Denver Law Review

Volume 33 | Issue 4 Article 8

January 1956

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Everett E. Smith

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BY EVERETT E. SMITH

**Everett E. Smith: admitted to the Minnesota bar in 1933; practised law in Minneapolis, Washington, D. C., and Kansas City; former appellate counsel in Denver for the Internal Revenue Service; former Assistant Judge Advocate of the Third Army in Europe; private practice in Denver since 1954.**

It is the business—and happy prerogative—of judges to judge others. Seldom in Anglo-American legal experience has History thrust upon a high magistrate the opposite, unenviable role of the judged. Rare and dramatic occasions of such a reversal of roles and fortunes, from the time of England's Francis Bacon to that of America's Judge Manton, are the subject of the present review.

Regardless of the resulting verdict, there is a substantial element of tragedy in any trial which requires an individual to vindicate himself or suffer the consequences. Ordinarily, the sheer number of trials occurring daily in the courts prevents any sense of the personal tragedy from extending beyond those most immediately concerned to a wider public. In the unusual case of an impeached or accused judge, it is easier to see the trial for what it is.

## BACON

In 1618, Sir Francis Bacon, who already had been Solicitor General and Attorney General, was raised to peerage and appointed Lord Chancellor by James I. As Lord Chancellor, Bacon was judge of the Chancery Court, which exercised sole jurisdiction over suits in equity. Four years later, in 1622, this brilliant lawyer and judge —so versatile he took all knowledge for his province and so talented he is believed by some to have written the works of Shakespeare— was impeached by the House of Commons. The House of Lords demanded an answer to the twenty-eight articles of impeachment charging bribery. Bacon's answer was "I do plainly and ingenuously confess that I am guilty of corruption and do renounce all defense**." He was sentenced to pay a fine of £40,000, to be imprisoned during the king's pleasure and to be incapable of sitting in parliament. The king remitted the fine and imprisonment.

Bacon acknowledged the justice of Parliament's action against him in an oft-quoted remark which seems to condemn that body for having been remiss in not taking action sooner and against other judges: "I was the justest judge that was in England these 50 years: But it was the justest censure in Parliament that was these 200 years." The remark also is consistent with Bacon's position that the moneys received from suitors in Chancery *pendente lite* were but gifts which did not affect nor change his judgment. In his enforced retirement, Bacon devoted himself to literary and philosophical work. He died in 1626.[1]

Bacon's confession of corruption may be accepted as sufficient

1 See 5 Holdsworth's History of English Law (1924) pp. 240-261; "De Montmorency on Bacon" in Great Jurists of the World (1914) pp. 144-168; 3 Campbell, Lives of the Lord Chancellors (1880) pp. 53-127; Rossman, Coke and Bacon (1952) 38 American Bar Association Journal 42.

proof that the charges against him were well grounded. This does not rule out the possibility that they were to some extent politically motivated. In the struggle of that time between King and Parliament, Bacon was an adherent of the former. It was the latter body, with which Bacon's rival, Sir Edward Coke, had aligned himself, which made and acted upon the charges—a circumstance which tempts the observation that Parliament "Coked" the King's Bacon. Whatever the fact in Bacon's case, there seems to be considerable agreement among the commentators that the next trial to be considered was brought about for political reasons.[2]

PICKERING

John Pickering, a United States district judge who formerly had been Chief Justice of the Supreme Court of New Hampshire, was the first federal judge to become enmeshed in the toils of the law. On February 4, 1803, President Jefferson sent to the House of Representatives a message referring to Judge Pickering's conduct in the Eliza case and suggesting an impeachment. The case mentioned had been a proceeding to forfeit the ship Eliza for violation of the customs revenue laws. The judge had refused to hear witnesses in the case, peremptorily had ordered the ship returned to its captain, and had refused to permit an appeal.

On March 2, 1804, a House Committee reported a resolution for Pickering's impeachment for high crimes and misdemeanors. The resolution was adopted immediately. The judge did not answer or appear at his trial, but his son presented a petition alleging his father's madness and praying that the Senate receive evidence to that effect. The Senate agreed to hear it, but only in mitigation of the misconduct charged. On March 12, 1804, the sixty-seven year old judge was convicted by a vote of 19 to 7, and sentenced to removal from office. He died in April of the next year.

The Pickering case has generated considerable comment. Senator Beveridge, the biographer of John Marshall, accepts the view that the judge was "hopelessly insane" and as a result had become "an incurable drunkard." He refers to Henry Adams' characterization of the conviction as infamous and illegal.[3] In his article on the impeachment of the federal judiciary, Brown expresses doubt of Pickering's insanity and adds, with seeming irrelevance, that if insanity did exist it "was attributable to habitual intemperance".[4] A federal court has mentioned the historian McMaster's concurrence in the verdict of Henry Adams. The court also stated that after his conviction "Pickering was adjudged insane by proper authority."[5]

According to the Constitution, federal judges hold their offices during good behavior but are impeachable only for treason, bribery or other high crimes or misdemeanors.[6] It seems fairly clear that

2 See Cummings and McFarland, Federal Justice (1937) pp. 54-55; 3 Beveridge, Life of John Marshall (1919) pp. 143, 164 and 167.

3 See 3 Beveridge, Life of John Marshall (1919) 143 and 164 et. seq.

4 Brown, The Impeachment of the Federal Judiciary (1913) 26 Harv. L. Rev. 684, 700.

5 Ritter v. United States (Ct. Cls., 1936) 84 Ct. Cls. 293, 299 cert .den. 300 U. S. 668.

6 Article III and section 4 of Article II. See also Article 1, section 3, cl. 6; Article 1, section 3, cl. 7; Article 1, section 2, cl. 5; Article II, section 2, cl. 1; Article III, section 2, cl. 2.

performing judicial duties while drunk is a lapse from good behavior. That such conduct constitutes a high crime or misdemeanor is less clear but not a wholly unwarranted conclusion if the constitutional category of crimes and misdemeanors is construed as qualified by the concept of good behavior. Moreover, it is far more serious for a judicial officer (as for a military officer) to be drunk on duty than it ordinarily is for a private individual to be drunk off-duty.

By the common law, an accused generally has a defense to a criminal charge if at the time of the act or conduct in question his state of mind was that characterized by the criminal law as insane. According to one view of the situation in the Pickering case, the

respondent's insanity, far from being recognized as a defense, was even begrudged any consideration in mitigation or extenuation. It seems sufficiently clear that insanity or mental incompetence on the part of a judge is, *per se*, neither misbehavior nor a high crime or misdemeanor. Perhaps the conduct flowing from such mental impairment stands on a different footing.[7]

The truth seems to be, however, that there is no wholly satisfactory solution to a substantive legal problem such as that presented by the Pickering case (assuming the judge was in an irrational and not merely a drunken state at the time of the proceedings in the Eliza case). The Constitution contains no provision for the removal of a federal judge who is mentally incompetent or suffering from a disabling physical ailment.[8] Nevertheless, a separation of the unfortunate officer from judicial functions seems warranted in the public interest. To effect the removal by impeachment seems comparable to clipping fingernails with a guillotine, but it is doubtful that any other method is permissable under the Constitution.[9]

The procedure followed by the Senate sitting as a Court of Impeachment in Judge Pickering's case reveals several contrasts with the presently approved procedure in the regular, federal courts. The Court proceeded to hear the charges without regard, apparently, to the judge's capacity at that time to understand the charges and to cooperate with counsel in his defense.[10] Again, the Court of Impeachment did not consider the presence of the judge or his representation by counsel as indispensable under the circumstances.[11] The trial proceeded in his absence and in the absence of counsel.

In noting the foregoing it is not intended to suggest that the rules developed by the regular federal judiciary for the cases within its cognizance are *ipso facto* standards of perfection to which Courts of Impeachment should conform in the exercise

7 This paragraph is not intended to suggest that impeachable offenses are to be equated with criminal offenses.

8 Cf. 3 Beveridge, Life of John Marshall (1919) p. 165.

9 Cf. Ritter v. United States, cited in footnote 5; Note, The Exclusiveness of the Impeachment Power under the Constitution (1937) 51 Harv. L. Rev. 330; Note, Removal of Federal Judges; A Proposed Plan (1937) 31 Ill. L. R. 631.

10 See Massey v. Moore (1954) 75 Sup. Ct. 145.

11 Cf. Hopt v. Utah (1884) 110 U. S. 262. But cf. Blackmer v. United States (1932) 284 U. S. 421.

of their jurisdiction. To the extent such rules of procedure are founded upon reasons of justice, however, departures should be warranted by the difference in the nature of the cases which come before the Courts of Impeachment or not be made.

CHASE

Within an hour after John Pickering was convicted, the House voted to impeach Samuel Chase, an Associate Justice of the United States Supreme Court, for high crimes and misdemeanors.[12] The justice, who was about sixty-four years of age at the time, had been a signer of the Declaration of Independence, a leader of the Maryland bar, and the Chief Justice of the Supreme Court of Maryland. President Washington had appointed Chase to the Supreme Court of the United States in 1796, about eight years prior to the initiation of the proceedings against the justice.

The eight articles of impeachment presented to the Senate almost a year after the aforesaid vote to impeach called in question the justice's charge to a grand jury at Baltimore in 1803; his attempt in Delaware to secure an indictment under the sedition law by inquisitorial methods; his legal rulings and conduct in 1800 in the trials of John Fries for treasonous resistance to federal taxation and of James Callender for violation of the federal sedition law. In the charge to the grand jury, Justice Chase had attacked universal suffrage, criticized President Jefferson's administration as weak, and disapproved the repeal of the Circuit Court Act by the Jefferson administration. In the second trial of Fries in Philadelphia, Chase had made up his mind on the law of treason before the jury was sworn. In Virginia, he had treated counsel for Callender with sarcastic contempt. This, in brief, was the tenor of the charges.

On February 4, 1805, the Senate convened as a Court of Impeachment to hear the charges. Vice President Aaron Burr, with but a month of office remaining, presided. Chief Justice Marshall, later to be a witness in the case, was a worried spectator. The other justices of the Supreme Court likewise were present. Among the managers for the House was John Randolph of Roanoke, Virginia. Chief among the brilliant array of counsel for the respondent was Luther Martin, the bibulous leader of the Maryland bar.

The details of the evidence and argument in this celebrated American counterpart of the trial of Warren Hastings need not detain us here. Beveridge's Life of Marshall and Warren's Supreme Court in United States History evoke the color, pageantry and significance of this occasion as Macaulay did for the British prototype. It is enough to point out that when the arguments were over and the Senate had voted, there was not a two-thirds majority for conviction on any of the articles. On March 1, 1805, Burr announced that Chase was acquitted of all the articles exhibited against him.

12 3 Beveridge, Life of John Marshall (1919) p. 169.

During the trial, the Senate held its legislative sessions in a Committee room before noon. The court sessions were held in the Senate Chamber in the afternoon. As for Justice Chase, neither the trial nor the physical pain which he suffered from the gout prevented him from taking his seat upon the Bench at the 1805 Term. Though continuing to suffer from the gout, Chase lived until 1811.[13]

The decisions in the Eliza, Fries and Callender cases invite several incidental, slightly satirical, reflections. Is the "gastronomic school of jurisprudence" comforted or confounded by the possibility that Judge Pickering's impaired reason and Justice Chase's afflicted feet may have affected their judgment in the mischievous cases mentioned? May one infer from the fact that the respective counsel in the Fries and Callender cases threw up their briefs that contented feet are even more important to good judgment than sound reason, sobriety, or a well-regulated digestion?

HALSTED L. RITTER

Of the two federal judges impeached during the remainder of the nineteenth century, one, James H. Peck, Judge of the

[13] 3 Beveridge, Life of John Marshall (1919) pp. 169-222; 1 Warren, Supreme Court in United States History (New, rev. ed., 1928) pp. 276 et seq.; 4 Dictionary of American Biography pp. 35-37. For the Fries case, see 11 Lawson's American State Trials pp. 146-174. See also the report of the Callender case in 10 Lawson's American State Trials 813 et seq.

United States District Court for the District of Missouri, was acquitted; the other, West H. Humphries, Judge of the United States District Court for the District of Tennessee, was convicted on charges relating to activities in aid of the Southern Confederacy. In this century, there has been one conviction, one resignation to forestall trial, and two acquittals prior to the trial of Judge Halsted L. Ritter in 1936.[14]

Judge Ritter, who had lived and practiced law with distinction for thirty years in Denver, Colorado, went to Florida in 1925 because of his wife's health.[15] He took office as a United States District Judge for the Southern District of Florida in February, 1929. The original impeachment resolution was introduced in the House of Representatives in May, 1933. An investigation and report were made. There the matter rested until 1936, when, a week after the Supreme Court invalidated the Agricultural Adjustment Act, the question was raised again. On January 14, 1936, Representative Green of Florida on his own responsibility as a member of the House revived the charges.[16]

The House agreed upon a resolution to impeach Judge Ritter of misbehavior and high crimes and misdemeanors on March 2, 1936.[17] Amendments were made on March 31, 1936.[18] In brief, the respondent was charged with practising law in violation of statute; receiving fees and gratuities; income tax violations; and the final article, 7, combined various charges, most of which, if not all, were pleaded in the preceding six articles. The respondent filed an answer on April 3, 1936 which pleaded that the alleged offenses were not impeachable and also contained a denial of the articles of impeachment.[19] A formal replication was made on behalf of the House.

On April 6, 1936, the trial began with the opening statements made on behalf of the House and the respondent.[20] Thereafter, the Senate sitting (and sworn) as a Court of Impeachment held daily sessions from noon to 1:30 P. M. and from 2:00 o'clock to 5:30 P. M. Between 25 and 30 witnesses were heard. Questions by members of the Court were reduced to writing and put by the Presiding Officer. Closing arguments were made on April 13 and 14.[21] On April 17, 1936, the roll call of Senators revealed less than the two-thirds majority constitutionally required for conviction on the first six articles. The respondent was convicted of the charges in the seventh article, and adjudged removed from office.[22]

Thereafter, Judge Ritter filed a petition in the United States Court of Claims seeking to recover his judge's salary for the month of April, 1936. In this suit, the petitioner raised anew the claim that the charges made in the articles of impeachment

14 For details, see Brown's article, cited in footnote 4 and Ten Broek, Partisan Politics and Federal Judgeship Impeachment Since 1903 (1939) 23 Minn. L. Rev. 185.
15 74th Cong., 2d Sess., Vol. 80, pt. 3, p. 3088; pt. 4, p. 3646.
16 74th Cong., 2d Sess., Vol. 80, pt. 1, p. 404.
17 74th Cong., 2d Sess., Vol. 80, pt. 3, p. 3066, 3092.
18 74th Cong., 2d Sess., Vol. 80, pt. 4, pp. 4654-55.
19 74th Cong., 2d Sess., Vol. 80, pt. 5, pp. 4899 et seq.
20 74th Cong., 2d Sess., Vol. 80, pt. 5, pp. 4972 et seq.
21 74th Cong., 2d Sess., Vol. 80, pt. 5, pp. 5401 et seq.
22 74th Cong., 2d Sess., Vol. 80, pt. 5, pp. 5602, 5606–5607.

were not impeachable offenses. The conviction on the seventh article was attacked on the ground that the matters alleged in that article were merely restatements of the charges in the prior articles.[23]

The Court of Claims dismissed the petition, stating (at page 300):

> "Our conclusion is that we have no authority to review the impeachment proceedings held in the Senate and decide whether the accusations made against the plaintiff were such that he could properly be impeached thereon, nor can we pass upon the question of whether his acquittal on the first six articles was a bar to prosecution under the seventh. In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final."

BEN B. LINDSEY

There is some disagreement among the commentators about the merits of the impeachment procedure. It is not the only means, however, which has been used for bringing a judge to trial with respect to his judicial conduct. In one very difficult but interesting case involving a former state judge, the judge was called upon to vindicate himself in a disbarment proceeding. In another instance, a judge of a United States Circuit Court of Appeals was tried in the regular federal courts on criminal charges.

Prior to the expiration of his term of office in July, 1927, the well-known Judge Ben B. Lindsey of the Juvenile Court of Denver, Colorado had received sums totalling $47,500 which gave rise to an original proceeding in disbarment in the Supreme Court of Colorado. The information filed on behalf of the State charged that the receipt of the two sums comprising the total was illegal and gravely unethical in that they represented unlawful extra compensation to the respondent as judge or fees for the wrongful practice of law by a judge, or both.

The judge's answer admitted the receipt in 1926 of $37,500 from the mother, and guardian of the estate, of two minor children as well as the receipt in the same year of $10,000 from Samuel Untermyer, the New York lawyer who had asserted for the guardian the right of the children to share in the estate of their deceased father, the guardian's divorced husband. The judge's answer asserted, however, that said sums were not legal fees nor extra compensation to him as judge but gifts made in recognition of his friendly mediation in the dispute between the mother and her children on the one side and the claimant under the decedent's will on the other. The will proceedings were pending in a surrogate court of New York.

The State moved for judgment and the case was decided on

[23] Ritter v. United States, cited in footnote 5.

the pleadings. The Supreme Court of Colorado held that Judge Lindsey should be disbarred. The decision was based, primarily at least, on the view that the moneys received by Judge Lindsey were legal fees. On the Supreme Court's denial of an application which the judge made for reinstatement several years later, two justices dissented. One of the dissenting justices made the following observations which illuminate the above-mentioned difficulties of the case:

> "The respondent has made it difficult for a member of the court to vote for his reinstatement. After his disbarment, he published attacks upon the members of the court, assailing them in language that I do not approve.**
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> ****
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> "In the typical disbarment case the misconduct of the respondent generally results in injury to some person. In the present case no person suffered injury by reason of the respondent's conduct. On the contrary, every person connected with the transaction received a substantial benefit by reason of the respondent's activities, was highly pleased, and expressed gratitude to the respondent for his efforts."

Two years later the respondent's renewed application for reinstatement was granted.[24]

MARTIN T. MANTON

Judge Martin T. Manton, the senior judge of the United States Circuit Court of Appeals for the Second Circuit, having been convicted by a jury of conspiracy to obstruct the administration of justice and to defraud the United States, appealed. The judge raised a number of points, the most noteworthy of which for present purposes was to the effect that he had not obstructed justice by receiving money from suitors in various specified civil cases pending before him because in the favorable decisions for such suitors he had voted to decide the cases according to law. The appellate court overruled that contention summarily, saying (at page 845) "Judicial action, whether just or unjust, right or wrong, is not for sale."

The Circuit Court's decision affirming Judge Manton's conviction was rendered on December 4, 1938. Not until February, 1939, did the judge resign from the bench. Thereafter, the United States Supreme Court denied certiorari.[25]

There is an element of grim, ironic humor in a comparison of the first and last of these tragedies chosen from the assortment of legal history. In the last case, the law appears to have been sufficiently elastic to permit the court on which Judge Manton sat to enter correct decisions in favor of the bribing litigants. In the time of Bacon, it was not so, and some of the gift-giving suitors had to be disappointed in the Lord Chancellor's just judgments.

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[24] People v. Lindsey (Colo., 1929) 283 Pac. 539; (1933) 23 P. 2d 118; (1935) 52 P. 2d 663. See Lindsey and Borough, The Dangerous Life (1931) for the judge's reaction to his disbarment and Sears and Goldman, Disbarment of Judge Lindsey (1931) 25 Ill. L. R. 569, for a disinterested comment.

[25] United States v. Manton (2nd Cir., 1938) 107 F. 2d 834, cert. den. (1940) 309 U. S. 664.