requires that 1) impeachment is the only way to remove a federal judge; and 2) criminal misbehavior is a prerequisite for removal. Baude's test for liquidation has three elements: "indeterminacy, a course of deliberate practice, and settlement."[99]

Given the text's ambiguity and Prakash and Smith's contributions to the historical record, this Essay takes it for granted that there is enough indeterminacy in the interpretation and interaction of the two Clauses to permit consideration of the other elements of the liquidation test. The two professors do not doubt that the Clauses may be liquidated; they even acknowledge that practice and settlement are reasons to accept the standard view over theirs. [100]

1. The Impeachment-Only Practice

As Shane writes, the "common understanding" of the Constitution is that impeachment is the only process governing "issues of judicial tenure,

---

[93] Caleb Nelson, Feature, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2453 (2016) (quoting Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 185 (1865)).

[94] *See* Michael McConnell, *Lecture, Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1774 (2015).

[95] Baude, *supra* note 87, at 57.

[96] *Id.* at 56.

[97] *See generally* Gergis, *supra* note 92.

[98] Burbank, *supra* note 10, at 913.

[99] Baude, *supra* note 87, at 13.

[100] *See* Prakash & Smith, *Reply*, *supra* note 74, at 169 (One reason to keep the standard view is "if one possesses a resolute commitment to salvage a construction that . . . has become entrenched in some quarters."). Naturally, they do not think it a *good* reason and do not concede indeterminacy.

compensation, discipline, and removal."[101] In other words, the Clause has been liquidated to mandate the dominant view of removal.

That makes sense. Impeachment has been the method by which prior removals have occurred, a longstanding presumption for members of Congress, and has gone unchallenged by presidents and judges alike. This is significant, for in determining the possibility of liquidation, "we might look for whether other branches had acquiesced in a particular branch's interpretation."[102] And the American people do not object to the impeachment of judges as an unconstitutional measure. Impeachment thus "carr[ies] with it the public sanction"[103] necessary for a successful liquidation. These claims are corroborated by statements and practices throughout our history.

Begin with the Founding era. While drafting checks on government officials, the Framers "fail[ed] to provide any alternative mode for the removal of the two highest officials of the executive branch."[104] They similarly "fail[ed] to set forth an alternative mode for the removal of federal judges."[105] The natural inference is that this noticeable failure indicates that impeachment is the only removal process for these officials. Prakash and Smith point out, however, that inference would leave the Good Behaviour Clause as surplusage.[106]

But James Wilson, a prominent drafter, disagreed. He "directly connected"[107] impeachment with the Good Behaviour Clause in his writings without mentioning removal through judicial proceedings, the remedy for which Prakash and Smith advocate.[108] To the contrary, Wilson contended that "judges in the United States stand on a firmer footing of independence that judges in England, where removal on address without conviction of crimes or misdemeanors was possible."[109] To be more independent, it would make little sense to adopt the exact protections afforded to good-behaviour judges in England. If the Good Behaviour Clause somehow *informed* the impeachment process, rather than upended it, that Clause would not be surplusage.

Early Congresses similarly adopted the impeachment-only view by rejecting other remedies. As Prakash and Smith lament, "by 1803 at least, Congress . . . conflat[ed] impeachment and the removal of judges for misbehavior."[110] Though Congress considered nine alternatives to impeachment shortly thereafter,[111] no proposal was successful. This was not a denouncement of the proposals themselves, but a perceived constitutional limitation. Members of the legislative branch worried that "alternatives to impeachment were unconstitutional, and

---

[101] Shane, *supra* note 4, at 209.
[102] Baude, *supra* note 87, at 19.
[103] Letter from James Madison to Martin L. Hurlbut (May 1830), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 370, 372 (Gaillard Hunt ed., 1910).
[104] Pfander, *supra* note 58, at 1229.
[105] *Id.*
[106] *See* notes 41–43 and accompanying text.
[107] *Id.* at 1232
[108] *See* 1 THE WORKS OF JAMES WILSON 410 (Callaghan, ed. 1896).
[109] Pfander, *supra* note 58, at 1232.
[110] Prakash & Smith, *supra* note 22, at 123.
[111] *See* AM. ENT. INST., JUDICIAL DISCIPLINE AND TENURE PROPOSALS 3 (1979).

[they] could not be convinced that it was wise to amend the Constitution to facilitate removal of federal judges."[112]

Congress followed through with this interpretation, only using the impeachment power to remove misbehaving judges.[113] Indeed, there is "evidence from over two hundred years of American practice" of judicial removal to support that claim.[114]

In the mid-1800s, prominent members of the legal profession noted their support of the settling impeachment-only view. For instance, in his influential writings, William Rawle described impeachment as the "only" way to remove officials who possessed a "commission granted during good behavior."[115] And Justice Story stated that while public officials, including judges, were subject to criminal proceedings, he did not think that those proceedings could deprive the official of his office.[116] In order to remove an official from office, he wrote, Congress would have to impeach and convict that official for the conduct at issue.[117]

The tradition continued without complaint as time went on. But a wrinkle came with Congress's enactment of statutes permitting intrabranch review of federal judges. In *Chandler v. Judicial Council of the Tenth Circuit*, the Supreme Court considered a challenge to such review.[118] Chandler, a district judge, "frequently clashed with the Judicial Council of the Tenth Circuit regarding backlogs in his docket, his failure to disqualify himself in the face of claims of bias, and his personal involvement as a defendant in lawsuits."[119] The Council, citing statutory authority,[120] removed Chandler from all cases before his court.[121] Chandler argued that the Council effectively usurped the removal power, which requires impeachment.[122]

The Court never reached the constitutional claim.[123] It did, however, suggest that statutes could confer internal regulatory power to judicial councils, for "if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse."[124]

But writing in dissent, Justice Douglas wrote that it "is time that an end be put to these efforts of federal judges to ride herd on other federal judges."[125] He adhered to the traditional view that if judges "become corrupt or sit in cases in

---

[112] Abrams, *supra* note 13, at 66.
[113] *See* Part II.B.2.a
[114] Suzanna Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. L. REV. 795, 805 (1998).
[115] *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 208 (H.C. Carey & I. Lea, eds. 1825)).
[116] JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION § 784, at 253-54 (1833) ("In the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as a part of its regular judgment.").
[117] *See id.*
[118] 398 U.S. 74, 77–80 (1970).
[119] Abrams, *supra* note 13, at 70.
[120] *See* 28 U.S.C. § 332 (2018).
[121] *Chandler*, 398 U.S. at 80.
[122] *Id.* at 82.
[123] *Id.* at 89.
[124] *Id.*
[125] *Id.* at 140 (Douglas, J., dissenting).

which they have a personal or family stake, they can be impeached by Congress."[126] And he thought that Chandler suffered what amounted to a functional removal.

Though intrabranch checks continue, Congress's current conception of *actual* judicial removal remains consistent with those who consider impeachment as the only constitutional mechanism. To be sure, while the *Chandler* proceedings occurred, Congress considered a bill that would permit an alternate removal method.[127] But Congress never passed that bill, for they had doubts concerning its constitutionality.[128] And current law reflects the dominant view; the very provision that this bill would have impacted now reads that, "under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior."[129]

The finality of the liquidation requiring impeachment comes in the form of Supreme Court opinion which says that the Constitution "guarantees that Article III judges shall enjoy life tenure, subject only to removal by impeachment."[130] The combination of continued practice, multiple failed contrary ideas, the contribution of important legal authorities, and now Supreme Court precedent confirms that this understanding was deliberately followed and finally settled. It would take extraordinary circumstances to follow Prakash and Smith's ideas.

But they are correct to worry about surplusage if "the constitutional community may prefer that judges should be removable only through impeachment, and accordingly may choose to understand the good-behavior provision to mean simply 'life tenure.'"[131]

But surplusage is no foregone conclusion; the reading may be harmonized. Indeed, it seems that Wilson took that view, connecting the Clause with the impeachment proceedings. Or as Abrams writes, "the "good behaviour" clause may not [require] impeachment, but may establish an additional standard of conduct to which Article III judges are held."[132] This Essay concurs, contending that impeachable offenses may be liquidated to include ethical lapses through "good Behaviour."

2. Impeachable Misconduct

With the sole constitutional method for removal liquidated, next consider reasons *why* a federal judge might be impeached. Originally, there were two ways Congress could define "high Crimes and Misdemeanors": 1) a narrow reading that permits impeachment only for *actual* crimes and misdemeanors; or 2) a reading

---

[126] *Id.*

[127] *See* S. 1506, 91st Cong., 1st Sess. (1969).

[128] *See* Frank J. Battisti, *The Independence of the Federal Judiciary*, 13 B.C. L. REV. 421, 425–33 (1972).

[129] 28 U.S.C. § 354 (3)(A) (2018). A 1990s commission similarly concluded that "a statute that would provide for the removal from office of Article III Judges by means other than impeachment and conviction would be unconstitutional." Re, *supra* note X, at 107.

[130] *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 59 (1982).

[131] Prakash & Smith, *Reply*, *supra* note 74, at 169. And surplusage may not be world-ending. This Essay, however, attempts to give meaning to each constitutional clause it encounters.

[132] Abrams, *supra* note 13, at 75.

that necessarily incorporates the broad standards of the Good Behaviour Clause.[133]

But now just one survives, for the term "high Crimes and Misdemeanors" has been liquidated to demand the second definition. That settled meaning preserves the importance of the Good Behaviour Clause and heightens judicial accountability, for this broader standard could hold certain ethical missteps as impeachable.

Moreover, it is correct as a matter of interpretation. By looking back at judicial removals, this Essay argues that a repeated and accepted practice of good-behaviour standard impeachments has taken place. But this liquidation argument is less certain, for a "practice had to happen repeatedly and consistently—to be neither a one-off nor a continually contested question."[134] In reviewing impeachments, it is "hard to say definitively whether all judicial impeachments have been for indictable conduct, or whether 'high crimes or misdemeanors' has actually been interpreted to set a higher standard of conduct for judges than for citizens not holding public office."[135] Only a few, unchallenged broad readings is enough to make the point since actual crimes would fall under impeachment's purview anyway.

a. Historical Examples

The record of impeachments from which to draw inferences is sparse, for only fifteen judges have been impeached by the House and only eight were convicted by the Senate.[136] But that record is sufficient, for those impeachments stretch out over American history such that it is possible to map an accepted practice across time.

Start again with the Founding era. Two judges were impeached during Jefferson's presidency. The first was Judge John Pickering, impeached and convicted for mental instability and intoxication on the bench. As the House wrote in its Articles of Impeachment, the judge:

> appear[ed] on the bench . . . in a state of total intoxication, produced by the free and intemperate use of intoxicating liquors; and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens.[137]

While dramatic and rude, these offenses would not constitute *criminal* behavior. They might, however, fall under a category of misbehavior inconsistent with the Good Behaviour Clause. And they were enough for the Senate to remove him from office. The first case of judicial removal, then, supports claims above,

---

[133] *See* Part II.B.2.b

[134] Baude, *supra* note 87, at 17.

[135] Edwards, *supra* note 30, at 774.

[136] FED. JUDICIAL CTR, *Impeachments of Federal Judges* (last visited Mar. 10, 2024), https://www.fjc.gov/history/judges/impeachments-federal-judges.

[137] *See* ASHER C. HINDS, HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 692 (1907).

for Congress must accept a broad reading of impeachment, justified by English history and a "hiatus" between the Clauses, to explain its actions.

The second judge impeached in the Jefferson years was Associate Justice Samuel Chase. A dedicated Federalist and political target,[138] Chase was impeached for his conduct during two trials (reaching an opinion before argument and saying snide things about a defendant's guilt before hearing the case) and a giving a highly political speech before a grand jury.[139] Congressional Republicans threw the kitchen sink at Chase in their Articles of Impeachment, pushing the broad view of offenses past its limit. While Chase's attorneys argued that only "indictable" conduct was impeachable,[140] Republicans thought removal was "nothing more than the belief that impeachment was a means of keeping the men on the bench in line with the will of the people."[141]

Chase was acquitted but his lawyers' attempt to limit eligible offenses failed. After the trial, it was said that "it can hardly be said to be yet determined what is an impeachable offense, and under what limits the Senate sits as a court of impeachment."[142] This proceeding bolstered the broad reading because Congress did not agree to Chase's reading and voted on the Republican charges. Plus, some of these charges "seemed hardly such a high crime or misdemeanor as to render [Chase's] conviction certain."[143] While the broad reading survived, however, it was clear that it needed guardrails; some Articles were related to "dubious" matters of law and one could have been applied against the entire Supreme Court.[144]

The next clear noncriminal yet impeachable offense came in 1873. Judge Delahay was impeached for "personal habits unfitted him for the judicial office; that he was intoxicated off the bench as well as on the bench."[145] There were also concerns about the judge's financial dealings, but those remain unsubstantiated.[146] But relying on the Pickering removal, Congress impeached Delahay for his unsavory but noncriminal habit of "sentence[ing] prisoners when intoxicated, to the great detriment of judicial dignity."[147]

The next case is highly analogous to today's ethical concerns. In 1911, Judge Archbald was impeached for "willfully, unlawfully, and corruptly [taking] advantage of his official position"[148] by "doing business with [litigants] in [cases]then pending in his court."[149] Specifically, Archbald dealt with, and even served as an agent for, coal and railroad companies that repeatedly litigated before

---

[138] *See* Robert B. Lillich, *The Chase Impeachment*, 4 A. J. LEGAL HIST. 49, 51–53 (1960).
[139] Alexander P. Humphrey, *The Impeachment of Samuel Chase*, 5 VA. L. REG. 281, 286–88 (1899).
[140] Lillich, *supra* note 138, at 57.
[141] *Id.* at 55.
[142] Alexander P. Humphrey, *The Impeachment of Samuel Chase*, 33 AM. L. REV. 827, 842 (1899).
[143] HENRY ADAMS, JOHN RANDOLPH 97 (1893) (emphasis added).
[144] Lillich, *supra* note 138, at 59–60.
[145] HINDS, *supra* note 137, at 1009.
[146] *Id.* at 1010.
[147] *Id.*
[148] PROCEEDINGS OF THE UNITED STATES SENATE AND THE HOUSE OF REPRESENTATIVES IN THE TRIAL OF IMPEACHMENT OF ROBERT W. ARCHBALD, volume III, 62d. Cong., 3d Sess., 1680, 1913.
[149] Patrick J. McGinnis, *A Case of Judicial Misconduct: The Impeachment and Trial of Robert W. Archibald*, 101 PA. MAGAZINE OF HIST. & BIOGRAPHY 506, 510 (1977).

his Court.[150] His relationship with the companies even discouraged others from litigating against those companies.[151] Archbald often accepted or requested gifts or favors from litigants, often without incurring costs, and sometimes in exchange for appointments.[152] The same companies gave such gifts, including payment of a "pleasure trip" to Europe.[153]

Like the Federalist attorneys in the Chase impeachment, Archbald's attorneys relied on a constitutional reading that would only remove judges for actual crimes.[154] But the Senate disagreed, convicting and removing the judge and thereby taking the view that "*impeachable conduct must necessarily include any such lack of good behavior* whether prescribed by an existing statute or not."[155] This was the first time that corruption was held impeachable, but the precedent makes sense given the ongoing acceptance of broad readings of impeachable offenses. A precedential misdemeanor therefore includes, the "desire to make gainful bargains with parties having cases before [the judge] or likely to have cases before [that judge]."[156]

Impeachable corruption continued in the proceedings against Judge English. There, English was impeached, among other reasons, for his favoritism of a bankruptcy referee in his rulings and appointments.[157] He also sought an appointment for his son from a railroad company which was likely to litigate in the judge's district.[158] Though removal did not occur, English's impeachment further indicates the availability of removal as a remedy for judicial corruption or favoritism.

The last case dealing with the impeachability of noncriminal conduct comes from another favoritism case. In 1936, Judge Ritter was also impeached for favoritism of a bankruptcy referee and was removed from office by the Senate.[159] Ritter contested the impeachment in the Court of Claims, alleging that the impeachment was invalid since he was convicted on an Article that summarized the Articles upon which he was found not guilty.[160] But that court determined it could not hear the case because the Senate has the sole and final responsibility for judicial removals.[161] And it was careful to note that the impeachment power may be used on political grounds, not the strictly legal grounds upon which courts might review an impeachment.[162]

---

[150] *Id.* at 509–13.
[151] *Id.*
[152] *Id.* at 513–15.
[153] *Id.* at 514.
[154] *See id.* at 518.
[155] Carl L. Shipley, *Legislative Control of Judicial Behavior*, 35 L & CONTEMP. PROBS. 181 (1970).
[156] PROCEEDINGS, *supra* note 148, at 914.
[157] *See generally* ARTICLES OF IMPEACHMENT PRESENTED AGAINST GEORGE W. ENGLISH (1926).
[158] *See id.* at 14.
[159] 3 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 2246 (1994).
[160] Ritter v. United States, 84 Ct. Cl. 293, 294 (1936).
[161] *See id.* at 296–300.
[162] *Id.* at 297–98 (relying on People v. Hayes, 143 N.Y. Supp. 325, 328 (1913) ("It is the exclusive and final judge of the occasion or time it shall select to impeach, and of the acts of the Governor it may specify for impeachment. This great power is political. History is replete with illustrations of its use and abuses. It is reserved to the state for its preservation and the destruction of its enemies, and is beyond the control of every court except the court empowered to try the impeached and find him guilty or innocent.")).

Each of these impeachment proceedings saw conduct that would not be considered an actual crime serve as a reason to remove a judge. That conduct was accepted by the other branches and the people as rightly impeachable. Thus, impeachment's scope is broad, just as the Good Behaviour Clause's meaning is. Indeed, the same offenses that were considered misbehavior in common-law England could likely be an impeachable offense under the Congress-decides model of impeachment. So it is not a stretch to say that the Clause could inform and validate the process of judicial removal for unethical actions.

b. Objections and Impeachment's Scope

Though the last case of unethical, noncriminal, yet impeachable conduct took place in 1936, the tradition of broad impeachments should not be thought abandoned. It may be that the availability of other avenues of recourse—like intrabranch limitations on judges—are a more appropriate method for disciplining judges. It may be that the process itself is generally fraught and unworkable, as demonstrated in the Chase impeachment.[163] It may be that noncriminal impeachments do not often meet the desired results.[164] Or it may be that Congress does not want to enter into the political and separation-of-powers nightmare that such impeachments might manifest. No matter the reason, a relative earliness of examples is not fatal to liquidation.[165] In fact, they are fantastic sources of support. So long as the *option* of noncriminal impeachment is an accepted and settled practice, the broad reading of impeachment may be liquidated.

But how may the scope of impeachment be determined in light of these examples? And how might the Good Behaviour Clause inform that scope? For starters, there is disagreement about whether the practice is categorized at all. That counterargument warns that "the difficulty of characterizing . . . alleged misconduct as a high crime or misdemeanor as opposed to mere misbehavior"[166] counsels against liquidation.

The classification is simpler, however, than the argument suspects, since "all of those actually convicted were impeached for serious misconduct, ranging from habitual drunkenness and senility to conviction for criminal offenses."[167] "Serious misconduct" as a descriptor is sufficient because those examples show "that this standard should not be limited to indictable offenses, but instead includes a broad range of abuses of public office."[168] The inclusion of uncouthness, inability, and criminality must be made somehow. So it seems that the practice *is* settled to be a broad standard, agreed to by the people and other branches through their acceptance during past impeachments.

Establishment of a practice, however, begets another counter—that the practice must be incorrect and may therefore not be liquidated. The argument goes that if "any 'not good' behavior is impeachable, [the practice] leav[es] a

---

[163] *See* Lillich, *supra* note 138, at 72.
[164] Sherry, *supra* note 114, at 805 ("the Senate is much less likely to convict if no indictable offense is charged.").
[165] It might, however, be fatal to a living traditionalist analysis. *See generally* Girgis, *supra* note X.
[166] Prakash & Smith, *supra* note 22, at 125.
[167] Sherry, *supra* note 114, at 805.
[168] Abrams, *supra* note 13, at 80.

standard as expressed by then-Congressman Ford that 'an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.'"[169] And if this malleable standard exists, though the Good Behaviour Clause or otherwise, it "would provide a basis for almost unlimited legislative control over the judiciary."[170] And that runs contrary to the idea of impeachment being a tough mark to reach.[171] Indeed, this was one of the arguments made by Justice Chase's lawyers in his impeachment.

Advocates of the "incorrectness" counterargument rest first on the value of judicial independence. Wishing to jettison the past practice, some advocate for change. Redish, for one, would amend impeachment "to be narrowly confined to situations in which the judge has engaged in criminal behavior that threatens the integrity of the judicial role."[172] This way, he thinks, "the ability of Congress to employ its impeachment power . . . to influence future judicial decisionmaking or penalize past judicial decisionmaking" would likely fail.[173]

This would make a good argument at the constitutional convention, but its revisionism is insufficient to combat liquidation. Past practice includes the settled impeachments of Pickering, Archbald, and Delahay, and the impeachable misbehavior they committed must be squared in any contrary account. And these prior impeachments inconveniently show that "Congress has been willing to impeach individuals for behavior that is not indictable, but nonetheless constitutes an abuse of an individual's power and duties."[174] History's role in solidifying a constitutional interpretation cannot be ignored, so the argument falls.

The second, more powerful "incorrectness" argument is that "the power of removal together with the appropriate standard are contained solely in the impeachment clause."[175] In other words, "'good behavior' defines tenure subject to impeachment, *not an independent standard of conduct*."[176] Judge Edwards defends this view, saying that "high Crimes and Misdemeanors" loses its independent meaning if the Good Behaviour Clause classifies impeachable judicial behavior."[177]

If correct, this view would cut out the Good Behaviour Clause from the liquidation at stake. The noncriminal misbehavior covered by historical practice would instead be a liquidation of the Impeachment Clause *alone*, rather than an impeachable standard informed by the implication of the other provision. That is

---

[169] Edwards, *supra* note 30, at 777 (citing 116 CONG. REC. 11913 (1970)).
[170] Abrams, *supra* note 13, at 76.
[171] *Id.* (citing THE FEDERALIST, No. 77, at 474 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).
[172] Redish, *supra* note 45, at 677.
[173] *Id.*, at 686.
[174] LEGAL RSCH. INST., *Jurisprudence on Impeachable Offenses* (last visited Mar. 10, 2024), https://www.law.cornell.edu/constitution-conan/article-2/section-4/jurisprudence-on-impeachable-offenses-1865-1900.
[175] Cheryl L. Johnson, RULES OF THE HOUSE OF REPRESENTATIVES 608. The House guide notes that this interpretation is not supported by the historical record. *Id.*
[176] Abrams, *supra* note 13, at 79.
[177] Edwards, *supra* note 30, at 777 (If liquidated as suggested, "the gap between 'not good' behavior and impeachable behavior disappears; they are merely two different ways of expressing the same type of conduct.)

not a bad argument. It may be that "[t]he causes of impeachment are *more specific* although they are all included in the notion [of] 'misbehavior.'"[178]

Nevertheless, there are compelling reasons to carry on liquidating with Good Behaviour in mind. And this goes to the point this Essay makes: the Good Behaviour Clause might very well justify a broad scope of impeachable offenses. First, the Constitution is widely understood to command 'good behavior as a condition of federal judicial tenure, and impeachment as the exclusive device for its enforcement."[179] In that sense, both readings—incorporation of the Clause and not—are possible.

Second, the term "misdemeanor" might limit impeachment to actual crimes. While drafting the Constitution, James Madison "argued that impeachment could be founded on 'any act which might be called a misdemeanor,' [which] impliedly exclude[s] lesser offenses from his definition."[180] If that is the case, then a standalone Impeachment Clause liquidation should not be understood to include the historical practices of noncriminal impeachment described above.[181]

Third, judges are subject to a condition of tenure not suffered by the President or Vice President. While the Impeachment Clause is the only disciplinary provision regulating the two executive positions, judges are regulated by the Impeachment Clause *and* the Good Behaviour Clause. The omission of an additional standard for the President and Vice President could imply that the Framers wished that a given standard be applied to *judicial* impeachments while *executive* impeachments be conducted without such requirements. If that is correct, then the value of judicial independence would be protected to a greater extent than if the other reading was adopted and the Good Behaviour Clause would not be written out of the Constitution.

Fourth, it makes sense that some of the broad English practice emigrated here with most of its common law, and that standard is more likely found in the Good Behaviour Clause than in impeachment. There were certainly reasons to separate from English practice, but such separation most likely happened through practice, not the adoption of an English term of art. Like the impeachments above, the English practice could deny officeholders tenure for noncriminal misbehavior.[182] And that is not the case for an impeachment remedy alone.

Finally, the fact that this argument is uncertain is reason to continue liquidating judicial impeachments as if they implicated Good Behaviour. At bottom, the impeachable defenses will be better defined. And in all events, the liquidation described herein leads to the same conclusions no matter which Clause is actually liquidated. If you think the Good Behaviour Clause is not being liquidated in the examples above, just rename the Essay to "Expounding Judicial Crimes and Misdemeanors."

---

[178] Burke Shartel, *Federal Judges, Appointment, Supervision, and Removal: Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 899 n. 79 (1930) (emphasis added); *see also* ALEXANDER SIMPSON, A TREATISE ON FEDERAL IMPEACHMENT 40 (1916).

[179] *See, e.g.*, Shipley, *supra* note X, at 181.

[180] Lillich, *supra* note 138, at 72 (citing JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 688 (1893)).

[181] This is contested. *See id.* at 55 n.21.

[182] *See* notes 62–70 and accompanying text.

Assuming, therefore, that it is right to liquidate the Good Behaviour Clause as informing impeachment, there remains one problem: the scope does seem to admit *any* conduct as impeachable, to the detriment of judicial independence.[183] Judge Edwards worries that examples of impeachable conduct "could range from indecent personal habits inside or outside the courtroom, to substandard judicial performance, to mental or physical incapacity."[184]

Fair, but whatever the *original* scope was, it has certainly been narrowed. And that's the entire point of liquidation. If there was uncertainty as to the scope at the Founding, then subsequent, settled practice can place limitations on the term. And remember, even the English meaning had no definition, making the term ripe for an elucidation by practice. So if an anything-goes good-behavior standard secretly applied to impeachment at the beginning, as Edwards worries, then subsequent practice may have morphed that standard from a dinosaur into a chicken. The tame meaning is the liquidated constitutional requirement.

To recap: past impeachments show that noncriminal but unethical misbehavior may result in the impeachment and subsequent removal of federal judges. That interpretation has been settled by continued practice, and that it has not been the subject of serious discontent by the judiciary, executive, or the American people. It can be fairly understood as referencing the Good Behavior Clause, or even applying it through impeachments. With the objections against this analysis taken care of, the question remains: what counts as an impeachable offense under the two liquidated Clauses? The answer is frustrating: we don't know.

The standard is still being liquidated, for there is still no settled interpretation that conveniently lays out the limitations Congress must follow. Two certainties: 1) impeachment may be levied against the unethical behavior committed by the judges above—and for any actual crimes; and 2) Arguments against a crimes-only view have been discounted repeatedly by Congress, and the judiciary and executive branches have not fought back. The rest, laid out below, is conjecture but lists some possibilities about how the scope could be elucidated.

Liquidation depends on historical practice, and past impeachments may prove a powerful ally in making an argument for the impeachability or nonimpeachability of a given practice. Practically, then, one could assume that any ethical lapse is impeachable subject to the parsing of historical precedent—or start from the opposite presumption.

Scholars have also looked at a stronger limitation: look at the history in light of the values protected by the Constitution—accountability and independence. In other words, if an unethical but noncriminal action is taken, its impeachability is determined by its impact on the judge's ability to carry out her duties. A judge may be impeached for favoritism or denouncing a defendant before argument while "an executive official who has done the same thing may not be impeached, because neutrality is not necessarily important to his or her job."[185]

---

[183] A liquidation of "misdemeanors" could run into a similar issue. *See* n. 179, *supra.*

[184] Edwards, *supra* note 30, at 777.

[185] *See, e.g.*, MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 107 (1996) ("a federal judge might be impeached for a particularly controversial law review article or speech, because these actions undermine confidence in the judge's neutrality and impugn the integrity of

Another possible limitation is about ongoing ethical failures. If the ethical lapses are mild and short-lived, there would be no grounds for impeachment. Consider the duty to inform the public about a judge's finances. McGreal writes that if the compensation is not for an illegal or unethical purpose, failure to report is a ministerial lapse that should not support impeachment."[186] Similarly, while one well-intended but unethical abuse of the contempt power might not warrant impeachment, "a pattern of such behavior certainly would, as would a single incident of an egregious nature."[187]

Finally, drawing in part from the lessons of Justice Chase's impeachment trial, McGreal creates a three-part formula: "First political activity by a federal judge should be per se impeachable. Second, all other judicial misconduct is impeachable only if a lawyer would be disbarred for the same or similar misconduct. Third, all nonimpeachable misconduct should be left to judicial self-regulation."[188]

Whatever one thinks of this formula, or any test aimed at defining impeachable offenses for judges, those ideas above work with the practice liquidated thus far. The Good Behaviour Clause is sweeping. Ethical missteps like favoritism, gross inability, business dealings with clients or litigants, and the like might be removable offenses in the English common law. And, more importantly, they would be removeable offenses according to American practice.

Congress is therefore left with the unhelpful liquidated guideline that, according to the Good Behaviour and Impeachment Clauses, "federal judges should be impeached for some, but not all, ethical violations."[189] The remaining determination of what actually counts is up to Congress to define. But it is not without resources. Congress should look first to the broad scope of the Clauses, which could be applied to anything from drunkenness to criminal conduct, and then trace impeachment's application through prior proceedings. In doing so, the scope of the impeachment power comes somewhat into focus.

It may seem obvious, but this reading is different. Some previous debates centered around the original meaning alone or the original application of the Clauses. Others concentrated on the modern use of the Clauses or proposed new ways to understand impeachment. But by using liquidation as a theory to harmonize originalism with historical practice, this Essay boils down the relevant question to the precise scope of unethical behavior that justifies removal. And it argues that impeachment necessarily incorporates the good-behavior standard, or at least that there are solid reasons for its explicit reintroduction.

III. GOOD BEHAVIOUR AND IMPLICATIONS

The liquidated interpretation of the removal Clauses remains relevant. Under that settled meaning, it is possible that much of the judicial conduct complained

---

the judicial process."); Paul E. McGreal, *Impeachment as a Remedy for Ethics Violations*, 41 S. TX. L. REV. 1369, 1371 (2000).

[186] McGreal, *supra* note 185, at 1371.

[187] Abrams, *supra* note 13, at 84. Judge English was impeached, in part, for such egregious and continuous uses of the contempt power. *See* ARTICLES OF IMPEACHMENT PRESENTED AGAINST GEORGE W. ENGLISH (1926).

[188] McGreal, *supra* note 185, at 1398.

[189] *Id.* at 1371.

about today could be removeable if Congress decided to act. To be sure, there are differences between the actions of today's judiciary and judges of yesteryear, but constitutional history shows that ethical blunders could count either as a violation of good-behaviour tenure or as a high misdemeanor. Though it generates a spacious guideline, the Constitution gives Congress a nearly unlimited prerogative to determine when something impeachable has occurred. And it ensures that only Congress can remove judges for such conduct.

This liquidation might appear radical. One on hand, it may confer too much power on partisan representatives, threatening the impartial nature of federal judges. If conducting business deals with likely litigants and appearing intoxicated justify removal, few actions would be outside congressional purview. On the other hand, it might do little to solve perceived problems of ethical misadventure. The chance for impeachment is rare and unpredictable, let alone the removal of a bad actor in the Senate. Unethical federal judges seem unaccountable—indeed, untouchable—if the nation's opportunity for their removal depends on a difficult political process. Yet this is for the best.[190]

The liquidation above simply amounts to the status quo. Those worried about a capacious standard may rest easy, for it is unlikely that an impeachment will occur for anything less than shocking judicial conduct. And those concerned about a lack of judicial oversight can do the same. This last Part briefly addresses why the good-behaviour standard, enforceable only through impeachment is appealing. It primarily focuses on assuring skeptics that unethical judicial behaviour will result in sufficient adverse consequences. The other objection need not be addressed at this time because few would seriously suggest that impeachments for unethical slipups are imminent in today's climate.

A. Internal Safeguards

The first answer to unmoored judicial independence are disciplinary responses aside from impeachment.[191] Many such measures are dealt with inside the judiciary so Congress cannot threaten to undermine the courts' ability to discharge their constitutional functions, or if any risk posed to judicial power is outweighed by the appropriateness of congressional action."[192] Intrabranch corrections are also desirable as a normative and practical matter because "without strong mechanisms for signaling intolerance for judicial misconduct, the judiciary makes itself vulnerable to a whole host of potential risks."[193]

One such endeavor at internal accountability was the passage of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,[194] which

---

[190] Shane, *supra* note 4, at 212 ("the existence of authority to devise mechanisms other than impeachment for judicial discipline does not itself prove that instituting those other mechanisms is desirable.").
[191] *Id.* at 234 ("the exclusivity of impeachment for removal purposes would not logically foreclose other disciplinary sanctions short of removal, which might be effectuated through other means.").
[192] *Id.* at 238 (citing Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 443 (1977)).
[193] Martinez, *Judicial Discipline*, *supra* note 12, at 980.
[194] 28 U.S.C. §§ 351-64 (2018).

"enabled the judiciary—through its own self-oversight and governance—to address allegations of improper conduct or disability of judges as they arise."[195]

Of course, the Act does not review the removal of federal judges as a possible punishment for unethical behavior. But it does give judicial councils the ability to investigate, penalize, and report misbehavior.[196] And the sanctions juridical councils may distribute are not insignificant. They include public censuring or reprimanding, docket-clearing similar to the actions taken in the *Chandler* case, and the certification of a judge's disability.[197] Though weighty, punishments available to councils are respectful to its focus on "correction of conditions that interfere with the effective and expeditious administration of the business of the courts."[198] The Act makes clear that it is not a substitute for the political and value-laden power of congressional impeachment.

But internal discipline under the Act could also be a precursor to impeachment. Congress might witness a public-facing reprimand or action as reason to begin the formal impeachment and removal process. Indeed, the Act even contemplates that possibility by permitting judicial committees to certify determinations that a violation of good behaviour has occurred and send that determination to the Judicial Conference of the United States for further consideration.[199]

Voluntary resignation may also stem from ethical violations, even though the Act "is concerned with individuals who currently exercise the powers of the office of federal judge."[200] While that resigning judge may still receive benefits,[201] the practical effect is that the offending judge was removed from office.

Internal disciplinary procedures have an edge on impeachment in that the procedures' standards are clearer. Rather than guess whether something counts as misbehavior, violations under the Act are spelled out by canons promulgated by the Judicial Conference.[202] The canons include the conduct historically deemed impeachable as sometimes warranting discipline.[203] Notably absent, however, from the pull of these canons are the Justices of the Supreme Court.[204]

The Supreme Court, though susceptible to the same—if not greater—ethical concerns as other federal judges, need not abide by either the Act or the canons.[205] This is because there are constitutional doubts about whether Congress can

---

[195] Martinez, *Judicial Discipline*, *supra* note 12, at 956.
[196] *See* 28 U.S.C. §§ 353-54.
[197] *Id.* at § 354.
[198] Order at 2, In re Complaint of Judicial Misconduct, Nos. 18-90204-jm, 18-90205-jm, 18-90206-jm (2d Cir. Jud. Council Apr. 1, 2019).
[199] *See* 28 U.S.C. § 353.
[200] Order at 2, In re Complaint of Judicial Misconduct, Nos. 18-90204-jm, 18-90205-jm, 18-90206-jm (2d Cir. Jud. Council Apr. 1, 2019); 28 U.S.C. § 354.
[201] *See Id.* at § 371.
[202] *See* JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES 3 (2019). Not every violation, however, will result in discipline; applicability depends on "such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system." *Id.*
[203] *See id.* at 3, 5, 18.
[204] *See id.* at 2.
[205] *See id.*; 28 U.S.C. § 351.

regulate the Supreme Court in this manner,[206] and because there could be heightened concerns "in light of separation of powers concerns and the importance of preserving judicial independence."[207] Nevertheless, until the publication of their formal ethics code, the Court '[a]dopted an internal resolution in which they agreed to follow the Judicial Conference regulations as a matter of internal practice,' which provide for 'limitations on gifts and outside income.'[208] However strong they adhere to the ethical canons, the fact remains that the Justices remain unbound by congressional action and unthreatened internal checks. The removal of unethical *Justices*, then, depends solely on the application of liquidated impeachment practices.

B. Responsiveness

Another check on the judiciary is their responsiveness to the public. Of course, the courts should not be seen to be deciding rulings or making political statements to shore up public approval, but they should strive to maintain the perception of independent and impartial jurists.[209] This is important because, as the Judicial Conference says, "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor."[210]

If judges are seen to be unethical, their actions "diminish[] public confidence in the judiciary and injures our system of government under law."[211] The public therefore has a role to play in setting the tone of legal culture and shaping the views of those who have the power to shape the judicial branch. It is in the best interests of all to accept that rulings are correct and unbiased, and if the public drifts from those thoughts, it is incumbent on the other branches to fix that perception by passing laws targeting the lower courts or Supreme Court jurisdiction, pressuring the judiciary, or taking other action as appropriate.

This is especially relevant because "[o]ver the past several years, the short-circuiting of investigations into judicial impropriety has played out in the public eye."[212] And as Root Martinez contends, "it is often the case that the only discipline judges face is the stain on their reputation when they resign in the midst of a pending investigation."[213]

---

[206] *See, e.g.*, David Rivikin Jr. & James Taranto, Opinion, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL STREET J. (July, 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7?st=yaf444fmb8q9vd1 (Justice Alito: "No provision in the Constitution gives them the authority to regulate the Supreme Court—period.").

[207] *Cf.* John G. Roberts, Jr., Letter to Richard J. Durbin (April 25, 2023), *available at* https://www.documentcloud.org/documents/23789636-roberts-letter-to-durbin-4-25-2023.

[208] Veronica Root Martinez, *Supreme Impropriety? Questions of Goodness and Power*, forthcoming 87 L. & CONTEMP. PROBS., at 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4685507 [hereinafter *Supreme Impropriety*] (citing John G. ROBERTS, JR., 2011 END OF YEAR REPORT ON THE FEDERAL JUDICIARY 4 (2011)).

[209] *See* JUDICIAL CONFERENCE, *supra* note 202, at 3, 17.

[210] *Id.* at 3.

[211] *Id.*

[212] Martinez, *Judicial Discipline*, *supra* note 12, at 958.

[213] *Id.* at 968.

Should the stain be great enough, both individual and organizational change might occur without having to resort to the burdensome impeachment process. Former judge Alex Kozinski, for instance, resigned after allegations regarding sexual misconduct,[214] and some judges facing impeachment-level misbehavior similarly resigned before charges could be brought in the Senate.[215] Similarly, at other times, the judicial branch, and the Conference in particular, "was able to appease public opinion through reforms aimed at improving the administration of justice and thereby diffuse more drastic reform efforts that would have struck more closely at substantive judicial authority."[216]

Responsiveness to public concerns also shaped the canons that now have some bite through the Conduct and Disability Act. In the early 1900s, a federal judge served as a Baseball Commissioner concurrent with his judicial duties, raised the question, "Where do federal judges look for guidance in resolving ethics issues?"[217] Because of that controversy, Chief Justice Taft oversaw the drafting of the canons now followed by most federal judges today.[218]

Recently, a parallel scene took place during "the crescendo of what had been a long-term clamoring about the ethical rules and standards that should govern Supreme Court justices."[219] Even though the Justices routinely sought guidance from the canons and elsewhere,[220] emergent stories about the Justice's personal dealings percolated.[221] Some Justices spoke out, favoring action to combat resulting distrust.[222] And the Court was responsive to the ethical concerns, releasing a formal code of ethics last fall.[223]

But with the adoption of that code, however, the Court did nothing drastic. Instead, it simply "formalize[d] efforts the justices were already undertaking,"[224] mirroring the Conference's code of ethics for lower court judges (but without the possible statutory bite). And it continued to leave recusal decisions "solely in the hands of individual [J]ustices with no possibility for review,"[225] arguing that recusal standards should be lax since there is no "substitute available for Supreme Court [J]ustices when they must recuse, unlike the lower federal courts."[226] So

---

[214] *See* Dan Berman & Laura Jarrett, *Judge Alex Kozinski, Accused of Sexual Misconduct, Resigns*, CNN (Dec. 18, 2017), https://www.cnn.com/2017/12/18/politics/alex-kozinski-resigns/index.html.
[215] *See* FED. JUDICIAL CTR, *supra* note 136.
[216] Abrams, *supra* note 13, at 70.
[217] *See* ROBERTS, *supra* note 208, at 1. One may not serve as both a Judge and Baseball Commissioner; the judge in question resigned from judicial duty. *Id.* at 2.
[218] *See id.* at 1–2. The canons have been updated since their original promulgation.
[219] Martinez, *Supreme Impropriety*, *supra* note 208, at 3.
[220] *See* ROBERTS, *supra* note 208, at 4–5.
[221] *See* note 1, *supra.*
[222] *See* Joe Hernandez, *Amy Coney Barrett Says She Supports an Ethics Code for Supreme Court Justices*, NPR (Oct. 17, 2023), https://www.npr.org/2023/10/17/1206509876/amy-coney-barrett-ethics-code-supreme-court.
[223] *See* CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023).
[224] Martinez, *Supreme Impropriety*, *supra* note 208, at 8.
[225] *Id.* at 12.
[226] *Id.* at 10.

while things may have cooled down, perceived lower ethical standards at the Court remain a public narrative.[227]

Despite any possible shortcomings, however, the new code is helpful beyond its role as a replication of the Conference's code. It "augments the statutory rules Congress already has in place and provides an additional lens that Congress can use when determining whether impeachment proceedings are warranted."[228] In doing so, the code helps further narrow the types of misbehavior included in the ongoing liquidation of the broad, good-behaviour standard Congress uses in its impeachment and removal of judges.

One additional aspect of responsiveness is relevant: the Senate—and by extension, the voters—can preempt all these concerns through the nominations process. During that process, intense investigations are conducted into judicial candidates that are "as comprehensive as reasonably possible to ensure sound judgments about their integrity and qualifications."[229] If these investigations and the gauntlet of advice and consent is functioning, then the likelihood of commissioning unethical judges is lessened.

C. Independence and Accountability Revisited

But checks on the judiciary are not enough by themselves. In finding the proper availability of judicial removal, "it becomes necessary to weigh, balance or accommodate competing values or ideals."[230] For the settled constitutional meaning to adhere, it must be consistent with a functioning and honest justice system. Remembering that "both judicial independence and judicial discipline [are] parts of an integrated whole,"[231] this last Section briefly ensures that neither value runs away from the other.

Some think that if a broad list of impeachable offenses exists, the judiciary will lose independence. To them, the good-behaviour scope could "easily undermine the vitally important functions manifestly served by Article III's protections of salary and tenure by giving rise to the very danger of external political influences on the judicial process that those protections were quite clearly intended to prevent."[232] It is possible that political assaults on the judiciary may happen, but that is nothing new.[233] And as the impeachment of Justice Chase showed, not all charges are impeachable, certainly not those born from political distaste or disagreement. Other limitations might exist as well, though they are not yet defined or settled.[234]

It might be, however, that accountability was never supposed to be a powerful value at all. Redish writes that "those who drafted Article III's protections . . .

---

[227] *See, e.g.*, Last Week Tonight, *Supreme Court Ethics*, YOUTUBE (Feb. 22, 2024), https://www.youtube.com/watch?v=GE-VJrdHMug.
[228] Martinez, *Supreme Impropriety*, *supra* note 208, at 21.
[229] NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL 29–30 (1993).
[230] Re, *supra* note 3, at 93.
[231] Redish, *supra* note 45, at 706.
[232] *Id.* at 683.
[233] *See* William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673.
[234] *See* Part II.B.2.b.

must have understood that there could be a resulting cost," and that ultimately they voted to risk a "lack of accountability in order to assure judicial independence."[235] There is historical evidence to support this claim, for American judges were meant to be more insulated from executive and legislative power than their English counterparts. Indeed, that is a reason why the impeachment-only plan became law.

But the problem with defending titanic independence with political distance is that the sole means of removal was placed in the hands of the most political branch of government. And the presence of limitations on impeachable offenses would not solve the problem, for Congress has always determined what counts as a high crime or misdemeanor. Indeed, they could criminalize a certain act retroactively if they wanted to. Ultimately, then, removal must always be at least partly political, narrow construction or not.

That does not harm judicial independence in the long run. It might even be good for judges and the judicial branch. Redish concedes that his view "leaves open the possibility that extremely questionable judicial behavior will fail" to be removed from office.[236] And if these questionable characters are untouchable, then confidence will be damaged in the administration of law and the other branches would be forced to step in and restrain judges as they did with the 1980 Act.

Regulation of judges in this manner is more determinantal to the independent judiciary than the possibility of impeachment for unethical action. Especially since "the process of impeaching an Article III judge may be inefficient and may devolve into political theater that fails to achieve a concrete and respected resolution."[237] Congress has rarely used its impeachment power on judges and is unlikely to begin a regular campaign against judges, so the notion of unbounded impeachment is, practically speaking, a chimeric fear.

Even if it were not, independence is "hardly an absolute value or an unmitigated good."[238] Prakash and Smith take the opposite view from Redish, arguing that "the Framers' concern about accountability seems much more pervasive in their deliberations—and more manifest in the Constitution itself—than does their concern to ensure judicial independence."[239] But like titanic independence, this indeterminate accountability is worrying.

Judges must be able to confidently say what the law is without fear of becoming political targets. And that is hard to do if accountability is permitted to ride roughshod over concerns for independence, especially the way Prakash and Smith wish to reimagine judicial removals.

By rejecting alternate removal proceedings yet widening the scope of impeachable offenses beyond indictable crimes, the current liquidation strikes a balance between the two extremes. Or at the very least, it does exalt one value at the expense of the other. Judicial independence is protected because judges are able to rely on intrabranch codes of conduct with the knowledge that political removal is an unlikely possibility. Judicial accountability, meanwhile, is present because judges are placed in check through means besides removal, yet unethical

---

[235] Redish, *supra* note 45, at 691.
[236] *Id.*
[237] Martinez, *Judicial Discipline*, *supra* note 12, at 977.
[238] Prakash & Smith, *supra* note 22, at 87.
[239] Prakash & Smith, *Reply*, *supra* note 74, at 163.

actions may still result in removal if an action is offensive enough. And while Congress is free to slide the scales one way or another, it is hesitant to make bold moves to encroach on legal decisionmaking. Put differently, the values compete with each other, and while one may appear stronger in a given moment, the settled meaning of the constitution does not put a decisive thumb on the scale.

One final note: care must be taken as liquidation proceeds concerning what counts as a limitation on the good-behaviour standard. When making such determinations, they must engage with past removals and current values "with a spirit and process that will allow for fine distinctions."[240] Otherwise, the careful balance between accountability and independence might be toppled.

CONCLUSION

Judge Edwards writes that "history has thus left us with a rough consensus on two constitutional conclusions: first, that a constitutional hiatus between 'bad behavior' and impeachable 'high crimes and misdemeanors' exists, and second, that impeachment is the only removal mechanism for federal judges."[241]

Despite the fact that "the judicial enterprise rises and falls with the character of its judges,"[242] recent history demonstrates that there is "widespread reluctance to sanction judges for actions that were found to be inappropriate."[243]

But as pressure mounts, Congress might use its power to remove unethical judges. This Essay has shown that American tradition has liquidated the Constitution such that "the constitutional reference to 'good behavior' might amplify, rather than override, the impeachment clauses."[244] In doing so, constitutionally permitted impeachable offenses encompasses many of the ethical lapses in judgment federal judges are accused of committing today.

This wide reading interpretation, however, does not shift the status quo to endanger the judicial branch. Impeachment and removal remain an extraordinary and rare punishment, reserved for the most blatant of judicial missteps. Current checks on judicial power and the balance of independence and accountability is enough to encourage federal judges to exhibit good behavior without threatening their mission.

---

[240] Martinez, *Supreme Impropriety*, *supra* note 208, at 25.
[241] Edwards, *supra* note 30, at 778.
[242] Martinez, *Judicial Discipline*, *supra* note 12, at 956.
[243] *Id.* at 971.
[244] Edwards, *supra* note 30, at 796.