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IMPEACHMENT: LESSONS FROM THE MECHAM EXPERIENCE

Robert Jerome Glennon*

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* Professor of Law, University of Arizona. I wish to thank David Kembel for able research and editorial assistance, Margaret Gilbert for helpful comments on earlier drafts, and Melissa Rigg.

I. INTRODUCTION

Arizona has just experienced high drama in the supreme confrontation between the executive and legislative branches of government. Inter-branch conflicts regularly occur but rarely yield an ultimate resolution. In this struggle, however, one branch emerged victorious. The Legislature prevailed on April 4, 1988, when Evan Mecham became the first Governor in Arizona history to be removed from office by impeachment.

While forty-nine states provide impeachment as a method of removing various executive, legislative, and judicial officers,[1] gubernatorial impeachment is seldom used.[2] In most states, impeachment is a two-step process that begins in the lower house of the legislature (the House of Representatives in Arizona). The role of the House parallels that of a grand jury. It investigates and, if warranted, makes accusations called "articles of impeachment." If the House passes such articles, the official has technically been "impeached." States vary as to the voting requirement for an impeachment. Some require a two-thirds vote; others, including Arizona, a simple majority, and approximately half the states have not clarified the requisite vote.[3]

The second step is the trial, which is usually held before the upper house of the legislature (the Senate in Arizona).[4] In most states, the chief justice of the state supreme court presides over the trial.[5] The Senate conducts itself as a "court of impeachment" and either "acquits" or "convicts" the accused officeholder. Most state constitutions, including Arizona's, require super-majority votes to convict.[6] A conviction results in removal of

1. Oregon is the exception. *See* Beyle, *The Governors, 1984-85* in THE BOOK OF THE STATES 24, 26 (Council of State Governments 1986). In Arizona, a variety of state officials are subject to impeachment. Article VIII, Section 2 of the Arizona Constitution provides that "[t]he Governor and State and judicial officers, except justices of courts not of record, shall be liable to impeachment. . . ." ARIZ. CONST. art. VIII, pt. 2, § 2. There is ambiguity in the meaning of this phrase. At the very least, it means that some state officers are subject to impeachment while judges on minor lower courts are not. The Arizona Supreme Court had occasion to consider this clause in Holmes v. Osborn, 57 Ariz. 522, 115 P.2d 775 (1941). An Arizona statute permitted the governor to remove members of the Industrial Commission of Arizona for cause. When then-Governor Osborn removed two members of the Commission, they sued challenging his action as inconsistent with Article VIII, Section 2. *Holmes*, 57 Ariz. at 535, 115 P.2d at 781. They argued that impeachment was the only method by which they could be removed from office. *Id.* The Arizona Supreme Court held that the legislature could properly provide an alternative method of removal to impeachment. *Holmes*, 57 Ariz. at 539, 115 P.2d at 783. It interpreted the clause in Article VIII, Section 2 as extending to, but no further than, "all other elective constitutional officers [except justices of courts not of record]." *Holmes*, 57 Ariz. at 536, 115 P.2d at 782. The clause extends to the Governor, the Attorney General, the Secretary of State, the State Treasurer, the Superintendent of Public Instruction (ARIZ. CONST. art. V, § 1), Arizona Corporation Commissioners (ARIZ. CONST. art. XV, § 1), all members of the legislature (ARIZ. CONST. art. IV, pt. 2, § 1), state supreme court justices, court of appeals judges, and superior court judges (ARIZ. CONST. art. VI, § 29).

2. Governor Mecham is the first governor in the United States to be removed from office by impeachment since 1929. Of the 2,000 governors who have served in the various states, only fifteen had been impeached before Mecham and, of those, only seven convicted. *See* Beyle, *supra* note 1, at 26.

3. Beyle, *supra* note 1, table 2.8 at 43.

4. *Id.*

5. *Id.* Also, the United States Constitution has the Chief Justice of the United States preside only over presidential impeachment trials. U.S. CONST. art. I, § 3.

6. Beyle, *supra* note 1, table 2.8 at 43.

the person from office; it does not involve criminal punishment.[7]

Politics inevitably affects the impeachment process. In Arizona's experience, the House of Representatives, in considering whether to impeach Governor Mecham, and the Senate, in deciding whether to convict, acted against the backdrop of the entire record of the Mecham administration. In a diffused and unspecified fashion, the perceptions of individual senators and representatives necessarily colored their approach to evaluating the specific, concrete allegations against Mecham. No single action that Evan Mecham took resulted in his removal; it was the synergistic effect of many actions. Probably each of Arizona's representatives and senators would have a different explanation for what caused Mecham's conviction. Does this suggest that he may not have been guilty of the charges on which he was convicted? Not at all. Instead, it suggests that, in another time and place, an official who performed the same actions as those for which Mecham was removed from office might not have been impeached and convicted. Indeed, Evan Mecham might have avoided this ignominious result through compromise at several points along the way, but coming hat-in-hand to the Legislature was not his style.

This article examines aspects of the Mecham impeachment process. Section II offers a brief comment about the history of politics in Arizona. The following section interprets the 1986 gubernatorial campaign and Mecham's performance as Governor by identifying events that eroded his

7. On impeachment generally, see R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); I. BRANT, IMPEACHMENT: TRIALS AND ERRORS (1973); HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT: SELECTED MATERIALS, 93d Cong., 1st Sess. (1973); HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT: SELECTED MATERIALS ON PROCEDURE, 93d Cong., 2d Sess. (1974); P. HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805 (1984); HIGH CRIMES AND MISDEMEANORS: SELECTED MATERIALS ON IMPEACHMENT (1974); T. KINGSLEY, THE FEDERAL IMPEACHMENT PROCESS: A BIBLIOGRAPHIC GUIDE (1974); T.L. BEYLE, REMOVING ELECTED OFFICIALS: THE CASE OF THE GOVERNOR (1988) (unpublished paper).

For commentary on federal executive impeachment, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 4-17 (2d ed. 1988); A. SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS (1916); J. LABOVITZ, PRESIDENTIAL IMPEACHMENT (1978); C. BLACK, IMPEACHMENT: A HANDBOOK (1974); AMERICAN CIVIL LIBERTIES UNION, WHY PRESIDENT RICHARD NIXON SHOULD BE IMPEACHED (1974); HOUSE COMM. ON THE JUDICIARY, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, 93d Cong., 2d Sess. (1974); J. ST. CLAIR, J. CHESTER, M. STERLACCI, J. MURPHY, L. SMITH, AN ANALYSIS OF THE CONSTITUTIONAL STANDARD FOR PRESIDENTIAL IMPEACHMENT, U.S. Gov't. Doc. 4000-00307 (1974); DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL, LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW (1974); THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON FEDERAL LEGISLATION, THE LAW OF PRESIDENTIAL IMPEACHMENT (1973); Taylor, *Impeachment as Applied to Executive Officers, or, Can Congress Corner a Crooked Cabinet?*, 15 NEW ENG. L. REV. 160 (1979).

For commentary on federal judicial impeachment, see *Proceedings in the Senate of the United States in the Matter of the Impeachment of Charles Swayne, Judge of the District Court of the United States in and for the Northern District of Florida*, 39th Cong., 2nd Sess. (1905); Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420 (1987); Stevens, *Reflections on the Removal of Sitting Judges*, 13 STETSON L. REV. 215 (1984); Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 JUDICATURE 123 (1987); Parker, *Impeachments*, TRIAL, Oct. 1986, at 15; Glickman, *The Impeachment of Judge Harry Claiborne*, KANSAS B.A.J., Nov.-Dec. 1986, at 11.

For commentary on impeachment of state officials, see Dunne & Balboni, *New York's Impeachment Law and the Trial of Governor Sulzer: A Case for Reform*, 15 FORDHAM URB. L.J. 567 (1987); Comment, *The Awful Discretion: The Impeachment Experience in the States*, 55 NEB. L. REV. 91 (1975); Comment, *An Evaluation of Nebraska's Impeachment Standard–State v. Douglas*, 19 CREIGHTON L. REV. 357 (1986).

political support and led to his impeachment. A successful movement to force a recall election emboldened legislators to consider impeachment. Section IV analyzes the impeachment process, from the constitutional and statutory parameters to the rendering of judgment. It reviews the evidence and testimony only to make general observations about the process. It examines specially-adopted rules of procedure in the House impeachment and the Senate trial. It also explores the functions performed by various lawyers, especially counsel for the House and the Senate. Furthermore, it considers the powerful symbolic role played by Arizona Supreme Court Chief Justice Frank X. Gordon, Jr. who, as Presiding Officer, ensured a tone of civility and propriety that gave legitimacy to the trial. Under his leadership the trial appeared fair and impartial, like a judicial trial rather than a political donnybrook. Finally, it develops as a theme the political character of the impeachment process. By design, lofty and base political considerations influence both the process and the result. Section V examines the question of the proper role of judicial courts in reviewing the actions and decisions of the impeachment process, and concludes that the political question doctrine and the doctrine of comity bar judicial review in almost all instances. Should a court address the merits, it ought surely to conclude that Mecham received a fair trial conducted according to constitutional procedures.

II. ARIZONA POLITICS

Progressive democracy characterizes Arizona government.[8] When Arizona became a state in 1912, the Progressive Era of American politics was in full swing.[9] In a reaction to the corruption of both Tammany Hall and "big city" politics, as well as to the financial manipulations of the Robber Barons, Progressives sought to purify American politics by returning it more closely to the American people. To that end, they proposed reforms that would make government less republican and more democratic. Their program included broadening the franchise to include women and other citizens who previously were denied voting rights, providing for direct election of the United States Senate and state senators, allowing citizens to initiate statutory and constitutional change (by way of initiative), permitting the legislature to refer important questions to the people for a vote (by way of referendum), allowing disgruntled citizens to recall officials, providing for secret election ballots, and requiring disclosure of campaign expenditures.

The proposed Arizona Constitution adopted the Progressive platform when it largely imitated the constitutions of the previously-admitted Western states. However, the proposed Arizona Constitution additionally pro-

8. J. MURDOCK, CONSTITUTIONAL DEVELOPMENT OF ARIZONA 45-53 (1933); B. MASON & H. HINK, CONSTITUTIONAL GOVERNMENT IN ARIZONA 125 (6th ed. 1979); D.R. VAN PETTEN, CONSTITUTION AND GOVERNMENT OF ARIZONA 7-116 (1952).

9. For a discussion of the Progressive movement, see R. WIEBE, THE SEARCH FOR ORDER: 1877-1920, at 176 (1967); R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION (1948); S. HAYS, THE RESPONSE TO INDUSTRIALISM: 1885-1914 (1957); A. LIND, WOODROW WILSON AND THE PROGRESSIVE ERA: 1910-1917 (1954); J. BLUM, B. CATTON, E. MORGAN, A. SCHLESINGER, JR., K. STAMPP & C.V. WOODWARD, THE NATIONAL EXPERIENCE: A HISTORY OF THE UNITED STATES (6th ed. 1985).

vided for the recall of judges.[10]

This provision led President Taft to veto a congressional resolution calling for the admittance of Arizona into the Union.[11] Taft's action prompted the deletion of the judicial recall section from the original Arizona Constitution and delayed Arizona's admission one year, to 1912.[12]

This capsule constitutional history of Arizona assists in understanding contemporary Arizona politics. The Arizona electorate, having adopted the Progressive philosophy, is not content with unfettered republican government which allows elected representatives to exercise independent judgment and vote their consciences. In Arizona, if an elected official casts a vote or makes a decision with which his/her constituents disagree, it may provoke an effort to recall the official or a citizen initiative to reverse the substantive decision.[13]

III. EVENTS LEADING TO IMPEACHMENT

Gubernatorial impeachment is so seldom used and even less frequently successful that a recent commentator described it as "an unlikely threat [rather] than a reality."[14] Just the right set of circumstances led to Evan Mecham's impeachment conviction. In the 1986 Republican gubernatorial primary, Mecham, a perennial candidate for governor, bested former House Majority Leader Burton Barr, an extremely popular and powerful Republican. Along the way, Mecham attacked Barr's integrity by alleging that Barr had profited from inside information gained while House Majority Leader.[15] Attorney General Bob Corbin subsequently exonerated Barr.[16] Some political experts credited Mecham's primary victory to his nasty, smear campaign.[17]

In the 1986 election, Mecham faced two Democratic opponents (one running as an Independent) and won the Governor's office with just 40% of the vote, while the Democrats split the remaining 60%. He became Governor with a plurality of the vote because Arizona's Constitution does not require a runoff election in the event that none of the candidates receives a majority of the votes.[18]

Mecham entered office with a fragile mandate but immediately began to alienate legislators and constituents. The day after his election, Mecham secured the enmity of the State's minority voters and further annoyed many liberals when he announced that, upon assuming office, he would rescind former Governor Bruce Babbitt's declaration of a State holiday honoring the

10. D.R. VAN PETTEN, *supra* note 8, at 32-37.

11. *Id.* at 31; *see also* J. MURDOCK, *supra* note 8, at 33.

12. After admission, the Arizona legislature referred the recall provision to the voters who restored it to the Arizona Constitution. B. MASON & H. HINK, *supra* note 8, at 23-24.

13. Since the House began the impeachment, twenty-one elected officials in Arizona have been the target of recall efforts, including House Speaker Joe Lane, and Attorney General Bob Corbin. Only three recall efforts are still active. Ariz. Daily Star, June 24, 1988, at 1B, col. 4.

14. *See* Beyle, *supra* note 1, at 26.

15. Ariz. Daily Star, Apr. 6, 1988, at 5C, col. 1.

16. *Id.* at 5C, col. 2.

17. *Id.* at 2C and 5C; Ariz. Daily Star, June 17, 1988, at 9A, col. 1.

18. ARIZ. CONST. art. VII, § 7.

late Reverend Martin Luther King, Jr.[19] This announcement received national attention, and the national media followed Mecham's subsequent actions closely.[20]

Mecham alienated additional blocks of Arizona voters with each passing day. In his first month in office, Mecham announced plans to hire a private investigator to unearth corruption in government, but the candidate withdrew after newspapers reported his Marine Corps court martial and his criminal convictions for driving while intoxicated and disorderly conduct.[21] Mecham later withdrew another nomination after reports surfaced that the nominee (for head of the Department of Liquor Licenses and Control) was under investigation in connection with a 1955 slaying.[22]

In February 1987, Mecham's education liaison told the House Education Committee that school teachers should not disagree with students who believe that the Earth is flat.[23] The next month, Mecham agreed with his nominee to the State Board of Education that working women contribute to divorce.[24] He then defended using the word "pickaninny" to refer to blacks.[25] The miscues continued in April 1987 when he nominated as director of the Department of Revenue a man who had filed his state and federal income tax returns late.[26]

Given his slender margin of victory, Mecham's combative style of administration proved ineffective. He succeeded in antagonizing legislators by vetoing their pet bills and hurling insults at them. For example, in May 1987, Mecham vetoed five bills, all favorite projects of Republican legislators, without the courtesy of first notifying the bills' sponsors and after the legislative session had adjourned, thus preventing a possible legislative override. One such bill was a proposal by a legislator from Tempe to make petrified wood the state fossil.[27] In remarks accompanying his veto, Mecham snidely observed that an elderly state senator was the state's oldest fossil.[28] Legislators may have remembered his gratuitous insults when it came time to vote on his impeachment.

In July 1987, these actions prompted a group of citizens to form the Mecham Recall Committee. Spearheaded by Ed Buck, a Phoenix businessman and avowed homosexual, the Recall Committee sought to collect sufficient petition signatures to force a recall election. Mecham responded in typical fashion with an *ad hominem* attack on Buck's sexual preferences and

19. Ariz. Daily Star, Apr. 6, 1988, at 2C, col. 1.

20. *See, e.g.*, Los Angeles Times, Apr. 17, 1988, § 1, at 2, col. 4; Los Angeles Times, May 5, 1988, § 1, at 27, col. 5; The Washington Post, May 8, 1988, at A-18, col. 2; The Washington Post, Apr. 5, 1988, at A-1, col. 1; U.S.A. Today, Jan. 14, 1988, at 2A, col. 1. An informal search discovered over 350 newspaper articles from the national press dealing with Mecham's impeachment and criminal trial.

21. Ariz. Daily Star, Apr. 6, 1988, at 2C, col. 1.

22. *Id.*

23. *Id.*

24. *Id.* at 2C, col. 2.

25. *Id.*

26. *Id.* Mecham later appointed the same person to the second-highest position in the Department of Revenue, a position that did not require the consent of the legislature.

27. S. 1444, 38th Leg., 1st Reg. Sess. (Ariz. 1987). For the veto message, see 1987 Ariz. Legis. Serv. A-5 (West) Veto Messages.

28. Ariz. Daily Star, Apr. 6, 1988, at 2C, col. 2.

disparagingly dismissed the recall as supported only by "militant liberals and the homosexual lobby."[29] Such intemperate outbursts cast further doubt upon Mecham's judgment and estranged additional voters. The recall effort was a surprising smash success, collecting 100,000 signatures the first month.

Notwithstanding the success of the Recall Committee and the erosion of political support, Mecham's combative actions, conflict of interest appointments, and discriminatory slurs did not stop. In July, Mecham was accused of trying to influence a committee to choose Fred Craft, his friend and advisor, as the State's lobbyist for the Superconducting Supercollider Project. In response to this criticism, Mecham hired Craft as his Washington representative at a salary of $80,000 a year for part-time work.[30] Also during July, Mecham hired a former TV weathercaster as his Hispanic liaison, but then alienated the Hispanic community by stating that he picked her because he "was so dazzled by her beauty."[31] In September 1987, a Mecham fund-raising letter sought nationwide conservative support to fight "the militant liberals and the homosexual lobby" who threatened him with a recall election.[32]

By October 1987, leading Republicans began to call publicly for the Governor's resignation. First, at a press conference, former U.S. Senator Barry Goldwater asked the Governor to step down.[33] Mecham dismissed his pleas as pure politics. Then, in January 1988, four of the five Republican Members of Congress assembled before the media and called on Mecham to resign.[34] These exchanges poignantly reflected a breakdown in customary methods, as leading politicians of the same political party rarely resort to communicating with each other through press conferences.

In October 1987, Attorney General Corbin confirmed that Mecham was under investigation for his alleged failure to report a $350,000 campaign loan from a Tempe, Arizona developer.[35] Arizona election laws require candidates to file detailed statements of campaign expenditures and financial contributors.[36] During the same month, the Speaker of the House of Representatives, Joe Lane, appointed former judge William P. French Special Counsel to investigate the loan and other matters to determine whether impeachment was warranted.[37]

Meanwhile, the recall movement reached its goal. On November 2 and 3, 1987, the Mecham Recall Committee filed with Secretary of State Rose Mofford recall petitions signed by 387,285 Arizona voters—far exceeding the 216,746 needed. More people signed recall petitions than voted for

29. *Id.* (In fact, the President of the Gray Panthers, a group not normally associated with liberal causes or gay rights, chaired the Recall Committee.).

30. *Id.*

31. *Id.*

32. *Id.*; Ariz. Daily Star, Apr. 6, 1988, at 2C, col. 3.

33. *Id.*

34. Ariz. Daily Star, Jan. 17, 1988, at 1A, col. 2.

35. *Id.* This allegation was the focus of Article II of the Articles of Impeachment.

36. ARIZ. REV. STAT. ANN. § 16-901 to 16-923 (1956 & Supp. 1987).

37. Ariz. Daily Star, Apr. 6, 1988 at 2C, col. 3.

Mecham in the election just a year earlier.[38]

After Mofford received the recall petitions, she met with Director of Elections Jim Shumway and they determined from a cursory inspection that, based on their years of experience, the petitions contained more than a sufficient number of valid signatures. On approximately November 10, 1987, they met with Governor Mecham to present him with an option.[39] If he waived challenging the validity of the signatures, Mofford would schedule an early recall election. Mecham's public pronouncements had indicated that he looked forward to being vindicated by the people in a recall election.[40] However, he refused to accept the validity of the requisite number of signatures and demanded that the Secretary of State verify them.[41] This meeting has not been reported by the media, yet it is fascinating. In hindsight, Mecham lost an opportunity to thwart the impeachment process. Had he consented to a prompt recall election, it would have occurred shortly after the time the House of Representatives ultimately considered whether to impeach him. A recall election would have forestalled the impeachment inquiry and determined Mecham's fate at the ballot box rather than in the impeachment court.

The remarkable record of the Mecham administration continued in November, when Lee Watkins, Mecham's head of prison construction, was accused of threatening the life of the Governor's former legislative liaison.[42] In December 1987, Mecham told a Jewish men's group that the United States is "a great Christian nation that recognizes Jesus Christ as God of the land."[43] In the ensuing uproar, Mecham never unequivocally apologized. Instead, he regretted that his remarks were misinterpreted, stated that he never meant to offend anyone, and then restated his belief that the United States is "a great Christian nation." In January 1988, Mecham described how the eyes of Japanese visitors "suddenly . . . got round" on finding out about the number of Arizona's golf courses.[44]

On January 8, 1988, the Arizona State Grand Jury indicted Mecham on six felony counts for perjury, willful concealment, and filing a false campaign contribution and expenses report and a false personal financial disclosure form in connection with the $350,000 loan from the developer.[45] A week

38. In the 1986 gubernatorial election, 867,000 voters cast ballots; 343,923 people voted for Mecham.

39. Telephone interview with Karen Osborne, Assistant Secretary of State, June 29, 1988. I am indebted to Paul Eckstein, Esq., for bringing this meeting to my attention.

40. Ariz. Daily Star, Aug. 26, 1987, at 1B, col. 4.

41. It cost the State $101,930 to verify the signatures. Telephone interview with Karen Osborne, Assistant Secretary of State, June 29, 1988.

42. This incident, and Mr. Mecham's efforts to impede the Attorney General's investigation of it, ultimately constituted the basis for Article I of the Articles of Impeachment and the Senate's conviction on that Article. *See* Arizona House of Representatives, Report of the House Managers in the Matter of the Impeachment of the Honorable Evan Mecham, Governor of the State of Arizona, Art. I, Document 1, at 2 (Feb. 8, 1988).

43. Ariz. Daily Star, Apr. 6, 1988 at 2C, col. 3; Ariz. Daily Star, Jan. 3, 1988 at 1C, col. 2.

44. Ariz. Daily Star, Jan. 13, 1988 at 1A, col. 3.

45. Allegations regarding this loan comprised Article II of the Articles of Impeachment. Arizona House of Representatives, Report of the House Managers in the Matter of the Impeachment of the Honorable Evan Mecham, Governor of the State of Arizona, Art II, Document 1, at 4 (Feb. 8, 1988).

later, House Special Counsel French delivered his impeachment report which concluded that Mecham had knowingly concealed the loan on his campaign finance report, had misused state money by lending public money to his automobile dealership, and had obstructed justice by attempting to block the Attorney General's investigation into the death threat.[46]

Throughout this period Mecham's relationship with the press deteriorated. At one point, Mecham refused to answer any questions from a reporter, branding him a "nonperson" and barring him from the Governor's news conferences.[47]

On January 26, 1988, Secretary of State Mofford certified that there were sufficient valid petition signatures to order a recall[48] and, following state statutes, notified Mecham that he could either resign from office within five days or face a special recall election.[49] When he refused to resign, the Secretary of State scheduled a special recall election for May 17, 1988.[50]

The relationship between the recall movement and the impeachment by the House and subsequent conviction by the Senate deserves comment. Quite simply, the enthusiastic public support of the recall movement made possible both impeachment and conviction by revealing the astonishing erosion of political support for Mecham. It demonstrated to elected legislators the political vulnerability of the Governor.

IV. THE IMPEACHMENT PROCESS

A. *Constitutional Background*

Several different sets of rules governed the impeachment proceedings: the Arizona Constitution,[51] Arizona statutes,[52] Rules of the House Select Committee,[53] Rules of Procedure of the Court of Impeachment,[54] the House and Senate Standing Rules,[55] and the Arizona Rules of Evidence.[56] First and foremost, the Arizona Constitution provided parameters. Arizona's constitutional provisions on impeachment are relatively sparse and replete with vague legal terms. Arizona Constitution article VIII, section 1 provides for impeachments to be "tried" by the Senate, for the senators to take an "oath or affirmation to do justice according to law and evidence," and for

46. "A Report By the Speaker of the House to the Arizona House of Representatives, 38th Legislature," In the Matter of the Arizona House of Representatives Investigation of Certain Allegations Against the Governor of the State of Arizona, January 15, 1988.

47. Ariz. Daily Star, Mar. 4, 1987 at 4B, col. 1.

48. The procedure for certification is set forth in ARIZ. REV. STAT. ANN. § 19-208.01-.03 (1956). Mofford certified that 301,032 Arizona voters had properly signed recall petitions.

49. ARIZ. REV. STAT. ANN. § 19-209 (1956).

50. ARIZ. REV. STAT. ANN. § 19-209 required the election to be held 100-120 days after Mecham refused to resign.

51. ARIZ. CONST. art. VIII, pt. 2, §§ 1-2.

52. ARIZ. REV. STAT. ANN. §§ 38-311 to 38-322 (1956).

53. Arizona House of Representatives, Resolution of Special House Select Committee, Rules for the Special House Select Committee.

54. Arizona Senate, Rules of Procedure of the Court of Impeachment (Feb. 11, 1988).

55. Standing Rules, Arizona House of Representatives; Standing Rules, Arizona Senate.

56. 17A ARIZ. REV. STAT. ANN., Arizona Rules of Evidence (Supp. 1987). The Senate was not required to follow rules of evidence but Chief Justice Gordon urged that rules of evidence be used and the Senate agreed.

the trial to be "presided over by the Chief Justice of the Supreme Court." If the Chief Justice is unavailable, the Senate selects another "judge" to preside.

Article VIII, section 2 provides that no person "shall be convicted" without a two-thirds vote of the senators. It also provides that the governor and other state officers are "liable to impeachment for high crimes, misdemeanors, or malfeasance in office" and that "judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust, or profit in the state." Finally, article VIII, section 2 describes the judgment as either a conviction or an acquittal.

Despite the plethora of legal terms that suggest a conventional trial by a jury resulting in a judgment of acquittal or conviction, political history clearly demonstrates that the impeachment process does not replicate independent provisions of criminal statutes. Although the Senate is called a "court" when it conducts an impeachment, that appellation does not necessarily connote a judicial tribunal. It is worth remembering, particularly when considering a procedure having ancient English roots, that Parliament was sometimes described as "a court of the king, nobility, and commons assembled" and that colonial legislatures in Massachusetts and New Hampshire were called the General Courts.[57] English history,[58] the Constitutional Convention debates,[59] and the Federalist Papers[60] confirm that the impeachment process serves to remove an official because of an abuse of a public trust.[61] While the Arizona Constitution borrowed the legal terms "high crimes, misdemeanors, or malfeasance" in describing impeachable offenses, these are terms of art suffused with meaning from political history which do not envision the commission of a specific criminal act.[62] Conversely, merely proving that a state officer has engaged in conduct technically constituting a misdemeanor, for example jaywalking, ought not constitute adequate grounds for impeachment and conviction.[63]

Although political history clearly indicates that these terms are not narrow, technical legal jargon, legal discourse so dominates our language and vocabulary that it fosters thinking along legal lines. When the Board of Managers—five representatives elected by the House membership—finally

57. *See* BLACK'S LAW DICTIONARY 318, 615 (entries on "court" and "general court") (5th ed. 1979). The Massachusetts legislature is still called "the General Court."

58. *See generally* J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689, at 50, 65-67, 112-115; 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 259-62 (1923); 1 *id.* at 381-84; 2 *id.* at 415; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 204, 232 (1956); A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 180, 181 (4th ed. 1962).

59. *See* HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT: SELECTED MATERIALS 3-6 (1973).

60. THE FEDERALIST No. 65, at 396 (A. Hamilton) (Mentor ed. 1961).

61. *See* R. BERGER, *supra* note 7, at 7-52; A. SIMPSON, *supra* note 7. In State *ex rel.* DeConcini v. Sullivan, 66 Ariz. 348, 359, 188 P.2d 592, 599 (1948), the Arizona Supreme Court stated, "the object of [impeachment] is not to punish the officer, but to improve the public service."

62. *See* The Impeachment Inquiry Staff of the House Judiciary Comm., *Constitutional Grounds for Impeachment*, in HIGH CRIMES & MISDEMEANORS: SELECTED MATERIALS ON IMPEACHMENT 17-22 (1974); R. BERGER, *supra* note 7, at 53-93; I. BRANT, *supra* note 7, at 10; C. BLACK, *supra* note 7, at 33-36; L. TRIBE, *supra* note 7, at 294; Feller, *Impeachment and Trial in Arizona: Some Key Issues*, 26 Arizona Bar Briefs No. 3 at 1 (Mar. 1988).

63. *See* L. TRIBE, *supra* note 7, at 294.

drew up the Articles of Impeachment against Governor Mecham, it was a thirteen page document making seventeen accusations of wrongdoing in three counts.[64] With respect to each accusation, it specified a criminal provision of the Arizona Revised Statutes that Governor Mecham allegedly violated.

B. *Statutory Framework*

In addition to the constitutional provisions, Arizona statutes regulate the impeachment process.[65] The only provision regulating impeachment in the House provides simply that it will be instituted by resolution.[66] If the House votes to impeach, a Board of Managers prepares and prosecutes the articles of impeachment.[67] The accused must be given ten days notice of the date for the Senate to hear the impeachment.[68] The Senate also must constitute itself as a court of impeachment within ten days after receiving the articles.[69] The Senate may appoint a clerk, a marshall, and other stenographic and clerical assistance.[70] An Arizona law permits a final vote by fewer than thirty senators, recognizing that the Senate, sitting as a court of impeachment, may decide that a senator has a sufficient number of absences and that he/she should therefore be excluded from voting.[71] Another statute provides compensation to the senators, the Board of Managers, clerks, court reporters, and other personnel and additionally authorizes the Board to employ "legal . . . assistance."[72]

Arizona law allows the impeached party to "object to the sufficiency of the articles of impeachment," either orally or in writing.[73] This provision operates like a motion to dismiss in a civil case, testing the legal adequacy of the articles of impeachment. The question is: assuming the facts as alleged by the Board of Managers, has the accused committed an impeachable offense? Interestingly, the "Objections to the Sufficiency of the Articles of Impeachment," filed on Mr. Mecham's behalf, quibbled with the facts alleged in the Articles, rather than questioning their sufficiency for impeachment.[74] This approach does not seem called for by the statute. Unless a majority of

64. Arizona House of Representatives, Report of the House Managers in the Matter of the Impeachment of the Honorable Evan Mecham, Governor of the State of Arizona, Document 1 (Feb. 8, 1988). References to criminal statutes may appear to strengthen the seriousness of the charges.

65. ARIZ. REV. STAT. ANN. §§ 38-311 to 38-322 (1956).

66. ARIZ. REV. STAT. ANN. § 38-312 (1956).

67. The Board of Managers were members of the House of Representatives, charged with preparing articles of impeachment, presenting them to the Senate, and assuming the role of prosecutor during the proceedings. ARIZ. REV. STAT. ANN. § 38-312 (1956). The Board of Managers retained Mssrs. William French and Paul Eckstein to assist them in presenting the case to the Senate.

68. ARIZ. REV. STAT. ANN. § 38-313 (1956).

69. ARIZ. REV. STAT. ANN. § 38-314 (1956).

70. *Id.*

71. ARIZ. REV. STAT. ANN. § 38-316 (1956).

72. ARIZ. REV. STAT. ANN. § 38-317 (1956). This provision authorized legal fees to the Board's counsel and their respective law firms. There is no provision authorizing compensation to the accused for legal counsel. At the conclusion of the proceedings, the Senate voted to compensate Mr. Mecham's counsel, but an Attorney General's opinion halted the payment because no Arizona law permitted such disbursement of public money to a private party.

73. ARIZ. REV. STAT. ANN. § 38-320(b) (1956).

74. Objections to the Sufficiency of the Articles of Impeachment, Proceedings of Governor Evan Mecham, Document 29 (Feb. 25, 1988).

the members of the court of impeachment sustains the objection to the sufficiency of the articles, the impeached party must "answer" the articles by pleading "guilty" or "not guilty."[75] If the accused pleads "not guilty," a date is set for trial by the Senate. If the Senate convicts, its judgment may provide either for removal from office or removal and disqualification from holding future office.[76]

Finally, one statutory provision suggests that an impeached person will continue performing the duties of his office unless and until removed.[77] For most officers subject to impeachment, this provision creates no difficulties. However, with respect to the impeachment of the Governor, it runs directly counter to the Arizona Constitution, which provides that, if the Governor is impeached, the duties of the office will be performed by the same person who would fill a vacancy.[78] This section treats impeachment as a temporary disability, like illness or absence from the State. As the House inquiry proceeded, the Governor intimated that he might not leave the office even if the House impeached him. This confusing possibility did not materialize. If this statute is construed to allow an impeached Governor to continue serving as Governor while the Senate tries him/her, it is plainly unconstitutional.[79]

C. *Impeachment by the House*

In the context of an indicted Governor facing a recall, the Arizona Legislature began considering the possibility of impeachment. After receiving Special Counsel French's report on January 15, 1988, Speaker of the House Joe Lane and Minority Leader Art Hamilton appointed a Select Committee composed of ten representatives to review the evidence assembled by the Special Counsel and to take further sworn testimony from witnesses, including Mecham.[80]

Lawyers and legal discourse played dominant roles in the impeachment proceedings. For example, the Democrats in the House of Representatives perceived a need to have the assistance of their own counsel as the House Select Committee considered its business. They sought the assistance of Paul Eckstein, a prominent Phoenix practitioner, who initially acted as Minority Special Counsel on a *pro bono* basis. Ultimately, he became retained counsel to the Board of Managers in the trial before the Senate.[81]

On January 20, 1988, the House Select Committee promulgated Rules to govern its hearing evidence on whether to impeach the Governor. All Committee meetings were open to the public and the electronic and print

75. ARIZ. REV. STAT. ANN. § 38-320(a) (1956). A refusal to plead is treated as a guilty plea. ARIZ. REV. STAT. ANN. § 38-320(c) (1956).

76. ARIZ. REV. STAT. ANN. § 38-321 (1956). This latter clause and its effect on the Mecham impeachment process is discussed herein under "The 'Dracula Clause' ".

77. ARIZ. REV. STAT. ANN. § 38-322 (1956).

78. ARIZ. CONST. art. V, § 6.

79. *See* Marbury v. Madison, 5 U.S. 137 (1803).

80. They chose a Select Committee in hope that the normal legislative business could continue. Ariz. Daily Star, Jan. 18, 1988, at 3A.

81. Many other talented lawyers participated in these proceedings including associates in the law firms of lead counsel and lawyers on the Senate staff.

media.[82] The Committee chair had the power to set the time for meetings and to rule on the admissibility of evidence.[83] Witnesses took oaths to tell the truth and had the right to make ten minute statements and to have counsel present. Like all legislative investigations, a witness' counsel could advise the witness but could not conduct an examination or actively participate in the hearings.[84] House Special Counsel French and Minority Special Counsel Eckstein examined the witnesses. After this examination, Select Committee members could ask questions.[85] Finally, the House members could direct questions to witnesses, but only questions pertaining to matters in the French report or to specific answers of the witness.[86] House members could pursue other lines of inquiry only upon a written request and approval of the chair.[87] The power to hold a witness or his attorney in contempt depended upon a Select Committee recommendation that the entire House hold the person in contempt.[88] The Select Committee supplemented these special Rules with the standing Rules of the House. Thus, the Select Committee hearings resembled a typical legislative committee investigation.

The Select Committee heard nine days of testimony, culminating with testimony from Governor Mecham. On the day he began testifying, Mecham unexpectedly announced that he would only answer questions directed to him by legislators and that he would refuse to answer questions posed by the lawyers, French and Eckstein. Although Mecham's refusal to cooperate appeared to many to be somewhat petulant, he won the standoff. It was a pyrrhic victory, however, for the lawyers could surely suggest to Select Committee members questions they might ask. Whether the question was posed by one person or another was unimportant. The Select Committee could have forced the Governor to comply.[89] They could have subpoenaed him and asked the full House to hold him in contempt if he refused to cooperate.[90] However, there was nothing to be gained by confrontational politics and the House let the Governor have his minor triumph.

On February 5, 1988, the House of Representatives voted to impeach Mecham by a vote of 46-14, far surpassing the simple majority needed.[91] The House action temporarily removed him from office pending a trial in the Senate.[92] On February 8, 1988, the Board of Managers presented three Arti-

82. Rules for the special House Select Committee, Rules 1 and 3 (Jan. 20, 1988) [hereinafter House Rules].

83. House Rules, *supra* note 82, nos. 2 and 9.

84. House Rules, *supra* note 82, no. 5.

85. House Rules, *supra* note 82, no. 6 (unless objection is raised).

86. House Rules, *supra* note 82, no. 7.

87. House Rules, *supra* note 82, no. 8.

88. House Rules, *supra* note 82, no. 11.

89. ARIZ. REV. STAT. ANN. § 41-1151 (1956).

90. ARIZ. REV. STAT. ANN. § 41-1153 to 41-11 55 (1956). *See also* Arizona Senate Rules of the Court of Impeachment, no. 25 (Feb. 11, 1988) [hereinafter Senate Rules] (also claiming this power).

91. ARIZ. REV. STAT. ANN. § 38-312 states that "Impeachment shall be instituted in the House of Representatives by resolution. . . ." The Select Committee never prepared a committee report. Instead, at the conclusion of hearing evidence, the full membership considered the impeachment resolution.

92. *See* ARIZ. CONST. art. V, § 6.

cles of Impeachment to the Senate.[93] The first Article accused Mecham of obstructing justice by impeding the Attorney General's investigation into an alleged death threat by Lee Watkins, who was in charge of prison construction for the Department of Corrections. Article II focused on Mecham's failure to disclose a $350,000 campaign loan from the Tempe, Arizona developer, Barry Wolfson. In Article III, the House accused Mecham of misusing funds by lending $80,000 from the Governor's protocol fund to his own automobile dealership.

D. *The Trial in the Senate*

The Senate convened as a Court of Impeachment for the first time on February 11, 1988. The Senate scheduled the hearing of testimony to begin February 29, 1988, after several delays, one for the purpose of allowing a new attorney for Mecham time to prepare.[94] The Senate rejected a request by Mecham's attorneys to postpone the impeachment trial until after the conclusion of the scheduled criminal trial. This refusal prompted the filing of a special action in the Arizona Supreme Court seeking an injunction delaying the trial; the Arizona Supreme Court refused to intervene.[95]

Before proceeding with the trial, the President of the Senate decided that it would be prudent for the senators, as jurors, to have the assistance of legal counsel. After all, the Board of Managers, in its role as prosecuting force, and Evan Mecham, as Respondent, each had experienced counsel. Up until this point, the Senate Legal Staff had prepared various legal documents. In early February, the Senate retained John Lundin to serve as counsel. He played an important though little publicized role by helping to persuade the Senate to adopt the Rules of Procedure of the Court of Impeachment. Throughout the trial, he offered counsel both to the Senate and to individual senators, advising them, for example, on how to frame certain questions. Furthermore, he drafted and presented the instructions to the Senate at the close of the trial.[96]

1. *Rules of Procedure of the Court of Impeachment*

The Senate Legal Staff, with assistance from Chief Justice Gordon's law clerks, prepared initial drafts of Rules of Procedure that might govern the trial. For possibilities, they turned first to the 1964 Senate impeachment trial and to rules used in recent impeachments in Alaska and Oklahoma.[97]

93. Arizona House of Representatives, Report of the House Managers in the Matter of the Impeachment of the Honorable Evan Mecham, Governor of the State of Arizona (Feb. 8, 1988).

94. The addition of new counsel to the Governor's defense team induced Murray Miller, who had represented him before the House and who was intimately familiar with the evidence, to resign. Senate Trial Transcript, vol. 1, at 6-25 (Feb. 29, 1988). *See also* Motion to Withdraw as Counsel for Governor Evan Mecham, Respondent, Document 31, filed Feb. 26, 1988.

95. *See* discussion *infra* at text accompanying notes 169-92.

96. Memorandum from Ariz. Senate Legal Staff to All Senators re: Impeachment, Document 96 (Mar. 31, 1988).

97. Telephone interview with Frederick R. Petti, law clerk to Arizona Supreme Court Chief Justice Gordon, June 28, 1988. For the rules of procedure in the impeachment of A.P. Buzard and E. Williams, Jr., Arizona Corporation Commissioners, in 1964, see Arizona Senate, Rules of Procedure of the Court of Impeachment (1964).

The Senate leadership and Chief Justice Gordon reacted to successive drafts.

On February 11, 1988, the Senate met behind closed doors to discuss the Rules of Procedure of the Court of Impeachment, then returned to the floor and adopted them without debate.[98] Oddly enough, neither counsel for the Board of Managers nor counsel for the Governor was given an opportunity to challenge the Rules of Procedure. The Rules borrowed heavily from the procedures and traditions that govern judicial courts and, as a consequence, the impeachment trial closely resembled a judicial trial. Basically, the impeachment trial pitted the Board of Managers of the House of Representatives against Governor Evan Mecham, with the Senate acting as jury. The Preamble to the Rules noted that the purpose of an impeachment proceeding was "to improve the public service by determining fitness for office,"[99] not to punish Evan Mecham.

The Rules of Procedure required the presence of at least three members of the Board of Managers, though by consensus all proceedings on behalf of the Board were conducted by legal counsel, French and Eckstein, who were retained by the House. The Secretary of the Senate served as the equivalent of a clerk of court, administering oaths, keeping a journal, and performing those tasks usually assigned to a court clerk.[100] The Secretary of the Senate, the Presiding Officer, every senator, and all witnesses were required to take oaths to tell the truth or to act impartially.[101]

Both the Board of Managers and Mr. Mecham had the right to subpoena witnesses. Any senator could also subpoena witnesses, either with the concurrence of a party, or by a majority vote of the senators present at the trial.[102] The Rules contemplated a pre-trial conference, at which the parties would meet with the Presiding Officer to stipulate to facts, provide a list of witnesses and exhibits, and discuss other procedural issues.[103] Governor Mecham had the right to be present, either personally or through counsel, the right to summon witnesses, and the right to testify in his own behalf or to refrain from testifying.[104]

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98. Ariz. Daily Star, Feb. 12, 1988, at 5A, col. 1.

99. Senate Rules, *supra* note 90, no. 1.

100. Senate Rules, *supra* note 90, no. 5. *See also* ARIZ. REV. STAT. ANN. § 38-314 (1956).

101. Senate Rules, *supra* note 90, no. 9(b).

102. *See* Senate Rules, *supra* note 90, no. 12. General legislative subpoena power is granted in ARIZ. REV. STAT. ANN. §§ 41-1151 to 41-1155 (1956).

103. Senate Rules, *supra* note 90, no. 8.

104. Senate Rules, *supra* note 90, nos. 10, 12, 13, 14. Mecham's right to refrain from testifying is derived from the fifth amendment to the U.S. Constitution, and Mecham would not be subject to contempt for asserting this right. *See* ARIZ. REV. STAT. ANN. §§ 41-1151 to 41-1155 (1956). The Senate legal staff prepared a summary of Mecham's rights during the impeachment trial. They included:

1. The right to know the charges against him.
2. The right to appear in person and by counsel.
3. The right to promptly challenge the sufficiency of the Articles of Impeachment.
4. The right to subpoena, and present witnesses and evidence on his behalf.
5. The right to confront and cross examine every witness.
6. The privilege against self-incrimination.
7. The right to receive a verbatim transcript of the proceedings at no cost.
8. The right to an impartial tribunal where:
   a. all participants are under oath
   b. each Senator is sworn to issue a verdict based on the law and the evidence

One Rule outlined the procedure for Governor Mecham's counsel to challenge the sufficiency of the Articles of Impeachment.[105] It required that the motion be in writing and limited oral argument to fifteen minutes, unless extended by a vote of the senators. A majority vote of the senators present would determine whether a motion challenging the sufficiency would be sustained.

The Rules of Procedure also modeled the presentation of evidence after those rules followed in a judicial trial. The Rules provided for opening statements by each side, beginning with counsel for the Board of Managers, followed by the taking of evidence, either testamentary or documentary.[106] Testamentary evidence proceeded by examination, cross-examination, redirect and recross.[107]

After each side finished its examination of a witness, the Rules provided an opportunity for senators to examine the witness.[108] If either party objected to a particular question of a senator,[109] the permissibility of the question would be determined first by the Presiding Officer and, if the senator was not satisfied, he or she could request a Senate vote.[110] A majority vote by the senators would override the decision of the Presiding Officer. The Senate heard the evidence presented by both sides on each Article separately, rather than, as is the usual case in a judicial trial, hearing all evidence from one side and then the other. After the conclusion of hearing evidence, each side would deliver closing arguments.[111] The Rules provided for a free transcript to be presented to the Governor, the Board of Managers, the Presiding Officer, and any requesting senator.[112]

The Rules anticipated that, during the course of the trial, there would be objections to evidence, legal motions, pleas and other procedural questions. These matters would be addressed to the Presiding Officer, who would either decide himself or refer the question to the Senate membership.[113] In addition, any senator could request that the Presiding Officer submit the question to the Senate for resolution.[114] In most respects, the Presiding Officer's power resembled that of a trial judge except that he could be overruled by the senators/jurors. He had the power to instruct the senators on procedural matters,[115] and the power of contempt,[116] for the purpose of compelling the attendance of witnesses, enforcing the Court of Impeachment's orders, and preserving order.

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c. the final verdict will be by a roll call vote taken on the floor of the Senate.

Memorandum to All Senators and Staff from Martha McConnell Bush (Feb. 29, 1988).

105. Senate Rules, *supra* note 90, no. 11.

106. Senate Rules, *supra* note 90, no. 13.

107. Senate Rules, *supra* note 90, no. 14.

108. *Id.*

109. The Board of Managers for the House instructed its counsel not to object to questions asked by senators. *Id.*

110. *Id.*

111. Senate Rules, *supra* note 90, no. 13. Closing arguments were limited to one hour, unless extended by a majority of the Senate.

112. Senate Rules, *supra* note 90, no. 15.

113. Senate Rules, *supra* note 90, no. 16(a).

114. Senate Rules, *supra* note 90, no. 16(b).

115. Senate Rules, *supra* note 90, no. 22.

116. Senate Rules, *supra* note 90, no. 25.

Oral motions were permitted unless the Presiding Officer or a majority of the senators made a request that the motion be in writing.[117] The Rules prohibited oral argument on motions without Senate approval, and even then allowed only fifteen minutes unless another Senate vote increased the time allocation.[118] Any senator could request a roll-call vote which would be held if five additional senators concurred.[119]

The drafters of the Rules anticipated that Governor Mecham would challenge the eligibility of certain senators to participate on the Court of Impeachment and would demand the right to question individual senators, members of the Board of Managers, and counsel for the Board of Managers. The Rules barred challenges to the qualification of senators and prohibited calling as witnesses the senators, members of the Board of Managers, and their counsel.[120]

The Rules explicitly provided that the Senate's verdict would be based on a "clear and convincing evidence" standard,[121] thus adopting a middle position between a preponderance of the evidence standard and proof beyond a reasonable doubt. This important decision received no input from counsel for each side and no public debate by the Senate. The clear and convincing standard plainly marked the impeachment trial as having a fundamentally different character than a criminal trial.[122] To vote to convict, the Rules provided that each senator had to be convinced, both that the allegations in the specific Article of Impeachment were true and that the activity constituted an impeachable offense.[123] The Rules allowed for suspension or amendment of the Rules by a vote of two-thirds of the senators elected.[124]

Finally and explosively, the Senate Rules allowed any senator to request an immediate, confidential conference among the senators.[125] This rule engendered a storm of controversy as Mecham objected to the Senate holding closed-door meetings. He received support from improbable allies–the American Civil Liberties Union,[126] the media, and some senators. As a result of the political fallout, the Senate decided to conduct its debate in public. There is reason to doubt that the Senate chose the wisest course of action. On this issue, the ACLU was wide of the mark.[127] There are good

117. Senate Rules, *supra* note 90, no. 16(b).
118. Senate Rules, *supra* note 90, no. 16(c).
119. Senate Rules, *supra* note 90, no. 16(d).
120. Senate Rules, *supra* note 90, nos. 17 & 18.
121. Senate Rules, *supra* note 90, no. 23(a).
122. The 1964 impeachment trial of two Arizona Corporation Commissioners had arguably used a proof beyond a reasonable doubt test. *See* Arizona Senate Rules of Procedure of the Court of Impeachment (1964). For reasons elaborated later in this article, that strict standard would have unduly slighted the interests of the State and the people in the impeachment process. *See* discussion *infra* under "3. Dismissing Article II."
123. Senate Rules, *supra* note 90, no. 23.
124. Senate Rules, *supra* note 90, no. 27.
125. Senate Rules, *supra* note 90, no. 24. These conferences could include the ultimate deliberation.
126. Letter from Louis Rhodes, Executive Director, Arizona Civil Liberties Union, to Carl Kunasek, President, Arizona Senate (Feb. 15, 1988).
127. I say this although I am an active ACLU member and have served as an ACLU law clerk, a member of an ACLU State Board of Directors, and as an ACLU cooperating attorney.

reasons to insulate such deliberations from public viewing.

Whether one regards senators during an impeachment trial as playing the role of judges or of jurors, the analogy counsels protection of their deliberations. The legal system insulates judicial and jury deliberations from public scrutiny on the assumption that private discussions may have a different tone, candor, and purpose than public deliberations.[128] When members of the House spoke about the wisdom of voting for or against the Articles of Impeachment, and when the senators spoke about the wisdom of voting for or against conviction, we heard professional politicians giving formal public speeches defending positions they were taking. There was a stilted quality to this kind of public rhetoric. The purpose of these speeches was to articulate and defend a particular conclusion and judgment. In contrast, jury and judicial deliberations, according to anecdotal evidence, are tentative exploratory exchanges through which opinions change and judgment is reached.[129] The process itself contributes to the ultimate decision. Behind closed doors, elected officials might be more flexible and willing to discuss honestly their concerns and reasons than they would be if these opinions were broadcast by the electronic media and printed by the press. In the 1964 impeachment trial, the Senate deliberated privately, so there was precedent supporting secrecy.

Nevertheless, if the senators had insisted on holding private deliberations, they would have created the specter of political manipulation and fueled accusations that they were unfairly maligning Mecham. Thus, while private deliberations are generally the best procedure, political considerations counseled the senators to deliberate openly. As a consequence of the political uproar, the Senate met in conference only twice—at an initial evening meeting and on the last day of trial to consider whether to amend the Rules to allow a vote on Articles I and III on which evidence had been completed.[130] Some senators refused to participate in conferences. Although the senators rarely used the conference mechanism for private deliberations, each political party caucused frequently and private conversations among senators were ongoing.

Within this constitutional and statutory framework, the Rules of Procedure of the Court of Impeachment governed. These were supplemented by the standing Rules of the Senate, invoked by the President of the Senate.[131] Additionally, the Arizona Rules of Evidence served as a guide. However, variation from the Rules of Evidence was permitted, and reasonably reliable evidence admitted if the interests of justice required.[132]

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128. *See* Thayer, *The Jury and its Development*, 5 HARV. L. REV. 249 (1892); M. KANE, CIVIL PROCEDURE IN A NUTSHELL 189 (2d ed. 1985). *See also* KALVEN & ZEISEL, THE AMERICAN JURY vi (1966) (This was a research study by several faculty at the University of Chicago Law School on actual jury deliberations secretly taped. The ensuing national uproar halted the research, and the data was not published in the book for which the research was done.).

129. *See* Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954).

130. Telephone interview with John Lundin, Esq., June 13, 1988. Some senators were concerned about the applicability of Arizona's open meeting law.

131. *See* Arizona State Senate Standing Rules.

132. Senate Rules, *supra* note 90, no. 21. In fact, the Presiding Officer kept both sides operating within the rules of evidence. The same standard was not applied to questioning by the Senators, none of whom were lawyers.

On February 29, 1988, the Senate began hearing the first of twenty-three days of testimony. Public television and radio stations in Phoenix and Tucson carried live broadcasts of the entire trial. The press and the commercial electronic media gave extensive coverage; in homes and offices across the State, people watched and listened. Mecham had testified before the House for approximately thirteen hours, often with rambling statements making broad assertions and disclaimers. His testimony came back to haunt him in the Senate on cross-examination by Eckstein. Many observers, including at least three senators, thought that Mecham lied.[133] For example, in response to questions from several senators, he testifed that he had absolute proof that a certain witness had taken a particular document. After a luncheon recess, Mecham returned to the witness stand and admitted he had absolutely no proof.[134]

Although Mecham was accused of specific misconduct identified in the Articles of Impeachment, the entire fifteen-month record of his administration was on trial. And the senators acted accordingly. Several senators addressed questions to Mecham and other witnesses that had absolutely nothing to do with the subject matter of the Articles. Senator Tony West

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133. *See* Senate Trial Transcript, vol. 25, Apr. 4, 1988, Sen. Gabaldon: "There was no difficulty in identifying who was lying; only one person did not tell the truth, and that was Governor Mecham.", *Id.* at 5359; Sen. Henderson: "The governor had better recall of the facts when he was questioned by his own lawyer than he did . . . being questioned by the board of managers." *Id.* at 5360; Sen. Wright: "None of us could sit for days and fail to take notice of the conflicting testimony given by the Governor." *Id* at 5381.

134. *Mecham's Initial Testimony*:

"I had reason to believe . . . that [Lt. Johnson] had taken – that this report had been taken from Jim Colter's desk and delivered to DPS." Senate Trial Transcript, vol. 14, Mar. 17, 1988, at 2917 (Mecham).

. . .

"I [h]ad reason to believe that Lt. Johnson had" taken the Curtis Report from the Ninth Floor. *Id.* at 2918.

. . .

"We later found, and it was verified, that Beau Johnson had handed that [Curtis Report] to the head people at DPS, which he had no business getting into Jim's desk there and taking it." *Id.* at 3108.

. . .

"I have, since [Lt. Johnson] left, had complete confirmation that he was the one that did it. We sort of suspected, but, you know, you kind of hate to accuse anybody unless you have got some proof." *Id.* at 3109.

. . .

"The verification that I got was—came from DPS, Senator [Hays], that it was [Lt. Johnson] that brought it in." *Id.* at 3119.

. . .

"I have verification of what was told me. . . . It was told to me, and was reaffirmed that a–by–to the person affirming that to me by one of the officers, officers in DPS." Senate Trial Transcript, vol. 15, Mar. 18, 1988 at 3150.

. . .

"It was verified by a person at DPS headquarters, Senator [Gutierrez]." *Id.* at 3151.

. . .

Lt. Johnson "was the one that delivered it to the DPS headquarters, was apparently observed to do that, Senator [Gutierrez]." *Id.*

Mecham's Subsequent Testimony:

The senators persisted in questioning Mecham about the support for his accusation. Mecham at first refused to answer. A senator requested the Presiding Officer to direct the Governor to answer. At that point, they recessed for lunch. After the break Mecham returned to the witness stand and admitted:

asked questions of the Governor concerning the insurance director.[135] Senator Doug Todd reminded the Governor that he vetoed his pet bill to make petrified wood the state fossil.[136] Senator Jesus "Chuy" Higuera asked the Governor and other witnesses about Mecham's attitude toward racial minorities.[137]

2. *The Role of the Presiding Officer*

"The ayes appear to have it. The ayes do have it. It is so ordered."

With this ritualistic formulation, Arizona's Supreme Court Chief Justice Frank X. Gordon, Jr. became a public persona in his role as Presiding Officer of the Court of Impeachment. The constitutional provisions on impeachment thrust him in this new and unaccustomed hybrid role of legal advisor and referee. Gordon performed splendidly. The accolades for his performance culminated in Senate Resolution Two expressing respect and gratitude to Gordon for the manner in which he presided over the impeachment trial. According to the Resolution, he conducted the proceedings with "dignity, patience, dispatch and most importantly, absolute fairness." All thirty senators individually signed the Resolution.

Gordon set the tone of the proceedings. Civility, decorum, and impartiality characterized his performance as Presiding Officer. A danger in any impeachment trial, and this one in particular, is that the impeachment jury might appear biased or politically motivated. Gordon's display of judicial temperament created the unmistakable appearance of neutrality. Behind the scenes, Gordon told both lawyers and legislators that they were on display, as representatives of their professions, and should conduct themselves accordingly.

Perhaps the only flaw in Gordon's performance occurred before the trial even started. The day after the House of Representatives voted to impeach him, Governor Mecham urged his supporters to "work on intimidating your representatives. . . . If they are not intimidated by what you tell them, you rise up and replace them."[138] These remarks drew a rebuttal from Gordon in a speech on February 11, 1988, addressed to "Members of the Court of Impeachment and Citizens of Arizona." The exchange raised the question of the rights of Arizonans to communicate their opinions to members of the Arizona Senate.

The stridency of Mecham's rhetoric, with overtones of unspecified threats, possibly even violence, prompted Gordon to respond:

> You citizens of Arizona placed these people in office because you trusted their judgment and their integrity. Now you must let them do their jobs. . . . It is up to all of us as citizens to let the sytem work. Pressuring your senator to vote based on anything other than his evaluation of the law and evidence is in effect pressuring your senator to violate the oath to uphold the Constitution. Sadly, it cannot go with-

"I did not have the proof then and I do not have proof now." *Id.* at 3265.

135. *Id.* at 3241-51.
136. *Id.* at 3165-72.
137. Senate Trial Transcript, vol. 14, Mar. 17, 1988, at 3100-05.
138. Ariz. Daily Star, Feb. 7, 1988, at A1, col. 1.

> out saying that threats and intimidation can play no part in our process. Not only would this conduct hurt our form of government, it is illegal.[139]

Gordon boldly tried to diffuse a "volatile situation" and to quell a public response to the Governor's intemperate plea for intimidation.

Gordon made two points. First, he warned that pressuring senators to vote on anything other than the law and the evidence is asking that the senator violate his or her oath. Gordon judiciously asked citizens to recognize that the senators faced an exceedingly difficult task and, therefore, to let tempers cool so that rationality could prevail. However, Gordon's speech could be interpreted to mean that he would condone efforts by citizens to pressure senators to base their votes on the law and the evidence. As a second point, a direct rebuke of the Governor, Gordon maintained that threats and intimidation are illegal.

Gordon's motives were undoubtedly of the purest and noblest sort. Yet his comments, unfortunately, tended to deter the constitutionally-protected right of free speech. Must citizens quietly sit and watch as the senators "do their jobs"? What is the permissible range of a citizen's right to engage in political activity?

Perhaps Gordon feared that the Governor's remarks would provoke violence. Intimidation that involves a physical assault—for example, the proverbial mafia thug threatening to break someone's kneecap—would violate various criminal statutes.[140] Citizens may not threaten senators with physical reprisal for voting contrary to their view. Apart from threats of violence, however, it is not clear what Arizona law would make other types of threats and intimidation in this context illegal. An Arizona jury-tampering statute prohibits any communication with a juror that is designed to influence the juror's decision.[141] But this statute plainly concerns civil and criminal juries, not a jury in a court of impeachment. If the jury-tampering statute applied to the senators as jurors, it would even prohibit a citizen from telling her senator to vote only on the law and evidence.

Not a shred of historical evidence supports the argument that it is improper for citizens to discuss ongoing proceedings with members of an impeachment jury. The framers of the Constitution selected the senators to serve as jurors precisely because they would bring an informed sense of good judgment and political accountability to their task. What if a citizen "threatened" to withdraw political support from his senator or "intimidated" his senator with the prospect of facing a recall election? The first amendment guarantees the right to engage in freedom of expression. The liberty of the people of Arizona to speak freely includes the constituent's right to tell a senator that he will look unfavorably on a particular vote, either to convict or acquit.

Admittedly the senators had taken a special oath as impeachment ju-

139. Speech by Justice Gordon, addressed to Members of the Court of Impeachment and Citizens of the State of Arizona, Feb. 11, 1988.

140. ARIZ. REV. STAT. ANN. §§ 13-1201 to 1204 (1956).

141. ARIZ. REV. STAT. ANN. § 13-2807 (1956).

rors "to do justice according to law and evidence."[142] Therefore, a senator may not have been able, in good conscience, to vote as her constituent wished. In that case, the senator could explain to her constituent the reasons for her decision.

Denying the public access to elected senators at this critical moment in the state's history would have weakened Arizona's living democracy. There was no need to insulate senators from wrathful voters merely to keep the discourse polite or to coddle senators who accepted the cross of political accountability as part of their job. Arizona citizens had the right to let their senators know what they thought. The serious task confronting the senators merited public input.

Gordon perceived his role as Presiding Officer as "mainly a referee to make sure the rules [adopted by the Senate] are complied with and to make sure the procedure goes on in an orderly fashion."[143] As the Presiding Officer, Gordon made preliminary rulings on motions, objections, and questions of legal procedure. However, even though as Chief Justice of the Arizona Supreme Court he is the highest judicial official in the State, as Presiding Officer his rulings were subject to review and overruling by a majority vote of the senators.[144] In announcing votes, he employed "the ayes appear to have it" language in order to allow senators who disagreed with the vote to ask for a roll call or to appeal the ruling of the Presiding Officer.

The senators seldom disagreed with a ruling by Gordon. One exception occurred at the very beginning when the issue arose as to whether to delay the trial to permit Mecham's new attorneys, Jerris Leonard and Fred Craft,[145] time to prepare. When Gordon decided to grant a two-week continuance, the Senate opted instead for a one-week delay.

Gordon's outstanding performance may help produce, as a long term influence, better relations between the two branches of government.[146] The Arizona Legislature has not always looked favorably on Arizona courts and lawyers.[147] On June 8, 1988, the Arizona Judges Association honored Justice Gordon for his "exemplary" conduct. The President of the group, Judge Jeffrey Cates, praised Gordon for helping to bridge the rift between the legislature and the courts, and for heightening the public's awareness of the judiciary.

3. *Dismissing Article II*

On March 30, 1988, the Senate, acting as the Court of Impeachment, dismissed Article II of the Articles of Impeachment. The vote was sixteen ayes, twelve noes and two not voting, to dismiss the charge with prejudice and without hearing any evidence.

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142. Senate Rules, *supra* note 90, no. 9(b).
143. Ariz. Daily Star, Feb. 11, 1988, at 2A, col. 4.
144. Senate Rules, *supra* note 90, no. 16(a).
145. The same Fred Craft as Mecham sought to appoint as lobbyist for the superconducting supercollider project. *See supra* text accompanying note 30.
146. *See* Remarks of Sen. Sossaman, Senate Trial Transcript, vol. 25, Apr. 4, 1988, at 5377.
147. *E.g.*, mandatory sentencing. The recent mandatory sentencing movement in the Arizona Legislature highlights legislators' lack of confidence in Arizona's judiciary.

Politics affected the Senate's decision. Proponents of this action, supporters of Mecham, urged dismissal to avoid possibly prejudicing the upcoming criminal trial which was expected to address the same subject matter. They were joined by all eleven Democrats, who publicly supported the idea that the criminal trial might be prejudiced. Privately, the Democrats believed that the votes to convict Mecham on the other two Articles already were firmly in place. But what if the Senate had then come up short of the requisite two-thirds for conviction? Under this scenario, the Senate would have defaulted on its constitutional obligation to try impeachments brought by the House.[148] The Democrats did not want to waste an estimated six more weeks hearing unnecessary evidence because these six weeks would delay ending the impeachment process until dangerously close to the recall election, scheduled for May 17, 1988. Politics makes strange bedfellows. The votes to dismiss Article II came from fervent Mecham supporters, who wished to protect the Governor, and from the Democrats, who wanted him out of office earlier in order to enhance a Democrat's chances in the recall election.[149]

The Democrats understood that moderate Republicans would vote to convict, if a vote was necessary, but would prefer not to vote at all. A more attractive proposition to the Republicans was to let the people decide Mecham's fate at the recall election. The dismissal of Article II forced Republican senators into the politically embarrassing position of voting to convict a Republican governor.

Article II was the most politically explosive count for all senators. If they convicted on Article II, the public might conclude that a double standard existed which allowed conviction of Mecham for not accurately reporting campaign contributions, but permitted many other state politicians who had previously made errors, intentional or otherwise, in filing their own reports to escape unscathed. While the Rules of Procedure forbade Mecham from subpoenaing either the senators or their financial records in order to prevent scrutiny of the senators' own compliance with campaign disclosure laws, Mecham and his attorneys clearly signaled their intention to make politics an issue on Article II when they filed their witness list, which included former Majority Leader of the House, Burton Barr, House Minority Leader Art Hamilton, and Representative John Kromko.[150] Mecham and his attorneys may have intended to embarrass these legislators by making them testify about their own campaign disclosure forms.

Another political reason encouraged the senators to dismiss Article II. If they convicted Mecham on Article II and, in the subsequent criminal trial, the petit jury acquitted him, as indeed it did on June 16, 1988, the seemingly

148. ARIZ. CONST. art. VIII, pt. 2, § 2.

149. The Arizona Supreme Court subsequently cancelled the recall election. Since Mecham was removed from office by impeachment, the new Governor Mofford would have been the target of the recall election. The court ruled that requiring Governor Mofford to face a recall election violated ARIZ. CONST. art. VIII, pt. 1, § 5, requiring an elected official to be in office 180 days before being submitted to a recall. Green v. Osborne, No. CV-88-0142-SA (Ariz., June 14, 1988).

150. Before the Senate of the State of Arizona Sitting as a Court of Impeachment, In the Matter of the Impeachment of Evan Mecham, Governor of the State of Arizona, Witness List — Article II (Wolfson Loan), Document 72 (Mar. 9, 1988).

inconsistent verdicts would have proven extremely embarrassing for certain senators, especially those from politically conservative districts.

It was not troubling for the Senate to dismiss one Article of Impeachment without hearing evidence so long as there were sufficient votes to convict on another Article. Wasting time and money is not sensible. However, the publicly-stated reason for dismissal—a desire not to possibly prejudice the criminal trial—is enormously troublesome. An impeachment trial ought not to defer to a criminal trial. In an impeachment proceeding, the interest of the state is at issue; at stake is the integrity of government. An impeachment conviction removes from office a person who has violated a public trust. This important state interest requires prompt resolution. In contrast, the purpose of a criminal proceeding is to punish wrongdoing. At stake is the liberty of the particular person accused of crime.

It might be argued that the interest of the State would have been adequately protected in the criminal arena for, if a criminal jury had convicted Governor Mecham of a felony, he would have been automatically removed from office and barred from holding future office by Arizona's election laws.[151] However, the criminal arena was inadequate in this case for two reasons. The first reason concerns the time lapse involved. While every criminal defendant is constitutionally entitled to a speedy trial, delays in criminal trials are inevitable. Indeed Mecham's criminal trial was postponed twice and, once begun, did not end until June 16, 1988. Since Mecham was removed from office when the House impeached him, the State government would have been in limbo for over four months. Consider Arizona's state of affairs after the House had impeached Mecham. The Governor had been removed from office. The Secretary of State, Rose Mofford, was serving as acting Governor; her office was vacant and was being run by her staff. The legislative branch ground to a halt as the Senate prepared to try Mecham, five members of the House of Representatives served as the Board of Managers, and the rest of the House membership watched to see if the Senate would sustain their Articles of Impeachment. The Chief Justice of the Arizona Supreme Court became the Presiding Officer in the Court of Impeachment. Quite obviously, the process paralyzed the upper echelons of all three branches of government. Pressing needs and concerns went unattended as the impeachment trial took center stage.

Secondly, the criminal arena would not have adequately protected the State's interests because of the different standards that apply. In a criminal trial, we place the burden of proof on the state to demonstrate "beyond a reasonable doubt" that the person is guilty; we presume that the person is innocent; and we insist that the jury agree unanimously. We indulge every presumption in favor of the accused in order to protect liberty. We do not want a person wrongfully convicted.

The standards of proof for impeachment in Arizona are lower. Any presumption of innocence—if there be one—may have evaporated when the House of Representatives voted on the Articles of Impeachment. While the Arizona Constitution does not clearly state the standard of proof to be uti-

151. ARIZ. REV. STAT. ANN. § 38-291(8) (1956).

lized, the Senate used the clear and convincing evidence standard.[152] Finally, only two-thirds of the senators elected need vote to convict in order to remove a person from office.[153] Clearly, different standards make it much more difficult to convict a person in a criminal trial than in an impeachment trial.

The Senate could have dismissed Article II without prejudice, reserving the right to try Mecham in an impeachment hearing after the criminal trial. However, acquittal in the criminal case would have made conviction in a subsequent impeachment hearing on Article II—or any Article—politically impossible. Legislators would have been extremely reluctant to reach a verdict seemingly inconsistent with that of a petit jury. But that is not to say that Mecham deserved to remain in office. It is rather to suggest that the standard of proof in a criminal case is so high that a person may escape criminal conviction but nonetheless merit impeachment and conviction.[154] There is no inconsistency in Mecham's conviction by the impeachment jury and subsequent acquittal by the criminal jury. The respective juries considered different subject matters and applied different standards.[155]

At the same time, Governor Mecham was clearly correct in his claim that hearing evidence on Article II might have prejudiced his criminal trial. If the Senate had proceeded in hearing evidence on Article II, the media coverage would have made the task of impaneling an impartial jury in the Governor's criminal trial much more difficult. Although finding an untainted jury would have been complicated, the problem was not insurmountable. One answer would have been to use voir dire carefully to select the jury. Or, if that failed or seemed inadequate, then the solution would be simply to dismiss the criminal charges. The criminal charges against Mecham paled in significance compared with the question of whether or not he should have remained Governor of Arizona. It is worth remembering what happened after the United States Congress House Judiciary Committee voted Articles of Impeachment against Richard Nixon. After Mr. Nixon resigned, President Ford pardoned him. A similar action might have been appropriate with respect to Mecham. The impeachment conviction served to vindicate the State's interest in preserving the integrity of its government. Demanding a pound of flesh by placing the former governor in the prisoner's dock was unnecessary. Alas, Mecham had alienated so many people by his racial slurs, channeling of funds to his automobile dealership, absurd ap-

152. Senate Rules, *supra* note 90, no. 23.

153. ARIZ. CONST. art. VIII, pt. 2, § 2. *See also* Senate Rules, *supra* note 90, no. 23.

154. This argument is occurring right now in the Alcee Hastings case. United States District Court Judge Hastings was acquitted in his criminal trial but after an Eleventh Circuit investigation, the U.S. Senate is considering impeachment. For federal judges, impeachment is the only constitutional method for removing an article III judge from power. This may create some unusual and complicated procedural questions. Particularly with respect to the recent cases of Judge Claiborne and Judge Hastings, the cumbersome nature of impeachment is obvious. Nevertheless, unless a constitutional amendment is passed, and one has been proposed, impeachment remains the exclusive method for removing a federal judge from office. *See* H.R. 4393, 100th Cong., 2d Sess. (1988); H.R.J. Res. 364, 100th Cong., 1st Sess. (1987); 134 CONG. REC. E931 (daily ed. Mar. 31, 1988).

155. The subjects of impeachment, Article I regarding Mecham's obstruction of justice in a criminal investigation, and Article III regarding the misuse of the governor's discretionary fund, were not a part of the criminal trial.

pointments of the fox to guard the chicken coop, intemperate attacks on the press, and arrogant, sometimes paranoid, style of administration, that there was no sympathetic groundswell creating the mood within which the new Governor, Rose Mofford, might have pardoned him. Remarkably, Richard Nixon enjoyed more public goodwill.

4. *The Judgment*

a. *Instructions*

After the close of evidence and after the Senate dismissed Article II, it came time for closing arguments and for decision. An issue arose as to "instructions" to the jury. In consultation with the Presiding Officer, it was determined and agreed to by both sides that the Senate would receive instructions from its own legal counsel, John Lundin. Counsel for both the Board of Managers and the Governor submitted proposed instructions on rules of law to Lundin. Normally, attorneys for each side would submit proposed rules to the judge. In this instance, Lundin played that role. Ultimately, he produced a memorandum to all senators, from the Senate Legal Staff.[156] This document attempted to state clearly the law that the senators ought to apply in acting as the jury. It set forth the senate's duty to determine the facts, distinguished direct from circumstantial evidence, noted that the opening statements and closing arguments of the lawyers were not evidence, and made other observations about the credibility of witnesses and expert testimony that resembled typical instructions of law a trial judge would give a jury.

Lundin's memorandum placed the burden of proof on the Board of Managers to demonstrate by "clear and convincing evidence" that the Governor had committed one or more impeachable offenses. The memorandum defined the categories of high crimes and misdemeanors as encompassing "serious abuses of official power, *whether or not* such abuses are crimes under the ordinary criminal law."[157] It also defined the various elements in the two Articles of Impeachment that remained for the Senate to decide.[158] In contrast to judicial jury instructions, however, Lundin's memorandum noted that each side might make additional legal arguments in their respective closing arguments and might disagree with his statements of law. In other words, the ultimate judge of both law and fact remained the senators.

On April 4, 1988, the Senate completed the trial and sustained Article I of the Articles of Impeachment by a vote of twenty-one ayes and nine noes and sustained Article III by a vote of twenty-six ayes and four noes.[159] At the same time, the Senate decided not to disqualify Mecham from holding

156. Memorandum from Ariz. Senate Legal Staff to All Senators re: Impeachment, Document 96 (Mar. 31, 1988).

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

158. *Id.* It made general observations about mental state, and what is meant legally by an attempt to commit certain acts. It had 25 subcategories going through the elements of the charges against the Governor.

159. Before the Arizona State Senate sitting as a Court of Impeachment In the Matter of Evan Mecham, Governor of the State of Arizona, Judgment, Document 102 (Apr. 8, 1988). The Senate had previously dismissed Article II. *See* discussion *supra* under "3. Dismissing Article II."

future office.[160] By a vote of seventeen ayes for disqualification and thirteen noes, the motion failed for want of the requisite two-thirds affirmative vote.

b. *The "Dracula Clause"*

Throughout the proceedings all parties assumed that the Senate had essentially two decisions before it: (1) whether to remove Mecham from office and (2) if they removed him from office, whether to bar him from holding future office. This second decision involved invocation of what was dubbed the "Dracula Clause." The Arizona Legislature created this alternative view in 1928, when it passed a law providing that an impeachment conviction may provide either that the accused be removed from office or that he be removed from office and disqualified from holding future State office.[161]

There remains a serious question whether the Arizona Constitution permits this choice or, rather, mandates that a person convicted in an impeachment trial is automatically and permanently disqualified from holding future office. The Arizona Constitution provides that in the case of an impeachment conviction, "judgment . . . shall extend only to removal from office and disqualification to hold any office of honor, trust or profit in the state."[162] Note that the language is ambiguous. On the one hand, the "shall extend only" language suggests the possibility that judgment might be less extensive. On the other hand, the text provides for "removal from office *and* disqualification" not "and/or" suggesting that both result automatically from a judgment of conviction. This second interpretation would explain the "shall extend only" language as intended to exclude criminal punishment from an impeachment conviction. The ambiguity in the Arizona Constitution could be resolved by coupling conviction with disqualification or by requiring independent application of a Dracula sanction. The Arizona Legislature chose the latter alternative; however, the Arizona Supreme Court has chosen the former option.

In *DeConcini v. Sullivan*,[163] the Arizona Attorney General, John L. Sullivan, was convicted of conspiring to violate the State's gambling laws. He challenged the constitutionality of a State statute that treated a felony conviction as creating a vacancy in the office, arguing that he could be removed from office only by recall or by impeachment. The Arizona Supreme Court rejected his argument and held that impeachment is not the exclusive remedy for removing an elected official. In analyzing impeachment under the Arizona Constitution, the Court observed

> Under our Constitution a successful impeachment results in a judgment of removal from office and disqualification to hold any office of honor, trust, or profit in the State. . . . An adjudication by way of

160. *Id.*

161. ARIZ. REV. STAT. ANN. § 38-321 (1956).

162. ARIZ. CONST. art. VIII, pt. 2, § 2. The United States Constitution provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold any Office of honor, Trust or Profit. . ." U.S. CONST. art. I, § 3. However, there is no apparent historical precedent setting forth the proper interpretation of this language.

163. 66 Ariz. 348, 188 P.2d 592 (1948).

> impeachment against the office is conclusive not only in connection with the matter of the incumbency of the office but carries with it as an additional penalty the disqualification to hold any office of honor, trust, or profit in the State.[164]

If Mecham should choose to run again for State elective office, litigation might seek to resolve this ambiguity.[165]

At first it seemed surprising that the Senate, having voted overwhelmingly to convict Mecham, would then hesitate to impose the Dracula Clause disqualification. Yet it made perfect sense for four reasons. First, the Senate had performed its duty by removing Mecham. If the people in their wisdom or their folly chose later to elect Mecham to a new position—or even to reelect him governor—then the people would get the kind of elected official that they deserved and chose.

Second, at the time that the Senate voted, Mecham was still facing an upcoming criminal trial. Conviction of a felony by the petit jury would have resulted automatically in a bar from holding future office.

Third, Mecham's electability was itself profoundly and adversely affected by the Senate's judgment of conviction. There was a kind of symbiotic relationship between public opinion and the decisions of the House of Representatives to impeach and of the Senate to convict. Mecham's political fortunes tumbled as the people of the State of Arizona watched both houses of their Legislature act to remove the Governor. Each House acted responsibly, with utmost seriousness, decorum, and judgment. In all probability, few voters at the extreme ends of the political spectrum were moved by the impeachment process. Fervent supporters of either the recall or the Governor would keep the faith. But vast numbers of Arizonans lacked that passionate commitment. To people in the political center, the impeachment process—with extraordinary electronic and print media coverage—cast grave doubt on Mecham's credibility and integrity. The Senate's conviction confirmed for many Arizonans that Mecham was not worthy of holding high elective office. Public opinion, in other words, was itself shaped by the process of impeachment just as the early stages of the impeachment process were shaped by public opinion.[166]

Fourth, the political alignment on the "Dracula Clause" vote suggests a partisan political motivation. Some Democratic senators refused to support the effort to end Mecham's political career.[167] Quite simply, Evan Mecham helped Democratic political fortunes and embarrassed Republicans. The Democrats refused to let the Republicans off the hook.

On April 8, 1988, the Senate entered judgment, signed by Frank X. Gordon, Jr. as Presiding Officer, formally removing Mecham from the office of Governor.[168]

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164. *Id.* at 354, 188 P.2d at 596.

165. *See* discussion of judicial review *infra* under "V. Judicial Review."

166. Although Mecham's acquittal in the criminal trial may pave the way for him to run for office again, the latest public opinion poll found that 74% of Arizonans would probably or definitely vote against Mecham if he ran again for Governor. Ariz. Daily Star, July 12, 1988, at 2B, col. 5.

167. Democratic Senators Pena, Rios, and Stephens voted against disqualification. Had they supported the motion, it would have received the requisite two-thirds vote.

168. *See* Before the Arizona State Senate Sitting as a Court of Impeachment in the Matter of

V. JUDICIAL REVIEW

Throughout the entire impeachment process, many legal issues arose to which there were no clear answers. Normally, we expect that courts will interpret or harmonize prevailing laws. But should courts play that role during the impeachment process or in judicial review of an impeachment conviction?

Two intertwined themes emerge. On the one hand, the fundamental structure of federal and state government allocates powers to each of three branches—executive, legislative, and judicial—and provides, according to the doctrine of separation of powers, that no branch will interfere with powers allocated to another branch. On the other hand, the exercise of certain powers may require cooperation between or among the branches. For example, legislation requires approval of the legislature, but a president or governor may exercise the veto power, which in turn may be overturned by a legislative override. Similarly, the treaty power requires the consent of the Senate and the advise and consent power requires Senate approval of executive nominations. Finally, the impeachment power almost universally originates in the lower house of the legislature which has the sole power of impeachment, but moves to the Senate where senators act as effective judge and jury in the impeachment trial, with the chief justice of the supreme court serving as presiding officer. With respect to a variety of powers, the structural separateness of the three branches is sometimes commingled.

A. *Review of Senate Procedure*

Mecham v. Gordon[169] arose when the Governor sought judicial review of his motion, as Respondent in the Court of Impeachment, to postpone the impeachment trial until after the conclusion of proceedings in his criminal trial. The Senate defeated his motion and Mecham brought a special action in the Arizona Supreme Court. The Governor asked the supreme court to enjoin the Senate from conducting the impeachment trial until after the close of his criminal trial in order to protect his rights in the criminal trial. The Governor's attorneys reasoned that the Senate was no longer acting as the Senate but was sitting as a *court* of impeachment and therefore came within the general jurisdiction of the State's highest court.

They made essentially three arguments.[170] They first argued that, because one count in the indictment concerned the same events that were the subject of the impeachment trial on Article II, the enormous publicity attendant to the impeachment trial would jeopardize the Governor's right to an impartial criminal jury. Therefore, as a remedy, the Arizona Supreme Court should order a postponement of the impeachment trial. Mecham's

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Evan Mecham, Governor of the State of Arizona, Judgment, Document 102 (Apr. 8, 1988). Judgment came four days after the Senate voted to convict on Articles I and III. *See id.*, Senate Resolution I (Apr. 4, 1988).

169. 156 Ariz. 297, 751 P.2d 957 (1988).

170. Mecham v. Gordon, 156 Ariz. 297, 751 P.2d 957, 959-60; *see also* Memorandum of Points and Authorities in Support of Petition for Issuance of Injunctive Relief and Application for Interlocutory Stay from Evan Mecham to the Arizona Supreme Court, No. CV-88-0044-SA (Feb. 26, 1988) [hereinafter Memorandum].

attorneys argued that this remedy would involve "no prejudice whatsoever . . . to the interests of the people or of the State Senate."[171]

The second argument maintained that requiring the Governor to participate in the impeachment trial would violate his due process rights in the criminal trial, especially his fifth amendment right against self-incrimination. His attorneys argued that no public interest demanded the Senate's "rush to judgment" because the Governor's "fitness to continue in office . . . may be resolved in the criminal proceeding" or by the people in the recall election.[172]

Finally, the Governor's attorneys argued for a series of procedural rights—"standards for due process analogous to, if not identical with, those applicable to a criminal trial." The most significant right claimed was the right to voir dire the members of the impeachment jury to determine whether they would judge the evidence fairly and impartially.[173]

Mecham again received support from an unexpected source—the American Civil Liberties Foundation. The ACLF filed a brief as amicus curiae expressing its interest in protecting the Governor's rights to due process. The memorandum of law and authorities filed by the ACLF attorneys remarkably sought to apply the standards of due process required in the criminal process to the impeachment trial.[174] The ACLF attorneys reasoned that the Governor had a property interest in keeping his office and a liberty interest in protecting his reputation. Because an impeachment conviction would remove an elected official from office, the ACLF urged a "heightened standard of due process" to protect the interest of the people of the State in having secure their choice at the polls.[175] Finally, because the Articles of Impeachment alleged conduct that was criminal in nature, the ACLF urged that it was appropriate to apply the requirements of due process in the criminal context.[176] The ACLF did not argue for imposing all "the trappings of a criminal proceeding" but did argue for some astonishing procedures.[177]

The political delicacy of the situation before the Arizona Supreme Court was evident in the fact that the case was heard by less than a full court of five justices. As Presiding Officer of the Court of Impeachment and defendant in Mecham's lawsuit, Chief Justice Gordon did not participate.[178] Thus, only four justices made the *Mecham* court decision. Vice-Chief Justice Stanley Feldman wrote the opinion that rejected the Governor's arguments.

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171. Memorandum, *supra* note 170, at 10.

172. Memorandum, *supra* note 170, at 13.

173. *Id.*

174. Memorandum of Law and Authorities, from the Arizona Civil Liberties Foundation to the Arizona Supreme Court, No. CV-88-0044-SA (Feb. 26,1988) [hereinafter ACLF amicus brief].

175. *ACLF amicus brief, supra* note 174, at p. 2.

176. *ACLF amicus brief, supra* note 174, at p. 2-3.

177. *ACLF amicus brief, supra* note 174, at 4 (arguing that Mecham be entitled to ask individual senators to recuse themselves if Mecham believed the senators were prejudiced); at 6 (the right to be present at all times during Senate deliberations); at 7 (arguing that Mecham be entitled to ignore Senate Rules of Procedure regarding the filing of timely witness lists).

178. Though he did not state reasons for his recusal, it would be incongruous for the Presiding Officer in the Court of Impeachment to turn around and sit as a judge in the Supreme Court to challenges to actions of the impeachment court, particularly since Gordon was himself a defendant.

Justice Feldman rejected the Governor's claims for two reasons. First, Justice Feldman held that the separation of powers doctrine, explicitly provided for in the Arizona Constitution,[179] precluded the judicial branch from interfering with the exercise of the legislative power of impeachment.[180] Justice Feldman reasoned that the impeachment process is legislative rather than judicial in that the impeachment proceeding requires the cooperative action of both Houses of the Legislature; the membership of these two bodies possesses the actual decision-making power. The only role played by a judicial official is that of the Chief Justice as Presiding Officer. He concluded that impeachment "is exclusively vested in the House of Representatives and the power of trial on Articles of Impeachment belongs solely to the Senate.... Trial in the Senate is a uniquely legislative *and* political function. It is not judicial."[181]

Justice Feldman justified his separation of powers reasoning by pidgeon-holing impeachment as "legislative." Conversely, Alexander Hamilton referred to "the judicial character of the Senate" while discussing impeachments in Federalist Paper Number 65.[182] However, the point ultimately is not which adjective governs but the fact that the trial of impeachments, whether it be legislative or judicial power, has been exclusively assigned to the Senate, not the judiciary.

Second, Justice Feldman found that Mecham's other alleged claims of constitutional wrongs were either premature, in that they had yet to occur, or could adequately be protected in the criminal proceeding if and when a violation occurred.[183] Accordingly, Mecham's claim was not yet ripe for judicial review. Justice Feldman rejected the argument that holding the Senate trial prior to the criminal trial would violate the Governor's fifth amendment right against self-incrimination. Analogizing to cases involving congressional investigations which recognized that parties have self-incrimination rights that would prevent information being used later in a criminal trial, Justice Feldman simply noted that Mecham, if he chose, could assert his fifth amendment right in the impeachment trial.[184]

In addition, the Supreme Court rejected Mecham and the ACLF's request that Mecham be allowed to "voir dire" the senators.[185] The voir dire analogy was faulty for several reasons. First, in the civil or criminal jury context, we expect jurors to be totally impartial. Preferably, jurors will have no knowledge of the particular events involved, the participants, the witnesses, or their counsel. Voir dire serves to identify and exclude jurors who are possibly biased. In contrast, impeachment jurors—members of the Sen-

179. Mecham v. Gordon, 156 Ariz. 297, 751 P.2d 957, 962 (1988); ARIZ. CONST. art. III.

180. Other states' courts have adopted this theory. Kinsella v. Jaekle, 192 Conn. 704, 475 A.2 243 (1984); Ferguson v. Maddox, 114 Tex. 85, 263 S.W. 888 (1924); State *ex rel.* Trapp v. Chambers, 96 Okla. 78, 220 P. 890 (1923); *see also* Doe v. McMillon, 412 U.S. 306 (1973); Walton v. House of Representatives, 265 U.S. 487 (1924).

181. *Mecham*, 156 Ariz. at —, 751 P.2d at 962. Justice Feldman apparently relied on the political question doctrine, though he did not explicitly allude to it.

182. THE FEDERALIST No. 65 (A. Hamilton) (Mentor ed. 1961)

183. *Mecham*, 156 Ariz. at —, 751 P.2d at 963.

184. *Id.*

185. *Id.*

ate—will frequently know a considerable amount about the participants involved, particularly in a gubernatorial impeachment. In Mecham's case senators had formulated favorable or unfavorable views about him and his administration during his tenure in office. All senators had had some past personal contact with the Governor, on legislation, politics, or whatever. Most senators had some knowledge of the events in question, key witnesses, or the lawyers. Thus, impeachment jurors may have considerable personal knowledge that would be totally unacceptable for civil or criminal jurors.

There is another point. The issue of who will serve on an impeachment jury in Arizona is arguably settled by the Arizona Constitution, which provides that "all impeachments shall be tried by the Senate."[186] The only limitation is the Constitution's requirement that the senators take an oath to do justice according to the law and evidence.[187] To grant an impeached party a right to voir dire senators at the Senate trial, and possibly to have those senators recuse themselves, quarrels with the political choice made in the Constitution to provide for trial by the Senate.

The maneuvering on this question was more than a moot point. The Arizona Constitution requires a vote of "two-thirds of the senators *elected*" for a valid impeachment conviction.[188] If Mecham could have excluded from participation one or more members of the jury, it would have made obtaining the requisite two-thirds that much more difficult.

Finally, the history of impeachment refutes the claim of a right of an impeached party to voir dire his jury. During the debates in the Philadelphia convention which drafted the U.S. Constitution in 1787, the framers considered having impeachment trials heard by a judicial tribunal.[189] One proposal would have had impeachments tried by the United States Supreme Court.[190] Instead, the framers opted to have the U.S. Senate serve as the impeachment jury.[191] The subsequent state constitutions, including Arizona's, have followed the federal lead. The framers plainly understood that senators with considerable prior knowledge, and even disposition, would serve as jurors in the trial of the chief executive. This is a strength, not a weakness, of the system. An advantage to having the trial before the Senate is precisely that the members are well-informed. They bring to the task years of experience and electoral accountability that has seasoned their judgment.

The Arizona Supreme Court did not address the presumption of innocence question. On this point, the ACLF argued that a Senate conviction in the impeachment trial would poison the minds of jurors in the subsequent criminal trial.[192] Therefore, to prevent a miscarriage of justice in the criminal trial, the ACLF argued that the senators ought to presume the Governor innocent and apply a rigorous standard of proof. The ACLF had the tail

186. ARIZ. CONST. art. VIII, pt. 2, § 1.
187. *Id.*
188. ARIZ. CONST. art. VIII, pt. 2, § 2.
189. *See also* A. SIMPSON, *supra* note 7, at 7-8.
190. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 605 (1966).
191. U.S. CONST. art. I § 3.
192. ACLF amicus brief, *supra* note 174, at 8.

wagging the dog in this instance. The most important interest at stake in the impeachment trial belonged not to Mecham, but to the people of Arizona. Therefore, contrary to the ACLF's position, an impeachment trial, unlike a criminal trial, ought not indulge every presumption in favor of the accused. Because a criminal jury verdict requires a presumption of innocence, proof beyond a reasonable doubt, and a unanimous verdict, it is exceedingly difficult for the State to sustain its burden. Applying these standards in the impeachment trial would have made conviction exceedingly unlikely regardless of whether the Governor deserved to be removed from office.

B. *Review of the Judgment of Conviction*

At several points in the proceedings, particularly toward the end, Mecham and his attorneys raised the possibility of seeking judicial review of the Senate's judgment. Initially, the Governor decided not to seek help from either the federal or state judiciary. However, on June 24, 1988, Mecham suddenly announced that he expected to challenge his impeachment conviction in federal court.[193] The availability of judicial review of an impeachment conviction, under either state or federal law, has been discussed and rejected in many decisions,[194] but the possibility keeps resurfacing. To seek federal court review of a state senate impeachment might present problems of complying with jurisdictional statutes. During the impeachment trial, Mecham threatened to seek review from the United States Supreme Court, but the only jurisdictional statute that could conceivably authorize Supreme Court review is limited to reviewing final judgments of "the highest court of a state."[195] An impeachment court apparently does not qualify as a "court" within the statute.[196]

If Mecham seeks review from a United State District Court, he could arguably assert general federal question jurisdiction by claiming a violation of some federal right.[197] Meeting this threshold, however, would not necessarily assure him a federal judicial ruling on the merits. First, he would undoubtedly confront a possibility of federal court abstention;[198] second, the doctrine of comity would counsel federal courts not to interfere with the judgment of the Senate.[199] An amorphous doctrine, comity concerns protecting the independence of state institutions from undue federal supervision.[200] In applying this doctrine, the United States Supreme Court has

193. Ariz. Daily Star, June 25, 1988, at 1A, col. 1.

194. *See, e.g.*, Walton v. House of Representatives, 265 U.S. 487, 490 (1923); Ferguson v. Maddox, 114 Tex. 85, 99, 263 S.W. 888, 893 (1924); State *ex rel.* Trapp v. Chambers, 96 Okla. 78, 81, 220 P. 890, 892 (1923).

195. 28 U.S.C. § 1257 (1982).

196. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 120-44 (6th ed. 1986).

197. 28 U.S.C. § 1331 (1982).

198. If resolution of his federal claim depends on resolving an uncertain state issue, a federal court may insist that he seek clarification from a state court. *See* Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941).

199. L. TRIBE, *supra* note 7, at § 3-28. Rizzo v. Goode, 423 U.S. 362 (1976) and Los Angeles v. Lyons, 461 U.S. 95, 112-13 (1983) are suggestive.

200. *See* Younger v. Harris, 401 U.S. 37, 44-45 (1971). *See also* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 550-52, 580-85 (1985).

sought to "vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States."[201] A federal court might conclude that a legal challenge to a state impeachment conviction, even one based on federal law, ought to be decided by a state court. For example, in *Walton v. House of Representatives of the State of Oklahoma*,[202] the Governor of Oklahoma, who had been impeached by the House, sought to enjoin the trial in the Senate on the ground that the impeachment was prompted by wrongful motives and would deny him due process and equal protection. The Supreme Court held that federal courts of equity lack jurisdiction over the removal of state officials by impeachment.[203]

Lastly, there is an independent possibility that the political question doctrine would counsel a federal court to stay its hand in deference to the judgment of the Arizona Senate. However, since the political question doctrine is normally considered an aspect of separation of powers, and thereby a limit on a judiciary interfering with coordinate branches of the same government, there is an argument that the political question doctrine is totally irrelevant when a federal court is considering whether to review the merits of a decision of a state branch of government.[204]

Perhaps Mecham was thinking of seeking review from the Arizona Supreme Court. Here, *Mecham v. Gordon*[205] is instructive. In *Mecham*, the Arizona Supreme Court held that the Arizona Constitution's separation of powers provision gave to the Senate the power to determine the rules and procedures to be followed in an impeachment trial.[206] From one perspective, *Mecham* was an extremely narrow judicial ruling, merely precluding judicial review of the rules and procedures the Senate adopted to conduct the impeachment trial. If the Senate had actually violated an impeachment rule set forth in the Arizona Constitution, the Arizona Supreme Court indicated that it would have power to require the Senate to follow the constitutionally prescribed rules on impeachment.[207]

Suppose Mecham believed, as he almost certainly did, that his conduct

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201. *Younger*, 401 U.S. at 44; *see also* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

202. 265 U.S. 487 (1924).

203. On the other hand, *Walton* leaves open the possibility of actions at law. However, in many instances the appropriateness of a declaratory judgment is assessed by the same standards used to judge the propriety of injunctive relief.

204. In Baker v. Carr, 369 U.S. 186 (1962), Justice Brennan described the "political question" doctrine as "essentially a function of the separation of powers," *id.* at 217, and commented: "It is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the political question." *Id.* at 210.

205. 156 Ariz. 297, 751 P.2d 957 (1988).

206. *Id.* at —, 751 P.2d at 962 (1988).

207. *Id.* Justice Feldman also recognized a possible judicial role if the Senate violated Mecham's rights against unlawful search and seizure or his right not to incriminate himself under the fifth amendment. Protecting these rights would not involve interfering with the impeachment trial. Rather, they would simply involve remedial devices which might operate in Mecham's criminal trial. That is, if the Senate unlawfully obtained incriminating evidence, then a criminal court, relying on the exclusionary rule, would properly exclude it from the criminal trial. Similarly, if the Senate had violated Mecham's right against self-incrimination, a court in a subsequent criminal trial would properly exclude the incriminating statements.

did not warrant removal from office. Could he obtain judicial review of the merits of the Senate's decision to convict? At first glance, this proposition seems ludicrous. If separation of powers precludes reviewing the refusal of the Senate to delay the trial, surely that doctrine must instruct a court not to second-guess the ultimate decision. Yet, on closer inspection, Justice Feldman left open room for debate.

The Arizona Constitution permits an impeachment conviction only for "high crimes, misdemeanors, or malfeasance in office."[208] Is judicial review available to ensure that a Senate conviction rests on conduct that constitutes one of these three categories? The seminal case on this question is *Powell v. McCormack*.[209]

In *Powell*, the United States Congress had refused to let Adam Clayton Powell take his seat as an elected representative to the 90th Congress because a House Select Committee reported that Powell had asserted an improper immunity from service of process in New York courts, had wrongfully diverted House funds for his personal use, and had falsely reported expenditures of foreign currency to a House committee. When Powell challenged in federal court the House action denying him his seat, the principal issue concerned whether the political question doctrine barred judicial review. The classic statement of this doctrine derives from *Baker v. Carr*,[210] in which the United States Supreme Court held that Tennessee's legislative apportionment violated the equal protection clause of the fourteenth amendment. Justice Brennan set forth a six-part test for determining the presence of a political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[211]

Application of the *Baker* doctrine by the *Powell* Court turned on the interpretation of two constitutional provisions. The first, United States Constitution Article I, section two, provides that no one may be a member of the House unless he or she is twenty-five years old, has been a citizen of the United States for seven years, and is a resident of the State. The second, United States Constitution Article I, section five, provides that "each House shall be the judge of the elections, returns and qualifications of its own members." The defendant, the Speaker of the House, contended that Article I, section five revealed a "textually demonstrable commitment" to the House

208. ARIZ. CONST. art. VIII, pt. 2, § 2.
209. 395 U.S. 486 (1969).
210. 369 U.S. 186 (1962).
211. *Id.* at 217.

of power to set qualifications for membership and to judge whether those qualifications had been met.

In *Powell*, the Supreme Court held that Article I, section five is a power of the House, limited by Article I, section two. In other words, "qualifications" refers only to the specific requirements of Article I, section two—age, citizenship, and residency. Therefore, a person could be excluded only if the person failed to meet the age, citizenship and residency tests. The Supreme Court asked one question and answered another. It asked whether there was a "constitutional commitment" of the power to another branch; it answered whether "qualifications" referred only to section two. The Court thus looked to the merits and not to whether the Constitution left resolution of the issue to a coordinate branch. The Supreme Court, not the branch with the textually committed power, defined the scope of the power.

The *Powell* Court considered another strand of the *Baker* criteria. Would a resolution by the Court be a "potentially embarrassing confrontation between coordinate branches?" No, the court answered; the Court was simply interpreting the Constitution. There was no disrespect for Congress, simply an act of interpretation. But how else could a potentially embarrassing confrontation arise? In *Powell*, the conflict was real: the Court ordered officers of the House of Representatives to give Mr. Powell back pay.

In summary, the *Powell* Court undercut most, if not all, the *Baker* criteria by insisting that it was engaged simply in the judicial task of interpreting the Constitution. Thus, one can interpret *Powell* as the Supreme Court's claim that when it interprets the Constitution, all political question objections dissolve.

Mecham might use *Powell* in an effort to obtain judicial review of the ultimate Senate conviction.[212] His argument would be quite simple: the Arizona Supreme Court must decide whether the conduct alleged in Articles of Impeachment I and III constitutes "high crimes, misdemeanors, or malfeasance."

In *Mecham v. Gordon*,[213] Justice Feldman dropped a tantalizing citation to *Powell* that left open some possibility of judicial review. It came at the end of a sentence in which he insisted that the Arizona Supreme Court does have power to require the Legislature to follow the rules of impeachment prescribed by the Arizona Constitution.[214] While rejecting review of Senate-created rules of impeachment, the court reserved review over constitutionally-mandated rules. Justice Feldman gave as an illustration the Senate attempting to hold an impeachment trial without the House having first voted articles of impeachment, a clear constitutional violation.[215] One could imagine that a claim could be made that a Senate conviction violated the

212. There is reason for thinking that the Arizona Supreme Court would borrow heavily from federal political question doctrine in resolving whether, as a matter of Arizona law, the state constitution permits judicial review of an impeachment conviction. Nevertheless, this question is ultimately one solely of state law, and federal law is relevant only to the extent that it affords persuasive analogy. In the absence of developed state law, the Arizona Supreme Court may properly borrow from the better developed federal doctrine.

213. 156 Ariz. 297, —, 751 P.2d 957, 962 (1988).

214. *Id.*

215. *Id.*

Constitution's rules because the subject-matter of the conviction plainly did not constitute a high crime, misdemeanor, or malfeasance.[216] When viewed together, *Mecham* and *Powell* conceivably authorize judicial review of a clear departure from the constitutionally-prescribed rules of impeachment. That review arguably extends to reviewing the Senate's judgment of conviction under the guise of interpreting the scope of an impeachable offense.

Even assuming that *Mecham* and *Powell* justify this review, the political question doctrine presents another barrier to judicial review of the Senate's application of the terms "high crimes, misdemeanors, or malfeasance." There are no "judicially discoverable and manageable standards" for defining these terms as they are terms of art with a uniquely political history and tradition. Alexander Hamilton, in *Federalist Paper* Number 65, captured this idea when he described the jurisdiction of a court of impeachment as "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL. . . ."[217] These terms embrace widely-divergent meanings.

For example, in 1970, then-Congressman Gerald R. Ford defined an impeachable offense as whatever a majority of the House of Representatives decided.[218] The Maine Supreme Court described the Maine Constitution as requiring "something . . . substantial."[219] When the United States House Judiciary Committee was considering a possible impeachment of President Nixon, its staff prepared a report that suggested as a standard for presidential impeachment, conduct "seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office."[220] The Florida Supreme Court interpreted its constitutional impeachment provision as including "any act involving moral turpitude."[221] This range of options, without any one choice clearly correct, suggests that ultimately the decision is political, as Hamilton acknowledged. Therefore, the judiciary may very well be precluded by the political question doctrine from defining the scope of an impeachable offense because there are no judicially manageable standards for making the decision.

Finally and significantly, there is apparently no reported case in American jurisprudence in which a court has reviewed and overturned a decision

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216. ARIZ. CONST. art. VIII, pt. 2, §§ 1-2. *See also* Kinsella v. Jaekle, 192 Conn. 704, 475 A.2d 243 (1984).

217. THE FEDERALIST No. 65, at 396 (A. Hamilton) (Mentor ed. 1961). Hamilton continued:

> as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the preexisting factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.

Id. at 396-97.

218. 116 CONG. REC. H. 3113-14 (Daily ed. Apr. 15, 1970).

219. Moulton v. Scully, 111 Me. 428, 433, 89 A. 944, 947 (1914).

220. STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26-27, 93d Cong. 2d Sess. (1974).

221. *In re* Investigation of a Circuit Judge, 90 So. 2d 601, 606 (Fla. 1957).

by a House of Representatives to impeach or the decision of a Senate to convict. The closest any court has come to reviewing a Senate conviction appears to be a 1924 decision by the Supreme Court of Texas, entitled *Ferguson v. Maddox*.[222] In *Ferguson*, the Texas House of Representatives impeached Governor James Ferguson. Ferguson tried to escape conviction by the Senate by resigning from office the day before the Senate, sitting as a Court of Impeachment, decreed that he be removed from the office of Governor. A Texas voter attempted to enjoin Ferguson from running again for the office of Governor on the ground that the Senate judgment of conviction not only applied to a person who technically on the date of conviction was no longer Governor, but also provided that Ferguson be disqualified from holding any future office in Texas.[223] The Texas Supreme Court affirmed the broad power of the House and Senate to conduct impeachment inquiries. Because it construed impeachment as essentially judicial in character, the court refused to require the House and Senate to abide by normal legislative rules, including one requiring that all action be taken within a single session of the Legislature. The Court also held that the resignation of the Governor did not impair the judgment of the Senate disqualifying him from holding any office in Texas.

Ferguson appears to be the only decision in American law in which a court undertook to review the validity of a judgment of conviction by a Court of Impeachment. At the same time, the *Ferguson* court understood the narrow role of judicial review. It observed that the judgment of a court of impeachment can only be called in question "for lack of jurisdiction or excess of constitutional power."[224] The impeachment power, the court recognized, is subject to judicial review only to ensure that its exercise is within "constitutional authority."[225] "[S]o long as the Senate acts within its constitutional jurisdiction, its decisions are final. As to impeachment, it is a court of original, exclusive, and final jurisdiction."[226]

Even if Mecham overcomes the problems of jurisdiction, comity, the political question doctrine, and the lack of precedent and persuades a federal or state judge to review his impeachment conviction, a more formidable problem remains: the merits. An abstract claim that the Senate violated due process evaporates on close examination of the evidence presented and the procedures followed. The terms high crimes, misdemeanors and malfeasance may theoretically empower a Senate to convict on spurious political grounds. In fact, abundant testimony supported the Senate's judgment that

222. 114 Tex. 85, 263 S.W. 888 (1924).

223. *Id.* at 90, 263 S.W. at 888.

224. *Id.* at 100, 263 S.W. at 893.

225. *Id.*

226. *Id.*, 263 S.W. at 893-94. For other cases suggesting that courts have no jurisdiction to interfere in cases of impeachment, see People *ex rel.* Robin v. Hayes, 82 Misc. 165, 143 N.Y.S. 325 (Sup. Ct. 1913), *aff'd*, 163 App. Div. 725, 149 N.Y.S. 250, *appeal dismissed*, 212 N.Y. 603, 106 N.E. 1041 (1914); State *ex rel.* Trapp v. Chambers, 96 Okla. 78, 220 P. 890 (1923); Ritter v. United States, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937).

For arguments favoring judicial review, see R. BERGER, *supra* note 7, at 103-216; Turner, *Appeal From an Impeachment Conviction and Other Interesting Conundrums*, 8 THE WRIT No. 4 at 1 (Pima County B. Ass'n, Apr. 1988).

Mecham obstructed justice and misused state money.[227] Similarly, it sounds reasonable to insist that the supremacy clause requires that the Arizona Senate conduct an impeachment trial consistently with due process.[228] On inspection, the long list of procedural rights accorded Mecham surely satisfied due process.[229]

One dimension of the impeachment trial of Evan Mecham might arguably have merited judicial review. Defenders of Mecham insisted repeatedly that the accusations against him contained in Article II of the Articles of Impeachment, involving sworn statements relating to various campaign loans, did not and could not qualify as an impeachable offense because they occurred prior to Mecham becoming Governor and because the Arizona Constitution permits impeachment only for "high crimes, misdemeanors, or malfeasance *in office*."[230] The Board of Managers tried to finesse this argument by alleging that amended campaign disclosure forms signed after Mecham became Governor reiterated and ratified the earlier misstatements, thereby constituting wrongful actions while Mecham was Governor.[231] Putting this factual response to one side, the legal question remains whether the phrase "in office" modifies high crimes, misdemeanors, and malfeasance, or, only the third category, malfeasance. Arguably, judicial standards exist for handling this relatively narrow dispute. In other words, the Arizona Supreme Court might determine as a matter of constitutional interpretation whether the phrase "in office" applies to only malfeasance or to all three categories of impeachable offenses. However, this interesting problem never arose, for the Article of Impeachment dealing with campaign finances was dismissed by the Senate before convicting Mecham.

Although direct judicial review of an impeachment conviction seems entirely inappropriate, Arizona courts may yet be asked to evaluate collaterally the Senate's conviction on Article III. That Article involved the alleged impropriety of Mecham lending money from the Governor's protocol fund to his automobile dealership.[232] On this Article, the Senate voted twenty-six to four to convict.[233] In the aftermath, Mecham has refused to turn the funds over to the State and Attorney General Corbin has threatened suit to recover them.[234]

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227. *See* Senate Trial Transcript, vol. 3, Mar. 2, 1988; *Id.*, vol. 16, Mar. 21, 1988.

228. U.S. CONST. art. VI.

229. See note 104 for a list of rights Mecham was afforded. The Arizona Supreme Court in *Mecham*, 156 Ariz. 297, —, 751 P.2d 957, 963, rejected Mecham's claim that he be granted in the impeachment proceeding all the rights granted defendants in criminal proceedings. *See also* Matthews v. Eldridge, 424 U.S. 319 (1976).

230. ARIZ. CONST. art. VIII, pt. 2, § 2 (emphasis added). Another interesting question arises as to the construction of the term "in office" as to whether it embraces acts committed by an official before taking office that arguably helped to win the office. With respect to Mecham, arguably concealing the $350,000 campaign loan prevented Arizona voters from understanding accurately his financial backing. *Cf.* Maloney v. Kirk, 212 So. 2d 609, 614, 620 (Fla. 1968) (Ervin, J., concurring).

231. *See* Arizona House of Representatives, Report of the House Managers In the Matter of the Impeachment of the Honorable Evan Mecham, Governor of the State of Arizona, Articles of Impeachment, Document 1 at 6 (Feb. 8, 1988).

232. *Id.* at 10.

233. Before the Arizona State Senate sitting as a Court of Impeachment In the Matter of the Impeachment of Evan Mecham, Governor of the State of Arizona, Judgment, Doc. 102 at 2 (Apr. 8, 1988).

234. Ariz. Daily Star, July 16, 1988, at 1B, col. 4.

During the impeachment proceedings, Mecham contended that these funds were donations to the Mecham Inaugural Committee designed by the donors to defray the cost of the inaugural ball and to reduce Mecham's 1986 campaign debt.[235] In contrast, the Board of Managers argued that they were public funds governed by Arizona statutes regulating public money received by state officers in their official capacity.[236] The propriety of convicting Mecham on Article III turned on whether or not these funds were indeed "public money." If the funds were private, then it was entirely appropriate for Mecham to lend them to his automobile agency. If, on the other hand, the funds were public monies, then the loan did not appear to promote the interests of the State, as required by statute.[237] This narrow legal question might properly be addressed and answered by a court if Corbin brings suit to recover the funds. This collateral litigation may effectively place Arizona courts in the position of deciding whether the Senate properly convicted Mecham on Article III. Even if a court finds that the funds are "private,"[238] the decision would not vitiate the Senate's conviction judgment but would prove politically embarrassing.

One last possibility for judicial review remains. If Mecham decides to run for office again, litigation might ask a court to decide whether the Constitution automatically imposes disqualification on a person convicted by a court of impeachment.[239] A judicial court might consider that this question poses an issue of constitutional interpretation fit for judicial resolution.[240]

VI. CONCLUSION

Arizona has survived a painful, nationally-embarrassing episode. State government has returned to normal business, though the long-term effect on executive-legislative relations remains uncertain. At the September 1988 primary and November 1988 general election, the electorate may vote out of office legislators who supported either impeachment or conviction.[241] Even if this backlash occurs in scattered legislative districts, however, the striking message of this year's events is a legislative victory over the executive.

The impeachment process worked well. Arizona constitutional and statutory law, supplemented by the Legislature's standing Rules and specially-adopted Rules, provided a good structure for conducting an impeachment proceeding.[242] The process protected the interests of the people and

235. *See* Before the Arizona Senate Sitting as a Court of Impeachment, Trial Memorandum Regarding Article III: Misuse of Funds, Doc. 95 at 1 (Mar. 31, 1988).

236. *Id.* at 10.

237. ARIZ. REV. STAT. ANN. §§ 41-1105 and 35-302 (1956).

238. This assumption is a major one because the argument that the funds are public has substantial force. *See* Before the Arizona State Senate Sitting as a Court of Impeachment, Trial Memorandum Regarding Article III: Misuse of Funds, Document 95 at 10 (Mar. 31, 1988).

239. ARIZ. CONST. art. VIII, pt. 2, § 2.

240. *See* De Concini v. Sullivan, 66 Ariz. 348, 354, 188 P.2d 592, 596 (1948).

241. Some legislators are particularly vulnerable, such as Representative Joe Lane–who comes from Willcox—an exceedingly conservative area. *See supra* text accompanying notes 80-88.

242. Ambiguities remain in Arizona's impeachment law. It would be helpful to have a clarification of the phrase "in office". Does that phrase apply only to malfeasance or to high crimes and misdemeanors as well? Does the phrase "in office" implicate activities that a person may take in attempting to obtain the office in question? It would also be helpful to have a clarification of the

the State, and accorded Mecham procedural rights that gave him a fair trial. At the same time, politics played both a grand and a venal role. The grand role was the protection of the people from an abuse of public trust. The venal role surfaced in the partisan votes not to impose the "Dracula Clause." Despite the inevitable intrusion of political considerations in the impeachment process, Arizonans witnessed a marvelous spectacle of republican government. Legislators took their duties seriously, performed admirably, and discharged faithfully their responsibilities in breathing life into a dormant constitutional procedure.

The Arizona electorate's commitment to Progressivism, with its insistence on democratic principles, spawned the Mecham Recall Committee. The successful recall effort paved the way for the impeachment process, yet perversely the impeachment conviction thwarted the recall election by removing the object of the recall.[243] The ironic result is that Arizona now has a Governor who will serve until 1990 without ever having been elected governor, and a new Secretary of State, James Shumway, who was appointed, not elected, to fill the vacancy created when Secretary of State Mofford became Governor. Thanks to an Arizona Supreme Court ruling, he too will serve until 1990 without facing an election.[244]

It would have been preferable, given the ambiguities in Arizona law, for the Supreme Court to have allowed the scheduled recall election to have taken place. That election would have provided Arizona voters with a fresh chance to elect their Governor.[245] Nevertheless, it would be a mistake to ignore the political character of impeachment and to conclude, as some commentators have,[246] that the impeachment frustrated either the people's choice of Governor or the recall movement. If Arizonans wanted Evan Mecham as Governor, he would still be Governor. Arizona Representatives and Senators did not sabotage democratic government. Rather, as the framers intended, they responded as elected officials to a State crisis. In the end, recall supporters accomplished their ultimate objective of ousting Mecham. It happened through an impeachment conviction rather than a recall election.

"Dracula clause": does the Constitution impose disqualification automatically? And it would be helpful for the legislature to amend ARIZ. REV. STAT. ANN. § 38-321 to eliminate any argument that a Governor may continue to serve as Governor after impeachment by the House. On one front, the Legislature already has acted. In June, 1988, the Legislature decided to place before the voters in November, 1988 the question of requiring a run-off election for Governor if none of the candidates receives a majority of the votes.

243. *See* Green v. Osborne, No. CV-88-0142-5A (Ariz., June 14, 1988).

244. *Green*, No. CV-88-0142-5a.

245. Justice Cameron's dissent in *Green* persuasively argues this position. At the same time, it should be recognized that Governor Mofford was elected to three four-year terms as Secretary of State, so the new Governor certainly enjoys considerable state-wide political support.

246. *See, e.g.*, Ariz. Republic, Apr. 6, 1988. at A10, col. 5; Wall St. J., Mar. 23, 1988, at 26, col. 1; Wall St. J. June 21, 1988, at 32, col. 1.