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Abstract

On January **19, 1983,** in Miami's federal courthouse, opening statements began in the criminal trial of Federal Judge Alcee L. Hastings, United States District Judge for the Southern District of Florida.

KEYWORDS: immunity, criminal, impeachment

Federal Judges' Absolute Immunity from Criminal Prosecution Prior to Impeachment: *U.S.* v. *Hastings*

I. INTRODUCTION

On January 19, 1983, in Miami's federal courthouse, opening statements began in the criminal trial of Federal Judge Alcee L. Hastings, United States District Judge for the Southern District of Florida. Judge Hastings had been indicted for bribery. Prior to the commencement of this criminal trial, Judge Hastings instituted a constitutional challenge to the criminal justice system. Judge Hastings is the first federal judge in United States history to claim that an active federal judge is immune from criminal prosecution prior to impeachment by Congress.

The major issue throughout this monumental case is best stated by the Roman philosopher, Juvenal: "Quis quatodiet ipsos custodes, or, who is to judge the judges[?]"[1] This article will focus on the decision issued by the Eleventh Circuit Court of Appeals.[2] The position taken in this paper is not designed to address the merits of the criminal trial. Nor is this article to be construed as to imply the guilt or innocence of Judge Hastings but rather to examine the narrow procedural issues discussed in the decision by the Eleventh Circuit Court of Appeals.

1. Thompson & Pollitt, *Impeachment of Federal Judges—An Historical Overview*, 49 N.C.L. REV. 87, 87 (1970).

2. The first issue in United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), whether the court of appeals has jurisdiction over the interlocutory appeal, will not be discussed in this article. The Eleventh Circuit held that they had jurisdiction because the issue was collateral in that it could not be effectively reviewed from a final judgment. *See* Helstoski v. Meanor, 442 U.S. 500 (1979); Abney v. United States, 431 U.S. 651 (1977); United States v. Brizendine, 659 F.2d 215 (D.C. Cir. 1981); United States v. Dunbar, 611 F.2d 985 (5th Cir. 1980); United States v. Myers, 635 F.2d 932 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980); 28 U.S.C. § 1254(c) (1976); 28 U.S.C. § 1291 (1976).

II. INDICTMENT

On December 29, 1981, a federal grand jury, in the Southern District of Florida, returned a four count indictment against Federal Judge Alcee L. Hastings and William A. Borders, Jr. Mr. Borders, allegedly became involved with Judge Hastings when an undercover agent, posing as a defendant in one of Hastings' cases (*United States v. Romano*)[3] approached Borders to set up a bribe. Other than this connection, Mr. Borders had not been involved in any way with this case. Hastings, a federal judge since November 30, 1979, was charged with offenses in two counts of the indictment.[4]

The first count charged Judge Hastings with "conspiracy to solicit and accept money in return for unlawful influence in performance of lawful governmental functions in violation of 18 U.S.C. § 371."[5] The indictment charged that Judge Hastings and Mr. Borders solicited and accepted a bribe from an undercover agent posing as a defendant in *Romano*. Specifically, Hastings was alleged to have agreed to reduce the defendant's prison sentence and to revoke an order which required the defendant to forfeit certain property in return for $150,000.[6]

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3. 523 F. Supp. 1209 (S.D. Fla. 1981).

4. Counts III and IV of the indictment charged only Borders with traveling in interstate commerce in furtherance of bribery in violation of 18 U.S.C. § 1952 (1976). After a change of venue to the Northern District of Georgia, Borders was convicted by a jury on all four counts on May 7, 1982. He has appealed the conviction.

5. United States v. Hastings, 681 F.2d 706, 707 n.2 (1982). 18 U.S.C. § 371 (1976) provides in full:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

However, in the Brief for Appellant the Hon. Alcee L. Hastings at 3, United States v. Hastings, 681 F.2d 706 (11th Cir. 1982) [hereinafter cited as Hastings Brief] the charge stated that he "had been *influenced* in making a judicial decision by the promise of a bribe. (R. 1-5)." (emphasis added).

6. *Hastings*, 681 F.2d at 707.

The second count charged Hastings "with corruptly impeding due administration of justice in violation of 18 U.S.C. § 12 and § 1503."[7] The indictment alleged that Hastings obstructed the due administration of justice by disclosing to Borders the substance of the unissued order in *Romano*. The acts alleged would have involved the exercise of Hastings' judicial authority.

Hastings' first argument was made in the motion to quash the indictments. He claimed that a federal district court does not have jurisdiction over the criminal prosecution of an active federal judge prior to removal from office. This motion was denied by the district court. However, on appeal, a stay was granted by the Eleventh Circuit Court of Appeals[8] until they reviewed and affirmed the district court's decision

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7. *Hastings*, 681 F.2d at 707 n.2.

18 U.S.C. § 12 (1976) provides in full:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1503 (1976) provides in full:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, . . . or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, *or impedes*, or endeavors to influence, obstruct or *impede*, the *due administration of justice*, shall be fined not more than $5000 or imprisoned not more than five years, or both.

(emphasis added).

8. Historically, when a criminal action was brought against a federal judge, prior to impeachment, the House of Representatives stayed its hand until the criminal pro-

rejecting Hastings' argument. As a result of the Eleventh Circuit's decision, the criminal trial commenced on January 19, 1983, prior to the initiation of any impeachment proceeding.

III. HASTINGS' THREE ARGUMENTS

A. Textual Reading of Article I, Section 3, Clause 7 of United States Constitution

Hastings raised three major issues on appeal. The first argument was that a literal reading of Article I, Section 3, Clause 7 of the United States Constitution[9] mandated a sequence of impeachment prior to criminal prosecution. This granted Congress the exclusive power to remove a federal judge. Through the use of the maxim, *Expressio unius exclusio est aterus,* a federal judge has an absolute right not to be tried in federal court unless and until he is impeached and convicted (removed) by Congress.[10] The explicit language in the Constitution precludes the existence of concurrent power to prosecute unlawful acts of a federal judge. Hastings argued that through the indictment the executive branch has "chose[n] to bypass the judicial mechanisms Congress created."[11]

B. Separation of Powers Doctrine

Hastings' primary argument was that the separation of powers doctrine is designed to prevent one branch of government from encroaching on the powers of the other branches of government. Congress

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ceedings were adjudicated. *See* Brief for Appellee United States of America at 40, United States v. Hastings, 681 F.2d 706 (11th Cir. 1982) [hereinafter cited as United States Brief]. Never has a judge, after conviction of an impeachable crime, remained in office. *Id.*

9. U.S. CONST. art. I, § 3, cl. 7 states:
Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punisment, according to Law.

10. United States Brief, *supra* note 8, at 17.

11. Hastings Brief, *supra* note 5, at 48.

is explicitly given the power to cut across the lines fixed by the separation of powers doctrine through the impeachment provision in the Constitution. The separation of powers doctrine stands in the way of any legislative removal of executive and judicial officers except as such removal is expressly authorized in the impeachment provision.

C. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

Hastings' final argument was that the creation of The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980[12] (hereinafter referred to as the Judicial Conduct Act of 1980) reaffirmed his argument that impeachment was the exclusive form of removal for a federal judge.[13] Through this act "Congress expressly retained and asserted the exclusivity of its removal power."[14]

IV. GOVERNMENT'S RESPONSE

A. Interpretation of Article I, Section 3, Clause 7 of United States Constitution

The government maintained that in Article I, Section 3, Clause 7 the framers of the Constitution explicitly provided for the *procedural* rights of an accused during the impeachment process.[15] This clause was not intended to prevent criminal prosecutions of federal judges' unlaw-

12. 28 U.S.C. § 372 (Supp. IV 1980).

13. Act of April 30, 1790, ch. 9 § 21, 1st Cong., 2d Sess., 1 Stat. 117 (1845). Hastings also examined the Act of 1790 created by the First Congress. The pertinent part of the statute stated that a federal judge convicted of bribery "shall forever be disqualified to hold any office of honour, trust or profit under the United States." *Id.* Hastings argued that this statute did not specify if criminal prosecution was to precede removal. The government countered that the Act of 1790 would be superfluous unless criminal prosecution took place prior to impeachment because a judge convicted in an impeachment proceding would already be removed from office and thereby disqualified from holding the position. United States Brief, *supra* note 8, at 27. This statute indicates that Congress anticipated trials for bribery prior to the initiation of impeachment proceedings.

14. Hastings Brief, *supra* note 5, at 25.

15. *Hastings,* 681 F.2d at 710.

ful acts.[16] Article I, Section 3, Clause 7 clarifies the rights of civil officers, which includes judges, and was not intended to limit the jurisdiction of Article III courts.[17] It does not establish a mandatory sequence between these two *independent* processes.[18] Instead the purpose behind Article I, Section 3, Clause 7 was twofold: 1) to distinguish impeachment from English Common Law where criminal sanctions (severe penalties such as death) could be imposed on an impeached judge and 2) to anticipate the question concerning double jeopardy and to avoid this claim if the criminal trial is subsequent to the impeachment proceedings.[19]

B. Separation of Powers Doctrine

Although impeachment is the only explicit method of removal provided in the Constitution, the government contended that it was not necessarily intended to be the exclusive remedy for reprimanding a federal judge. Nothing in the text of the Constitution either explicitly or implicitly exempts judges from federal prosecution.[20] If the drafters intended judicial immunity for judges from criminal prosecution, they would have explicitly provided for it in the Constitution.

The government took the non-exclusivist position created by Shartel[21] and later expanded by Raoul Berger.[22] According to this position, impeachment is not the exclusive means of reprimanding a federal judge.

The government in analyzing the separation of powers doctrine argument examined the several Constitutional Conventions. None of the remarks made in these Constitutional Conventions suggested that judges were to be immune from traditional judicial controls.[23] Rather

16. United States Brief, *supra* note 8, at 16-17.
17. *Hastings*, 681 F.2d at 710.
18. United States Brief, *supra* note 8, at 23.
19. *Id.* at 21-23.
20. *Id.* at 17.
21. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1930).
22. Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475 (1970).
23. *Id.* at 1503.

Congress' jurisdiction is to be concurrent and not exclusive.[24]

A criminal conviction prior to impeachment does not violate the separation of powers doctrine because "whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of co-equal branches of government they do not exempt the members of those branches 'from the operation of the ordinary criminal law.' "[25] Criminal conduct is not to be protected by the separation of powers doctrine because criminal acts are not within the necessary functions to be performed by public officials. The executive branch would not be intruding upon the judicial branch if the act was outside the scope of the judge's office.[26] In *United States v. Nixon*,[27] the Supreme Court held that the separate powers allocated to each branch of government was not intended to operate with absolute independence.

C. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

An analysis of the Judicial Conduct Act of 1980[28] reveals that it does not deal with criminal prosecution of federal judges. The Judicial Conduct Act of 1980 "establishes a mechanism within the judiciary for processing and remedying complaints against federal judges arising from their mental or physical disability or conduct prejudicial to the effective administration of justice."[29]

The Judicial Conduct Act of 1980 is based "on the premise that

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24. Shartel, *supra* note 21, at 894.

25. United States v. Isaacs, 493 F.2d 1124, 1144 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

26. United States Brief, *supra* note 8, at 23-24.

27. 418 U.S. 683, 707 (1974).

28. 28 U.S.C. § 372 (Supp. IV 1980). Complaints of senility or physical disability of a federal judge do not give rise to an impeachable or indictable offense. This was the gap that Congress remedied through the enactment of the Judicial Conduct Act of 1980. Under the Judicial Conduct Act of 1980, federal judges who are senile or ill have their cases assigned to another federal judge.

When a judge is impeached and found guilty, he is denied his salary, tenure, pension and removed from office, whereas, when a judge's cases are assigned to another judge he retains his office and his salary.

29. United States Brief, *supra* note 8, at 36-37.

the judiciary is subject to controls other than impeachment."[30] During the hearings on the Act, the Honorable Elmo B. Hunter, a United States District Court judge for the Western District of Missouri, commented that "[w]e need not discuss criminal conduct as such. Federal and state criminal statutes apply to every federal judge just as they apply to any other citizen."[31]

Even though both briefs set forth extensive arguments concerning this Act, the Eleventh Circuit in *Hastings* stated in a footnote that Hastings' argument was totally devoid of merit.[32]

V. The Basis for the Eleventh Circuit Court of Appeals Decision

A. History of Impeachment

In reaching its decision, the Eleventh Circuit Court examined the history of impeachment as it related to prior cases involving federal judges.[33] Through the impeachment provisions of the Constitution, Congress was given the explicit power to ensure that the federal judges

30. *Id.* at 37 n.23.

31. *Id.* at 38. In addition, a similar remark was made by Representative Kastenmeier; "Nothing in the legislation precludes a complainant from bringing any matter to the attention of the House of Representatives for an impeachment inquiry *or* to the U.S. Department of Justice for a criminal investigation." United States Brief, *supra* note 8, at 39 n.24 (quoting 126 CONG. REC. H8785 (daily ed. Sept. 15, 1980)).

32. Hastings, 681 F.2d at 712 n.20.

33. 1929—Francis Winslow—Judge in Southern District of New York. Judge Francis Winslow resigned before his criminal trial commenced and on the day impeachment proceedings were to begin in the House of Representatives.

1940—Martin Manton—Second Circuit Judge. Resigned during his criminal trial. Ultimately tried and convicted. United States v. Manton, 107 F.2d 834 (2d Cir. 1939).

1941—John Warren Davis—Judge in the Third Circuit Court of Appeals. He was indicted and while remaining in office was a defendant in two criminal trials. The jury could not reach a verdict in either case and the indictments were dismissed. Before impeachment proceedings began, he resigned from office.

For a discussion of the proceedings concerning these three federal judges see J. BORKIN, THE CORRUPT JUDGE (1962); Thompson & Pollitt, *supra* note 1, at 108; Ferrick, *Impeaching Federal Judges: A Study Of The Constitutional Provisions,* 39 FORDHAM L. REV. 1, 25 (1970).

act within their judicial capacity.[34] According to the United States Constitution, Congress has the "sole power to impeach"[35] "civil officers,"[36] including federal judges, for "Treason, Bribery or other high Crimes and Misdemeanors."[37] If impeached and convicted by the United States Senate, the judge is removed from office and precluded from holding any office in the United States government.[38]

B. *United States v. Isaacs*

Until *United States v. Isaacs*,[39] in 1974, no one questioned the power of the executive or judicial branch to prosecute federal judges prior to impeachment.[40] The issue was raised in this case because one of the defendants, Otto Kerner, was a sitting Seventh Circuit federal judge. The Eleventh Circuit relied solely on this case because it was the only decision in the area.

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34. Since 1796, the qualifications of at least forty-seven federal judges have been questioned in the House of Representatives. Only nine federal judges have been actually impeached by the House of Representatives. Out of these nine judges, four were acquitted by the Senate, four were convicted and one resigned.

For an extensive history on the impeachment of these nine federal judges, see Ford, *Impeachment—A Mace for the Federal Judiciary*, 46 NOTRE DAME LAW. 669 (1971); Kelley & Wyllie, *The Congressional Impeachment Power as it Relates to the Federal Judiciary*, 46 NOTRE DAME LAW. 678 (1971); Thompson & Pollitt, *supra* note 1.

35. U.S. CONST. art. I, § 3, cl. 7.

U.S. CONST. art. I, § 3, cl. 6 states:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

36. U.S. CONST. art. II, § 4 states:

> 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.

37. *Id.*

38. U.S. CONST. art. I, § 3, cl. 7.

39. 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

40. In *Isaacs*, Judge Kerner of the Seventh Circuit raised the same argument as Judge Hastings on appeal, but it was denied. Judge Kerner was convicted and resigned prior to being sent to prison.

In *Isaacs,* there were nineteen counts to the indictment,[41] the majority of which related to activities that allegedly took place while Judge Kerner was governor of Illinois and prior to his appointment to the Court of Appeals for the Seventh Circuit. Even though a majority of the charges against Judge Kerner in *Isaacs* did not involve acts within his judicial capacity, the Seventh Circuit, in *dicta,* stated "[t]he Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or *after* the assumption of judicial office."[42] Thus, if a federal judge can be criminally prosecuted for acts prior to his taking office, *a fortiori,* he can also be subject to criminal liability for acts committed within his judicial office. The Eleventh Circuit in *Hastings,* extended the holding in *Isaacs* and used *Isaacs' dicta* to reach the holding in *Hastings.*

C. Immunities

1. *Congressmen*

The Eleventh Circuit analogized the prosecution of congressmen to the prosecution of federal judges in reaching their decision. Congressmen can be criminally prosecuted prior to expulsion by the House of Representatives.[43] There is no indication in the Constitution that judges are to be held to a different standard. A parallel can be drawn between federal judges and congressmen concerning criminal acts of a federal official committed within his official capacity. If the framers of the

41. The major charges were mail fraud, 18 U.S.C. § 1341 (1976); conspiracy, 18 U.S.C. § 1952 (1976); and perjury before a grand jury, 18 U.S.C. § 1623 (1976). All of these charges related to the conspiracy count which involved an Illinois racing operation. The perjury charge was the only activity which took place after Kerner took office as a federal district judge. It is important to note that the perjury charge was in no way connected with Judge Kerner's performance of his judicial duties. Judge Kerner was eventually sentenced to three years in prison and fined $50,000.

42. *Isaacs,* 493 F.2d at 1142 (emphasis added).

43. A Congressman can argue that he can not be indicted or tried until he is expelled by Congress, because the Constitution explicitly provides for a method of removing him from office. United States v. Hastings, 681 F.2d 706, 710 n.10 (11th Cir. 1982). U.S. CONST. art. I § 5, cl. 2.

This argument, which is similar to Hastings' argument, has been rejected. *See* United States v. Brewster, 408 U.S. 501 (1972); Burton v. United States, 202 U.S. 344 (1906); United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978).

Constitution wanted to give judicial immunity to federal judges they would have explicitly provided for it. This argument gains support when viewed in light of the expressed provisions of the *speech and debate clause* for congressmen and the *limited immunity from arrest clause* for congressmen.[44]

2. *Judges—Civil Immunity*

At common law, judges enjoyed absolute immunity from civil liability for acts committed within their judicial capacity.[45] However, the immunity does not apply if the act is outside the scope of his judicial capacity.

> Judicial immunity is thus neither an absolute nor an unlimited bar to any suit brought against a judge or judicial officer. Common-law immunities extend only so far as the interests of the common good demand protection for the holder of the office from liability from carrying out his official functions. The application of the doctrine

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44. U.S. CONST. art. I § 6, cl. 1 states in part:

> They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

45. The Civil Immunity doctrine for judges was established in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

Even when a judge is accused of acting maliciously and corruptly for the benefit of the public, he is civilly immune. Judges should be at liberty to exercise their own function with independence and without fear of consequences. *See* Burton v. United States, 202 U.S. 344 (1906).

Pierson v. Ray, 386 U.S. 547 (1967), created the well-established doctrine that judges are immune from liability for damages for acts committed within their judicial jurisdiction.

Stump v. Sparkman, 435 U.S. 349 (1978), involved a situation where a judge, without a hearing or notice to a young retarded girl, ordered the girl sterilized. The Supreme Court held that the judge was not civilly liable because he was acting within his judicial capacity.

O'Shea v. Littleton, 414 U.S. 488 (1974), in this case blacks were deprived of due process by a state circuit court judge. In *dicta* the Supreme Court held that no official is granted immunity from criminal prosecution.

See also Imbler v. Pachtman, 424 U.S. 409 (1976).

> of judicial immunity is restricted to its single objective of protecting judicial freedom in the process of deciding civil and criminal cases. Where the initiative and independence of the judiciary is not effectively impaired the doctrine of judicial immunity does not hold.[46]

Thus, the judge's cloak of civil immunity does not grant him immunity from criminal prosecution. The criminal statutes, in their application, allow no exceptions.[47] Blanket immunity has never been extended to any class of citizens or governmental officials with the exception of foreign diplomats.[48]

The absolute immunity from civil liability was not intended to protect the judicial office.[49] The immunity from civil liability is premised on the balancing of "the public benefit derived from the judicial independence created by the immunity [weighed against] the sacrifice suffered by aggrieved individuals who are deprived of their civil remedies."[50] If federal judges were granted immunity from criminal acts, it would be a great threat to the public interest.[51] A federal judge should be able to function in his judicial office without fear of retribution for his beliefs or unpopular decisions.[52] A judge can not be criminally prosecuted for the manner in which he exercises his judicial power.

When a criminal act is involved, there is no balancing of interests. Bribery defeats the purpose of the judicial system. The purpose of the judicial system is to give a person a fair and impartial trial. Criminal laws are a method of vindicating a public interest[53] and are dissimilar from civil interests which are private in nature. The judicial system has "never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the

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46. Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Tex. 1976).

47. United States Brief, *supra* note 8, at 16.

48. *Id.* at 17.

49. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History,* 36 U. CHI. L. REV. 665 (1969). *See also* Kelley & Wyllie, *supra* note 34.

50. *Hastings*, 681 F.2d at 711 n.17.

51. United States Brief, *supra* note 8, at 34 (quoting Imbler v. Pachtman, 424 U.S. 409 (1976)).

52. Stump v. Sparkman, 435 U.S. 349, 364 (1978).

53. Kelley & Wyllie, *supra* note 34, at 891.

reach of the criminal law."[54]

VI. Impeachment Versus Criminal Prosecution

The impeachment process is a separate and distinct mechanism from the criminal law system.[55] Historically, the impeachment process was depicted as cumbersome and fraught with political overtones.[56] Impeachment was not intended to be a substitute for a criminal trial. The criminal trial is broader in scope. The impeachment process is a supplement to the criminal prosecution.[57] Impeachment "is a proceeding of [an] entirely political nature and relates solely to the accused's rights to hold civil office, not to the many other rights which are his as a citizen and which protect him in a court of law."[58] The impeachment proceeding does not determine guilt as in a criminal trial but rather determines if there has been an abuse of power which in turn makes the judge unfit to hold office.

In addition, the impeachment process lacks many of the procedural safeguards mandatory in a criminal trial. The safeguards in a criminal trial consist of an impartial jury, evidentiary rules, the state carrying the burden of proof beyond a reasonable doubt, and the defendant's ability to appeal. A charge on the House floor leaves a judge defenseless, whereas in a criminal trial he would be innocent until proven guilty. "[T]he judicial process provides a more appropriate forum for the resolution of guilt or innocence than does the more political impeachment process."[59] The Seventh Circuit in *Isaacs* reaffirmed this statement by stating:

> [T]he independence of the judiciary is better served when criminal

54. *See supra* note 50 (quoting *Imbler*, 424 U.S. at 428-29).

55. Ford, *supra* note 34 at 670 (1971).

56. *Isaacs*, 493 F.2d at 1144. *See* Shartel, *supra* note 21, at 872 (1930). *See also* Brief for Amicus Curiae American Civil Liberties Union—Florida at 2, United States v. Hastings, 681 F.2d 706 (11th Cir. 1982) [hereinafter cited as Amicus Curiae Brief], which states "The framers deliberately designed a cumbersome impeachment process to ensure that the judiciary would enjoy independence from the other branches of government.

57. Berger, *supra* note 22, at 1490 (1970).

58. Ford, *supra* note 34, at 670.

59. United States Brief, *supra* note 8, at 6.

> charges against its members are tried in a court rather than in Congress. With a court trial, a judge is assured of the protections given to all those charged with criminal conduct. The issues [in a criminal prosecution] . . . are subject to the rules of evidence, the presumption of innocence and other safeguards.[60]

There are different sanctions imposed by each process. Impeachment does not impose a penalty, as in a criminal case, on the judge. The purpose of the impeachment provisions in the Constitution is not intended to punish the individual as in a criminal trial, but rather to protect the public and the political office. Thus, there is a distinction between an indictable offense and an impeachable offense.[61]

An impeachable offense involves conduct of a judge which is injurious to society due to an abuse of his public office. In this context, a bribery or a conspiracy charge is an act which can be considered both an indictable and an impeachable offense. The former process is a criminal mechanism and the latter is a political mechanism. Due to the inherent political overtones and lack of procedural safeguards, the impeachment process can result in non-removal despite clear guilt, or visa versa.[62]

VII. Practical Considerations of the *Hastings* Decision

The Eleventh Circuit did not examine the ramifications of its decision and chose not to address whether or under what circumstances an extended prison sentence might approach in substance a removal from office.[63] As previously noted, most judges who have been criminally convicted have resigned prior to the initiation of the impeachment proceedings.[64] Yet, the problem remains when a judge is criminally convicted and does not resign from office prior to impeachment. With the slow process of impeachment a convicted criminal could technically remain in office until impeached by Congress. Hastings argued that if a federal judge is first criminally convicted, then impeachment will be a

60. *Isaacs*, 493 F.2d at 1144.
61. Kelley & Wyllie, *supra* note 34, at 682.
62. United States Brief, *supra* note 8, at 44.
63. United States v. Hastings, 681 F.2d 706, 712 n.19 (11th Cir. 1982).
64. *See supra* note 33.

mere formality and have no independent significance.[65]

The American Civil Liberties Union, in its Amicus Curiae brief, argued that even an acquittal of Judge Hastings in the criminal trial would in effect act as a partial removal from office.[66] This is because Hastings would be compelled to excuse himself whenever the United States is a party.[67] This would greatly interfere with his judicial duties. "Any interest of the United States not addressed in the impeachment process could be resolved at a later trial, if the judge was removed [first] by the Congress."[68]

The Amicus Curiae brief expressed the fear that a criminal prosecution would induce selective prosecution by the executive branch.[69] The executive branch may use a criminal prosecution as a mechanism to oust judges who are unfavorable to the United States government. The American Civil Liberties Union characterized Hastings as a liberal judge, a lenient sentencer, and a judge who has ruled against the government on several occasions prior to his indictment.[70] The District Court in *Hastings* held that the record was absent any evidence to support the allegation that the government's motivation in bringing the criminal charges against Hastings was vindictive or retaliatory in nature.[71]

The federal courts adhered to the universal precept:

> No man in this country is so high that he is above the law. No

65. Hastings Brief, *supra* note 5, at 43 states: "Although. . . conviction of and imprisonment for criminal abuse of official power does not remove a judge from office, the clear practical effect of a conviction would be removal."

Relating the Supreme Court opinion in Reid v. Covert, 354 U.S. 1 (1957), to the *Hastings* case, if Judge Hastings was acquitted, any person tried and convicted before Judge Hastings would have strong grounds upon which to claim that he was denied the due process required by the Constitution. Therefore, taking Hastings' argument one step further, even if a judge is *acquitted* of all charges he still may not be able to carry out his duties as a judge. Hastings Brief, *supra* note 5, at 44 n.23.

66. Amicus Curiae Brief, *supra* note 56, at 11.

67. *Id.* at 11-12.

68. Hastings Brief, *supra* note 5, at 54.

69. Amicus Curiae Brief, *supra* note 56, at 2-3.

70. National Council of Churches v. Egan, No. 79-2959 (S.D. Fla. 1979), is an example of a Hastings decision which was against the government. In this case, the government was required to continue to issue work permits for Haitian refugees.

71. *Hastings*, 681 F.2d at 711 n.16.

> officer of the law may set that law at a defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[72]

V. CONCLUSION

"[O]ur rights are only as secure as our judiciary."[73] If immunity from criminal prosecution was granted to federal judges, it would "frustrate the overriding need to detect and eliminate corruption in the judiciary."[74] This immunity would erode the public's confidence in the judiciary system and in the long run it would weaken the judicial branch. The executive branch has the power, independent of and concurrent with Congress' impeachment power, to criminally prosecute a federal judge. The rights and immunities granted to the federal judges are conferred on the office for the benefit of the people and not for the judge's personal benefit. The judge holds a position of trust and a fiduciary duty to the public. All are expected to conform to the law enacted by Congress. Criminal statutes allow no exceptions.

In *Hastings,* the Eleventh Circuit, following *Isaacs,* held that an active judge, prior to impeachment, could be subject to federal criminal prosecution for acts within the exerxcise of his judicial authority. The judicial title does not shield its holder from criminal prosecution[75] unless the act falls within the prescribed common law immunity for judges. Thus, the nature of the judicial office does not raise a judge above the law, but rather holds him to the same legal responsibilities as any other citizen.[76]

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72. United States v. Lee, 106 U.S. 196, 220 (1882).

73. Amicus Curiae Brief, *supra* note 56, at 14.

74. United States Brief, *supra* note 8, at 6.

75. Braatelien v. United States, 147 F.2d 888, 895 (8th Cir. 1945). Mr. Braatelien (defendant) was a Conciliation Commissioner who was administering the Frazier-Lemke Act. He was found guilty of conspiracy to defraud the United States by corruptly administering the Frazier-Lemke Act.

76. Prior to the publication of this article, on February 4, 1983, Judge Hastings

Prior to the publication of this article Judge Hastings was acquitted of all charges in the criminal trial. This vindication supports the position taken in this paper. The system functioned properly and enables the public to continue their trust in both Judge Hastings and in the judicial system.

In addition, at the publication of this article, Judge Hastings was under investigation by a special five judge committee due to a misconduct complaint filed under a 1980 law.[77] This panel will report to the councils of judges governing the Eleventh Circuit. The 1980 law prohibits disclosure of the investigation and as a result the nature of the investigation is not clear.

Victoria Santoro

was found not guilty of all criminal charges.

77. The Miami Herald, Apr. 21, 1983, § D, at 1.