THE IMPEACHMENT OF SAMUEL CHASE: REDEFINING JUDICIAL INDEPENDENCE

*Adam A. Perlin**

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I. INTRODUCTION

Americans often assume that the Supreme Court began as a well-established, independent, and co-equal branch of government that operated above the political fray. In reality, the Court initially possessed little defined power and less prestige. With the appointment of John Marshall as Chief Justice in 1800, however, the Court began to more aggressively assert itself and quickly became mired in many of the most controversial political battles of the day. In 1804, partially as a response to the Court's newfound brazenness, Democratic members of the House of Representatives impeached Federalist Samuel Chase, an Associate Justice of the United States Supreme Court. The impeachment pitted the two parties against

each other in an ideological conflict about the role of the courts and the meaning of judicial independence.

Before the Chase impeachment, judicial independence was largely understood as the freedom for judges to interpret, follow, and decide issues of law without fear of political retribution. It was what Chase described as the necessity that judges be "under no influence . . . only accountable to God and their own consciences."[1] Following Chase's acquittal, however, the notion of judicial independence began to encompass certain limitations on judicial conduct. Because judicial independence largely shields the judiciary from Congress's oversight, the expectation emerged that judges would interpret the law regardless of their personal biases and political leanings. The current canons of judicial conduct reflect the teachings of the Chase impeachment and bar federal judges from rendering opinions on pending and impending cases[2] and from publicly endorsing candidates for public office.[3] But these aspects of judicial independence, considered now to be integral to the judicial function, were not always viewed as essential elements of our political system. At a critical time in our nation's history, the Chase impeachment affirmed the importance of the judiciary's independence from Congress and contributed to the emergence of an apolitical judiciary.

Although not exactly unknown, the story of Chase's impeachment is often relegated to little more than a historical footnote, creating a void in historical scholarship on a critical event in American legal history.[4] Even more significant, despite its immediate relevance to the debate over judicial independence today, not a single law review article has been devoted to the Chase impeachment in almost forty years.[5] In an effort to alert a wider

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* Adam A. Perlin is a graduate of the University of Pennsylvania Law School and holds a Bachelor of Arts in History and Politics from Brandeis University. This article began as an honors thesis under the tutelage of David Hackett Fischer. Since then, it has gone through many drafts and owes its current form to the following individuals: Sarah Barringer Gordon, a consummate legal historian, Miliette Marcos, a legal scholar in her own right, and my ever faithful proofreaders and cheering section, my parents, Bette and Norman, and my sister, Jana. Nevertheless, any errors remain my sole responsibility.

1. United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800).

2. MODEL RULES OF JUDICIAL CONDUCT Canon 3B(9) (2009).

3. *Id.* at Canon 5A(1)(b).

4. Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law Against the Jeffersonians*, 62 VAND. L. REV. 349, 349-51 (2009).

5. Although not a law review article, in 1992, Chief Justice William Rehnquist authored a book attempting to draw more attention to the Chase impeachment trial. The book featured a detailed account of the Chase trial, but offered little analysis and relied heavily on secondary sources. WILLIAM H. REHNQUIST, GRAND INQUESTS: THE

audience, especially lawyers, about this critical event in legal history, this Article provides a more complete picture of the Chase impeachment trial, including an analysis of the surprisingly often ignored debates in the House of Representatives. In addition, it resolves some of the shortcomings in the existing scholarship by explaining: (1) how the impeachment contributed to the emergence of an apolitical judiciary;[6] (2) how the impeachment contributed to the debate over the role of judge and jury in trial proceedings;[7] and (3) the role that the Chase impeachment played in defining what constitutes an impeachable offense.[8]

In analyzing the debates in the House of Representatives, the subsequent impeachment trial, and the papers and journals of some of the individuals directly involved in the proceedings, this Article addresses each of these issues and argues that the Chase trial affirmed certain principles now believed essential to judicial independence while fundamentally altering the expectations Americans placed on federal judges. Contrary to what many scholars have suggested, the position taken by Chase's defense team as to what actions rise to the level of an impeachable offense constitutes the modern view on impeachment and has prevailed in all subsequent judicial impeachments.

In 1804, the Democrat-Republican majority in the House of Representatives made history when it voted to impeach Samuel Chase, a sitting Supreme Court Justice. The "Revolution of 1800," as Jefferson termed it, handed the Democrats control of the Presidency and both houses of Congress.[9] But the Federalist members of the Supreme Court had emerged unscathed from the political revolution

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HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 74-89 (1992).

6. Because in the years since the Chase trial Congress has removed federal judges for committing non-indictable offenses some historians have argued, incorrectly I believe, that the verdict in the impeachment trial did not establish anything beyond that Chase's alleged offenses were not high crimes and misdemeanors. JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE 304 (1980). Although Chase's acquittal did not definitively answer the question of whether impeachment must also be an indictable offense, it firmly established that legal error and political expediency are not proper grounds for impeachment.

7. *See* Robert R. Bair & Robin D. Coblentz, *The Trials of Mr. Justice Samuel Chase*, 27 MD. L. REV. 365, 385-86 (1967) (stating in a conclusory fashion that "[m]anners of the judges improved considerably" after the trial); Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 71 (1960) (noting without explanation or analysis that, as a consequence of Chase's acquittal, "federal judges subsequently refrained from active participation in politics").

8. Charles B. Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 48 J. AM. JUDICATURE SOC'Y 183, 187 (1965); 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 206 (1919).

9. REGINALD HORSMAN, THE NEW REPUBLIC 84-85 (2000).

and Democrats viewed the judiciary, and particularly the Supreme Court, with skepticism and as an impediment to the consolidation of their power. Outspoken, an ardent Federalist, and entrenched on the Court, Chase became a symbol of everything the Democrats loathed about judicial independence.

At the time of Jefferson's inauguration, six justices sat on the Supreme Court and they were all Federalists.[10] By 1804, only one, Alfred Moore, had been replaced by a Jefferson appointee.[11] Unable to change the composition of the Court through the democratic process, Democrats began to challenge the concept of judicial independence at a time when the Supreme Court, under the helm of Chief Justice John Marshall, began to more aggressively assert itself in governmental affairs. By impeaching Chase, Democrats forced the judiciary onto the defensive and placed the very concept of judicial independence on trial.

Had the Senate convicted Chase, the immediate impact likely would have been a dramatic shake up in the composition of the Supreme Court. Although it is unclear to what extent Democrats would have actually carried out a plan to eliminate all Federalists from the federal judiciary, they made no secret of their plans to target other Supreme Court justices, including Chief Justice John Marshall.[12] Statements by prominent Democrats did little to assuage such fears. As William Branch Giles, one of Jefferson's political allies in the Senate, asserted with confidence, "[N]ot only Mr. Chase, but all the other Judges of the Supreme Court, excepting the last one appointed, must be impeached and removed."[13] Giles's single exception pertained to William Johnson, Jr., who in 1805, was Jefferson's sole appointment to the Supreme Court.[14] Federalists believed that in the wake of Chase's removal, Jefferson planned to replace Federalist judges with Democratic loyalists at all levels of the federal judiciary.[15]

Beyond preserving the composition of the Supreme Court as it existed in 1805, Chase's impeachment trial likely did more to define

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10. DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 114 (1970).

11. Supreme Court of the United States, Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.aspx (last visited Mar. 26, 2010).

12. 1 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795-1848, at 322 (Charles Francis Adams ed., 1874).

13. *Id.*

14. *See* Supreme Court of the United States, *supra* note 11.

15. 2 MANASSEH CUTLER, LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D. 1587-59 (William Parker Cutler & Julia Perkins Cutler eds., 1888).

the boundaries of judicial independence and the scope of impeachment than any other single event up to that time. In 1800, Chase, like most Federalists, believed judicial independence meant that judges should be free to act without interference from the executive and legislative branches. It did not mean that the judges themselves had to be independent from politics. The political grand jury charge epitomized this way of thinking. Popular throughout the eighteenth century, judges delivered grand jury charges extolling the virtues of judicial independence while simultaneously embroiling themselves in the most controversial issues of the day.[16] Following Chase's acquittal, the practice ceased.

The end of the political grand jury charge was not an inevitable consequence of the impeachment trial, but rather a consequence of the way Chase and his opponents framed the debate over judicial independence. Throughout the House debates and the subsequent impeachment trial, both sides maintained the unacceptability of a judge using his position to criticize the very government whose laws he was bound to follow and uphold. As one historian observed, "[b]arely four decades after one Chief Justice [Jay] could speak of not omitting occasions for promoting goodwill, good temper, and the progress of useful truths among the citizenry, another Chief Justice [Roger Taney], could opine confidently to a grand jury," stating that "it would be a waste of time in the court to engage itself in discussing principles, and enlarging upon topics which are not to lead us to some practical result . . . . Not a moment should be wasted in unnecessary forms."[17]

In redefining judicial independence, the Chase impeachment challenged the related question of what constitutes an impeachable offense. If judicial independence required, as Chase believed, that judges must be free to interpret the law without fearing congressional retaliation, then it follows that there must exist some limit on Congress's power to impeach and remove judges. The following oft-quoted conversation recorded by Senator John Quincy Adams of Massachusetts neatly summarizes the various views of impeachment considered throughout Chase's trial.

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16. The propriety of the political grand jury charge had become so ingrained that when John Jay, the nation's first Chief Justice of the United States, delivered his first grand jury charge in 1790, he devoted over half of it to "justifying and explaining the nature of the recently created federal government." WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 127 (1995). Judges used jury charges to publicly expound on matters of government stability and politically sensitive legal issues. As late as 1800, judges received advice from the executive branch regarding particular issues to be addressed in their charges. *Id.* at 128.

17. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 155 (1967).

On December 21, 1804, a wintry afternoon in which the Senate had voted to adjourn early, John Quincy Adams found himself a seat by one of the fireplaces located in the lobby off the Senate floor.[18] A large glass screen separated the small lobby from the vice president's dais, allowing senators to relax, while still remaining in earshot of the proceedings on the Senate floor.[19] After some time, William Branch Giles, Jefferson's lieutenant in the Senate and a fellow Virginian, began discussing the issue of Chase's impeachment with Israel Smith, a Democratic senator from Vermont. The two were eventually joined by Representative John Randolph, also of Virginia and the chief architect of Chase's impeachment.[20] Expressing the "utmost contempt [for] the idea of an independent judiciary," Giles outlined the Democrats' position to his audience as follows:

> [T]he power of impeachment was given without limitation to the House of Representatives; the power of trying impeachment was given equally without limitation to the Senate . . . . A trial and removal of a Judge upon impeachment need not imply any criminality or corruption in him. Congress had no power over the person, but only over the office. And a removal by impeachment was nothing more than a declaration by Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them better.[21]

Incredulous, the far more moderate Smith responded that surely "honest error of opinion could not, as he conceived, be a subject of impeachment," for it would "establish a tyranny over opinions, and he traced all the arguments of Giles to their only possible issue of rank absurdity."[22] Adams, who until this point had remained silent, found that he could no longer restrain himself, and he brought the conversation to an abrupt end by brusquely telling Giles that he could not assent to his definition of the term impeachment.[23]

The conversation reveals several important details about the Chase impeachment. Although some scholars have suggested that Giles's statements were not representative of all Democrats, his argument demonstrates the potential damage the Democratic view of impeachment might have inflicted on the Court. Potentially chilling speech far more than the Sedition Law, Giles's logic implies that

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18. ADAMS, *supra* note 12, at 322.

19. Architect of the Capitol, Old Senate Chamber, http://www.aoc.gov/cc/capitol/old_sen_ch.cfm (last visited Mar. 10, 2010).

20. ADAMS, *supra* note 12, at 322.

21. *Id.* (emphasis in original).

22. *Id.* at 322-23 (emphasis in original).

23. *Id.* at 323.

impeachment could be used to silence any federal judge that would dare criticize or rule against Democratic interests.

The vignette also foreshadows the critical role that moderates like Smith would come to play in Chase's impeachment. Clearly uncomfortable with Giles's articulation of the power of impeachment, Smith had expressed misgivings about granting Congress such an expansive power. Realizing that the success of the impeachment hinged on the votes of moderates like Smith, Giles "labored with excessive earnestness" to convince Smith of the correctness of his view. As Adams recorded, "[i]t was easy to see that Giles was anxious about Smith's vote on the impeachment of Judge Chase. His manner was dogmatical and peremptory."[24]

Like the Democrats, Federalists were keenly aware of the importance of securing the moderates' vote, but despite Smith's reservations about Giles's argument, Adams remained apprehensive about the Vermont senator's vote. Adams concerns were not unfounded. During the fight over the impeachment of Judge John Pickering – the Democrats' first successful removal of a federal judge – Smith and other moderates had promised to stand with the Federalists against the Democrats' attempts to expand the definition of impeachment, only to have caved to party pressure when the vote was taken.[25] If Chase was to survive the impeachment, Adams knew the moderates would need to be firmly convinced of the correctness of the Federalist view.

The conversation between Giles, Adams, and Smith provides insight into one of the Federalist goals for the impeachment as well. Although party allegiance undoubtedly drove many Federalists to oppose the impeachment, there were important legal and theoretical grounds for rejecting Giles's proposal as well. James Mathers, the Senate doorkeeper, had been unable to avoid overhearing the senators' animated conversation, and noted to Adams that "[i]f all were of Mr. Giles's opinion, they never need trouble themselves to bring Judge Chase here.'[26] Adams agreed, scribbling in his journal that the Democrats intended that the "impeachment system is to be pursued, and the whole bench of the Supreme Court to be swept away, because their offices are wanted."[27] Adams's genuine concern

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24. *Id.*

25. *Id.* Although Adams recorded that Smith "so often expressed these opinions that the friends of Judge Chase flatter themselves he will vote for an acquittal," he bitterly noted that on the question of Pickering's impeachment, "his vote abandoned them." This unpredictability of the moderates' votes lent an even greater sense of high drama to the impeachment proceedings.

26. *Id.*

27. *Id.* The phrase, "*their offices are wanted,*" always emphasized in Adams's journal, seems to have struck him with special terror. Not only would Giles not

over Giles's broad definition of what constitutes an impeachable offense and the idea that political expediency provided a justifiable ground for impeachment was shared by Chase and his colleagues.[28] The refutation of this broad approach to impeachment became one of the primary goals of Chase's defense team's trial strategy.

Chase's impeachment addressed many of the most controversial legal issues of his time and the effects of his acquittal stretch far beyond the boundaries of one man and his office into our own time. Despite allegations of judicial activism and calls for the removal of judges, no Supreme Court Justice since Chase has ever been impeached. For Chase's contemporaries, his impeachment went to the heart of the American experiment and sharpened the debates over the destiny of the young republic. For posterity, it confirmed the independence of the judiciary while nonetheless redefining what that meant. This is Samuel Chase's legacy.

II. LAYING THE FOUNDATION: CHASE ON CIRCUIT

In the nineteenth century, Supreme Court Justices were required to ride the circuit, hearing lower courts' cases in addition to their own caseload at the Supreme Court. In 1800, while riding the circuit, Chase delivered three of the most vilified decisions of his career, two of which involved the enforcement of the Sedition Act of 1798.[29] That same year, Chase refused to dismiss a grand jury until he had been satisfied that the grand jurors were not trying to protect a seditious printer.[30] Then, in 1803, Chase delivered a controversial grand jury charge in Baltimore.[31] These acts formed the bases of the

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require criminality, but he did not even require error of any kind. And with an overwhelming Democratic majority in both houses, Adams had no reason to doubt that Giles's views on impeachment would prevail.

28. Federalist William Plumer even worried that the Democrats' articulation of an impeachable offense jeopardized the recently announced doctrine of judicial review. Plumer believed that if the Democrats prevailed in removing Chase, a judge might be impeached for declaring void an unconstitutional law favored by the President. *See* WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803-1807, at 229 (Everett S. Brown ed., 1923) [hereinafter PLUMER] (noting that if the President enforces an unconstitutional law, "a Judge [who] decides against the measure directed by the President – declares it illegal – in this, and all other cases where the judge, though honest and upright, commits such errors, and persists in the repetition of them – the House may impeach & the Senate convict & remove from office").

29. The Sedition Act "penalized any person, citizen as well as alien, for any 'false, scandalous and malicious' statements against the president, either house of Congress, or the government, made with intent to defame them, or to bring them into contempt or disrepute, or to excite against them the hatred of the good people of the United States." JAMES MORTON SMITH, FREEDOM'S FETTERS 94-95 (1956).

30. *Id.* at 184.

31. Presser, *supra* note 4, at 363.

articles of impeachment against Chase.

A. *The Cooper Trial*

Although the articles of impeachment did not explicitly refer to the Cooper trial, Chase's conduct at the trial greatly contributed to his eventual impeachment.[32] While employed by the partisan newspaper, the *Northumberland Gazette*, Thomas Cooper published a handbill that attacked President John Adams and his administration and alleged that Adams had attempted to bias the judiciary against Democrats.[33] On April 19, 1800, having been charged with violating the Sedition Act, Cooper stood trial before Samuel Chase and his colleague, District Court Judge Richard Peters.[34] Chase issued strict guidelines by which the jury should judge Cooper. Chase stated that if the jury found any part of what Cooper wrote to be untrue, they must announce a guilty verdict.[35] The judge denounced Cooper's pamphlet and left no doubt that that he believed Cooper should be found guilty. As a result, the Democratic press assailed Chase as "an unprincipled tyrant" and cast him as the poster child for the unpopular Sedition Act.[36]

Chase's remarks at the Cooper trial reflected the conventional view of judicial independence at that time. Chase believed that judges must remain free to act without fearing political repercussions from Congress and the President and insisted that the impartiality demanded of judges requires that they be "under no influence . . . only accountable to God and their own consciences."[37] If judges were beholden to any other body, they would forever endeavor to ingratiate themselves with that body. This would create legal uncertainty in the face of political upheaval, causing the meaning of the law to shift according to the rise and fall of political majorities.

Chase, however, did not yet see any inconsistency in advocating for judicial independence while at the same time intervening in the political discussions of the day. Thus, from his seat of power at the Cooper trial, Chase could confidently extol the policies of the Adams Administration while maintaining that it is "[u]pon the purity and

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32. SMITH, *supra* note 29, at 100-01 ("There are three cases to which I suppose the House would refer, Fries, Cooper [and] Callender . . . .").

33. ELSMERE, *supra* note 6, at 93; 1 FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATION OF WASHINTON AND ADAMS 659-60 (1849).

34. ELSMERE, *supra* note 6, at 95; WHARTON, *supra* note 33, at 662.

35. *See* United States v. Cooper, 25 F. Cas. 631, 639-43 (C.C.D. Pa. 1800).

36. *See* ELSMERE, *supra* note 6, at 139 (stating that "no member of the federal judiciary was accorded more opprobrium for his part in enforcing the Sedition Act than was Chase").

37. Cooper, 25 F. Cas. at 641.

independence of the judges" that "the existence of your government and the preservation of your liberties" depend.[38]

B. The Fries Trial

Not long after delivering the sentence in the Cooper trial, Chase again found himself embroiled in controversy over his conduct at the trial of John Fries. As the leader of the opposition to a federal tax, Fries had rallied about sixty men and ventured into the Pennsylvania countryside to intimidate the tax assessors and prevent them from collecting the tax.[39] Eventually the state militia apprehended Fries, and he stood trial before Justice Iredell for the capital crime of treason.[40] Having discovered that some of the jurors were biased, however, Iredell ordered a retrial for Fries before Judge Chase.[41]

Three key aspects of Chase's conduct in the Fries trial materialized in the first article of impeachment against him. First, Fries's counsel alleged that Chase: (1) improperly drafted an opinion on the law of treason before they had been granted an opportunity to be heard, although they never questioned the correctness of Chase's opinion; (2) improperly prevented them from introducing certain federal statutes into evidence; and (3) usurped the jury's role in interpreting the law by refusing to allow them to present to the jury an interpretation of the law of treason other than that which was endorsed by the court.

Infuriated by Chase's obstinancy, Fries's counsel refused to continue with their client's defense and withdrew from the case. Although his attorneys hoped the court would take mercy on their client, the jury returned a guilty verdict and Chase sentenced Fries to death.[42] Even President Adams's eventual pardon did not appease Democrats who viewed Chase's conduct as a calculated effort to ensure Fries's punishment.[43]

C. The Callender Trial

Although the Fries and Cooper trials had made Chase unpopular among Democrats, little contributed more to Chase's eventual impeachment than his conduct at the trial of James Callender. One

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38. *Id.*

39. Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Proving Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1123-24 (2009).

40. Presser, *supra* note 4, at 353.

41. *Id.* at 353-54.

42. 13 ANNALS OF CONG. 808 (1804).

43. *See* Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 851 (2002).

of the most opportunistic men in the early republic, Callender merited his reputation as the "bitter enemy of all Federalists."[44] While working for the Democratic paper, the *Richmond Examiner*, Callender penned his best known pamphlet, *The Prospect Before Us*.[45] The pamphlet was a relentless attack on the Federalist Party and an explicit plea for Jefferson's ascendancy to the presidency, which earned Callender an appearance before Chase for violating the Sedition Act.[46]

Unlike Cooper or Fries, Callender chose his counsel from among the most gifted and able lawyers of his time. His defense team consisted of Governor James Monroe's son-in-law and a future U.S. Attorney, George Hay; Virginia's Attorney General, Philip N. Nicholas; and the Clerk of the Virginia House of Delegates and future Attorney General of the United States, William Wirt.[47] The much anticipated trial "promised to be a head-on clash between [Democrats] and Federalists, between bar and bench, between state and federal authority."[48] People hurried into the courtroom for Richmond's main event, filling it until it "was thronged with spectators from every quarter."[49] Such an important event promised to catch the attention of the Democratic leadership.

The trial began on May 28, 1800, and Callender pleaded not guilty.[50] Callender's attorneys immediately sought to challenge the constitutionality of the Sedition Act. Before Hay could finish his argument, however, Chase interrupted him, notifying him that the court would not entertain any arguments on the constitutionality of the Sedition Law.[51]

Unable to launch a substantive challenge to the law, Callender's counsel accused Chase of usurping the jury's power to decide questions of law.[52] After repeatedly trying to make the argument, Chase ended the discussion. Launching into a defense of judicial review, Chase declared that "[t]he judicial power of the United States is the only proper and competent authority to decide whether any statute made by Congress (or any of the State Legislatures) is contrary to, or in violation of, the Federal Constitution."[53] According

44. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 248 (1996).

45. *See* Presser, *supra* note 4, at 356-57.

46. *Id.* at 357.

47. *Id.*

48. SMITH, *supra* note 29, at 346.

49. *Id.* at 347.

50. Bruce A. Ragsdale, *The Sedition Act Trials*, *in* FEDERAL TRIALS AND GREAT DEBATES IN UNITED STATES HISTORY 13 (Federal Judicial Center 2005).

51. Presser, *supra* note 4, at 361.

52. *Id.* at 359-61.

53. MELVIN UROFSKY, THE SUPREME COURT JUSTICES: A BIOGRAPHICAL

to Chase, judges, not juries, properly decide when state and federal laws run afoul of the Constitution.

The courtroom's temperature rose as Chase continually clashed with Callender's attorneys. Chase also refused to admit testimony from one of the defense's witnesses, John Taylor. Chase believed that Taylor's testimony only proved part of a charge in the indictment wrong, and since Callender's counsel had offered no witnesses to prove the other part of the charge wrong, the testimony could have no effect on the ultimate verdict.[54] Despite the defense counsel's outrage on this point, Chase acknowledged that Taylor's testimony might actually be admissible and "that it was possible that he was in an error in respect to the opinion which he entertained of the law."[55] Conceding his possible error, Chase made the following offer to Callender's counsel: "If the gentlemen who dissented from his opinions would form a bill of exceptions, he [Chase] would be the first man to allow them a writ of error to go into the Supreme Court of the United States, a superior tribunal, and have there his opinions tested."[56]

Unappeased, Callender's counsel grew increasingly irritated at Chase's constant interruptions and what the defense team called his "disrespectful, irritating, and highly incorrect" comments.[57] The tension came to a dramatic end when, in what had become a familiar occurrence in Chase's cases, Callender's defense team withdrew from the case in disgust and frustration.[58]

Although Callender's defense team, like Lewis and Dallas, initially hoped that the jury might take pity on their defenseless client, Chase left little doubt about the outcome. After Chase dismissed Callender's entire book as "false" and insisted that "the intentions of its author were 'sufficiently obvious,'" the jury returned a guilty verdict after only two hours of deliberation.[59] Chase subsequently fined Callender two hundred dollars and sentenced him to serve nine months in prison.[60]

Added to the complaints of Callender's counsel were several other grievances that would eventually comprise the bulk of the articles of impeachment. After his trial, Callender's thoughts turned to revenge against the judge that had dared to attempt to silence

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DICTIONARY 134 (2006).

54. *See* Presser, *supra* note 4, at 358-59 n.54.

55. 14 ANNALS OF CONG. 256 (1805).

56. *Id.*

57. THE AUTHOR OF THE THIRTY YEARS' VIEW, ABRIDGEMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 188 (1857).

58. SMITH, *supra* note 29, at 354.

59. *Id.* at 355.

60. *Id.* at 356.

him. Writing to a friend, the opportunistic Callender raised the possibility of impeaching Chase. Callender argued that he should be released from jail because Chase had violated Virginia law while presiding over the trial, an accusation that would later comprise one of the articles of impeachment against Chase. Callender did not secure his release from prison, but the genie of impeachment had escaped from the bottle. [61]

D. The New Castle Grand Jury

What would evolve into the seventh article of impeachment against Chase concerned his next stop on the circuit in 1800, New Castle, Delaware. Sitting with Judge Gunning Bedford, Jr., an assembled grand jury did not return any indictments and requested permission to leave. Chase refused, stating he had knowledge of at least one seditious newspaper in New Castle. Chase ordered the District Attorney, George Read, to collect files on the town's newspapers to look for evidence of seditious material.[62]

Although Chase released the jury after they reviewed the file – they found no evidence of a seditious printer – Democrats believed the episode, along with Chase's charge to the grand jury in Baltimore, provided further proof that Chase had been using his authority on the bench to silence the Democratic press.[63] Chase responded that his position required him to notify the jury of any possible federal crimes that might have occurred, but his defense fell on deaf ears.[64]

By this time, Chase's conduct off the bench had begun to irritate his political opponents as well. Chase spent the summer of 1800 in Maryland organizing the Adams campaign against the Hamiltonian Federalist candidate. Chase's electioneering made him late to the August session of the Supreme Court which, due to others' injuries and illnesses, had to be delayed for a lack of quorum.[65] As one Democrat described the scene, "[w]hat a becoming spectacle to see *Chase* mounted on a stump, with a face like a full moon, vociferating in favour of the present President, and the Supreme Court adjourning from day to day, and the business of the nation hung up, until Chase shall have disgorged himself!"[66]

Although Chase's election efforts might have been mildly

61. *See id.* at 357. For a more detailed description of Chase's conduct at the Fries and Callender trials and a defense of Chase's actions, see REHNQUIST, *supra* note 5, at 74-89.

62. 14 ANNALS OF CONG. 227-29 (1805).

63. *See id.* at 53, 90-93.

64. *See id.* at 91-92.

65. JAMES HAW ET AL., STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 208 (1980).

66. *Id.*

successful – the Federalists split the vote with the Democrats in Maryland – the nation-at-large had grown tired of the Federalists and looked to the Democrats for change.[67] Thirty-six ballots later, in a vote in the House of Representatives, Thomas Jefferson became the third president of the United States and its first Democrat-Republican.[68] Upon hearing of Jefferson's ascendancy to the presidency, Chase worried about the terrible fate that had befallen the nation. "I believe nothing can save the *present* [government] from dissolution," he despairingly wrote.[69] "Some Events, as a War with France, may delay it for a few years. The Seeds are sown, they ripen daily. Men without *Sense* and without *property* are to be our *Rulers*, there can be no Union between the Heads of the two Parties. Confidence is destroyed."[70]

The image of the partisan Chase using his position to defend Federalist ideals while attacking Democratic principles enraged Chase's political opponents.[71] Democrats increasingly saw Chase as their best opportunity to fight back against the activist Marshall Court.

E. The Baltimore Grand Jury Charge

The change in power in the nation's capital did nothing to temper Chase's outspoken nature. In 1803, Chase delivered a political and controversial grand jury charge that would provide the basis for the eighth and final article of impeachment. Chase delivered the charge in a makeshift courtroom held in Evans's Tavern in Baltimore, Maryland.[72]

The tavern owner arranged the room in the style of a courtroom. One observer recalled: "The grand jury were on his right, some sitting on benches placed along the wall and others standing. I stood myself about fifteen feet from the judge, who was sitting during the whole time he was delivering his charge."[73] Donning his spectacles

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67. *Id.*

68. The Democrat-Republicans went through a period of time where they were largely referred to as Republicans. By 1804, however, the party began to prefer the name "Democrat." Writing to his friend, Thomas Cushing, Federalist Manasseh Cutler dryly observed, "As circumstances have changed, the (now) Democratic party have thought it convenient to change their designating name, but perhaps it is not best they should have their choice what we should call them. I am glad that we for ourselves have stuck to the name of Federalists, it wears well, and I believe they would be glad to filch it from us." CUTLER, *supra* note 15, at 176.

69. HAW, *supra* note 65, at 214 (emphasis in original).

70. *Id.*

71. For a defense of Chase's conduct at the Cooper, Fries, and Callender trials and before the Baltimore Grand Jury, see Presser, *supra* note 4, at 351-65.

72. 14 ANNALS OF CONG. 294 (1805).

73. *Id.* at 304.

and reading from prepared remarks he carried in a marble notebook, Chase chastised the Democratic Congress for repealing the Judiciary Act of 1801 and accused Democrats of launching an attack on the judiciary.[74] Chase likewise criticized various pending changes in the Maryland Constitution, including amendments abolishing Maryland's General Court and a recently enacted law establishing universal male suffrage.[75]

Pausing occasionally, Chase would raise his spectacles to his forehead and speak directly to his audience.[76] For further emphasis, "[a]t the conclusion of particular sentences he lengthened out the tones of his voice, and made a pause, as if to arrest the attention of the jury."[77] "The great bulwark of an independent judiciary," Chase began, "has been broken down by the Legislature of the United States, and a wound inflicted upon the liberties of the people which nothing but their good sense can cure."[78] Chase opined that because of the acts of the Democratic Congress, "[t]he independence of the National Judiciary is already shaken to its foundation, and the virtue of the people alone can restore it."[79]

The repeal of the Judiciary Act of 1801 in 1802 had marked the opening shots of the Democrats' war against the national judiciary, and so Chase believed it remained more important than ever for Marylanders to secure their own judges' independence. Marylanders must unite in their opposition to the pending amendments, Chase insisted, because "[t]he independence of the judges of this State will be entirely destroyed if the bill for the abolishing [of] the two supreme courts should be ratified by the next General Assembly."[80] And if judicial independence is allowed to "crumble," Chase said, "it will precipitate the destruction of your whole State constitution, and there will be nothing left in it worthy the care or support of freemen."[81]

Appalled at his audacity, the Democratic press assailed Chase for criticizing the Jefferson Administration from the bench. Even worse, Chase's charge had amounted to a call to arms for the people of Maryland to resist the laws of their state! Chase's ardent defense of judicial independence in Baltimore only steeled Democratic resolve to devastate it. John Montgomery, a member of the Maryland legislature and chief author of the measures complained of by Chase,

74. *See id.* at 294.
75. *Id.*
76. *Id.* at 234.
77. *Id.* at 294.
78. *Id.* at 235.
79. *Id.* at 145.
80. *Id.* at 145-46.
81. *Id.* at 146.

called for the judge's removal. "It must rest with the next congress to wipe off this defilement from our courts, by removing from the bench the obnoxious rubbish which has occasioned it."[82]

Upon learning of the charge, Jefferson wrote to Joseph Nicholson, a surrogate in the House, regarding the "extraordinary charge of Chace [*sic*] to the Grand Jury at Baltimore."[83] He further asked, "Ought this seditious and official attack on the principles of our Constitution, and on the proceedings of a State, to go unpunished?"[84] Ever the consummate politician, however, Jefferson advised his ally that however Nicholson might choose to proceed, "it is better that I should not interfere."[85] Nevertheless, Jefferson's invisible hand guided the impeachment, even if the President did not involve himself in the details of the prosecution.[86]

III. THE STAGE IS SET: THE ADDISON AND PICKERING IMPEACHMENTS

Throughout John Adams's presidency, the Democratic frustration over the Federalist judiciary had been mounting. John Marshall's unanimous 1803 opinion in *Marbury v. Madison* only fanned the flames of antagonism that the Democratic Party already felt towards the Supreme Court. Now in firm control of the executive branch and both houses of Congress, it seemed only a matter of time before Democrats would begin their systematic dismantling of the judiciary.

The events of 1800 coupled with Chase's Baltimore jury charge provided Democrats with the ammunition they needed to pursue Chase. But it was the trial of another judge – John Pickering – that provided the legal impetus the Democrats needed to initiate the first impeachment of a Supreme Court Justice.

The Jeffersonian Democrats had been using impeachment as a weapon against the judiciary before Chase, and even before Pickering, the most famous being the removal of Pennsylvania State District Judge Alexander Addison. Addison had been removed, in

82. *See id.* at 291; *see also* UROFSKY, *supra* note 53, at 110.

83. MALONE, *supra* note 10, at 467.

84. *Id.*

85. *Id.*

86. Typical of Jefferson, the President exerted his influence through surrogates. On February 16, midway through the trial, John Quincy Adams confided in his journal that he suspected Giles, Jefferson's close ally in the Senate, and John Randolph, "chairman of the Managers," were working together to ensure Chase's downfall. Adams had seen Giles, "a member of the Court," enter Randolph's lodgings. It gave Adams pause because he recalled an incident a few days earlier where both men had left the Chamber and returned at about the same time. "These incidents, concurring with the opinions of Giles against Judge Chase, so long, so openly, and so often declared, have an appearance of concert in every step of this prosecution, which is not very consistent with my ideas of impartial justice." ADAMS, *supra* note 12, at 353.

part, because he had usurped his colleague's power by preventing the other judge from issuing instructions to the jury.[87] But impeachment had never before been used to remove a federal judge. That changed when, on January 4, 1803, the House of Representatives voted to impeach John Pickering, the United States District Court Judge for the District of New Hampshire.[88]

Everyone agreed that John Pickering no longer belonged on the bench, but the two sides could not agree on how to remove him. Pickering suffered from insanity and alcoholism, but he had not broken any law.[89] Despite his embarrassment to Federalists, they argued that Pickering could not be impeached because his conduct did not rise to the level of "high Crimes and Misdemeanors" as required for removal under the Constitution.[90] Federalists saw the Democrats' attempts to remove Pickering as an attempt to establish a low threshold for impeachment, thereby creating a precedent that would enable them to pursue other judges for political reasons. "The removal of the Judges, & the destruction of the independence of the judicial department," Senator William Plumer wrote just two days after dining with the President, "has been an object on which Mr. Jefferson has been long resolved, at least ever since he has been in office."[91]

Rather than travel down the more slippery slope of whether an insane man had the requisite capacity to be held legally responsible for his actions, the Democrats focused on Pickering's alcoholism. Despite some grumbling from moderate Democrats, on March 12, 1804, the Senate voted along strict party lines to remove Pickering; all votes to convict came from Democratic senators and the seven to acquit from Federalists.[92]

Federalists greeted the verdict with great consternation. A few months after Pickering's conviction, Federalist Senator William Plumer of New Hampshire wrote that the judge's removal brought the viability of judicial review into question and severely undermined the Supreme Court's power to strike down unconstitutional federal laws.[93] Moreover, Plumer believed that Pickering's conviction dangerously expanded the constitutional definition of an

87. 14 ANNALS OF CONG. 508 (1805).

88. *See id.* at 507.

89. *Id.*

90. *See* U.S. CONST. art. II, § 4 ("The President, Vice President and 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.").

91. PLUMER, *supra* note 28, at 101.

92. *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 95-96 (1973).

93. *See* PLUMER, *supra* note 28, at 229.

impeachable offense so that "[e]rror in a judge, without being guilty of a high crime or misdemeanor, is cause for impeachment." Indeed, Plumer posited that following the Pickering impeachment, "[a]ll that is necessary is for a majority of the House to accuse & two thirds of the Senate to agree to that accusation [that the judge committed an error]." The result, Plumer feared, was that "mere error . . . is sufficient cause to justify removal."[94] Federalist Representative Manasseh Cutler of Massachusetts seconded Plumer's concerns when he pessimistically wrote that "[t]he removal of this Judge is but the beginning of this species of demolition."[95] Even Democratic Vice President Aaron Burr wrote that the impeachment "has given rise to some troublesome questions, rendered more embarrassing by the total want of rule or precedent, and still increased by some dissatisfaction on the part of the managers, which seems to have also infected the House of Representatives."[96] Whatever its bureaucratic shortcomings, the impeachment process had proven a powerful Democratic weapon in their arsenal against the judiciary.

IV. THE HOUSE DIVIDED: DEMOCRATS TURN TO IMPEACHMENT

On January 5, 1804, John Randolph of Roanoke moved to create a committee of inquiry in the House of Representatives. The sole purpose of the committee was to determine "the official conduct of Samuel Chase . . . and to report their opinion whether the said Samuel Chase hath so acted in his judicial capacity as to require the interposition of the Constitutional power of this House."[97] Surprisingly, the House debates are almost always overlooked by historians and legal scholars alike in their analyses of the Chase impeachment. Yet, the debates framed many of the important issues that would later arise in the Senate trial and helped to clarify each side's goals regarding the impeachment, thereby helping to define the relationship between Congress and the judiciary and to sharpen the debate over judicial independence.

Although some Democrats described themselves as "friend[s] to the independence of judges," others, like Joseph Clay, did not bother

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94. *Id.* John Quincy Adams agreed, noting that "the principle assumed, though not yet openly avowed, [is] that by the tenure of *good behavior* [what] is meant [is] an active, continual, and unerring execution of office." ADAMS, *supra* note 12, at 310. He continued to elaborate: "[A]ny trivial error of conduct in a Judge, must be construed into misdemeanors, punishable by impeachment . . . I think [this] must produce important consequences to this Union." *Id.*

95. CUTLER, *supra* note 15, at 157.

96. 2 AARON BURR, MEMOIRS OF AARON BURR WITH MISCELLANEOUS SELECTIONS FROM HIS CORRESPONDENCE 280 (Matthew L. Davis ed., 1836).

97. 13 ANNALS OF CONG. 804-06 (1804).

to conceal their disdain for the practice.[98] Clay maintained that arguments for judicial independence, if taken to their logical conclusion, would shield judges from removal and threaten American liberties. Declaring members of the House to be "the Constitutional guardians of the morality of the judiciary," Clay argued that Congress was empowered to regulate, censor, and punish wayward judges.[99] In a far reaching statement, Clay dismissed the need for any factual basis in calling for an investigation into a judge's conduct, and asserted that Congress may properly appoint a committee of inquiry on the basis of suspicion alone.[100]

Clay's argument, which essentially positioned Congress as a judicial overseer, brought Federalists to their feet. Roger Griswold of Connecticut assailed the resolution as "dangerous," and argued that cloaking a committee with the authority to investigate a government officer without any proof of wrongdoing would lead to the bizarre result of raising a "committee . . . to act in secret, first to find an accusation, and next to prove it."[101] Unlike the political branches, the judiciary was not supposed to interpret the law in accordance with the will of the people, but rather in accordance with legal precedent and rules of judicial construction. If a majority is unhappy with a ruling by the Supreme Court, Griswold insisted, the people, through their representatives in Congress and the President, should change or repeal the law. Judges, however, must not be expected to bend the law to satisfy the majority's wishes. Thomas Lowndes, a South Carolinian Federalist, heartily agreed. Accusing the Democrats of attempting to "destroy the independence of the judges" by punishing a judge for enforcing an unpopular law, Lowndes warned that the Democrats' resolution would render "judges the flexible tools of this House."[102]

James Elliott, a congressman from Vermont who believed "that the Judicial department ought to attach to itself a degree of independence," confronted Clay's notion of congressional oversight head on, maintaining that "this House possesses no censorial power over the Judicial department generally, or over any judge in particular."[103] The term "high Crimes and Misdemeanors" implies that judges should be impeached only for "flagrant misconduct," but that Randolph's motion constituted nothing more than "a vote of censure on this judge, which neither the Constitution nor laws

98. *Id.* at 830.
99. *Id.* at 809.
100. *Id.*
101. *Id.* at 836.
102. *Id.* at 825.
103. *Id.* at 807.

authorize."[104] Piggybacking off of Elliott's remarks, Griswold touched on the same concerns that Senator Israel Smith expressed in his conversation with Giles, and argued that legal error alone cannot provide the basis for impeachment. "[T]he judge may have erred," Griswold conceded, "but it was an error of judgment for which he cannot be impeached."[105]

Democrats disagreed with Elliott and Griswold, and some hoped the committee of inquiry would establish the very principle the Federalist congressmen railed against: that judges *could* be impeached for errors of judgment. Indeed, the view espoused by Democrats meant not only that judges could be impeached for legal error, but, as Plumer had noted, that "error" would be defined exclusively by the party in control of the House of Representatives. "What will you say to such principles as these?" Federalist Manasseh Cutler asked in his private correspondence. "That a Judge is impeachable for an opinion, in a law point, if that opinion should be judged erroneous by the House of Representatives? That a judge ought in duty to favor the ruling political party? And that he is bound to be governed by the will of the people (so-called)?" No longer content "merely to remove Federal Judges, which his Democratic Majesty in his work of destruction had not power to assail," Cutler believed Democrats now wished "to prostrate, completely, the Judiciary branch of our government."[106] Radical Democrats might insist that the purpose of the inquiry remained to acquire the very proof demanded by the Federalists, but Federalists were not persuaded. They saw the committee as the first step towards a frontal assault on judicial independence.

Federalists were not alone in criticizing the committee, and some Democrats added their voices to the opposition to the resolution. Although limited and far less emphatic in their tone, these statements represent some of the earliest signs that even Democrats from all regions of the country felt some uneasiness with the precedent the committee might establish. George Washington Campbell of Tennessee, who would later be selected to serve as a manager in Chase's impeachment, lamented the lack of specific facts presented. Campbell found "no statement satisfactory to my mind that there are probable grounds for proceeding in this business . . . and it is not my wish to decide on the propriety of the conduct of the judge until the facts are before us."[107] James Holland of North Carolina and James Mott of New Jersey agreed. Mott pressed for a

104. *Id.*

105. *Id.* at 810.

106. CUTLER, *supra* note 15, at 158.

107. 13 *ANNALS OF CONG.* 816-17 (1804).

postponement of the vote "because I wish time for consideration, and because I am against the resolution itself. I think it is improper to go into such an inquiry before specific charges are laid before the House."[108] Holland, like Campbell, "did not feel perfectly satisfied with the appointment of a committee of inquiry before any facts had been substantiated."[109]

Despite the visible and vocal defections of some Democrats, it is important not to make too much of these dissenting voices. Such was the extent of Randolph's influence that even Holland, who had spoken out in favor of the postponement, having "reflected on the course pursued in similar cases" in his home state of North Carolina, felt induced "to think that the course proposed is proper, and I shall, accordingly, vote for the appointment of a committee of inquiry."[110] Although when the final vote was called, all but three Democrats – Mott, and two New Yorkers, Samuel Latham Mitchill and John Smith – joined the Federalists in voting nay, the votes and speeches by these Democratic skeptics lend credence that the impeachment proceeding was not always simply about partisan politics.[111]

With the committee approved, many Federalists worried that Giles's extreme view of impeachment would prevail. "Thus do I fear that this precedent will furnish the instrument of vengeance of one party against another," Thomas Lowndes warned. "The price we pay for our liberties is the existence of parties among us; but it becomes us rather to restrain than to invigorate their passions. If we establish this precedent we shall render impeachments so easy, as greatly to facilitate the means of oppression."[112] Federalists had good

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108. *Id.* at 817.

109. *Id.* at 816.

110. *Id.* at 848.

111. *Id.* at 825. After voting against both the committee of inquiry and the articles of impeachment against Chase in the House of Representatives, Samuel Latham Mitchill and John Smith both received commissions from the New York State Legislature to represent their state in the United States Senate. Smith won election to the Senate on February 4, 1804, to fill the vacancy caused by the resignation of De Witt Clinton" Biographical Directory of the United States Congress: 1774-Present, SMITH, John, http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000566 (last visited Mar. 26, 2010) [hereinafter SMITH]. Mitchill won election to the Senate on November 9, 1804, to fill the vacancy caused by the resignation of John Armstrong. Dr. Mitchill's Letters from Washington City, HARPER'S NEW MONTHLY, Apr. 1879, at 740, 748, http://digital.library.cornell.edu/h/harp/harp.1879.html (follow "April 1879, vol. 58, issue 347" hyperlink; then follow "Dr. Mitchill's Letters from Washington City" hyperlink).

Because both Smith and Mitchill had to wait to receive their official commissions, Smith did not take his Senate seat until February 23, 1804. SMITH, *supra*. Mitchill took his seat on November 23, 1804, a few weeks after the first session of the Eighth Congress had convened. Dr. Mitchill's Letters, *supra*.

112. 13 ANNALS OF CONG. 826 (1804). Roger Griswold made a similar argument,

reason to be afraid. The Democrats had taken an important step in establishing that political expediency could justify impeachment.

The House chose Randolph to head the committee.[113] Cutler found "some satisfaction" in noting that "the most respectable Democrats voted with us."[114] Senator William Plumer, however, who had closely followed the House debates on the committee, believed the moderates had been duped, and bleakly observed that

> [t]he doctrine is now established in the House that a specific charge against a Judge is not necessary to institute enquiry into his official conduct. A committee of enquiry is said to be a harmless measure–some vote for it, who are not prepared to vote an impeachment–not perceiving that when the Committee have collected exparte [*sic*] testimony [and] reported an impeachment–that then they will be under a kind of necessity to impeach.[115]

The committee tilted decidedly in favor of the Democrats. Of the seven members, only two were Federalists, Roger Griswold and Benjamin Huger of South Carolina. The remaining members of the committee were John Randolph, Joseph Nicholson, Joseph Clay, Peter Early, and John Boyle, all ardent proponents of impeachment.[116] In the months following, the committee held hearings, heard testimony from individuals who had witnessed Chase's bad behavior, assessed the evidence, and determined what charges, if any, should be levied against Chase. The committee, which ordered testimony, in the form of affidavits, to be printed for every congressman to read, focused on Chase's partisan maneuvers from the bench.[117]

On March 12, 1804, with the ink barely dry on Pickering's conviction, Randolph's committee issued its report to the House of Representatives, "the object of which was to impeach Judge Chase."[118] The report was met with a "solemn awe" in the House chamber, but Randolph alienated many moderates with his severe accusations and calls for impeachment.[119] Upon Randolph's reading of the report, several moderate Democrats even left their seats in

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asserting that assembling a committee of inquiry without first requiring some form of hard evidence would be tantamount to "an inquiry into the conduct of a high officer of the Government merely on hearsay." *Id.* at 810. "The proper course is first to have proofs which will justify ourselves to our consciences in making the inquiry–for we ought not to touch the character of a judge, unless we are satisfied from facts that there is good reason for an investigation into his conduct." *Id.*

113. *Id.* at 876.

114. CUTLER, *supra* note 15, at 157-58.

115. PLUMER, *supra* note 4, at 102.

116. 13 ANNALS OF CONG. 876 (1804).

117. CUTLER, *supra* note 15, at 157, 167.

118. *Id.*

119. *Id.* at 157.

protest.[120]

Amid the quiet resistance from the moderates, Elliot reached out for their support. Even at this early stage in the proceedings, Elliot was ready to concede that Chase's partisan conduct from the bench was no longer acceptable and that judges should retreat from the political arena.[121] Often overlooked, Elliot's remarks represent one of the earliest suggestions in the impeachment debate for an apolitical judiciary. "Next to the holy altars of religion," he began, "I consider the temple of justice as the most improper place from whence to dispense the dogmas of party, or the theories of political disquisition."[122] And although he acknowledged that judges possess the same political rights as private citizens, Elliot recognized that "the bench may be a very improper situation in which to exercise them."[123] Elliot's criticism of the political grand jury charge would be repeated throughout the Chase impeachment trial by members on both sides of the aisle, but at this stage, Elliot was a lone voice in the chamber. His insistence that Chase could not be impeached for a practice sanctioned for the past hundred years fell on deaf ears.[124]

Once again, Federalists felt steamrolled by the Democratic majority. Benjamin Huger, one of the two Federalist members who had been on the committee of inquiry, described the entirely partisan affair. The five Democratic members of the committee of inquiry had met and drafted the report recommending impeachment without the presence of the Federalist members. Although the Democrats had presented the report to the full committee the next day, "after five out of seven members had already on the preceding day decided in favor of [impeachment], I certainly, sir, had not the vanity to suppose that anything I [Huger] could say would effect a change of opinion."[125] Clearly frustrated, Huger and Griswold voted against

120. *Id.* at 168.

121. In his book *Constitutional Construction*, Keith Whittington argues that the Democrats were primarily responsible for the emergence of the apolitical judiciary. Whittington contends that the Democrats "offered a more moderate construction of the judicial power that made a place for an independent judiciary, but put conditions on that independence. Primary among these conditions were the political neutrality of the judiciary . . . and the separation of the judiciary from the executive branch." KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 59 (1999). Although technically true, it was the Federalists' attempts to secure the moderate Democrats' votes that gave life to these ideas. Federalists like Elliot framed the debate and zealously advocated for a working definition of judicial independence that the moderates would feel comfortable voting for. 13 ANNALS OF CONG. 1174 (1804).

122. 13 ANNALS OF CONG. 1174 (1804).

123. *Id.*

124. *Id.*

125. *Id.* at 1180.

the impeachment in both the select committee and on the floor vote.[126]

When the debate ended on March 12, the House approved the report, seventy-three to thirty-two.[127] The vote to impeach had carried, but a "spirit and bitter feeling" hung in the air.[128] Most would not dare to openly oppose Randolph, but perhaps foreshadowing what would come in the Senate, some in his own party privately expressed their belief that the impeachment had been unwarranted. According to Cutler, a group of moderate Democrats even "made a pretty violent attack" upon Representative Samuel Dana for not defending Chase. Dana replied that "it was folly to reason with them, for he should just as soon think of *'[t]hrowing snow-balls into h-ll, to put out the fire*, as to convince Democrats by reasoning.'"[129]

With the report approved, Randolph "moved that a Committee be appointed to appear at the bar of the Senate, to impeach, in the name of the House of Representatives, Samuel Chase, of high crimes and misdemeanors."[130] The motion passed, and Randolph assembled his committee to compose the formal articles of impeachment.

On March 26, 1804, Randolph's committee proposed to the House seven articles of impeachment against Chase. The committee proposed an additional eighth article of impeachment when it presented the finalized articles to the House in November.[131] Chase wasted little time before readying himself for the upcoming trial. The fact that the House had approved the committee's initial report likely meant that the finalized articles of impeachment would also likely pass. Given the circumstances, the aging Justice went to work assembling a team of lawyers and researching his own defense.

Chase enlisted for his defense counsel several of the ablest and most prestigious men of the current and Revolutionary period. Robert Goodloe Harper, a former Federalist congressman who had also appeared on behalf of John Pickering during the first federal impeachment, and Luther Martin, Chase's long time friend, Maryland Attorney General and a delegate to the Constitutional Convention of 1787, both agreed to head up Chase's defense. Joseph Hopkinson, a young Philadelphia attorney, Philip Barton Key, a judge on the United States Court of Appeals for the Fourth Circuit, and former United States Attorney General Charles Lee of Virginia

126. *Id.* at 1180-81.

127. *Id.*

128. CUTLER, *supra* note 15, at 168.

129. *Id.* (emphasis in original).

130. 13 ANNALS OF CONG. 1181 (1804).

131. *Id.* at 1237-40; 14 ANNALS OF CONG. 85-88 (1805).

rounded out Chase's defense team.[132]

On December 3, 1804, Randolph and his committee presented the finalized articles of impeachment to the House.[133] Although Randolph faced sporadic opposition from within his own party, his detractors tended to have qualms with specific articles, and failed to present an organized opposition to the entire impeachment.[134] As a result, Randolph's coalition shifted slightly from article to article, but no congressman had any real doubt that the articles of impeachment would pass.

On December 5, 1804, the House of Representatives overwhelmingly passed all eight articles of impeachment against Chase, bestowing upon him the dubious distinction of being the first Supreme Court Justice ever impeached.[135] Moderate Democrat Samuel Mitchill lamented that the articles were "a great accusation; [this impeachment] excites much curiosity and feeling hereabout."[136] Seven new managers were chosen to prosecute Chase, elected by "having a majority of the whole number of votes."[137] To no one's surprise, Randolph was among those chosen, along with Joseph Nicholson, Caesar Rodney, Peter Early, John Boyle, George Washington Campbell,[138] and Roger Nelson.[139] Randolph's impeachment juggernaut seemed unstoppable.

The decision to appoint Randolph to lead the prosecution proved a critical one. In hindsight, the position probably should have gone to a more moderate Democrat, able to bridge the gap between the radical and more moderate factions of the party. By the time of the impeachment, Randolph had already established himself as a polarizing figure, harshly assailing the Jefferson Administration for its handling of disputed land claims in Georgia.[140]

Even Randolph's allies sometimes had trouble swallowing his brand of politics. Democratic Senator William Cocke of Tennessee, one of only four senators to vote "guilty" on every article of

132. ELSMERE, *supra* note 6, at 201-03, 221, 254.

133. 14 ANNALS OF CONG. 88 (1805)

134. *See generally id. at* 747-62 (discussing House's consideration of each article of impeachment).

135. *Id.* at 88.

136. Dr. Mitchill's Letters, *supra* note 111, at 749.

137. 14 ANNALS OF CONG. 762 (1805).

138. Perhaps in part, because of his initial resistance to the committee of inquiry, when the seventh ballot was taken, George Washington Campbell received only a plurality of votes, instead of a majority like the others. "The Speaker, supposing that the rules of the House in the case of committees chosen by ballot was applicable to that of Managers, declared Mr. G.W. Campbell duly chosen." *Id.*

139. At the start of the trial, "on account of absence," the House replaced Nelson with Representative Chris Clark of Virginia. *Id.* at 88.

140. ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES 87 (1992).

impeachment except one,[141] described Randolph as a man of "excessive vanity, ambition, insolence, and even dishonesty." [142] Cocke disliked "that Randolph boasted with great exultation that this was *his* impeachment – that every article was drawn by *his* hand, and that *he* was to have the whole merit of it."[143] Cocke found Randolph's bragging about the destruction of Chase's reputation utterly contemptible. Even assuming Randolph's sole responsibility for the impeachment, Cocke believed "it was not a very glorious feat for a young man to plume himself upon; for the undertaking to ruin the reputation and fortune of an old public servant, who had long possessed the confidence of his country, might be excusable, but was no subject to boast of."[144] Given such strong sentiments of condemnation from even his closest political allies, it is not terribly surprising that Randolph had difficulty maintaining a coalition to eventually impeach and convict Chase.

Randolph must have been blind to such practical concerns as he forged ahead with the impeachment. Using the trial to further his political career, Randolph unwittingly ensured that win or lose, success or failure, the brunt of the endeavor would lie squarely on his shoulders.

V. THE SENATE: JUDICIAL INDEPENDENCE ON TRIAL

Thirty-four senators from seventeen states comprised the United States Senate in 1805: twenty-five Democrats and just nine Federalists. [145] Senate rules at the time mandated that, as Vice-President, Aaron Burr would preside over the Chase impeachment trial.[146] At the time of the trial, however, several states had issued indictments against Burr for the murder of Alexander Hamilton. Because Burr had been granted immunity in Washington, D.C., he would be able to fulfill his duties as President of the Senate.[147]

Many were appalled that Burr would have the audacity to sit and preside over Chase's trial. One particularly sarcastic contemporary even commented, "[w]hereas in most courts the murderer is arraigned before the judge, in this court the judge was arraigned before the murderer!"[148] To some, however, Burr's murder

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141. 14 ANNALS OF CONG. 665-69 (1805).

142. ADAMS, *supra* note 12, at 364.

143. *Id.*

144. *Id.*

145. CONGRESS QUARTERLY, GUIDE TO CONGRESS 94-A (4th ed. 1991).

146. 14 ANNALS OF CONG. 91 (1805).

147. BUSHNELL, *supra* note 140, at 63.

148. William H. Rehnquist, Reflections on the History and Future of the Supreme Court of the United States, ¶ 13 (June 16, 2000) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?filename=sp_06-

of Hamilton made him a hero. Democratic Senator Robert Wright of Maryland said that he could "justify duelling by the example of David and Goliath in the Scriptures" and that Federalists hated Burr only because "*our* David had slain the Goliath of federalism."[149]

Although Chase and his team had begun preparing his defense before the articles of impeachment had been finalized, when Congress reconvened, Chase still needed more time to prepare a proper defense. On January 2, 1805, Chase appeared before the Senate and Vice-President to request a postponement of his trial until the next term.[150] In accordance with parliamentary procedure, Burr refused to allow Chase to have access to a chair.[151] As a result, Chase stood in the Senate chamber, shaking from either emotion or gout, and taxed to the point that "tears suspended his voice for a moment or two."[152] Hardly recognizable as the domineering tyrant who had allegedly railroaded defense counsel and intimidated grand juries, Chase physically labored to deliver his request. Seeing Chase struggle, Burr finally relented and furnished Chase with a chair.[153] After resting for a moment, Chase rose and began his defense: "It behooves me, for the legal justification of my conduct, and for the vindication of my character, to meet *each* charge with a full and particular answer . . . I disclaim all intention of affected delay."[154]

To the chagrin of Federalists, Burr repeatedly interrupted Chase throughout his answer and spoke to him in a very condescending and scolding manner. "These violent measures in Mr. Burr may, [and] I believe are, adopted with a view to ingratiate himself with the [Administration] – In this he will, I presume fail – He has merited the contempt [and] indignation . . . of many."[155] On January 3, the Senate rejected Chase's request to put the trial over until the following term, and instead voted to give him just one additional month.[156] The Senate ordered Chase to stand trial on February 4, 1805.[157]

A. Trial Preparations

For the trial, Burr arranged the Senate chamber in a "style of appropriate elegance" intended to replicate the historic British

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16-00.html).

149. ADAMS, *supra* note 12, at 360.

150. 14 ANNALS OF CONG. 93 (1805).

151. *Id.* at 92.

152. PLUMER, *supra* note 28, at 238.

153. *See* 14 ANNALS OF CONG. 92 (1805).

154. *Id.* at 93, 96 (emphasis in original).

155. PLUMER, *supra* note 28, at 239.

156. *See id.* at 241.

157. *Id.*

impeachment of Warren Hastings.[158] Burr ordered crimson benches, which flanked the President's chair on either side and were allotted to the Senator-jurors. The stenographers sat next to the trial teams, occupying seats at the "termination of the benches of the members of the Court."[159] Facing Burr and the Senators were two boxes of seats covered in blue cloth, reserved for the managers on the right and for Chase and his team on the left. The members of the House, who would not directly participate in the impeachment trial, occupied a large part of the remaining floor space and sat in rows of benches covered in green cloth. Besides the congressmen, the remaining spectators on the floor were foreign ministers and United States civil and military officers.[160]

To accommodate the anticipated influx of spectators, Burr commissioned the construction of a new gallery.[161] This new gallery, "allotted to the indiscriminate admission of spectators," was "raised, and fitted up with peculiar elegance."[162] At the end of the gallery, Burr ordered boxes of seats "specially assigned to ladies attached to the families of public characters."[163] The blatantly ostentatious display in an era that trumpeted republican simplicity was not lost on the senators, prompting Federalist Uriah Tracy of Connecticut to remark that the chamber resembled a "Roman amphitheatre."[164]

B. Chase's Answer

On Monday, February 4, 1805, Robert Goodloe Harper read Chase's three-and-a-half hour answer "incomparably well"[165] to a chamber "filled with spectators, a large portion of whom consisted of ladies."[166] In his answer, Chase outlined the legal arguments that would occupy his defense throughout the trial. First, he contended that his actions fully comported with tradition and precedent, and that his conduct did not stem from any partisan desire to punish Fries or Callender. Second, he argued that he had correctly followed Virginia law in Callender's case, but that even if he had not, a judge cannot be removed for legal error alone. Lastly, Chase maintained that political statements from the bench, however "indiscreet or unnecessary," do not constitute an impeachable offense.[167]

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158. 14 ANNALS OF CONG. 100 (1805).
159. *Id.*
160. *Id.*; *see also* Bair & Coblentz, *supra* note 7, at 380.
161. Bair & Coblentz, *supra* note 7, at 380.
162. *Id.*
163. *Id.*
164. *Id.*
165. CUTLER, *supra* note 15, at 182.
166. 14 ANNALS OF CONG. 101 (1805).
167. *Id.* at 237, 239-41.

Five of the eight articles accused Chase of maliciously using the law and his position as a judge to further a political agenda of punishing Democrats.[168] Chase argued at length that his conduct comported with tradition and well-settled law and insisted that if he had committed any errors, they were errors of judgment which do not constitute constitutionally impeachable offenses.[169] "The contrary opinion," Chase continued, "would convert this honorable Court, from a Court of Impeachment into a Court of Appeals."[170] He stated further that it would "lead directly to the strange absurdity, that whenever the judgment of an inferior court should be reversed on appeal or writ of error, the judges of that court must be convicted of high crimes and misdemeanors, and turned out of office."[171]

The fifth and sixth articles of impeachment alleged that Chase had violated certain Virginia procedural laws; but Article V did not accuse Chase of exhibiting any malicious intent towards Callender. Instead, the article alleged only that Chase had erred in issuing Callender a capias – a type of arrest warrant – in violation of a Virginia law requiring judges to issue a summons in non-capital criminal cases.[172] Through poor draftsmanship or by design, the fifth article represents Randolph's ambitious attempt to expand the universe of impeachable offenses to include any judicial error and comes the closest to Giles's original articulation of Congress's limitless power of impeachment. Article VI accused Chase of violating Virginia law in trying Callender in the same term that the grand jury issued its presentment against him.[173]

Chase defended his decisions in both instances by arguing that the controlling statutes left the acts complained of within the discretion of the judge.[174] Chase reiterated that the "correctness" of his decisions were irrelevant to impeachment proceedings, explaining that if any judge was "impeachable for acting against law from ignorance only, it would follow that he would be punished in the same manner for deciding against law willfully, and for deciding against it through mistake. In other words, there would be no

168. Article I had alleged that Chase had improperly prejudged the law of treason, had restricted the authorities that counsel were allowed to cite, and had usurped the right of the jury to decide the law; Articles II–IV enumerated various misdeeds regarding Chase's conduct at James Callender's trial; and Article VII alleged that Chase had inappropriately refused to dismiss a grand jury at New Castle, Delaware, insisting that an investigation be conducted to find a seditious printer that Chase believed resided in the area. *Id.* at 86-87.

169. *Id.* at 116.

170. *Id.* at 111.

171. *Id.*

172. *Id.* at 86-87.

173. *Id.* at 87.

174. *Id.* at 138, 141.

distinction between ignorance and design, between error and corruption."[175]

Article VIII accused Chase of delivering "an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury . . . conduct highly censurable in any, *but peculiarly indecent and unbecoming, in a Judge of the Supreme Court of the United States*,"[176] and of "prostitut[ing] the high judicial character with which he was invested to the low purpose of an electioneering partizan [sic]."[177] The implication was that judges, unlike congressmen, are held to a higher standard regarding statements made in their official capacity.

From the outset, Chase acknowledged the inappropriateness of his own conduct, and conceded that judges should refrain from politicking while sitting on the bench, but contended that the position taken by the Managers would establish a standard of correctness that would empower the members of the ruling party to remove a judge whenever they failed to agree with his opinions.[178] Although this is precisely the radical view that some Democrats embraced, Chase hoped enough senators saw the value of judicial independence to avoid eviscerating it entirely.

On February 7, Randolph delivered a short replication devoid of substance in which he accused Chase of applying a "gloss and coloring" in his answer to the circumstances outlined in the articles of impeachment.[179] Two days later, on February 9, 1805, Randolph rose to deliver his opening remarks.

C. Opening Remarks

The Managers' case depended upon proving one of two contradictory arguments. First, they argued that the Senate had the power to remove Chase at will and that the Managers were not required to prove anything. Alternatively, they attempted to prove that Chase's misconduct constituted a high crime or misdemeanor worthy of removal from office.[180] Robert Goodloe Harper, however, pounced on the inconsistency in the Managers' position and accused them of being "as much at war with themselves on this point, as with the Constitution and the laws."[181] He noted that, despite the Managers' having "in one breath[ ] that this is merely a question of

175. *Id.* at 139.
176. *Id.* at 88 (emphasis added).
177. *Id.*
178. *Id.* at 146-48.
179. *Id.* at 151.
180. *Id.* at 163-64.
181. *Id.* at 505.

policy and expediency, they resort in the next to legal authorities, both English and American, for the purpose of explaining the doctrine of impeachment, and of proving that the acts alleged against the respondent amount to impeachable offenses."[182]

Randolph never addressed Harper's criticism head-on, and instead concentrated on proving that Chase's misconduct constituted an impeachable offense. To accomplish this, he divided his case into three separate lines of attack that closely paralleled the articles of impeachment. First, Randolph asserted that contrary to what Chase had argued in his answer, the judge's conduct represented "a gross departure from the forms, and a flagrant outrage upon the substance of criminal justice."[183] If Chase had ignored tradition and precedent, Randolph claimed, he did so because tradition and precedent did not dictate the result he wanted.

Second, Randolph argued that Chase could be convicted for mere errors of law. Defending Article V, Randolph accused Chase of incorrectly applying Virginia state law and argued that this provided sufficient ground for his removal.[184] Lastly, Randolph admonished Chase for pontificating to a Baltimore grand jury on wholly irrelevant political issues. "Shall a judge declaim on these topics from his seat of office? Shall he not put off the political partisan when he ascends the tribune? or shall we have the pure stream of public justice polluted with the venom of party virulence?"[185] In a span of less than five years, the political grand jury charge had fallen from a commonplace and accepted judicial practice to what Randolph now painted as a vilified instrument of judicial tyranny that exemplified the dangers of judicial independence.

Randolph adequately articulated the Managers' case, but often appeared arrogant and overconfident. At times, this arrogance gave way to laziness, such as when Randolph declined to address Article VII.[186] Expectedly, Federalists greeted Randolph's opening remarks with contempt and criticism. Senator Plumer called the speech "feeble – the most incorrect that I have ever heard him make."[187] Representative Cutler, watching from the gallery, recorded dryly:

182. *Id.*

183. *Id.* at 154.

184. *Id.* at 161-62.

185. *Id.* at 163.

186. The allegations contained in Article VII coincided with Randolph's argument that Chase's conduct had been motivated by a partisan desire to punish Democrats, similar to the allegations contained in Articles I-IV and Article VI. However, Randolph decided not to address the article, as he felt "nearly exhausted," and contented himself to "leave it on the ground where the respondent himself has placed it." *Id.* at 162-63.

187. PLUMER, *supra* note 28, at 280.

"Randolph made his speech; nothing great; closed with much spitefulness."[188] Whatever its flaws, Randolph had accomplished what he set out to do: he had laid out an argument that expanded the definition of impeachment and, if successful, would vastly increase Congress's influence over the Supreme Court.

In contrast, when Robert Goodloe Harper rose on February 15, 1805, he declined to issue sweeping statements on theories of impeachment and character assassinations. Waiving the defense's right to a general opening statement, Harper chose to confine his remarks to a "brief statement of the points to which our testimony will be directed."[189]

D. The Witnesses

Among the Managers' first witnesses were William Lewis and Alexander Dallas, John Fries's defense counsel. The thrust of their testimonies focused on the "novelty" of Chase's acts, which the Managers endeavored to prove could only be explained by Chase's desire to punish Fries.[190] Apart from establishing Chase's animus towards Fries, however, Lewis and Dallas often appeared more interested in justifying their own decision to withdraw from Fries's case than with explaining why Chase should be removed from office.[191]

The defense's early witnesses were similarly lackluster and were called to refute Lewis and Dallas's claim that Chase had acted improperly at Fries's trial. William Meredith, a spectator at Fries's trial, placed Chase's supposedly novel conduct in context, and testified that Chase's prejudgment of the opinion on treason derived from his desire to save time and avoid confusion to the jury.[192] William Rawle, the District Attorney, testified that Chase's restriction of authorities for the reasons proffered by the defense applied with equal force to the prosecution.[193] To demonstrate Chase's impartiality, Meredith testified that Chase had urged Lewis and Dallas to continue with their defense, offered to withdraw his opinion on treason if they would proceed, and when Chase's offers failed to placate them, directed Fries on how he should conduct himself as his own counsel.[194]

After the somewhat disappointing performance of the Managers'

188. CUTLER, *supra* note 15, at 182-83.
189. *Id.* at 237.
190. 14 ANNALS OF CONG. 167, 174 (1805).
191. *Id.* at 167.
192. *Id.* at 243-45.
193. *Id.* at 243.
194. *Id.* at 245.

witnesses regarding the Fries trial, Randolph called witnesses for the second, third, and fourth articles. For these three articles, the first to address Chase's conduct at the Callender trial, the Managers primarily relied upon the testimony of George Hay and Philip Nicholas, both of whom had served on Callender's trial defense team, and John Taylor, the defense witness whose testimony Chase had ruled inadmissible.[195] These witnesses bolstered the Managers' case by asserting that Chase's decisions constituted an abrupt and radical departure from trial procedure. In addition, they portrayed Chase as a rude and contemptible judge, whose decisions had been calculated to prejudice Callender and secure a guilty verdict.[196]

The most damaging testimony, however, came from John Heath, a lawyer who did not even attend Callender's trial. John Heath had moved for an injunction in a case unrelated to Callender's. While awaiting a decision on his injunction, Heath paid a visit to Chase's chambers at Crouch's Tavern, where he knew Chase to be lodging. According to Heath, while he and Chase were discussing the injunction, the marshal, David Randolph, walked in with a paper in his hand.[197] Upon being informed by Randolph that the paper contained the list of jurors for Callender's trial, Heath stated that "Chase immediately replied, have you any of those creatures called Democrats on the panel? Mr. Randolph hesitated a moment, and then said that he had not made any discrimination in summoning the petit jury. Judge Chase said, look it over, sir, and if there are any of that description, strike them off."[198] The testimony, if true, seemed to firmly establish that Chase had attempted to stack Callender's jury against him and that he had arrived in Richmond with political motives and a predetermination to find Callender guilty.

To refute Heath's testimony, the defense called William Marshall, the clerk of the court and Chief Justice John Marshall's brother, and David Randolph, the marshal for the District of Virginia who had been tasked with empanelling the jury for Callender's trial.[199]

Randolph's testimony contradicted Heath's in the strongest terms possible. Randolph stated that he had never shown the list of panel members to Chase, had never heard anything regarding striking individuals off for any reason, and that the panel had not even been assembled until the day when the court was in session,

195. *Id.* at 206-07, 307-10, 739-43.
196. *Id.*
197. *Id.* at 217.
198. *Id.*
199. *Id.* at 247-52, 258-62.

"and the list was never shown by me to any person."[200] Randolph maintained that the only criteria he used for selecting potential jurors consisted of summoning the "best and fairest characters without respect to their political opinions."[201]

William Marshall confirmed Chase's noninvolvement with selecting Callender's jury. Marshall said that he and Chase had only discussed the potential jury for Callender's trial once where Chase had confessed to Marshall that he wished Callender would be tried by jurors of Callender's *own* politics.[202] Having mulled over the issue, however, Chase thought it improper to interfere with the marshal's duties and decided not to say anything to Randolph.[203] Although the jury that eventually found Callender guilty did not contain any Democrats, Marshall testified that the jury pool from which Callender's panel had been chosen had at least four Democrats, but that each of them – Vanderval, Radford, Tinsley, and Harvie – had either asked to be excused or simply never attended at all.[204] When asked directly about Heath's comments, Marshall stated that he "never heard the judge say anything about the jury," except his "instructions to summon twenty-four jurors above twenty-five years of age, and freeholders; that there should be enough to supply the juries required at that court."[205]

Marshall pleasantly surprised Federalists with his candor and demeanor,[206] but it was his more famous brother, Chief Justice John Marshall, who incited a "flutter of interest among spectators when . . . called to testify."[207] The defense called John Marshall as an expert witness to testify that Chase's conduct fell within judicial norms. William Marshall's strong performance for the defense stands in stark contrast to that of his brother, John Marshall. In fact, the Chief Justice proved one of the poorest and most disappointing witnesses of the entire trial, as his "customary hesitancy of speech was exaggerated by his effort to choose words with care, and this created a bad impression upon some of his listeners."[208] Senator Plumer recorded that "[t]he Chief Justice really discovered too much caution – too much fear – too much

200. *Id.* at 259.

201. *Id.* at 258.

202. *Id.* at 251.

203. *Id.*

204. *Id.* at 255-56.

205. *Id.* at 252.

206. Plumer wrote that Marshall exhibiting a "frankness, a fairness & I will add a firmness that did him much credit," adding that he believed it offered a "complete defence for the accused--unless it can be destroyed." PLUMER, *supra* note 28, at 290.

207. ELSMERE, *supra* note 6, at 263.

208. *Id.*

cunning – He ought to have been more bold – frank [and] explicit than he was;" indeed, "[t]here was in his manner an evident disposition to accommodate the Managers [and] [t]hat dignified frankness which his high office required did not appear."[209] In short, John Marshall seemed frightened.

The Managers appear to have sensed Marshall's apprehension, and they examined him much more aggressively than they had many of the other defense witnesses. For his part, Marshall employed a number of rhetorical devices to avoid giving any answers that might definitively incriminate or exculpate Chase. Marshall speckled his testimony with phrases of avoidance such as: "I can only speak of courts where I have attended;" "That is a question of law I have never turned my mind to;" and "My practice, I before stated, had not taken this course; I therefore cannot well say what the usual practice is."[210] In addition, despite the defense's having called Marshall as a legal expert, he refused to give his opinion or draw any conclusions and instead retreated behind a recitation of general principles of law leaving each side to battle over their interpretation and application.[211]

So why did Marshall, whom some scholars have hailed as the "father of the Supreme Court," suddenly grow so timid and tempered?[212] Although some scholars have suggested that Marshall's conduct might be interpreted as the Chief Justice's tacit approval of the impeachment,[213] it is unlikely that Marshall would have embraced any move that would undermine the Court's status as significantly as the conviction of one of its members. It seems more reasonable that Marshall's trepidation was owed more to the rumors circulating from men like Giles that if the Democrats successfully removed Chase, they would target Marshall soon after. In addition, Marshall probably hoped that, regardless of his personal feelings about the propriety of Chase's impeachment, that in exchange for his cooperation, the Managers might consider sparing the judiciary further disgrace than it had already suffered.

This line of thinking is evident in a letter Marshall wrote to Chase in late January of 1805 on the eve of the impeachment trial. Marshall suggested that the Supreme Court might cede a degree of independence to Congress to save the judiciary from total despair. "I think," Marshall wrote, that "the modern doctrine of impeachment

209. PLUMER, *supra* note 28, at 291.

210. 14 ANNALS OF CONG. 264, 266-67 (1805).

211. *Id.* at 266.

212. *See generally* Clifford SMYTH, JOHN MARSHALL: FATHER OF THE SUPREME COURT (2008).

213. Carrington & Cramton, *supra* note 39, at 1142.

should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault."[214] Marshall's proposal of a legislative veto over judicial decisions demonstrates how dire Marshall believed the Court's situation to be in 1805 and how seriously he understood the Democrats' threats against judicial independence to be. Although Marshall had been one of the first and indeed great champions of judicial power and independence, his fear that Congress and the President would devastate the Court subdued him. Marshall's testimony on Chase's behalf reflected this caution.

Following the discussion of the earlier articles of impeachment pertaining to Callender's trial, the Managers began calling witnesses regarding Article V. Unlike the first four articles of impeachment, Article V did not contain any allegations that Chase had acted with animus towards Callender; this article alleged only that Chase had misapplied the law.[215] Although Article VI contained an allegation that Chase had acted maliciously in trying Callender in the same term in which the grand jury had issued the presentment, it is best analyzed in tandem with the fifth article because of how closely related the underlying facts of the allegations are to each other.

The facts were undisputed. Upon presentment of Callender's indictment, Chase issued a capias for Callender's arrest. Then, upon Callender's appearance at the court, Chase announced he would be tried the same term.[216] The Managers contended that Chase had violated two Virginia statutes. The first statute – the subject of Article V – allegedly required Chase to issue a summons for Callender to appear, and not a capias. The second statute allegedly mandated that all misdemeanors had to be tried in the term following that in which the jury issued the indictment.[217] In his answer, Chase argued that he had not actually misapplied any law because the Virginia statutes left such decisions to the judge's discretion.[218]

Because much of the disagreement surrounding Article V centered on legal theories about the scope of impeachment, both sides left many of their arguments for their closing arguments.[219]

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214. BEVERIDGE, *supra* note 8, at 176-77 (providing a copy of Justice Marshall's actual letter).

215. 14 ANNALS OF CONG. 86-87 (1805).

216. *Id.* at 87.

217. *See id.* at 86-87 (discussing the statutes that Chase purportedly violated).

218. *See id.* at 138, 141 (Chase's answer).

219. Nicholas and Hay, two of the only Managers' witnesses to address either the fifth or the sixth article merely limited their testimonies to the novelty of Chase's

However, in discussing these articles, an interesting debate arose between the Managers and Charles Lee, a member of Chase's defense team, regarding whether or not Chase's counsel should be allowed to introduce testimony as to what constituted the proper process in Chase's home state of Maryland. Because the article of impeachment alleged a violation of Virginia law, Randolph facetiously remarked that we "might as well adduce the law in Turkey."[220] Charles Lee's response drew a very serious distinction between courts of impeachment and courts of appeals.

Lee argued that a showing that Chase had followed the law of Maryland demonstrated that Chase had acted in accordance with what he *believed* constituted the correct procedure. Lee assumed that "[t]his high Court which I have the honor of addressing is . . . a court of impeachment, and not of errors."[221] Granting that to be true, "[w]hen an error is alleged to have been committed by the judge, shall we be denied the right of adducing evidence to show, that if it was an error, it was common to the judicial tribunals before he was raised to the high place he now holds; that during the whole course of his professional career he retained the opinion, now charged as an error?"[222] More basically, "[i]f the conduct of the judge shall be deemed an error, will not this be considered as some excuse?"[223] The debate over the admissibility of Maryland law allowed Lee to stress the greater significance of maintaining the bright line between a court of impeachment that removes judges for violative conduct and courts of appeals that correct the very errors now complained of by the Managers. Randolph, caught off guard by Lee's argument, annoyed that he had allowed Lee to hijack the debate, and sorry he had objected to the evidence at all, consented to the admission of the evidence, stipulating that "the practice was such as [the defense] stated it to be in Maryland.[224]

On February 14, the Managers began calling witnesses to testify to Chase's conduct at the grand jury at New Castle, Delaware. To establish that Chase had abused his office by using the grand jury to engage in a witch hunt for seditious printers, the Managers called District Attorney George Read, James Lea, one of the grand jurors, and John Crow, a witness to the grand jury charge.[225] The Managers believed that the New Castle grand jury charge showed Chase's

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actions. *See id.* at 204-05.

220. *Id.* at 283.

221. *Id.*

222. *Id.*

223. *Id.*

224. *See id.* (Randolph sarcastically noted that "had he known that his remark would have occasioned so long an argument, he would not have said a word.").

225. *See id.* at 227-31 (testimonies of Read, Lea, and Crow).

relentless efforts to crush the Democratic Press and his willingness to improperly use his office to accomplish it.

The witnesses' testimony established little beyond the bare facts. Their testimony seemed so poor, that the defense barely cross-examined any of the witnesses, save for a few questions to James Lea, who admitted that the first day Chase held the jury it was for "a very short time – perhaps an hour."[226] Almost abandoned by the Managers themselves, the defense spent very little time refuting the article's allegations. Aside from injecting a little more star power by calling to the stand Gunning Bedford, Jr., Chase's fellow judge at New Castle and one of the signers of the Constitution from Delaware, the defense established little beyond the fact that Chase had conferred with Bedford before deciding not to release the jury, thereby bolstering Chase's argument that any mistakes he made were unintentional.[227]

For the eighth and final article of impeachment, Randolph and the Managers principally relied upon the testimonies of John Montgomery and John T. Mason, both of whom had been spectators during Chase's Baltimore charge.[228] Their combined testimony portrayed Chase as an unabashed partisan who used the bench as a bully pulpit to assail the Jefferson Administration. They claimed that Chase denounced the democratic administration as "weak, relaxed, and inadequate to the duties devolved on it," and that he had criticized the administration's "violent attack on the independence of the Judiciary."[229] They also claimed that Chase attacked Jefferson personally, accusing him of desiring "unfairly-acquired power."[230] According to Montgomery, Chase then went on to ridicule the Administration for its support of a pending universal suffrage bill and various other alterations to the state constitution and that Chase had beseeched the grand jury "to pause, to reflect, and when they returned to their homes, to use their endeavors to prevent these impending evils, and save their country,"[231] hoping to effect the defeat of these measures.

The Managers believed the Baltimore charge exposed judicial independence as nothing more than a euphemism for unchecked judicial partisanship and portrayed Chase as the ardent defender of judicial independence only because it enabled him to launch philippics from the bench without suffering any repercussions.

226. *Id.* at 230.
227. *See id.* at 284-86.
228. *See id.* at 231, 233.
229. *Id.* at 231-32.
230. *Id.* at 231.
231. *Id.* at 232.

Randolph attempted to persuade Democrats that limiting the scope of impeachment would impair Congress's ability to keep the federal judiciary in line with the will of the people and to punish judges like Chase who dared to challenge that will. [232]

Harper set the stage for the defense's witnesses by recalling to the stand the Managers' key witness, John Montgomery. In a tense moment, Harper flatly accused Montgomery of distorting facts "in his strong anxiety to get Judge Chase impeached" and stated that Montgomery had "remembered things which nobody else remembers, and has heard things which nobody else heard."[233] Randolph, defending his witness, fired back at Harper, "I have no objection to the counsel impugning the veracity of one witness by the evidence of another . . . but I think they take an improper liberty when they undertake to say . . . that what is deposed by a witness never passed."[234] Although Burr overruled the objection, Harper, ever mindful of his audience, tempered his earlier remarks. "[I]t is not my intention to say or to prove that the witness, when he deposed to certain facts, knew that they had not passed. I mean only to impeach his correctness, and to infer that, as he was angry, he gave to what he heard the coloring of his own feelings."[235]

Chase's defense to Article VIII constituted a sharp divergence from his defense to the other articles. For the other seven articles of impeachment, Chase and his counsel had endeavored to prove first and foremost that Chase had been following precedent and judicial norms. In Chase's answer, however, the judge had conceded that his conduct at Baltimore might now be construed as inappropriate.[236] As a result, the basis of his defense to Article VIII rested on discrediting Montgomery and proving that he should not be removed for what amounted to accepted judicial practice since the American Revolution.[237]

To discredit Montgomery, the defense called James Boyd and William McMechin, two spectators to Chase's grand jury charge. Boyd recalled that "I thought at the time the political part of the charge would bear hard upon [Chase], because I observed Mr. Montgomery paying particular attention to the address of the judge, which was an animadversion upon the measures Mr. Montgomery

232. *Id.* at 642-45.

233. *Id.* at 291.

234. *Id.*

235. *Id.* at 292.

236. *See id.* at 146 (detailing Chase's admission in his answer that "the expression of political opinions by a judge, in his charge to a grand jury, to be improper and dangerous").

237. *Id.* at 146-47.

had been anxious to carry in the Legislature of Maryland."[238] McMechin stated the point more bluntly. "About five minutes after the charge was delivered I left the court room: going down stairs I met Mr. Montgomery . . . . After a few observations, he said it was such a one as Mr. Chase would be impeached for."[239] The statement did not surprise McMechin, as "I thought [Mr. Montgomery] felt hurt on the subject of the alterations in the Judiciary of Maryland, which had been much talked of, and for which he had been an advocate in the State Legislature."[240]

In addition, several witnesses, including Chase's fellow judge at Baltimore, James Winchester, a United States District Court Judge for the District of Maryland, testified that Chase had not made any allusion to the Administration at all.[241] The testimony directly contradicted that offered by Montgomery and forced the Managers' witness to retake the stand to clarify. Although Montgomery testified that the remarks he attributed to Chase regarding the weakness of the Administration were not direct quotes, but rather, had been gleaned from Chase's tone and the context of the charge, Montgomery appeared as if he had tried to deliberately mislead the Senate. [242]

The testimony surrounding the eighth article further reflects the changing tide of disapproval attached to political grand jury charges, especially by members of the legal community. Judge Winchester admitted that he "regretted [the charge] as imprudent [and] felt convinced that it would be complained of," but nonetheless believed Chase should not be impeached.[243] Spectator and lawyer John Purviance agreed. Although Purviance believed "these kinds of charges ought not to be delivered from the bench," he "did not observe that anything which had fallen was of a nature to warrant an impeachment."[244]

Despite the growing criticism of the political grand jury, Harper endeavored to "show that it is the custom of the courts in this country to deliver political charges to the grand juries," but quickly added that it was "a practice which I am ready to admit is indiscreet."[245] Harper engaged in a short, and by no means exhaustive, historical survey of the political charge, intended to persuade the Senate that the political grand jury charge "did not originate with the present

238. *Id.* at 301-02.
239. *Id.* at 302.
240. *Id.* at 305.
241. *Id.* at 295.
242. *Id.* at 291.
243. *Id.* at 294.
244. *Id.* at 299.
245. *Id.* at 305.

respondent, but that he followed the track which had been a long time marked out."[246] Harper cited three political charges and a 1785 decision by the Executive Council of Pennsylvania which actually recommended that judges of the Pennsylvania Supreme Court include political subjects in their grand jury charges.[247] Harper concluded that Chase had merely conformed to "the general notoriety of the practice in this country for thirty years past, to enforce from the bench political principles, and to defend political measures; a practice which we contend universally prevailed."[248] Would the Senate now pass judgment on a judge for upholding a practice as old as the republic itself?[249]

With the defense's last witness called, the Managers and Chase's defense team readied themselves for closing arguments. The arguments were each side's last chance to appeal to the members of the Senate and to convince them of the propriety of their interpretations of the Constitution's provisions. On February 20, 1805, amid a packed gallery of eager spectators, assembled to hear the great orators of their time debate the power and limitations of the House of Representatives to impeach a United States Supreme Court Justice, Peter Early rose to deliver the first of the Managers' closing remarks.[250]

E. Closing Arguments

Closing arguments provide an opportunity for each side to summarize salient facts uncovered during the witnesses' testimony and to place those facts in the context of a particular legal theory. Put more eloquently, "[t]he closing argument is the lawyer's final opportunity to give perspective, meaning, and context to the evidence introduced throughout a lengthy trial. It is the last chance for the lawyer to forcefully communicate his position to the jury, to convince

246. *Id.*

247. *Id.*

248. *Id.*

249. Some scholars have mischaracterized Harper's attempts to place Chase's conduct in the context of a long-standing practice as an attempt to justify the politicization of the judiciary. *See, e.g.*, WHITTINGTON, *supra* note 121, at 47-48 (arguing that Chase's defense counsel "sought positively to defend the justice's actions" and that they wavered in their responses to Chase's charge of judicial partisanship, "variously denying it as untrue, dismissing it as trivial, and defending it as appropriate" and that "[i]n the end, the justice's allies seemed to claim that judicial partisanship was tolerable"). In fact, the defense's position was quite the opposite. Although Chase and his defense counsel argued that Chase should not be punished for something accepted at the time the act was committed, not one of Chase's counsel, including Chase, defended the political judiciary or argued that judicial partisanship was a necessary evil.

250. 14 ANNALS OF CONG. 312 (1805).

them why his version of the 'truth' is correct."[251]

1. The Managers Begin: The First Three Speakers

Peter Early, George Washington Campbell, and Chris Clark maintained on behalf of the Managers that impeachable offenses do not have to be indictable offenses and attacked Chase for his political grand jury charge. Early and Campbell also emphasized that partisanship and malicious motives had lay at the basis of all of Chase's acts throughout both trials and both grand jury proceedings.

Early and Campbell each addressed six out of the eight articles of impeachment, but Early mainly summarized the Managers' witnesses' testimony. Recounting Chase's numerous instances of alleged misconduct, Early rebuffed claims that the Managers had failed to convincingly prove that Chase's errors were malicious and not errors of judgment. Early contended that the only plausible explanation for Chase's errors, given the judge's education and experience, was that Chase had allowed his "thirst for punishment" to interfere with his impartial administration of justice.[252] "[S]urely we shall not be asked for proofs of corrupt intent . . . . In such a case as the one now under consideration, the answer is, that the criminal intent is apparent upon the face of the act."[253]

Campbell elaborated on the prosecution's legal theories and stressed the importance of an *apolitical* judiciary. Arguing that Chase had misused the bench to spread his own political gospel, Campbell believed Chase's "judicial authority was prostituted to party purposes, and the fountains of justice were corrupted by this poisonous spirit of persecution, that seemed determined to bear down all opposition in order to succeed in a favorite object."[254] Although Manasseh Cutler found Campbell's speech "long and tedious," it held important implications for judicial independence.[255] Campbell argued that political grand jury charges were inconsistent with ideals regarding judicial independence because they clashed with notions of impartiality required of judges. Political grand jury charges conflated the political branches with the judiciary and destroyed confidence that the "law will be administered to [defendants of any political party] with justice, impartiality, and in mercy."[256] Although Campbell's speech was calculated to move senators to convict Chase, his speech also helped to redefine the very

251. MICHAEL S. LIEF, H. MITCHELL CALDWELL & BENJAMIN BYCEL, LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW 11 (1998).

252. 14 ANNALS OF CONG. 328 (1805).

253. *Id.* at 326.

254. *Id.* at 353.

255. CUTLER, *supra* note 15, at 183.

256. 14 ANNALS OF CONG. 353 (1805).

object he hoped to destroy: judicial independence.

Almost as important as what Early and Campbell stated in their summations is what they did not say. Both Managers declined to address the fifth and sixth articles of impeachment. In fact, of the six closing arguments delivered by the prosecution, only Chris Clark addressed these articles at all and did so in very short shrift.

In Clark's brief argument, he maintained only that the statutory language "to issue a summons or *other proper process*" seized upon by the defense did not connote judicial discretion but rather, referred to a specific class of cases where a capias is required.[257] According to Clark, since Callender's case did not fall into that class of cases, Chase had erred in issuing the capias.[258] Clark also made the extremely dubious claim that it was irrelevant that Callender's counsel had failed to raise an objection to the capias at the time of the trial, because technically, they were not retained as Callender's counsel until Callender appeared in court.[259] Regarding the sixth article, Clark flatly asserted that Chase had insisted on trying Callender in the same term that the grand jury handed down the indictment for the sole purpose "that this was one of the means [Chase] had determined to pursue in order to convict Callender."[260] Clark's justifications for the fifth and sixth articles were so feeble that Adams remarked that they "seem to be abandoned by the prosecutors themselves."[261]

2. The Defense Closes

Following Clark's discussion of the fifth and sixth articles, the defense began their summation. In its closing arguments, Chase's defense team not only addressed judicial independence but many of the hot button legal issues of the day including judicial review, the division of power between judge and jury to decide the law, and the proper role of precedent.

Joseph Hopkinson opened for the defense by arguing for a limited definition of impeachment. Hopkinson argued that the constitutional term "high crimes and misdemeanors" did not extend to "paltry errors and indiscretions," and maintained that the Senate lacked the power "to fix a standard of politeness in a judge, and mark the precincts of judicial decorum."[262] Assailing the Managers' position that Chase's political comments to the Baltimore grand jury

257. *Id.* at 354 (emphasis added).
258. *Id.*
259. *Id.*
260. *Id.*
261. ADAMS, *supra* note 12, at 356.
262. *Id.* at 359-60.

constituted an impeachable offense, Hopkinson accused the Managers of using Chase's conduct to expand Congress's authority to "create offences at their will and pleasure, and declare that to be a crime in 1804, which was an indiscretion or pardonable error, or perhaps an approved proceeding in 1800."[263] Chase's conviction would enable Congress to remove a judge for purely political reasons.

After finishing his preliminary remarks, Hopkinson moved to his primary argument, refuting the allegations contained in Article I of the impeachment. Plumer hailed Hopkinson's speech as "one of the most able arguments I ever heard delivered on any occasion."[264]

Hopkinson supported Chase's decision to reject the federal statutes Fries's counsel tried to introduce as evidence of Congress's constitutional interpretation. Insisting that the judiciary's interpretation of a law is paramount to any interpretation assigned to the law by any other branch of government, Hopkinson delivered a short lecture reminiscent of Marshall's opinion in *Marbury v. Madison*. Hopkinson stated that although Congress may construe a particular legal provision, such construction ultimately has no bearing on the legal interpretation assigned a provision by the courts. "It is in vain we have an instrument paramount to ordinary legislation, if there is no authority to check encroachments upon it," he began. [265] But that task cannot belong to the Legislature, "the very branch of Government most controlled by the Constitution, and intended to be so."[266] If Congress is allowed to "assume the wide and unlimited right of construction, the Constitution will sink at once into a dead and worthless letter."[267]

The answer, Hopkinson concluded, is to vest the power in the judicial branch as the Framers had done. Boldly linking the controversial concept of judicial review to judicial independence, Hopkinson argued, "The construction of the Constitution, in common with every other law, *belongs exclusively to the Judiciary, as best qualified both from its permanency and independence* as well as from legal learning to exercise so important a right."[268]

Stressing the need for judges to impartially interpret and consistently apply the law across political administrations and generations, Hopkinson argued that if judges are forced to yield to constitutional constructions articulated by Congress, the law might be "moulded into various fantastic shapes at the will of the

263. *Id.* at 361.
264. PLUMER, *supra* note 28, at 297.
265. 14 ANNALS OF CONG. 382 (1805).
266. *Id.*
267. *Id.*
268. *Id.* at 382 (emphasis added).

Legislature, and purporting one thing today and another to-morrow, and nothing at last."[269] A written constitution necessitates "a power existing somewhere to judge of the Constitution, and of the conformity or non-conformity of laws to the provisions of it," and no branch appeared better suited for that task than the judiciary.[270] Such a triumphant endorsement of judicial review could have been penned by the Chief Justice himself, declaring it the "province and duty of the judicial department to say what the law is."[271]

Following Hopkinson, Philip Barton Key, a successful lawyer of the time often considered to be among the best orators of the period, addressed the second, third, and fourth articles of impeachment. Despite suffering from a severe cold, Key managed to deliver a three and a half hour speech defending Chase.[272]

Although mostly technical and primarily aimed to prove that Chase had not acted with malice during the Callender trial, Key emphasized the defense's bedrock principle that legal error, alone, cannot be sufficient to remove a judge. "The truth," Key insisted, "is that no judge is liable for an error of judgment. I apprehend this is conceded by the article itself, which states a criminal intent."[273] The Managers had suggested that no man of Chase's learning and station could commit such errors, but Key masterfully turned the argument on its head. "[N]o inference of corruption can be drawn from an error in law; but that, on the contrary, particularly if it be committed by a man of acknowledged talents and unimpeached integrity, it is to be considered at best but as a mistake."[274]

The task of skewering the fifth article fell to Charles Lee. Although Lee attempted to prove that Chase's conduct as laid out in the fifth and sixth articles had been correct, his more important historical contribution lay in exposing the latent effect of Article V's broad language. "The article may perhaps be understood to produce an important inquiry: the inquiry how far the power of impeachment possessed by the House of Representatives shall extend."[275] Taking a narrowed interpretation to Article I, Section 2 of the Constitution, Lee cautioned the Senate against granting Congress the power to remove a judge for technical legal errors.[276] "Although the Constitution declares that 'the House of Representatives shall have

269. *Id.*

270. *Id.*

271. Marbury v. Madison, 5 U.S 137, 177 (1803).

272. 14 ANNALS OF CONG. 394 (1805).

273. *Id.* at 399.

274. *Id.* at 399-400.

275. *Id.* at 415.

276. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.").

the sole power of impeachment,' yet I trust there is some limit to this power, and that a judge cannot be impeached for a mere legal error in his judicial conduct, when no crime is imputed to him."[277] Exalting the virtues of an independent judiciary, Lee reminded the senators that they were "about to set an example to the ordinary tribunals of justice in every corner of the United States. . . . An upright and independent judiciary is all-important in society. Let your example be as bright in its justice as it will be extensive in its influence."[278]

The next day, February 23, 1805, Luther Martin rose to speak on Chase's behalf. Highly anticipated, "the Senate Chamber could not contain even a small part of the throng that sought the Capitol to hear the celebrated lawyer."[279] Exhibiting eloquence, humor, and wit, Martin elaborated upon the defense's legal theory surrounding the first six articles of impeachment. In the clearest terms yet, Martin denounced the Democratic position that a judge might be impeached for any reason, or worse, for no reason at all, and accused the Managers of trying to unconstitutionally expand the House of Representatives' power of impeachment to include the "right to impeach *every citizen indiscriminately*."[280]

Martin chastised the Managers for attempting to transform innocent conduct into criminal acts: "Impeachment and conviction cannot change the law, and make that punishable which was not before criminal."[281] Yet, if the House of Representatives and Senate possess the combined right to impeach and remove judges for innocent acts, "you leave your judges, and all your other officers, at the mercy of the prevailing party."[282]

Martin recognized the close relationship between what constitutes an impeachable offense and preserving the independent judiciary. The position asserted by the Managers granted the House of Representatives the right to impeach judges merely because a majority disagrees with them. "Must an officer," Martin asked defiantly,

> ever be in favor of the ruling party, whether wrong or right? Or, looking forward to the triumph of the minority, must he, however improper their views, act with them . . . ? Shall, then, a judge, by honestly performing his duty, and very possibly thereby offending both parties, be made the victim of one or the other, or perhaps of

277. 14 ANNALS OF CONG. 415 (1805).

278. *Id.* at 428-29.

279. BEVERIDGE, *supra* note 8, at 201.

280. 14 ANNALS OF CONG. 430 (1805) (emphasis in original).

281. *Id.* at 433.

282. *Id.* at 434.

each, as they have power?[283]

"No, sir," he triumphantly announced. "I conceive that a judge should always consider himself safe while he violates no law, while he conscientiously discharges his duty, whomever he may displease thereby."[284]

The inevitable "conflict of parties" inherent in republican governments necessitates a non-partisan branch of government that would ensure the consistent application of the rule of law.[285] Even the Managers, in their discussion of Chase's political grand jury charge, had suggested as much. If the Senate believed at all in the sanctity of judicial independence, Martin argued, it must reject the Managers' arguments favoring an unlimited congressional power of impeachment.

Having addressed judicial independence, Martin moved to a discussion of what modern scholars term jury nullification. Doug Linder explains that "[j]ury nullification occurs when a jury returns a verdict of 'Not Guilty' despite its belief that the defendant is guilty of the violation charged," and that "[t]he jury in effect *nullifies* a law that it believes is either immoral or wrongly applied to the defendant whose fate they [*sic*] are charged with deciding."[286]

Articles I and IV contained accusations that Chase had usurped the jury's right to interpret and decide questions of law. Martin feared that granting juries the authority to defy judges would invite jurors to use their individual "passions, prejudices, or ignorance" to decide cases. This could threaten the very legitimacy of the legal system by allowing juries in factually similar cases to deliver vastly different results, thereby undermining the fundamental principle that like cases must be treated alike.[287]

The precise issue, as Martin saw it, was not whether juries have the *power* to nullify a law but whether they have the *right*. A man might have the power to knock another man down, Martin analogized, but few would argue that a man has the right.[288] "Whether a law exists . . . whether a law has been repealed, whether a law has become obsolete or is in force? The decision of these questions hath always been allowed the exclusive right of the court. The power of the court to decide exclusively upon these questions

283. *Id.*

284. *Id.*

285. *Id.*

286. Doug Linder, Jury Nullification, http://www.law.umkc.edu/faculty/projects/ftrials/zenger/nullification.html (last visited Mar. 9, 2010) (emphasis in original).

287. 14 ANNALS OF CONG. 439-40 (1805).

288. *Id.* at 440.

hath never been before controverted."[289] Juries might have the power to disregard a court's legal instruction, but they do not have the right.

Yet the Managers contended that juries could refuse to follow the law as announced by the Court, and would grant juries the same right to negate federal laws as the federal judiciary. Exasperated, Martin exclaimed,

> It has indeed been seriously questioned, and that by gentlemen of great abilities, whether even the Judiciary have a right to declare a law, passed by the Legislature, to be contrary to the Constitution and, therefore, void! I shall not enter into an examination of that question, but I have no hesitation in saying that a jury have no such right, and that if they had the right, we might as well be without a Constitution.[290]

Harper, the final speaker for the defense, echoed Martin's sentiments regarding jury nullification. The Managers, said Harper, had twisted and contorted the jury's right to decide questions of law. "It is constantly asserted that the jury are to decide the law and the fact in criminal cases; and this is correct, when properly explained; but taken in its literal and unqualified sense, it is contrary to every principle of law, and every dictate of common sense."[291]

Clearly delineating between the rights of judges and juries, Harper announced that "[i]t is the province of the court to expound and declare the law . . . . To apply the law to each particular case; to decide whether the facts proved in any case bring it within the general rule of law, is the province of the jury."[292] As a result, a jury is "bound by the general principle of law as *declared by the court*. Their duty, *and their sole duty*, consists in applying it to the particular case. In this sense, and in this alone, are they judges of the law as well as of the fact."[293] A jury may find that the particular facts adduced by the prosecution fail to sustain an indictment under a particular statute, "[b]ut it has never been entered into the head of any man to suppose that the jury in such a case has a right to declare that the statute itself is not a law of the land–has been repealed, has expired, or does not create any offence. All these are questions of law, which come within the exclusive province of the court."[294]

Harper ended his discussion of jury nullification by tying it to the same concerns that demand judicial independence. Judicial

289. *Id.* at 470.
290. *Id.*
291. *Id.* at 519.
292. *Id.*
293. *Id.* (emphasis added).
294. *Id.* at 519-20.

independence is essential to republican government because the meaning of the law must remain the same regardless of what party commands a congressional majority. But the Managers' position on jury nullification would defeat that very aim. The effect would be the same as the one urged for by the Managers regarding Chase's refusal to allow Fries's counsel to argue against the settled law of treason. "If succeeding courts and juries are not to be bound by precedents established by their predecessors, then will everything be treason when a man is tried by his foes, and nothing when he is tried by his friends?"[295]

The security that comes from knowing that the law will mean tomorrow what it means today, the importance of precedent, requires that "[r]ules of law, once established, must be adhered to."[296] The Managers' position would allow judge and jury to simply ignore settled law and "to declare that to be law in each particular case, which the passions, the prejudices, or the political views of the moment may dictate."[297] If such principles take hold, Harper warned, "then indeed we have grasped a shadow, while the substance has escaped from us; and the blood of our fathers has in vain bedewed their native soil."[298]

Harper devoted a large portion of his remarks to criticizing an unlimited right to impeach judges. Harper denounced the Managers for asserting a principle "as novel in our laws and jurisprudence as it is subversive of the Constitutional independence of the judicial department."[299] The Managers had argued that impeachment is "but an inquiry in the nature of an inquest of office, to ascertain whether a person holding an office [may] be properly qualified for his situation; or, whether it may not be expedient to remove him."[300] Harper vehemently disagreed.

If the conviction of a judge on impeachment was, as the Managers claimed, based only on "some reason of State policy or expediency," why would the Managers even bother with "the solemn mockery of articles alleging high crimes and misdemeanors" or "a trial conducted in all the usual forms?"[301] After all, Harper wondered aloud, "[w]hy not settle this question of expediency, as all other questions of expediency are settled, by a reference to general political considerations, and in the usual mode of political discussion?"[302]

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295. *Id.* at 520.
296. *Id.* at 521.
297. *Id.*
298. *Id.*
299. *Id.* at 504.
300. *Id.*
301. *Id.*
302. *Id.*

Harper answered his own question:

> No! Mr. President! This principle of the honorable Managers, so novel and so alarming; this desperate expedient, resorted to as the last and only prop of a case, which the honorable gentlemen feel to be unsupported by law or evidence; this forlorn hope of the prosecution . . . will not, cannot avail. Everything by which we are surrounded informs us that we are in a court of law.[303]

How, then, is this court of law to decide Chase's guilt or innocence? The senators must rely on "no newly discovered notions of political expediency, or State policy, but on the well-settled and well known principles of law and the Constitution."[304]

But what, then, is sufficient to constitute an impeachable offense? Without ceding any ground, Harper contended that it is not necessary for the defense to insist that an impeachable offense must also be indictable. "I might safely admit the contrary, though I do not admit it," Harper began.[305] "But it is not necessary to go so far; and I can suppose cases where a judge ought to be impeached, for acts which I am not prepared to declare indictable."[306] Among such offenses, Harper counted a judge's refusal to hold court or to habitually sit for such a short time that it is impossible to dispatch business because they constitute "a plain and direct violation of the law, which commands him to hold courts a reasonable time for the despatch [sic] of business; and of his oath, which binds him to discharge faithfully and diligently the duties of his office."[307] Harper expressed "no hesitation" in saying that a judge should be removed for such conduct because, unlike legal errors or errors of judgment, these are acts of "culpable omission."[308]

Albert Beveridge, a biographer of John Marshall, criticized Harper's concession that some impeachable offenses might not be indictable and accused Harper of nearly "making a fatal admission."[309] Likewise, Eleanore Bushnell found Harper's statements "confusing," and argued that Harper's "observation advances the broadest description of impeachment made by anyone concerned with the subject."[310] Bushnell goes on to criticize Harper for maintaining that habitual drunkenness is an indictable offense.[311] Such criticism is misplaced. The Chase trial did not occur in a

303. *Id.* at 504-05.
304. *Id.* at 505.
305. *Id.* at 507.
306. *Id.*
307. *Id.*
308. *Id.*
309. BEVERIDGE, *supra* note 8, at 206.
310. BUSHNELL, *supra* note 140, at 80-81.
311. *Id.* at 80.

vacuum, and many moderate Democrats remained wary of a theory of impeachment that would allow a judge to abuse his office in the way Harper described and nonetheless escape punishment because no statute had been violated. Harper's statements are more properly viewed as an attempt to ease moderates' fears that adopting the defense's position would mean they would be unable to remove judges who knowingly abuse their office or positions without violating criminal law. As for his comments regarding habitual drunkenness, Harper was too shrewd an attorney to argue to a Senate that included many members who less than a year before had convicted Pickering that they had done so incorrectly. As a result, the unenviable task of justifying the Pickering impeachment while distinguishing Chase's case fell to Harper. Harper's comments are not "confusing" but a recognition of the political climate he faced and an attempt to explain to his audience why a vote against Chase's conviction was not inconsistent with their vote to convict Pickering.[312]

Lastly, Bushnell isolates a single line from Harper's speech, that drunkenness is an "offence[ ] in the sight of God and man, definite in their nature, capable of precise proof and of a clear defense," and extrapolates that "Harper produced a final manifestation of impeachable conduct: acting in a manner offensive to God and man."[313] Bushnell incorrectly focuses only on the first part of Harper's statement and ignores the explanatory phrase in the remainder of the statement. The requirement that the offense be "definite in their nature, capable of precise proof and of a clear defense," seems aimed at the Managers' position that political expediency might justify removal of a judge.[314] Political retaliation against a judge, however, would fail to satisfy Harper's test, given that the crime would be defined by whatever party held a congressional majority. Given what we know about the defense's concerns regarding the Managers' case, this seems a far more plausible explanation than the temporary insanity some historians have tried to lay on Harper. This explanation also fits with Harper's well-deserved reputation as a lawyer and orator. It is unlikely that he would have made an argument, the consequences of which he did not fully contemplate, in one of the most important speeches of his career in a trial for which he had been preparing for months. Congress, Harper argued, does not possess an unlimited power of impeachment.[315]

312. *Id.* at 81.

313. *Id.* at 80-81.

314. *Id.* at 52-53.

315. *See* 14 ANNALS OF CONG. 361 (1805) (asking if "in the exercise of their power of impeachment" a Congress may "create crimes and inflict . . . penalties on actions never

It also remains unlikely that Harper would have made such statements regarding the scope of impeachment without at least first consulting the other members of Chase's defense team, and although often overlooked by scholars, Martin's comments seem to support that theory. In his closing argument, Martin stated "that a judge should always consider himself safe while he violates no law, *while he conscientiously discharges his duty*, whomever he may displease thereby."[316] In far vaguer terms than Harper, Martin's statement implies that a judge may be impeached when he violates a law *or* when he has failed to conscientiously discharge his duty.

In light of Harper's comments, Martin's distinction is an important one. A legal violation is consistent with the majority of the defense's statements arguing that impeachment requires an indictable offense. Impeaching a judge for failing to conscientiously discharge his duty, however, would seem to come closer to Harper's examples of abuses of office such as a judge's refusal to hold court. Although Martin does not elaborate on the statement, given Harper's discussion, it is highly possible that Martin's statement represents a deliberate intent to expand the scope of impeachment beyond indictable offenses without conceding that *any* reason would justify impeachment.

Despite Harper and Martin's comments regarding non-indictable impeachable offenses, many historians have echoed Beveridge's conclusion that the Chase trial is of limited precedential value because in the years since Chase's acquittal, federal judges have been impeached for the "willful and persistent failure to perform his duties," and not only for criminal conduct.[317]

Jane Shaffer Elsmere, for example, has referred to the removal of Judge Robert W. Archbald in 1913. Archbald had used his office to secure lucrative business deals for himself from parties appearing before him.[318] Although Archbald had not committed an indictable offense, the House impeached him and the Senate convicted him because "he had violated the trust placed in him as a judicial officer."[319] Under Harper or Martin's test, however, Archbald's flagrant abuse of his office warranted his removal. In this light, Elsmere is incorrect to assert that "the Archbald conviction broadened the scope of the interpretation of high crimes and misdemeanors and placed it nearer the contention of John Randolph

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before suspected to be criminal").

316. *Id.* at 434 (emphasis added).

317. Blackmar, *supra* note 8, at 187; *see also* MALONE, *supra* note 10, at 478-80.

318. ELSMERE, *supra* note 6, at 305.

319. *Id.*

in the Chase trial."[320] Rather, Archbald's removal affirms the principles Chase's defense team articulated during the impeachment trial and is consistent with the defense's insistence that legal error and political expediency do not rise to the level of a high crime or misdemeanor.

Much of the remainder of Harper's remarks pertained to technical arguments about the articles of impeachment, before he reached his discussion of Article VIII. "Such conduct may perhaps be ill-judged, indiscreet, or ill-timed. I am ready to admit that it is so; for I am one of those who have always thought that political subjects ought never to be mentioned in courts of justice."[321] However unpalatable the Senate may find Chase's acts now, Harper beseeched his audience to remember, "if the respondent be condemned to punishment for an act, which far from being forbidden by any law of the land, is sanctioned by the custom of this country for more than twenty years past, then we have the form of free government, but the substance of despotism."[322]

Harper assured his moderate brethren that Chase's acquittal would not be looked upon as sanctioning Chase's political harangues but would instead recognize that "the prevalence of this custom for twenty years, the countenance which it received from some governmental authorities, and the acquiescence of all, are sufficient evidence of its legality."[323] "[R]emember that posterity will sit in judgment on your conduct; that her decision will be pronounced on the testimony of impartial history; and that from her awful sentence there lies no appeal."[324] As Harper's words reverberated through the Senate chamber, they must have had special resonance with the moderate Israel Smith.

3. The Managers Close: The Final Three Speakers

From February 26-27, the three remaining Managers – Nicholson, Rodney, and Randolph – took to the Senate floor in a final appeal for Chase's removal.[325] Unlike the earlier speakers, the remaining Managers attacked judicial independence as a pernicious institution threatening American ideals. Nicholson regarded Martin and Harper's assertion that constantly shifting majorities require an independent judiciary with the utmost contempt. "Are there then no inducements for a judge to swerve from his duty? Has he no feelings

320. *Id.*

321. 14 ANNALS OF CONG. 556 (1805).

322. *Id.* at 557.

323. *Id.* at 558.

324. *Id.* at 559.

325. *See id.* at 559-82 (Nicholson), 583-641 (Rodney), 641-64 (Randolph).

to gratify, and is it impossible for him to become a partisan?"[326] Nicholson asked. Even an "independent" judge may, in hopes of occupying a higher station of political importance, be induced to "bend to the ruling party."[327] An independent judiciary, therefore, does not protect against the evils warned of by the defense. If the Senate hopes to crush such ill incentives, they must teach a lesson to judges who dare oppose the majority's will and "not only remove Judge Chase from the high office which he now fills, but that by your judgment will forever hereafter disqualify him from holding any office of profit or trust under the Government of the United States."[328]

Rodney, the strongest orator for the Managers, seconded Nicholson, arguing that truly independent judges exist only in the American imagination. Rodney pointed out that judges are often promoted by the political branches and have "preached political sermons from the bench, in which they have joined chorus with the anonymous scribblers of the day and infuriate instruments of faction."[329]

The skeptical Rodney viewed judicial independence as countermajoritarian and as a threat to core American values. Rodney accused Chase and his defense team of merely paying lip service to "the principle that the will of the people should rule, because, forsooth, they dare not dispute it."[330] In truth, Rodney said, Chase only believed in the virtue of the majority's will as long as it advanced his own views.[331] Obstructing the will of the majority is the same as obstructing the will of the American people, and Rodney accused the defense of placing a higher value on judicial independence than on the people's voice. When the voice of the people ceases to support the Federalists' point of view, they claim that "it is no longer the voice of the people, but the clamor of faction."[332] If the people decide they are unhappy with their current judges, the defense transforms their voice into "political jargon, grating to the ears of those who claim the exclusive right, as if anointed with holy oil, of protecting the people from the violence of their own passions, or, in plain language, saving them from themselves."[333]

According to Rodney, the defense's proposed cure for political

326. *Id.* at 582.
327. *Id.*
328. *Id.*
329. *Id.* at 587.
330. *Id.* at 588.
331. *Id.*
332. *Id.*
333. *Id.*

bias was worse than the disease. There is no need to fear a judiciary *dependent* on Congress, for Congress is subject to the people's will. But an independent judiciary answers to no one. "Give any human being judicial power for life, and annex to the exercise of it the kingly maxim 'that he can do no wrong,' you may call him a judge or justice, no matter what is the appellation, and you transform him into a despot . . . ."[334] For Rodney, the line separating judicial independence and judicial tyranny was an imaginary one.

Even Rodney, however, retreated from the unlimited exercise of impeachment articulated by Giles and conceded that "if this court be satisfied that [Chase] acted innocently wrong, that it was an honest error of judgment which led him astray, he will no doubt stand acquitted."[335] Far from Harper's admission that a judge could be impeached for non-indictable crimes, Rodney's statements may well have proved a fatal admission for the prosecution.

Rodney levied his bitterest invective against Chase's political grand jury charge, which comprised "one of the strongest articles of impeachment."[336] Because of the relatively low value Rodney placed on judicial independence, the idea that Chase could rage against the Democratic agenda without repercussion infuriated him. "Every reflecting man must be decidedly opposed to the idea of blending political discussion, with the legal observations which ought to proceed from the bench. A party harangue little comports with the temperate and learned charges to be delivered by the president of a court."[337] Rodney took direct aim at Harper's assurance that Chase's acquittal would not signal countenance of his grand jury charges with a rhetorical charge of his own. An acquittal by the Senate would send the unqualified message that "[t]hey sanction every act which [Chase] has committed, and proclaim them to the world as examples which ought to be followed."[338]

As the final speaker of the trial, it fell to Randolph to close for the Managers. Randolph revisited each of the individual articles of impeachment, but he did so without the polish and humor of Martin or the legal skills of Harper. Although Randolph added very little substance to the Managers' overall case – a fact worsened by Randolph's misfortune of having misplaced his notes – he managed a forceful counterattack against the defense's theory of jury nullification. Randolph argued that there could be no "greater absurdity" than Martin's dichotomy distinguishing between a jury's

334. *Id.*
335. *Id.* at 601.
336. *Id.* at 638.
337. *Id.*
338. *Id.* at 641.

power and a jury's right to do something.[339] Mocking the defense, Randolph argued that the defense, in bestowing upon the courts a "more than Papal infallibility – the exclusive exposition and construction of the Constitution," told him, as a juror, "to surrender into their hands my conscience and my understanding; that, as levying of war is treason, so is the picking up of a pin a levying of war; that I, an unlearned layman, must not presume to expound the holy scripture of the Constitution, but must leave that to the elect."[340] Randolph stated flatly, "I deny the gentleman's law; and assert that, as an American citizen, I would refuse to be bound by it."[341] Together with Martin and Harper's remarks, these arguments helped frame the jury nullification debate and the question of the allocation of power between judges and juries.

The reception of Randolph's remarks was unsurprisingly influenced by party affiliation. Federalists ridiculed Randolph's performance, describing him as a grotesque figure on the Senate floor, writhing as he distorted his face and contorted his body amidst "tears, groans, and sobs" for added effect.[342] Cutler described Randolph's speech as "an outrageous, infuriated declamation, which might have done honor to Marat, or Robespierre."[343] The Democratic *Aurora*, however, showered Randolph with praise and triumphantly announced that Randolph had "executed in a style of brilliant and captivating eloquence – a mere description could not furnish any adequate idea of the force and beauty of his speech."[344] Having concluded his summation, Randolph and the Managers rested, and the impeachment trial ended. All that remained was the vote.

VI. THE DECISION: A SITUATION FULL OF REMARKABLE EVENTS

On Friday, March 1, 1805, in a room brimming with spectators and all thirty-four senators present, Aaron Burr explained the rules of conduct and instructions on how the vote would take place.[345] Even Uriah Tracy, who had been so ill that many reported he would not attend, managed to make it to his seat for the historic vote.[346] As each article was read, one by one, the senators cast their historic votes. The senators acquitted Chase on every charge.[347] For all his oratorical fire, Randolph had proven no match for the strength of the

339. *Id.* at 655.
340. *Id.* at 655-56.
341. *Id.* at 655.
342. ADAMS, *supra* note 12, at 359.
343. CUTLER, *supra* note 15, at 184.
344. Bair & Coblentz, *supra* note 7, at 384 (internal quotation omitted).
345. *Id.* at 384-85.
346. BEVERIDGE, *supra* note 8, at 217.
347. 14 ANNALS OF CONG. 665-69 (1805).

defense team's logic, a "current of legal reasoning and authority adduced by [Chase and his defense team]."[348] Samuel Mitchill best summed up the decision, when he called it the culmination of "a situation full of remarkable events."[349]

The Federalists owed a great part of their victory to the moderate Democrats. Historian Jane Shaffer Elsmere has noted that had twenty-four of the twenty-five Democrats voted Chase guilty, the nine Federalist Senators could not have saved him.[350] Instead, reason had trumped party politics. But why were the moderates willing to cross party lines? History paints the moderates as among the most practical actors in the American experiment. Unlike both the Federalists and the radicals within the Democratic Party, the moderates did not believe political parties to be passing fads or factions. Rather, as legal historian Kermit Hall has stated:

> [The moderates] seem to have benefited both from the lessons of their own opposition and from a recognition that they might become the victims of the impeachment process .... Political matters, Jeffersonian moderates recognized ... properly belonged to the legislative and executive branches of government. This rule freed the federal judiciary from the fear of intrusive, carping, and inexpert criticism from the legislature. The Chase episode meant that impeachment would not be used thereafter as "a means of keeping the Courts in reasonable harmony with the will of the nation."[351]

In addition, at times the Managers just did not seem to be trying all that hard. Randolph's ego had been bolstered by his relatively easy win on the impeachment vote in the House and overconfidence in the large Democratic majority in the Senate. To compare, Hopkinson's speech addressing the first article of impeachment covers approximately forty pages of the Annals of Congress, whereas the combined speeches of Early, Campbell, and Clark reviewing all eight articles of impeachment span a total of forty-one pages of the Annals – one more page than Hopkinson's speech alone.[352] Although verbiage is not necessarily an indication of the thoroughness or strength of an argument, it is nonetheless telling that the defense devoted as much time to defending Chase's conduct outlined in a

348. Alexander Pope Humphrey, *The Impeachment of Samuel Chase*, 5 VA. L. REG. 281, 289 (1899).

349. Dr. Mitchill's Letters, *supra* note 111, at 749.

350. ELSMERE, *supra* note 6, at 296-99.

351. KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 82 (1989) (quoting 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 71 (1947)).

352. *Compare* 14 ANNALS OF CONG. 354-94 (1805) (detailing the speech of Hopkinson), *with* 14 ANNALS OF CONG. 312-54 (detailing the speeches of Early, Campbell, and Clark).

single article of impeachment as the Managers devoted to the entire first half of their opening remarks. The defense's closing arguments sent a clear message to the Senate that Chase understood the gravity of the charges levied against him. Chase's defense team left no allegation unanswered, no argument unaddressed, and no witness unexamined. Through the sheer force of their logic and acute political understanding, the defense team ultimately earned the votes they needed to secure Chase's acquittal.

Unlike in the Pickering trial, the prosecution's passionate appeals had failed to sway moderates like Mitchill and Israel Smith, whom Adams had watched Giles try to persuade. By the end, even the most ardent proponents of the impeachment seemed to have grown weary of the cause. Giles himself described being gripped by a sudden change of heart, and voted "Not Guilty" on four of the eight charges.[353] After the dust had settled, a repentant Giles confided to Adams that "the ardor of his feelings upon political subjects had very much abated; that there was not a man in the Union against whom he harbored any resentment or aversion."[354]

Giles spoke for many senators when he expressed his regret to Adams that the impeachment had been attempted at all. Not a single senator voted "Guilty" on Article Five and six Democrats including Israel Smith and Mitchill acquitted Chase on every charge.[355] Despite the numerous defections, the vote had not been an easy one for the moderates and some feared repercussions from the Democratic Party. As Mitchill divulged to a friend, "[o]n this occasion myself and my colleague [John] Smith acted with the Federalists. But we did so on full conviction that the evidence, our oaths, the Constitution, and our consciences required us to act as we have done. I suppose we shall be libelled and abused at a great rate for our judgment given this day."[356]

Because of the courage to put principles above party, the moderate Democrats had handed their political opponents a great victory, but the victory did not solely belong to the Federalists. Together, this bipartisan coalition handed a victory to the nascent American constitutional system and the boundaries of judicial independence that these men were helping to define.

VII. CHASE'S LEGACY

The day the Senate handed down Chase's verdict, Senator Plumer wrote happily that "[a] prosecution commenced with the rage

353. ADAMS, *supra* note 12, at 363.

354. *Id.* at 372-73.

355. *Id.* at 362-63, 371.

356. Dr. Mitchill's Letters, *supra* note 111, at 749.

of party has been arrested – & to the honor of the Accused his political foes his enemies have acquitted him."[357] John Quincy Adams reflected that Chase's acquittal "has proved that a sense of justice is yet strong enough to overpower the furies of faction; but it has, at the same time, shown the wisdom and necessity of that provision in the Constitution which requires the concurrence of two-thirds for conviction upon impeachments."[358] Adams's colleagues had surprised him in discovering a "*coolness and firmness*,"[359] and together they had halted the "systematic attempt upon the independence and powers of the Judicial Department, and at the same time an attempt to prostrate the authority of the National Government before those of the individual States."[360] An exhausted, but relieved, Senator Mitchill wrote to a friend, "[t]hus this tedious and important trial is brought to an end. All this mighty effort has ended in nothing."[361]

Although Mitchill might have been referring to the Democrat's failure to remove Chase from the Supreme Court, the impeachment trial did not end in nothing. Ultimately, the Chase impeachment was about power: the power of the judiciary versus the power of Congress, the limits of the judiciary's power in the political sphere, and the power of judges versus the power of juries. Chase's acquittal marked a turning point in American legal history and shifted the balance of that power in favor of the judicial branch. In so doing, the Senate affirmed the importance of judicial independence, limited the scope of impeachable offenses, reassessed the apportionment of power between judges and juries, defended the concept of judicial review, debated the role of precedent, and answered the question of whether the elected branches may properly use impeachment because, as Giles had phrased it, "*[w]e want your offices*," with a resounding no.

Immediately following the vote to acquit Chase, an embittered Randolph took to the floor of the House of Representatives to accomplish by legislation that which the impeachment had failed to do. Randolph moved for a constitutional amendment that would have made all judges subject to removal by the President upon the joint address of Congress, for any reason, and at any time.[362] Nicholson, equally eager to fire back at the Democratic dissidents responsible for Chase's acquittal, called for an amendment that

357. PLUMER, *supra* note 28, at 312.

358. ADAMS, *supra* note 12, at 370-71.

359. *Id.* at 371 (emphasis in original).

360. *Id.*

361. Dr. Mitchill's Letters, *supra* note 111, at 749.

362. ADAMS, *supra* note 12, at 365.

would have allowed a state to cancel the commission of a senator who dared to vote against his own party.[363] Both amendments were easily defeated and earned the disapproval of Democratic Party officials.[364]

The impeachment had also disappointed Thomas Jefferson, who had kept a watchful, if distant, eye on the proceedings. Writing to William Branch Giles in 1807, Jefferson referred to impeachment as a "farce which will not be tried again" and ridiculed judicial independence as allowing "one of the great co-ordinate branches of the government, setting itself in opposition to the other two, and to the common sense of the nation, [to] proclaim[] impunity to that class of offenders which endeavors to overturn the Constitution, and are themselves protected in it by the Constitution itself."[365]

It is somewhat ironic that the boisterous and passionate Chase, impeached for his political harangues upon juries, should be hailed for his contributions to the furtherance of an independent judiciary. But as we have seen, Chase had undergone a transformation by the time of his impeachment trial, and the Chase that the Senate acquitted of high crimes and misdemeanors in 1805 was no longer the same Chase who rode the circuit in 1800. The radical Democrats' zeal to remove Chase for his partisanship, coupled with the Federalists' attempt to woo moderate Democrats, contributed to the preservation and redefinition of judicial independence.

In Martin's closing, he emphasized the new role of the independent judiciary. In the face of shifting majorities and minorities, Martin had explained that judges have no reason to ingratiate themselves with a particular political party, but that it is necessary for judges to remain apart from political issues. For judges to focus on interpreting and applying the laws consistently in the face of shifts in the balance of power, judges must avoid taking political stances on issues while on the bench:

> It is the duty of a judge to enforce the laws, while they exist, however unpopular those laws may be to any portion of the community. If he enforces such laws, he will gain the approbation of one party, but he will certainly be disapproved by the other. Would you then wish that your judges should be exposed to be removed from office because, by the most honest conduct, they had displeased one party or the other, and leave them at the mercy of those who should from time to time, hold the power of government in their own hands? No, it is the sacred independence of the

363. *Id.*

364. *Id.*

365. Letter from Thomas Jefferson to William Branch Giles, Thomas Jefferson Papers, Library of Congress, Manuscript Division (transcript available at http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj100161 (last visited Mar. 26, 2010)).

> judiciary, and that alone, which can be the best security that the judges shall not act with oppression.[366]

Chase himself, referred to the practice of politicking from the bench as "improper" and "unbecoming in . . . a judge."[367] The emergence of the concept of an apolitical independent judiciary during Chase's impeachment constituted more than just rhetorical flourish.[368] An almost immediate consequence of Chase's acquittal was the subsequent removal of the judiciary from the political arena. As Robert Bair and Robin Coblentz have described, in the early days following Chase's acquittal, "[m]anners of the judges improved considerably. Federal judges, especially, confined their official opinions and actions to judicial matters; and, although they did not lose sight of political considerations, they no longer subjected the public to lectures from the bench on political and moral issues."[369] Chase's acquittal "sealed the fate of the political charge. To avoid accusations of political partisanship justices hereafter would give a wide berth to broad political issues and stick to the legal matters before the grand jury."[370]

Chase's acquittal also established the principle that legal error, alone, does not constitute an impeachable offense. As Chase's defense counsel so aptly pointed out, the opposite position would create the absurd situation of converting the Senate into a court of appeals. Even Raoul Berger, one of a distinct minority who has argued that Chase should have been removed for his judicial conduct, concurred on this point, and noted that "[s]tanding alone, erroneous rulings in the course of a trial merely constitute reversible error and of themselves furnish no ground for impeachment."[371] This argument has special force today. Given the numerous and often complex trials that judges preside over today and the countless appellate decisions reversing lower court decisions or affirming them despite harmless errors, no judge would be safe from impeachment. This principle would fly in the face of the spirit of Chase's acquittal, and may explain why Article V is the only article of impeachment against Chase which failed to garner even a single senator's vote for guilty. The strength of the defense team's logic on this point may also

366. 14 ANNALS OF CONG. 443-44 (1805)

367. *Id.* at 136.

368. William Rehnquist erroneously called the cessation of the political grand jury charge "one of the lesser consequences of the proceedings against Chase." REHNQUIST, *supra* note 5, at 125. In fact, it is an important indicator that the Court was moving away from its more political role towards an increasingly apolitical one.

369. Bair & Coblentz, *supra* note 7, at 385-86.

370. JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 45 (1998); *see also* Humphrey, *supra* note 348, at 296.

371. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 235 (1973).

explain why in the over two hundred-year history since Chase's acquittal, legal error alone has never again provided the sole basis for an article of impeachment. As recently as 2000, Chief Justice William Rehnquist stated,

> The significance of the outcome of the Chase impeachment trial cannot be overstated. The vote represented a judgment that impeachment should not be used to remove a judge for conduct in the course of his judicial duties. The important precedent set by Chase's acquittal has governed the removal by impeachment of federal judges from that day to this: a judge's judicial acts may not serve as the basis for impeachment – only acts amounting to "high crimes and misdemeanors" can serve as the basis for removing a judge.[372]

Although many scholars have rightfully viewed Article V as a representation of an expansive view of impeachment because it lacked any allegation of corrupt intent, Article VIII potentially goes even further. If Chase had been convicted on the fifth article, legal error alone might well have constituted an impeachable offense. Were Chase to be convicted on the eighth article, however, it would have established the precedent that Congress has the power to impeach judges on the basis of political expediency. This broad view might well have had the very effect Chase and his defense team feared most – subjecting the judiciary to the will of Congress and enabling Congress to remove judges whenever it disagreed with the opinion of one of the court's members.

As Hopkinson cautioned in his closing remarks, the Managers' position commands that "[a] judge may thus be impeached and removed from office for an act strictly legal, when done, if any House of Representatives for any indefinite time after, *shall for any reason they may act upon*, choose to consider such act improper and impeachable."[373] Invoking its original understanding, Hopkinson insisted that "[t]he Constitution, sir, never intended to lay the Judiciary thus prostrate at the feet of the House of Representatives, the slaves of their will, the victims of their caprice. The Judiciary must be protected from prejudice and varying opinion, or it is not worth a farthing."[374] For better or for worse, the Chase trial both reflected and spurred on a change in the judiciary's role and redefined the concept of judicial independence.[375]

In addition to the constitutional questions it answered, the Chase trial held important implications for procedural questions as

372. Rehnquist, *supra* note 148, at ¶ 17.

373. 14 ANNALS OF CONG. 361 (1805) (emphasis added).

374. *Id.*

375. *See, e.g.*, PLUMER, *supra* note 28, at 230 (noting that prior to Chase's trial, Plumer believed that political expediency might justify a judge's removal from office).

well, such as what Keith Whittington described as the debate over defining the power of the judge in the courtroom.[376] The issue of jury nullification and the arguments surrounding Chase's judicial decorum and treatment of counsel more clearly defined the role of the judge and jury in the trial process. Separate from political questions, judges presiding over jury trials were expected to respect the jury's role and "militated against the judge's involvement in the realm of 'facts,' breaking from the common and accepted practice of the Federalist era."[377] As Whittington notes, this resulted in more clearly defined roles for the judge and the jury in the trial process. "Even as judges lost their authority to speak on the facts of a case, they solidified their roles in interpreting the written law and in limiting juries to the application of law."[378] This division of power governs the judge/jury relationship today and can be seen in the rules of deference that judges are required to observe regarding juries' findings of fact and the lack of deference owed juries by judges regarding pure questions of law.

The continuing dialogue over the judiciary's role, the failure of impeachment to ever again serve as a way to remove judges who are out of political favor, and the importance to which Americans now ascribe an apolitical judiciary are all evidence of the lasting impact of Chase's legacy. For a modern example, we need not look any further than the recent confirmation hearings of Judge Sonia Sotomayor as an Associate Justice of the United States Supreme Court. Unlike Chase, Judge Sotomayor had not made partisan speeches from the bench nor had her speeches contained references to one political party over another, but over the years she had remarked that the "court[s] of appeals [are] where policy is made."[379] In addition, Sotomayor had made several comments suggesting that her Hispanic background might, in some cases, help her reach a better decision than others who lacked the same ethnic and cultural background.[380] As a result of these comments, throughout her confirmation hearings, Sotomayor had to continuously affirm her fidelity to the law and her belief that judges' biases should not interfere with their interpretation of the law and that only Congress may consider policy implications, not judges.[381]

The attention paid to Sotomayor's comments are evidence of the

376. *See* WHITTINGTON, *supra* note 121, at 50-57.

377. *Id.* at 56.

378. *Id.* at 57.

379. Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES, May 15, 2009, at A21.

380. *Id.*

381. *See* Robert Barnes et al., *Sotomayor Pledges 'Fidelity to the Law,'* WASH. POST, July 14, 2009, at A01.

lasting impact Chase's acquittal had on Americans' view of the Supreme Court and how uneasy our nation's leaders are with judges who speak in terms of policy and make politically charged comments. It is in large part because of the Chase impeachment that our leaders began to outline the contours of an apolitical judiciary. Although legal scholars will continue to debate how successful judges are, or ought to be, in putting their biases aside and leaving the legislation to Congress, the Chase impeachment planted the *expectation* that American judges are to remain above the political fray their roles as interpreters of the Constitution and our nation's laws.

Chase's impeachment shifted the balance of power between Congress and the Supreme Court and forever ensured that judicial independence would shield the Court from the use of impeachment as a political solution to a party's discontent with the judiciary. In affirming that the Supreme Court is not subject to the political whims of Congress, however, the impeachment also raised expectations placed on courts and planted the seeds for a new era of judicial deference to congressional policy and a permanent abstention on the part of judges from partisan activity on the bench.[382] As Judge Thomas Schneider has phrased it, had Chase been convicted and Marshall removed, "[w]e can only speculate how different our jurisprudence would be today without the great chief justice's long tenure. But we can safely guess that the independence federal judges take for granted today, if achieved at all, would only have been achieved with far greater struggle."[383]

In the two-hundred-plus years since Chase's acquittal, no other Supreme Court Justice has ever been impeached–a testament to how powerful the precedent established by Chase's trial is and how embedded in the American psyche the idea of an independent judiciary has become following his impeachment.

VIII. CONCLUSION

For Chase, the acquittal meant something much more personal; it meant vindication. Visiting the judge at his home in Baltimore just two days after the Senate vote, William Plumer reported that "I never saw a family more happy–his daughters were much gratified at my visit–they are very charming girls. I was much pleased to witness the strong affection love & tenderness that mutually subsists

382. Following its 1803 decision in *Marbury v. Madison,* the Supreme Court did not again use judicial review to declare a federal law unconstitutional until 1857 in its decision in *Dred Scott*. JOSEPH MENEZ ET AL., SUMMARIES OF LEADING CASES ON THE CONSTITUTION 125 (2004).

383. Thomas Schneider, *The Impeachment Trial of Samuel Chase*, 32 JUDGES' J. 31, 34 (1993).

between him & them."[384] Chase's able defense team had successfully proven that his actions, however reprehensible anyone thought them to be, were not impeachable. As a result, they had cleared Chase's name and enabled him to remain on the Supreme Court.

Following his impeachment trial, and despite ever worsening gout, Chase returned to the Supreme Court.[385] He served the Court for another six years, until a "hot and sultry day," on June 19, 1811, when, at age seventy, Chase passed away.[386] Despite failing health, Chase never resigned from the Supreme Court and died in office, a tribute to the dedication he felt for the institution that he had worked so hard to defend.

384. PLUMER, *supra* note 28, at 316.

385. *See* HAW, *supra* note 65, at 243.

386. *Id.* at 248.

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