

1939

# Partisan Politics and Federal Judgeship Impeachment since 1903

Jacobus TenBroek

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

TenBroek, Jacobus, "Partisan Politics and Federal Judgeship Impeachment since 1903" (1939). *Minnesota Law Review*. 1544.  
<https://scholarship.law.umn.edu/mlr/1544>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## PARTISAN POLITICS AND FEDERAL JUDGESHIP IMPEACHMENT SINCE 1903

By JACOBUS TEN BROEK

“**A** DECLINE of public morals in the United States will probably be marked by the abuse of the power of impeachment as a means of crushing political adversaries or ejecting them from office.”

de Tocqueville, 1835.

Recent proposals to inject new blood into the federal judiciary have raised anew the question of the available methods by which politically undesired federal judges can be removed from their offices and replaced by men whose social and economic views better accord with the attitudes and purposes of those in control of the executive and legislative branches of the national government. Early in the history of the country, faced by an antagonistic judiciary into which the Federalists had retired, Jefferson evolved the idea of using impeachment as an instrument of persuasion and, if need be, control by expulsion.<sup>1</sup> His success was qualified, to say the very least.<sup>2</sup> This study covers the five Federal Judgeship impeachment cases since 1903<sup>3</sup> and is aimed at a determination of

<sup>1</sup>3 Beveridge, *Life of John Marshall* (1919), 21, 59, 158, 321; 3 McMaster, *A History of the People of the United States from the Revolution to the Civil War* (1907), 166; Garner and Lodge, *History of the United States* (1906), 687, 688, 689.

<sup>2</sup>Garner and Lodge, *History of the United States* (1906), 687-689; 3 Beveridge, *Life of John Marshall* (1919), 325.

<sup>3</sup>Charles Swaine, 1903; Robert W. Archbald, 1912; George W. English, 1925; Harold Louderbach, 1932; Halsted Ritter, 1936. During this period charges were brought against eight other federal judges on the floor of the House, but in these cases, none of the eight judges was actually impeached, while the five above mentioned were. The judges so threatened with investigation if not impeachment were Cornelius W. Hanford, United States Judge for the western district of Washington in the 62d Congress, 2d Sess.; Alston G. Dayton, United States Judge for the northern district of West Virginia, in the 63d Congress, 2d Sess.; Daniel Thew Wright, Associate Justice of the supreme court of the District of Columbia, 63d Congress, 2d Sess.; Frank Cooper, United States Judge for the northern district of New York, in the 69th Congress, 2d Sess.; Francis A. Winslow, United States Judge for the southern district of New York, 70th Congress, 2d Sess.; James A. Lowell, United States Judge for the Massachusetts District, 73d Congress, 1st Sess.; Joseph W. Molyneaux, United States Judge for the district of Minnesota, 73d Congress, 2d Sess.; and Samuel Alschuler, United States Judge for the 7th circuit at Chicago, Illinois, in the 74th Congress, 1st Sess. Of these, Hanford, Wright, Winslow and Alschuler resigned within the year during which the investigations against them had been started in the House, (*Official Register of the United States*),

the feasibility of impeachment as a method of political control of the federal bench.

The first of these federal judgeship impeachment cases was that involving Judge Charles Swayne, Federal District Judge in and for the northern district of Florida. Charles Swayne was given his appointment to the federal district bench on April 1, 1890, during the administration of President Harrison, who was a Republican. Senatorial confirmation was granted with the vote of 33 to 24, all of the former being Republicans and all the latter Democrats. From this it is fair to assume that the president and the Senate considered Swayne to be a Republican, whether or not he actually had affiliated himself with that party. Thus we have a Republican federal judge sent to hold court in the generally Democratic state of Florida. That a Democratic legislature twice sought his impeachment<sup>4</sup> and that Mr. Lamar, a Democrat of Florida, actually brought the charges in the House of Representatives<sup>5</sup> are interesting facts, probably even suggestive. But without further evidence, partisan politics cannot fairly be read into them, since it seems quite natural that a representative from Florida should bring charges, if anyone did, against a judge whose district was in Florida.

However, there is further evidence. When Mr. Lamar brought his impeachment charges, he moved that the matter be referred to the judiciary committee. Mr. Lacey, a Republican from Iowa, moved an amendment to Lamar's motion to the effect that the matter be referred to the judiciary committee without additional powers<sup>6</sup> merely to determine whether or not the preliminary evidence warranted an impeachment. Several suggestions now came from the floor urging that reference to the judiciary committee in any form was improper, and that Mr. Lamar should state his specific charges to the House. It is notable that Mr. Lamar's motion was supported only by Democratic speakers, while the latter two motions found only Republican adherents and split them.<sup>7</sup> It is also notable that the first motion was most advantageous to a minority party in the House seeking to force an investigation which might reflect adversely upon the majority in control.

---

James A. Lowell died, and the proceedings against Dayton, Cooper and Molyneux were dropped.

<sup>4</sup>39 Congressional Record, 58th Cong. 3d Sess., p. 214.

<sup>5</sup>38 Congressional Record, 58th Congress, 2d Sess., p. 95.

<sup>6</sup>38 Congressional Record, 58th Cong., 2d Sess., p. 97.

<sup>7</sup>38 Congressional Record, 58th Cong., 2d Sess., pp. 95-103.

Something of this strategy was indicated when Mr. Mann, a Republican from Illinois, asked, "Then this resolution is to be sent to the committee to determine whether or not it is ground for impeachment?"<sup>8</sup> He was answered by a Democrat, Fitzgerald, "No, to ascertain whether you can avoid an investigation."<sup>9</sup> Other statements show quite as clearly that some of the members of the House believed politics to be involved in the charges against Judge Swayne.<sup>10</sup> One of the members read a letter from Don A. Pardee, a judge of the United States circuit court of appeals, fifth circuit, in which the latter expressed the opinion that Swayne's present difficulties arose from the fact that Swayne was particularly directed by the president and the attorney general to provide early terms of court and other facilities for the prosecution and punishment of Democrats who had perpetrated frauds against Republicans in the preceding elections.<sup>11</sup>

These accusations were not without factual substantiation. The judiciary committee of the House of Representatives was composed of eleven Republicans and seven Democrats. When this committee reported a majority for impeachment on March 25, 1904, a minority submitted a dissenting report in which six members concurred, none of whom was a Democrat.<sup>12</sup> The select committee appointed to formulate the articles of impeachment consisted of seven members, five Republicans and two Democrats. When this committee reported the articles on January 12, 1905, three members submitted minority views, none of whom was a Democrat.<sup>13</sup> On the test motion to table the certificate articles the Democrats cast a solid vote in the negative, and they were equally solid in favor of impeachment on the various articles as they were brought up and given the stamp of approval by the House.<sup>14</sup> Without

<sup>8</sup>38 Congressional Record, 58th Cong., 2d Sess., p. 99.

<sup>9</sup>38 Congressional Record, 58th Cong., 2d Sess., p. 99.

<sup>10</sup>39 Congressional Record, 58th Cong., 2d Sess., pp. 980-982.

<sup>11</sup>39 Congressional Record, 58th Cong., 2d Sess., pp. 754-755.

<sup>12</sup>39 Congressional Record, 58th Cong., 2d Sess., p. 1054.

<sup>13</sup>39 Congressional Record, 58th Cong., 2d Sess., pp. 1054-1055, 1057-1058.

<sup>14</sup>One thing further should be said concerning the other than judicial influences in this case. In the discussion of the contempt proceedings concerning O'Neal, the minority of the judiciary committee made this charge, which was never again mentioned, nor was it controverted by the majority. The minority said: "O'Neal [a person who considered himself aggrieved by a sentence for contempt imposed on him by Judge Swayne] at once started in to get even with the court and the evidence shows that he employed lawyers to go to Tallahassee to lobby through the resolution passed by the legislature of the state of Florida. The two most prominent lawyers now prosecuting this matter, Mr. Liddon and Mr. Laney, admit that they were employed by O'Neal to lobby this resolution through."

much doubt, although the Republicans seemed free to do as they saw fit in this matter, the impeachment of Judge Swayne was made a party issue by the Democrats.<sup>15</sup>

During the trial in the Senate, aside from the votes taken on the articles of impeachment, four votes were taken in which the yeas and nays were called for.<sup>16</sup> They all concerned the admissibility of certain matters as evidence. Three were decided in favor of Swayne, one adversely to him. In all four cases, all but a few of the Democrats cast a vote against Swayne.<sup>17</sup>

On the twelve articles of impeachment themselves the Democrats were equally united.<sup>18</sup> They consistently exerted their organized strength in favor of impeachment, as indicated by the following chart:

ARTICLES OF IMPEACHMENT	GUILTY			NOT GUILTY			ABSENT OR NOT VOTING		
	Demo- crats	Repub- licans	Total	Demo- crats	Repub- licans	Total	Demo- crats	Repub- licans	Total
1st .....28	5	33	2	47	49	1	1		2
2nd .....28	4	32	2	48	50	1	1		2
3rd .....28	4	32	4	46	50	1	1		2
4th .....13	0	13	17	52	69	1	1		2
5th .....12	1	13	18	51	69	1	1		2
6th .....28	3	31	1	50	51	1	1		2
7th .....17	2	19	11	52	63	1	1		2
8th .....28	3	31	5	46	51	1	1		2
9th .....28	3	31	3	48	51	1	1		2
10th .....28	3	31	2	49	51	1	1		2
11th .....29	2	31	3	48	51	1	1		2
12th .....31	4	35	2	45	47	1	1		2

In closing the case of impeachment and acquittal of Judge Charles Swayne, I suppose that it is clearly established that from the beginning he was the victim of peculiar political circumstances. He was selected because he could be trusted to be relentless in the prosecution of justice against some Democrats who had committed political offenses which had been injurious to the Republican party, whose vengeance he was sent to accomplish. He did this job so

<sup>15</sup>39 Congressional Record, 58th Cong., 3d Sess., pp. 2540, 2899, 3167, 3176.

well that he was ever after the object of bitter persecution by the Democrats.<sup>19</sup> Congress was twice memorialized by democratic Florida legislatures to impeach him. A solid democratic vote finally accomplished this in the House of Representatives. It was by the grace of united Republicans in the Senate that he finally escaped ultimate ruin and disgrace at the hands of the Democrats.

The second federal judgeship impeachment case after 1903 was that involving Judge Robert W. Archbald, Judge of the circuit court assigned to the commerce court.<sup>20</sup> In so far as the

<sup>16</sup>Vote on questions of admission of evidence:

Question:	FOR SWAYNE			AGAINST SWAYNE		
	Democrat Votes	Republican Votes	Total No. of Votes	Democrat Votes	Republican Votes	Total No. of Votes
1st .....	7	38	45	22	6	28
2nd .....	7	40	47	23	6	29
3rd .....	5	29	34	23	10	33
4th .....	1	9	10	18	16	34

<sup>17</sup>39 Congressional Record, 58th Cong., 3d Sess., pp. 3468-71.

<sup>18</sup>See *supra*, note 16.

<sup>19</sup>However, the impeachment charges which were preferred against Swayne in the House of Representatives were not entirely without foundation. In fact, the legal argument was over the sufficiency of the charges made to establish a proper case for impeachment and removal. The articles of impeachment contained four counts against Swayne: (1) The evidence was complete that Judge Swayne had consistently certified his expenses for travel and attendance at courts on circuit at ten dollars a day, the maximum allowed by law. That this was far in excess of the actual expenditure normally incurred, both Judge Swayne and those defending him in the House freely admitted. (2) Judge Swayne, contending that he had a right to use the equipment of the road because it was in the hands of a receiver appointed by him, appropriated for his own use and that of his family and friends, without compensation to the owner, one of the cars of a railroad company, and had himself transported from Guyencourt, Delaware, to Jacksonville, Florida, and from Jacksonville, Florida, to California. A conductor, a porter, and other conveniences and provisions were supplied along with the car. The expenses for the trip were paid by the receiver out of the funds of the company and Swayne, acting as judge, allowed the credit claimed by the receiver on account of the expenses of this trip, as a part of the necessary expenses in operating the road. (3) Swayne did not reside in his judicial district, contrary to the expressed provisions of the law. (4) The last group of allegations against Swayne dealt with an abuse of the judicial power resulting in sentences of unusual severity in punishment of contempt of court.

<sup>20</sup>Archbald was impeached on July 8, 1912 (see H. Report 946, 62d Cong., 2d Sess.) on charges of having used his judicial office and influence for his personal financial gain both in relation to litigants in his courts and others. He was also charged with corrupt conduct, in that he permitted a lawyer to introduce vital evidence in a case informally and after the trial had been completed, in which he later handed down an opinion with a judgment on the side of the favored lawyer.

main features of the episode were concerned, the chief characteristics of the impeachment and trial of Charles Swayne was that the actuating force behind all the principal protagonists was not difficult to discern. Swayne's embarrassing experiences were the result of a particular inter-party situation in which the circumstances of a moderately successful life had placed him as the instrument of the one party and the victim of the other. A simple allusion to partisan politics, however, is insufficient to explain all the various forces at play in the proceedings that led to the impeachment and conviction of Judge R. W. Archbald, for in them there was a complex of relationships and political and personal aims that preclude fair comparison with the earlier case.<sup>21</sup>

There were four major factors which contributed to accomplish Archbald's downfall, and which seemed to operate quite independently of the fact that impeachment and conviction by completely impartial bodies would not have been unwarranted by the evidence.<sup>22</sup>

1) The first of these was normal inter-party play. Archbald first appeared in the federal judiciary on March 29, 1901, when he was given a recess appointment to the district court for the middle district of Pennsylvania by President McKinley. Theodore Roosevelt reappointed him with the confirmation of the Senate on December 17, 1901. He served in this capacity until January 31, 1911, when President Taft named him as additional circuit court judge assigned to the commerce court. Archbald's original advent upon the bench had been sponsored by Senator Quay, whose preponderance in Pennsylvania at the time was unquestioned.<sup>23</sup> His later elevation to the commerce court was upon the nomination of Senator Penrose.

There is evidence that this appointment was vigorously protested from Pennsylvania upon the ground of Archbald's unfitness for office.<sup>24</sup> But Penrose called for it most insistently. At the time it was generally thought that Penrose could deliver the Pennsylvania delegation to any presidential candidate whom he supported. It is notable that throughout the impeachment trial proceedings the two senators from Pennsylvania, Oliver and Penrose, either did not vote at all or voted in favor of Archbald.<sup>25</sup> In the

---

<sup>21</sup>See 48 Congressional Record, 62d Cong., 2d Sess., pp. 9051-54.

<sup>22</sup>Paxson, *Recent History of the United States*, (revised and enlarged ed. 1928) p. 298.

<sup>23</sup>Cf. 44 Literary Digest, May 18, 1912, pp. 1027-28.

<sup>24</sup>49 Congressional Record, 62d Cong., 3d Sess., pp. 1430, 1440, 1442-46.

<sup>25</sup>48 Congressional Record, 62d Cong., 2d Sess., p. 8922.

House the sole ballot cast against impeachment was that of a representative from Pennsylvania.<sup>26</sup> On each of the articles of impeachment, as indicated by the following chart, the Democrats persistently voted against Archbald, and they were continuously supported by the Progressives and the adherents of Theodore Roosevelt.<sup>27</sup>

ARTICLES OF IMPEACHMENT	GUILTY			NOT GUILTY			ABSENT OR NOT VOTING		
	Demo- crats	Repub- licans	Total	Demo- crats	Repub- licans	Total	Demo- crats	Repub- licans	Total
1st .....30	38	68	1	4	5	12	9	21	
2nd .....21	25	46	8	17	25	12	11	23	
3rd .....28	32	60	2	9	11	14	9	23	
4th .....27	25	52	2	18	20	13	9	22	
5th .....29	37	66	1	5	6	14	8	22	
6th ..... 8	16	24	20	25	45	14	11	25	
7th .....16	13	29	7	29	36	19	10	29	
8th .....12	10	22	11	31	42	20	10	30	
9th .....12	11	23	9	30	39	22	10	32	
10th .... 1	0	1	24	41	65	18	10	28	
11th .... 4	7	11	20	31	51	20	12	32	
12th .... 9	10	19	14	32	46	19	10	29	
13th ....19	23	42	5	15	20	17	15	32	

2) The second factor was that of the quarrel and ensuing struggle between Theodore Roosevelt and President Taft. The details of that episode in American history are too well known to require further repetition. It is regarded as significant that public attention was first directed to the charges against Archbald by newspapers acting in support of Roosevelt's presidential candidacy.<sup>28</sup> Further, the resolution requesting the president to transmit the papers in the case was introduced by Representative Norris, who was even then a leader of the insurgents, a political friend of

<sup>26</sup>The Senate not only ordered that Archbald be removed from office, but also disqualified him from ever holding or enjoying any office of honor, trust, or profit under the United States. The latter motion carried by a vote of 39 yeas of whom 26 were Democrats, and 35 nays of whom 6 were Democrats.

<sup>27</sup>44 Literary Digest, May 18, 1912, p. 1028.

<sup>28</sup>H. Res. 511, 48 Congressional Record, 62d Cong., 2d Sess., p. 5242.



Roosevelt, and a long-time opponent of Taft.<sup>29</sup> There is evidence that those who were most active in impeachment proceeding in Congress were motivated more by a desire to injure Taft than to purify the Bench.

3) The third factor was closely connected with the second, in that it concerned the commerce court, which was largely a Taft creation, and which became the center of a concentrated attack by the progressives. In relation to this, there were two matters of prime significance which show the point of contact between the attack on the commerce court and the impeachment of Judge Archbald. For one thing, the original charges were laid before President Taft by Commissioner Meyer of the Interstate Commerce Commission, which so notoriously had been overruled upon numerous occasions by the commerce court.<sup>30</sup> For a second, scarcely had the House begun its investigation of Judge Archbald's judicial conduct when it voted to abolish the never popular commerce court, of which Archbald was a member.<sup>31</sup> The Roosevelt adherents had taken the position that if the commerce court had been created to protect the railroads against the expanding powers of the Interstate Commerce Commission it could hardly have acted differently; and their effort to show, as was alleged in the articles of impeachment, that a member of the commerce court bench was profiting personally from his relations with the railroads was intended as incidental aid in the effort to discredit the commerce court. This movement on the part of the progressives culminated in their platform demand that "the commerce court be abolished."<sup>32</sup>

4) The fourth factor resulted from the pressure on Congress created by the swiftly spreading movement for the recall of judges. The House managers constantly reminded the House and the Senate that impeachment itself was on trial in the Archbald Case.<sup>33</sup> Those who were opposed to judicial recall were naturally anxious to demonstrate that the constitution already provided an adequate method for the removal of unfit judges. This could only be done

---

<sup>29</sup>48 Congressional Record, 62d Cong., 2d Sess., p. 5896.

<sup>30</sup>48 Congressional Record, 62d Cong., 2d Sess., p. 5761.

<sup>31</sup>Theodore Roosevelt, *Progressive Principles* (1913) (appendix-Platform of the Progressive Party adopted at first National Convention, Chicago, August 7, 1912, p. 377.

<sup>32</sup>48 Congressional Record, 62d Cong., 2d Sess., pp. 8697, 10135.

<sup>33</sup>In the Archbald impeachment trial, portions of seven days were taken in preliminary arrangements in the Senate, and the trial consumed 23 days. See Alexander Simpson, *Treatise on Federal Impeachments* (1916) p. 52. Also Bryce, *American Commonwealth*, 1st ed., p. 208.

by speeding up the impeachment process,<sup>34</sup> and by actually removing this judge who was popularly thought to be corrupt.<sup>35</sup>

Aside from these four factors contributing to the result in the Archbald impeachment case, there were two general problems in the case which were basic to the whole proceeding, and which received definite answers by the action of the Senate in the conviction of Archbald. The first of these determines whether or not a judge may be impeached and convicted for acts done or omitted while in a judicial position held previous to the one occupied at the time of the impeachment and conviction.<sup>36</sup> Articles of impeachment numbered 7 through 13<sup>37</sup> were concerned with alleged offenses committed by Archbald during his tenure of office as a district judge, and he was now sought to be impeached for them after he had been appointed to a circuit judgeship. Since circuit court judges were often assigned to duty in district courts, when Archbald was convicted on one of these charges, the vote of the Senate may have indicated one of two things: either that they were removing Archbald for acts committed in a previous office regardless of the relationship between the circuit and district judgeships, or that they were removing him because of the interchangeability of these two positions. However, whatever the construction, the fact remains that Archbald was convicted on a count alleging offenses committed in a previous office.

The second of these determines the inquiry whether a mere breach of good behavior constitutes an impeachable offense or whether an impeachable offense must also be an indictable offense. Judge Archbald was tried and convicted on five of thirteen articles, of which it is doubtful whether one charged an indictable offense.<sup>38</sup> By this conviction the Senate approved the doctrine that the constitutional provision that judges shall hold their offices "during good behavior" is attended with the corollary that they may be removed by impeachment for behavior which is not good. This approval established the individual discretion of the Senators, their personal opinion as to what constituted bad political conduct, as the test for good behavior in office, and as the measure for im-

---

<sup>34</sup>Outlook, January 15, 1913.

<sup>35</sup>48 Congressional Record, 62d Cong., 2d Sess., p. 8075, also Alexander Simpson, *Treatise on Federal Impeachments* (1916) p. 41.

<sup>36</sup>48 Congressional Record, 62d Cong., 2d Sess., pp. 9052-53.

<sup>37</sup>48 Congressional Record, 62d Cong., 2d Sess., pp. 8703-05, 8917, 10135; 3d Sess., vol. 49, pp. 1271, 1347, 1349; Simpson, *Treatise on Federal Impeachments* (1916) 31.

<sup>38</sup>67 Congressional Record, 69th Cong., 1st Sess., p. 6644.

peachable offenses. That this was a possible pathway at whose end to place the objectives of partisan inclination was not overlooked by the party leaders of the time, and was itself probably in large part the expression of widespread popular opinion.

The kind of patent infraction of judicial ethics revealed by the evidence in the Swayne and Archbald impeachment cases was present in that of Judge English, but in degree it was more flagrant. In the earlier two cases, the defendants' official conduct had not divested them of their party's support, while, in the latter, English was abandoned by the Democrats, and the Congressional proceedings against him were never developed into a partisan issue. The reason for this lay partly in the fact that English was a member of the minority party. Consequently, unlike the Swayne case, there was no hint of that stratagem by which an out of power faction seeks to embarrass the controlling party by exposing the corruption and abuses of its office holders. Contributing to the same result was the significant circumstances that the organization particularly aggrieved, which was the actuating force behind the proceedings against English (*The Post Dispatch of East St. Louis*), was itself an important adherent of English's own party. Lastly, before English came to trial in the Senate, the final testing ground of partisanship, he terminated the whole affair by resignation from the bench.

Aside from this general reasoning, there is a certain amount of specific evidence to be gathered from the formal record which tends to indicate that the Congressional attack on English was in the main not motivated by partisan aspiration, but resulted rather from the fact that particular local influences within Judge English's judicial district were able to convince given representatives that conditions there existed which demanded Congressional attention.

To begin with, the *Post Dispatch of East St. Louis* was the force most actively interested in the removal of English.<sup>39</sup> This interest arose out of the following situation: Judge English had disbarred and suspended from the practice of the law one Thomas M. Webb and one Charles A. Darch.<sup>40</sup> His conduct in doing so had apparently been arbitrary and officious. The reporter and columnist who adversely criticized this action in the columns of the *Post Dispatch* were haled into court and roundly abused by Judge English for thus publishing their views.<sup>41</sup> This episode, and

---

<sup>39</sup>67 Congressional Record, 69th Cong., 1st Sess., pp. 6586, 8579.

<sup>40</sup>67 Congressional Record, 69th Cong., 1st Sess., pp. 8580-81, 6586.

<sup>41</sup>67 Congressional Record, 69th Cong., 1st Sess., pp. 6586-88.

enough others like it so that the *Post Dispatch* could become the spokesman of a considerable number of especially aggrieved persons,<sup>42</sup> aroused the paper to a crusade against the Judge, which culminated in a Congressional inquiry at which the paper assumed the role of prosecutor, being constantly in attendance, adducing evidence, and tendering legal advice.<sup>43</sup>

The pertinent facts to be noted here in connection with the question of partisanship are that Webb and Karch, whose experiences with the judge had occasioned his direct controversy with the *Post Dispatch*,<sup>44</sup> as well as the *Post Dispatch* itself, which instigated the impeachment proceedings,<sup>45</sup> and Representative Hawes who introduced the formal resolution calling for a Congressional investigation, were all Democrats.<sup>46</sup> During the course of the Congressional proceedings, influential Democrats took the floor to urge impeachment.<sup>47</sup> Of the four members of the Judiciary Committee who submitted minority reports opposing impeachment, two were Democrats and two were Republicans.<sup>48</sup> On the motion to dismiss the proceedings after English's resignation<sup>49</sup> and on the motion to impeach,<sup>50</sup> the distribution of Democratic votes was equally expressive of essential non-partisanship. It is true that a greater proportion of Democrats voted against impeachment than Republicans, but that proportion only amounted to 42 out of a Democratic membership of 184. On the other hand, only twenty Republicans voted in favor of English, but in view of the slightness of the negative vote this can scarcely be considered a substan-

<sup>42</sup>*Supra*, note 38. Of course Judge English's conduct in the Webb and Karch episode was not the main basis upon which impeachment was sought. The investigations of the judiciary sub-committee developed evidence tending to show that English was corrupt in the handling of funds under the management of his court in bankruptcy cases, and that English himself personally profited from these manipulations. Evidence was also produced tending to indicate that English was guilty of partiality and favoritism "which resulted in the creation of a combination to control and manage the bankruptcy affairs of eastern Illinois in collusion with Charles B. Thomas, referee in bankruptcy, for their personal benefit, and profit." Evidence tended further to show that other instances of English's favoritism to Thomas resulted in public scandal. A motive for this leaning on English's part was thought to exist in the fact that Thomas had been responsible for English's enjoyment of a number of political benefits, including his judgeship. 67 Congressional Record, 69th Cong., 1st Sess., p. 6644.

<sup>43</sup>67 Congressional Record, 69th Cong., 1st Sess., p. 6644.

<sup>44</sup>67 Congressional Record, 69th Cong., 1st Sess., p. 6644.

<sup>45</sup>66 Congressional Record, 68th Cong., 2d Sess., p. 1790.

<sup>46</sup>*Supra*, note 38.

<sup>47</sup>*Supra*, note 38, at pp. 6599-6602, 6590-94.

<sup>48</sup>*Supra*, note 38, at pp. 6705, 6363-68.

<sup>49</sup>68 Congressional Record, 69th Cong., 2d Sess., pp. 302, 303, 348.

<sup>50</sup>67 Congressional Record, 69th Cong., 2d Sess., pp. 6735-36.

tial implication of politics. In this conclusion as to non-partisan-ship competent observers on the spot generally concur.<sup>51</sup>

The impeachment and trial of Judge Harold L. Louderbach, Judge of the United States district court for the northern district of California, was attended with at least one circumstance that gave it a political complexion; but that political complexion was at the outset more a matter of the politics of certain personalities than an interparty issue. To speak most conservatively, one of the factors that contributed strength to the impeachment movement was Judge Louderbach's connection with California's Senator Samuel Shorthridge. The main thing which Representative La Guardia publicly promised when he introduced a resolution into the House to appoint a committee to investigate the official conduct of Judge Louderbach<sup>52</sup> was a scandal involving Washington.<sup>53</sup>

The scandal to which La Guardia referred was apparently based upon the following facts: Judge Louderbach was appointed April 17, 1928 by President Coolidge upon the recommendation of Senator Shorthridge.<sup>54</sup> There is some evidence that Herbert Hoover, then Secretary of Commerce, protested the appointment. Now one of the major complaints constituting the grounds of the articles of impeachment was the manner of appointment of receivers and receivers' attorneys in bankruptcy and reorganization cases and the fees allowed them. Most notable among the names of Louderbach's appointees in such matters was that of Samuel Shorthridge Jr., son of the Senator, who had once been made receiver, and several times receivers' attorney.<sup>55</sup> Add to this the assertion,<sup>57</sup> in which there is some foundation of truth, that the public clamour for an investigation of Louderbach was most loudly urged by a San Francisco newspaper then interested in defeating Senator Shorthridge's campaign for re-election, and

<sup>51</sup>New York Times, March 11, 1926, p. 20; Literary Digest, April 17, 1926.

<sup>52</sup>May 26, 1932, H. R. 239, 75 Congressional Record, 72d Cong., 2d Sess., pp. 11, 358.

<sup>53</sup>New York Times, May 27, 1932, p. 3.

<sup>54</sup>It is not without significance that California's other Senator, Hiram Johnson, excused himself from participating from Louderbach's trial in the Senate on the ground that things had occurred at the time of the judge's appointment which would make him, Hiram Johnson, an unfair judge in the case. New York Times, March 10, 1933, p. 10.

<sup>55</sup>Articles of Impeachment 1 through 5, 76 Congressional Record, 73d Cong., pp. 4914-16.

<sup>56</sup>Articles of Impeachment, *supra*, note 55, and New York Times, *supra*, note 53.

<sup>57</sup>76 Congressional Record, 73d Cong., p. 4922.

suggestive conclusions present themselves about the personal interests that were here at stake. But little of importance is gleaned as to the significant object of this study, namely, the feasibility of impeachment as a method of controlling politically undesired federal judges, for the political elements here involved were peculiar to this case.

Another circumstance worthy of some inquiry was Representative La Guardia's connection with the case. It was he who started the original proceedings in Congress.<sup>58</sup> He was the driving force of the committee of three men that went out to California for the purpose of investigation.<sup>59</sup> Finally, after the judiciary committee of the House had voted 17 to 5 against impeachment,<sup>60</sup> it was largely La Guardia who pushed the articles of impeachment through Congress.<sup>61</sup> How he became interested in the case, and his personal motivation, remain as yet not completely answered. His explanation was that the wide spread newspaper reports had aroused his interest,<sup>62</sup> a statement which Louderbach's counsel took occasion to controvert at the hearings.<sup>63</sup> It may be that La Guardia's zeal for purity on the bench, which he had previously frequently revealed,<sup>64</sup> together with his political opportunism, was the real actuating force behind his connection with the case. But political realism insinuates a lingering doubt as to whether there was not some more direct contact between La Guardia and the local backers of the impeachment movement.

This naturally leads us to an inquiry of the forces that were at play on the spot. The very first official stand taken in the impeachment movement was that of the two San Francisco bar associations which called upon the president to investigate the judicial conduct of Judge Louderbach, stating that articles in the public press had cast public doubt upon the administration of justice in his court, but disclaiming any opinion as to their truth or falsity.<sup>65</sup> In conversation with the writer, two San Francisco attorneys who were witnesses at the trial in the Senate insisted that this action was induced, not by the activities of any particu-

---

<sup>58</sup>Supra notes 52 and 53.

<sup>59</sup>76 Congressional Record, 73d Cong., p. 4922.

<sup>60</sup>76 Congressional Record, 73d Cong., pp. 4913, 4922.

<sup>61</sup>76 Congressional Record, 73d Cong., p. 4920.

<sup>62</sup>76 Congressional Record, 73d Cong., p. 4919.

<sup>63</sup>76 Congressional Record, 73d Cong., p. 4919.

<sup>64</sup>La Guardia had been outstanding in, if not the moving force behind, impeachment charges in the case of four federal judges. *New York Times*, May 27, 1932, p. 3.

<sup>65</sup>75 Congressional Record, 72d Cong., 2d Sess., pp. 12, 470-71.

lar individual, but by a general dissatisfaction of the bar with Judge Louderbach's conduct, and by the reasons stated in the request to the president. The firm of one of these two attorneys was adversely involved in a case before Judge Louderbach which gave rise to one of the charges against the latter. This attorney's statement to the writer that since Judge Louderbach's acquittal he has been unwilling to try any cases before him save those involving purely formal questions of law, and the fact that Judge Louderbach's counsel appeared at his office to urge that the hatchet be buried, would tend to indicate that Judge Louderbach attributed his difficulties, at least in part, to the activities of individuals, however justifiably they may seem from the record to have acted.

But whatever the source and the personal motivation, if any, behind the local movement for impeachment, the Democrats, then fully in control of the House and Senate, were not sufficiently united on the matter to accomplish a conviction, although it is notable that but a very small percentage of the Republicans cast affirmative ballots. On the whole, the reluctance of a considerable number of the Democrats to support the ouster proceedings tends to show that the Democratic party had not yet, if it ever did, determined to test the feasibility of impeachment as a method of removing politically undesired federal judges.<sup>67</sup> It should be recalled however, that the New Deal had not yet received the treatment at the hands of the United States Supreme Court that it was later destined to get.

Articles of Impeachment	GUILTY				NOT GUILTY			
	Dems.	Reps.	Farm. Labor	Total	Dems.	Reps.	Farm. Labor	Total
1	28	6	....	34	22	20	....	42
2	19	4	....	23	23	22	....	47
3	7	4	....	11	11	23	....	63
4	25	5	....	30	30	27	....	52
5	38	6	1	45	45	22	....	34

The last of the five federal judgeship impeachment cases since 1903 was that of Halsted L. Ritter, federal judge for the southern district of Florida. Due to the time of its occurrence and its

<sup>68</sup>See article I or the articles of impeachment, *supra* note 55, at 4914.

possible connection with the New Deal attack upon the judiciary, its bearing on the question of feasibility of impeachment as a method of influencing or controlling the judicial department is more immediate and impressive than any of the earlier cases.

Halsted Ritter had spent most of his life in a quite successful practice of the law in Denver, Colorado. His removal to Florida in 1925 was caused by the health requirements of his family. This change from a code state to one employing common law pleading, and Ritter's comparative unfamiliarity with the latter system, was a source of considerable local complaint after his elevation to the federal bench. Another circumstance which fostered agitation against him arose out of the fact that his appointment to the highly prized federal judgeship occurred only four years after his arrival in Florida, and was granted in preference to applications by local partisans whose claims to the position as a reward for service rendered were thus denied. His nomination by Coolidge in 1929 upon the recommendation of the latter's postmaster general was opposed by both the Democratic and Republican state party organizations.<sup>67</sup> Furthermore, the original resolution authorizing a Congressional investigation was introduced into Congress by Mr. Wilcox, a Representative from Florida, whose congressional district coincided with Ritter's judicial district. It should not escape notice that Ritter had been employed in Wilcox's law office as an associate for nine months, and the latter admitted that thereafter there had been coolness and antagonism between them.<sup>68</sup> Thus, through the combination of these various factors, there was present a sufficient adverse local sentiment to produce and support a movement for Ritter's removal, and this provided the original impulse which cast his affairs into the eddying whirlpool of national politics, where their utility to broader purposes was presently perceived and acted upon.

That these purposes involved at least a not unpredictable inter-party play seems clear from the evidence. The impeachment petition was presented in the House by Representative Green, a Democrat from Florida.<sup>69</sup> The sub-committee of the judiciary committee which did the investigating and heard the testimony divided strictly along party lines, its two Democratic members being for impeachment and its one Republican in opposition.<sup>70</sup>

<sup>67</sup>On the question of impeachment in the House the vote was yeas 183, of whom 132 were Democrats, 49 were Republicans, and one Farmer-Labor; nays 142, of whom 40 were Democrats, and 102 were Republicans.

<sup>68</sup>80 Congressional Record, 74th Cong., 2d Sess., p. 3084.

<sup>69</sup>80 Congressional Record, 74th Cong., 2d Sess., p. 3081.

<sup>70</sup>80 Congressional Record, 74th Cong., 2d Sess., pp. 404-10.



In the House, the vote on the resolution to impeach was yeas 181, of whom 172 were Democrats, nays 146, of whom 63 were Democrats.<sup>71</sup> The vote in the Senate, if anything, was even more unequivocal than in the House.<sup>72</sup> The following chart indicates the exact party distribution of the votes in the Senate on each of the Articles of Impeachment:

Articles of Impeachment	GUILTY					NOT GUILTY				
	Dems.	Reps.	Prog's.	Farm. Labor	Total	Dems.	Reps.	Prog's.	Farm. Labor	Total
1	47	6	1	1	55	12	16	....	1	29
2	45	5	1	1	52	14	17	....	1	32
3	37	5	1	1	44	29	17	....	1	47
4	30	5	1	....	36	29	17	....	2	48
5	31	3	1	1	36	28	19	....	1	48
6	41	3	1	1	46	17	19	....	1	37
7	49	5	1	1	56	10	17	....	1	28

It will be noted that upon article I, the article containing specific allegations which produced the greatest affirmative ballot, those favoring impeachment failed by a single vote to attain the required two-thirds majority. On article 7, which was an omnibus recital of specific charges made in the preceding counts,<sup>73</sup> Democrat Minton, of Indiana, and Democrat Pitman, of Nevada, who had voted not guilty on article 1, changed to guilty and thus cast the deciding ballot; 56 votes constituted the two-thirds majority constitutionally necessary for impeachment. Thus on Article 7, 59 Democrats voted of whom 49 cast ballots for impeachment. Of the 22 Republican Senators who participated in the trial, only five supported the ouster proceeding. A glance at the names of these recalcitrant Republicans (Borah, of Idaho, Capper, of Kansas, Cousins, of Michigan, Frazier, of North Dakota, and Norris, of Nebraska) shows that group was predominantly made up of

<sup>71</sup>The judiciary committee itself had once voted 12 to 7 against recommending impeachment. At another time it divided 9 to 9, and one negative vote was later changed. Hancock, of New York, told the House that he had not been given notice of the meeting at which this tie vote had been taken and that therefore, since he was against impeachment, this fact was responsible for the matter ever having reached the floor. 80 Congressional Record, 74th Cong., 2d Sess., p. 3088.

<sup>72</sup>80 Congressional Record, 74th Cong., 2d Sess., pp. 3091-92.

<sup>73</sup>80 Congressional Record, 74th Cong., 2d Sess., pp. 5902-06.

men who in the past had not infrequently refused to vote according to party affiliations. Shipstead, Farmer-Laborite from Minnesota, and La Follette, Progressive from Wisconsin, made up the remaining votes which convicted Ritter of impeachable offenses.

Thus the conclusion seems inescapable that the Republicans united in Ritter's defense against an attack supported by the organized Democrats who were in control of the House and the Senate. That the question of his innocence or guilt was not the controlling influence which resulted in his removal from office thus seems incontrovertibly established and consequently immaterial to this study.<sup>74</sup> It would have been a curious coincidence indeed that resulted in such a strict party division if the basis of each senator's determination had been nothing more than a judicious weighing of the facts and evidence tending to indicate guilt or innocence, and a disinterested search for a standard whereby to evaluate the same. If the latter had been the case, something more fundamental would be involved in party differences than a mere concerted aspiration for power and its retention. But, accepting the evidence at its face value, we are confronted with the question of political motivation, at once the most intriguing and difficult of all the problems of government.

The stand of the Republicans is understandable enough. The conviction of a Republican office holder of impeachable offenses would cast undesirable aspersions upon the whole party, and such a consequence should be prevented if possible. But what did the Democrats have in mind? Were they solely interested in Ritter's impeachment and conviction as an opportunity to demonstrate the folly of reposing power in his party? Possibly they were moti-

---

<sup>74</sup>There were four counts in the original House Resolution to impeach Judge Ritter, but attention was centered primarily on one indictment, namely, an accusation that Judge Ritter accepted \$4,500 from A. L. Rankin, a former law partner, which was said to have been part of a \$75,000 fee received by Rankin from a receivership appointment made by Judge Ritter. The three other counts charged conspiracy in foreclosure proceedings, violation of that part of the judicial code prohibiting federal judges from accepting fees from private practice, and bartering his judicial authority for his own benefit in a case involving the Florida Power and Light Company and the City of Miami. See 80 Congressional Record, 74th Cong., 2d Sess., pp. 3066-69. Later three additional articles of impeachment were added, two charging that in 1929 and in 1930 Ritter received \$17,300 above his salary on which he failed to file income tax returns, and the other charging that he violated the judicial code by practicing law while on the bench. See 80 Congressional Record, 74th Cong., 2d Sess., pp. 4597-99. However, the record tends to show that Ritter was guilty of a breach of judicial ethics if nothing more.

vated by more than this; by the desire to utilize the impeachment as a means to induce judicial attitudes toward Constitutional questions not heretofore satisfactorily manifested.

The evidence on this question is conflicting and at best, can but lead to tentative conclusions. To the effect that the Democrats sought Ritter's impeachment and conviction at least partly for the help it would render them in their coincidental efforts to redirect the force of the United States Supreme Court's decisions on constitutional matters, the following suggestive facts should be considered:

The original resolution authorizing an investigation was introduced into Congress on May 29, 1933. The matter was not again raised on the floor of the House until January 14, 1936, when Green's impeachment petition interrupted its two and one half years of almost undisturbed repose. Between those two dates affairs of considerable moment had transpired. While sustaining the New Deal in but a single instance,<sup>75</sup> the United States Supreme Court reversed in eight, including the Hot Oil Cases on Jan. 7, 1935,<sup>76</sup> the National Recovery Administration,<sup>77</sup> the Federal Trade Commissioner Removal Case,<sup>78</sup> and the Frazier Lemke Case,<sup>79</sup> on May 27, 1935, the Building Loan Case,<sup>80</sup> Dec. 9, 1935, Railway Pension Act,<sup>81</sup> May 6, 1936, Agricultural Adjustment Act, Jan. 6, 1936.<sup>82</sup> None of the legislation involved in these cases was more fundamental to the New Deal policy than that invalidated in *United States v. Butler*,<sup>83</sup> and the fact that a Democrat re-opened Ritter's impeachment on the floor of the House of Representatives just eight days after this decision is accordingly of some significance, the more so, when we consider that it apparently had already been decided to kill the ouster proceeding

<sup>75</sup>Gold Devaluation, Feb. 1935—*Norman v. Baltimore & Ohio R. R. Co.*, (1935) 294 U. S. 240, 55 Sup. Ct. 407, 79 L. Ed. 885.

<sup>76</sup>*Panama Refining Co. v. Ryan*; *Amazon Petroleum Corp., et al, v. Archie D. Ryan*, (1934) 293 U. S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446.

<sup>77</sup>*Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570.

<sup>78</sup>*Humphrey's Ex'r v. United States*, (1935) 295 U. S. 602, 55 Sup. Ct. 869, 79 L. Ed. 1611.

<sup>79</sup>*Louisville Joint Stock Land Bank v. Radford*, (1935) 294 U. S. 555, 55 Sup. Ct. 854, 79 L. Ed. 1593.

<sup>80</sup>*Hopkins Federal Service & Loan Ass'n v. Cleary*, (1935) 295 U. S. 727, 55 Sup. Ct. 646, 79 L. Ed. 1671.

<sup>81</sup>*Railroad Retirement Board et al, v. Alton Railroad Co.*, (1935) 295 U. S. 330, 55 Sup. Ct. 758, 79 L. Ed. 1468.

<sup>82</sup>*United States v. Butler*, (1936) 297 U. S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477.

<sup>83</sup>*United States v. Butler*, (1936) 297 U. S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477.

by non-action in the committee.<sup>84</sup> Thus the record presents a suspicious but not a conclusive time element.

Other circumstances are equally inconclusive on the question as to whether Ritter's impeachments was a part of the New Deal executive and legislative controversy with the judiciary. It will be recalled that before Ritter was removed on a general charge of misbehavior, more than one-third of the Senate had seriatem acquitted him of six specific allegations of misconduct. On the face of it, this fact may seem to suggest an attack on the Court, but it is no less rationally explicable on narrower grounds. Individually considered, items of judicial misconduct may justifiably be thought not to warrant impeachment, while in the aggregate they seem clearly to authorize it. However, the narrower construction seems to be the only plausible one, when it is remembered that the difference between the vote on the general indictment and the best specific charge was but a single ballot. Likewise, when the Senate, unanimously and apparently by prearrangement, declined to disqualify Ritter from holding any office of honor or trust under the United States in the future, its action may have been motivated by a wish to demonstrate its willingness to remove undesirable federal judges by impeachment, in which case such disqualification would tend to suggest misconduct instead of a simple ouster proceeding; or the Senate's unanimous refusal may have been governed by the fact that Ritter had not been convicted of any specific crime, in which case such disqualification would indicate an unnecessary severity. Nor is the circumstance that Ritter had not held against New Deal Legislation conclusive on the other side, for the feasibility of impeachment as a weapon against undesirable federal judges is not affected by the factors which render them undesirable, but something must be allowed for situation and the threat of possibility.

Thus the record reveals little that is sufficiently definite to warrant anything like a general conclusion. Some circumstances occurred which presented a suggestive aspect rendering equally doubtful an assertion that this was or this was not an attack upon the judiciary through Ritter. Even when considered in the aggregate, these circumstances do not enable us to say that the Democrats seized upon Ritter for the deliberate purpose of threatening the United States Supreme Court. The most that can be deduced from the facts of the case is that some Democrats

---

<sup>84</sup>The original resolution in the House was introduced May 29, 1933; 77 Congressional Record, 73d Cong., 1st Sess., p. 4575.

were conscious of the fact that the ouster proceedings had an experimental value in relation to the problems of an adverse federal judiciary.

Whether we regard the Ritter impeachment and conviction as of contemporary importance in its bearing on the problem of the reorganization of the federal judiciary or not, it seems clear that the Democrats of today, like the Democrats of one hundred twenty-five years ago, have resolved to abandon any attempt that might have existed to utilize impeachment as a means of so controlling the court as to direct their views on constitutional matters. The late Senator Robinson and other Democratic leaders in the Senate have recently proposed reallocating the power of impeachment, and two bills at least have already been introduced in the House designed to turn judgeship impeachments over to a commission of judges, a proposal which had been made and rejected in the constitutional convention.<sup>85</sup>

---

<sup>85</sup>5 ELL. Deb. 131.