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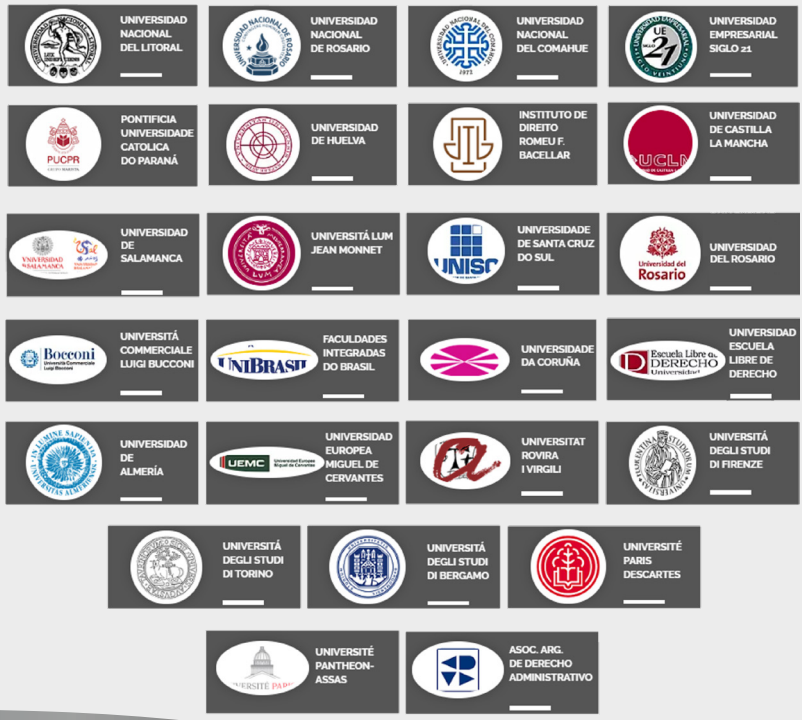

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Impeachment of judges: a brief historical and comparative analysis between Brazil and the United States of America

Impeachment de jueces: un breve análisis histórico y comparativo entre Brasil y los Estados Unidos de América

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Abstract:

This article aims to uncover some less known uses of the impeachment mechanism in Brazil and in the United States of America: judicial impeachment. On the one hand, it aims at discussing how impeachment relates to the removal of judges from public office in these two countries, namely when it comes to judges in the highest courts of the judicial branch (Supreme or Constitutional Court); on the other hand, the purpose is to discuss the connections between impeachment, judicial independence and accountability. The idea is to use comparative constitutional law methodology to address the historical background of impeachment and how it spread throughout different jurisdictions along the way before arriving in the Brazilian legal and constitutional scenario. In light of that, one of the most relevant sources will be found in precedents and legal doctrine regarding impeachment, with a significant focus on historical registers of its use and relation to judicial independence. The final objective is to test and investigate whether judicial impeachment can be seen or not as a mechanism that enhances judicial

Resumen

Este artículo tiene como objetivo discutir algunos usos menos conocidos del mecanismo de destitución en Brasil y en los Estados Unidos de América: el impeachment judicial. Por un lado, pretende discutir cómo se relaciona la medida con la destitución de jueces de cargos públicos en ambos países, es decir, cuando se trata de jueces de los niveles más altos del Poder Judicial (Corte Suprema o Tribunal Constitucional); por otro lado, la idea es discutir las conexiones entre impeachment, independencia judicial y rendición de cuentas. El objetivo es utilizar la metodología de los estudios jurídicos comparados para abordar los antecedentes históricos del instituto del impeachment y cómo se extendió por diferentes jurisdicciones en el camino antes de llegar al escenario jurídico y constitucional brasileño. Dicho esto, una de las fuentes de investigación más relevantes reside en la jurisprudencia y la doctrina jurídica en torno al impeachment, con especial énfasis en los registros históricos de su uso y su relación con los presupuestos de independencia judicial. El objetivo final es investigar si el impeachment judicial puede o no ser visto como un mecanismo que mejora la

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Kewyords. impeachment; Supreme Court judges; judicial independence; Brazil; United States of America.

***Palabras clave**: proceso de destitución; jueces de la Corte Suprema; independencia judicial; Brasil; Estados Unidos de América.*

Contents:

1. INTRODUCTION: JUDICIAL IMPEACHMENT.

According to the Black's Law Dictionary, impeachment is 'the act (by a legislature) of calling for the removal from office of a public official, accomplished by presenting a written charge of the official's alleged misconduct'.[1] In Alexander Hamilton's words in *The Federalist n. 65*, the practice of impeachment was regarded as 'a bridle in the hands of the legislative body upon the executive servants of the government'.[2] As the idea of impeachment is entwined with the idea of misconduct (or, in the exact terms of the US Constitution, 'treason, bribery, or other high crimes and misdemeanors')[3], it is common sense that the mechanism of impeachment is a remedy of last resort when it comes to the accountability of public officials. More than that, it is crystal clear that impeachment is not 'a way for political losers to overturn the outcome of a legitimate election'.[4]

The very first idea that comes to mind when the word "impeachment" is heard is always the same: the removal from office of a President for an alleged misconduct. This is true because our longstanding tradition regarding impeachment is tightly connected to the chief executive officer in a republic such as the United States of America and Brazil. Though the very idea of impeachment originated in England in the late 14th century, it has fallen into disuse there since the beginning of the 19th century. Thus, impeachment procedures and trials in England are not fresh in the countries' collective memory, being a purely historical matter.

When it comes to the United States of America and Brazil, the best (if not the only) examples of impeachment procedures are the ones linked to the most prominent figure in both democratic-republican countries: the president. The shared collective memory in these countries, namely in the last twenty or thirty years, is full of examples of

[1] GARNER, Bryan A. (Org.). **Black's Law Dictionary**. 11.ed. St. Paul: Thomson Reuters, 2019. p. 901.

[2] KESLER, Charles R. (Org.). **The federalist papers**. New York: Signet Classics, 2003. p. 396.

[3] Article II, Section 4 of the US Constitution.

[4] SUNSTEIN, Cass R. **Impeachment**: a citizen's guide. New York: Penguin Books, 2019. p. 24.

debates about impeaching a president. For these reasons, it is easy to understand how unfamiliar the expression "judicial impeachment" sounds to the general public and even for scholars who are not specialized in the subject.

With these ideas in mind, this article aims to uncover some less known uses of the impeachment mechanism in Brazil and in the United States of America: judicial impeachment. On the one hand, it aims at discussing how impeachment relates to the removal of judges from public office in these two countries, namely when it comes to judges in the highest courts of the judicial branch (Supreme or Constitutional Court); on the other hand, the purpose is to discuss the connections between impeachment, judicial independence and accountability.

The idea is to use comparative constitutional law methodology to address the historical background of impeachment and how it spread throughout different jurisdictions along the way before arriving in the Brazilian legal and constitutional scenario. In light of that, one of the most relevant sources will be found in precedents and legal doctrine regarding impeachment, with a significant focus on historical registers of its use and relation to judicial independence. The final objective is to test and investigate whether judicial impeachment can be seen or not as a mechanism that enhances judicial independence in countries that still adopt the practice, such as Brazil and the United States of America.

Though the very idea of impeachment originated in England in the late 14th century, it has fallen into disuse there since the beginning of the 19th century. At the same time, other jurisdictions started to adopt and develop it as a key feature in their constitutional and governmental structures. As Cass Sunstein points out, the American Revolution, the struggles for US independence and the Constitutional Convention of 1787 revived the idea of impeachment as a checks and balances' tool. In his words, impeachment 'became thoroughly Americanized. It turned into an instrument of popular sovereignty, an emphatically republican weapon, a mechanism by which the people might rule'.[5]

With the rise of liberal democracies since the end of World War II and the establishment of several new constitutional regimes worldwide, it became common sense to think of impeachment as the legal/political tool to remove from office the President in a democratic republic. It happens when the legislature finds evidence of an alleged misconduct by the President. From this starting point, one of the main questions to be addressed in this article is how the almost sacred concept of judicial independence is, or at least should be, entwined with the practices, procedures and regulations of impeachment, as it emerged in England and developed in the United States of America as a

[5] SUNSTEIN, Cass R. **Impeachment**: a citizen's guide. New York: Penguin Books, 2019. p. 24

check by the legislature in the other two branches: the executive and, for our purposes, the judiciary.

As for the judiciary, the idea of impeachment as a check by the legislature emerges as flipside feature of judicial independence. In a literal sense, judicial independence refers to the ability of courts and judges to perform their duties free of influence or control by other actors.[6] For the purpose of this article, we intend to carry out an analysis of the interaction between judicial independence and impeachment. More than that, the idea is to discuss how judicial impeachment evolved from England to the United States of America; later on, how it was received and incorporated in the Brazilian legal and constitutional scenario.

At the same time that judicial independence intends to 'insulate judicial decision-making and interpretation from corrupting outside influences'[7], it deserves to be looked at as an idea that has a flipside which deals with the forms of corruption and misconduct that are generated by the judges themselves.[8] Put differently, in order to achieve judicial independence one may need mechanisms to debug the judicial system and prevent misconducts and overreaches emerging from the judicial branch. In fact, it seems 'essential to balance judicial independence against judicial accountability and to distinguish appropriate forms of influence over the judiciary from inappropriate forms'.[9]

Henceforth, the idea is to analyze impeachment as a necessary flipside feature of judicial independence. For such, it is imperative to consider the impeachment mechanisms of different jurisdictions, in different times (through case law and by using a comparative framework). Thus, the focus of the research is based on three pillars: judicial independence (as a prerogative of judges), judicial accountability (as a subjection to judges) and the use of impeachment as a legal / political tool to remove judges from office by balancing these prerogatives and subjections. Adding up such variables leads us to the conclusion that 'the model of judicial accountability adopted in a given society determines, to a large extent, the independence of the judiciary'.[10]

To begin with, the experiences of judicial independence, accountability and impeachment of judicial officers from England, the United States of America and Brazil are deemed as the relevant primary sources for the research. Even though impeachment

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[6] BADIE, Bertrand; BERG-SCHLOSSER, Dirk; MORLINO, Leonardo (Orgs.). **International encyclopedia of political science**. v. 5. Los Angeles: Sage Publishing, 2011. p. 1369.

[7] FEREJOHN, John A.; KRAMER, Larry D. Independent judges, dependent judiciary: institutionalizing judicial restraint. **New York University Law Review**, New York, v. 77, n. 4, p. 692-1039, Oct. 2002. p. 972.

[8] FEREJOHN, John A.; KRAMER, Larry D. Independent judges, dependent judiciary: institutionalizing judicial restraint. **New York University Law Review**, New York, v. 77, n. 4, p. 692-1039, Oct. 2002. p. 972.

[9] BADIE, Bertrand; BERG-SCHLOSSER, Dirk; MORLINO, Leonardo (Orgs.). **International encyclopedia of political science**. v. 5. Los Angeles: Sage Publishing, 2011. p. 1372.

[10] SHETREET, Shimon; TURENNE, Sophie Turenne. **Judges on trial:** the independence and accountability of the english judiciary. 2.ed. Cambridge: Cambridge University Press, 2013. p. 2.

may not be the only way of removing a judge from office, the main idea of a check in the judiciary from the legislature's side is historically present in all these countries.

This leads us to the normative and legal questions that are proposed by this article: What is the scope of the parliamentary control over judges (especially Supreme Court judges)? How impeachment relates to the removal of such judges from public office? In a broader sense, how it is related to judicial independence and to the rule of law? Is impeachment the appropriate mechanism to check the judges in a Court of last resort that is responsible for overseeing the government? To sum up, is impeachment a proper means of controlling the misconduct of those who pave the way towards juristocracy?[11]

Though these questions will be addressed in this article in some way, it is important to establish that the main purpose of the study is to investigate how impeachment is (or may be) used as a means of judicial oversight in Brazil. More specifically, how our Supreme Court judges are subject to this particular idea of legislative check: judicial impeachment.

2. HISTORICAL BACKGROUND

Historically speaking, the idea of impeachment appeared for the first time in English history during the reign of Edward III (1327-1377). At the time, the English Parliament of the 14th century was still experiencing and exploring its new roles after evolving from the Great Councils about a hundred years before. Indeed, it was during the 'Good Parliament' sitting in London from April 28 to July 10 of 1376 that the House of Commons started impeachment proceedings against Richard Lyons, Lord Latimer and Lord Neville for 'lending funds to the Crown at exorbitant interest, and purchasing Crown debts from creditors below value'.[12]

Taking the English scenario as a primary source for understanding impeachment, it is possible to say that "impeachment is in fact a trial by the legislature, wherein the Commons are the prosecutors and the Lords, exercising at once the functions of a high court of justice and of a jury, return the verdict and impose the sentence".[13]

One of the first known proceedings involving judicial functions took place in 1386 when Sir Michael de La Pole (later Earl of Suffolk), then Lord Chancellor, was impeached by Parliament upon charges of several crimes.[14] Two years later, in 1388, the "Merciless

[11] For the concept and constitutional implications of juristocracy, see: HIRSCHL, Ran. **Towards juristocracy**: the origins and consequences of the new constitutionalism. Cambridge: Harvard University Press, 2007.

[12] FEERICK, John D. Impeaching federal judges: a study of the constitutional provisions. **Fordham Law Review**, New York, v. 39, n. 1, p. 1-58, 1970, p. 5.

[13] SHETREET, Shimon; TURENNE, Sophie Turenne. **Judges on trial:** the independence and accountability of the english judiciary. 2.ed. Cambridge: Cambridge University Press, 2013. p. 305

[14] HATSELL, John. **Precedents of the proceedings in the House of Commons**: with observations. v. 4. London: Hansard and Sons, 1818. p. 57-58.

Parliament" brought impeachment charges for treason against Sir Robert Belknap (Chief Justice of the Common Bench), Sir Roger Fulthorpe, Sir John Holt and Sir William Burgh (judges of the same Bench). They were impeached and the Lords stated 'they should be drawn and hanged as traitors and their heirs disinherited, and their lands, tenements, goods, and chattels, forfeited to the King'.[15] After conviction, it is said the Queen interceded for them with partial success: rather than hanged, 'they were all banished to Ireland for life with a yearly allowance of £20 and two servants'.[16]

These first cases established the outlines of impeachment procedures, whilst at least ten impeachments occurred between 1376 and 1459.[17] With no impeachments for more than a century, the procedures were brought back to stage in 1621[18], when Edward Coke, then in Parliament after being dismissed by King James I from his post as Chief Justice of the King's Bench, revived the mechanism against his longtime enemy Francis Bacon (then Lord Chancellor) and charged him with several counts of corruption for accepting bribes while in the bench.

The beginning of the 18th century brought another important development in judges' tenures and judicial independence. Until the Act of Settlement of 1701 the tenures of judges were basically dependent upon the pleasure of the Crown and the removal of a judge was quite simple: the king had merely to revoke his patent (appointment *durante beneplacito*).[19] Though some judges held office with tenures during good behavior prior to 1701, the Act made the commissions *quamdiu se bene gesserint* (during good behavior) a matter of law. This meant that judges could only be dismissed in consequence of a conviction for some offence or on the address[20] of both Houses. The

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[15] HATSELL, John. **Precedents of the proceedings in the House of Commons**: with observations. v. 4. London: Hansard and Sons, 1818. p. 60-61.

[16] RIDDELL, William Renwick. Erring judges of the fourteenth century. **Illinois Law Review**, Champaign, v. 21, n. 6, p. 543-558, 1926-1927, p. 553-554.

[17] VOLCANSEK, Mary L. British antecedents for U.S. impeachment practices: continuity and change. **The Justice System Journal**, Philadelphia, v. 14, n. 1, p. 40-62, 1990, p. 43. For specific information and a full list of impeachment procedures during that time, see: HATSELL, John. **Precedents of the proceedings in the House of Commons**: with observations. v. 4. London: Hansard and Sons, 1818.

[18] As pointed out by Frederic William Maitland, 'during the interval parliaments were hardly in a position to impeach the king's ministers, for it was as a check upon the king's ministers that the impeachment was chiefly valuable, and came to be afterwards valued; smaller offenders could be left to their fate in the ordinary courts'. Nevertheless, bills of attainder continued to be used for similar purposes. See: MAITLAND, Frederic William. **The constitutional history of England**. Cambridge: Cambridge University Press, 1909. p. 215.

[19] FEERICK, John D. Impeaching federal judges: a study of the constitutional provisions. **Fordham Law Review**, New York, v. 39, n. 1, p. 1-58, 1970, p. 10.

[20] MAITLAND, Frederic William. **The constitutional history of England**. Cambridge: Cambridge University Press, 1909. p. 313. Address is a 'legislature's formal request to the executive to do a particular thing, such as to remove a judge from office'. See: GARNER, Bryan A. (Org.). **Black's Law Dictionary**. 11.ed. St. Paul: Thomson Reuters, 2019. p. 48. According to Feerick, address is a formal request by Parliament to the King seeking the dismissal of a judge whose conduct, while wrongful, fails to warrant an impeachment trial. See: FEERICK, John D. Impeaching federal judges: a study of the constitutional provisions. **Fordham Law Review**, New York, v. 39, n. 1, p. 1-58, 1970, p. 11.

new legal framework cast some doubt on the possible ways of removing judges from office, but practice showed that the power to impeach judges was untouched by the Act of 1701.[21]

The interesting point about judicial impeachments is that 'in many cases judges were impeached for supporting the Crown against Parliament, either in the exercise of their judicial functions or in advice given extra-judicially. Even when the activities of the impeached judges were improper or corrupt, the motives for instituting the proceeding were not confined to purifying the administration of justice'.[22] This conclusion reinforces one of the main ideas of the proposed article: on the one hand, investigating impeachment of judges as a necessary flipside feature of judicial independence; on the other hand, investigating the relation between impeachment and the rule of law. In other words, here is question that arises: whether impeachment procedures are bound or not to follow common law standards of proof and due process (as a judicial procedure rather than a pure political one).

Impeachment remained as a tool for removing judges (and other public officers) in the United Kingdom until the beginning of the 19th century. In fact, the last time Parliament started procedures was in the unsuccessful impeachment of Lord Melville in 1806.[23] For a number of reasons, impeachment in the United Kingdom after that 'is considered obsolete, as it has been superseded by other forms of accountability, and the rules underpinning the procedure have not been adapted to modern standards of democracy or procedural fairness'.[24] In a nutshell, what started in England in the late 14th century – and developed during more than four hundred years – ceased to exist in the British world (as the 1806 Lord Melville's impeachment lead to no results at all).

Crossing the Atlantic, judges in the British colonies in America were either commissioned in England or by the local governors under express instructions from the mother country (as to protect judges from arbitrary removal by the governors).[25] Prior to the

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[21] According to Shetreet and Turenne, 'It clearly appears that the Act of Settlement did not exclude the power to impeach judges. The object of the Act, which was entitled in part 'an Act for the further limitation of the Crown', was to secure the independence of the judges of the Crown but not to render them independent of Parliament or to restrict the powers of Parliament over them. Apart from this, it would be unsound to believe that at a time of struggle for power between Parliament and the Crown, Parliament would give up a strong and efficient power over judges (which enabled Parliament not only to remove a judge or disqualify him from public office but also to sentence him severely) merely in order to assume the milder power of removal by address.' See: SHETREET, Shimon; TURENNE, Sophie Turenne. **Judges on trial:** the independence and accountability of the english judiciary. 2.ed. Cambridge: Cambridge University Press, 2013. p. 314-315.

[22] SHETREET, Shimon; TURENNE, Sophie Turenne. **Judges on trial:** the independence and accountability of the english judiciary. 2.ed. Cambridge: Cambridge University Press, 2013. p. 310.

[23] HATSELL, John. **Precedents of the proceedings in the House of Commons**: with observations. v. 4. London: Hansard and Sons, 1818. p. 483-486.

[24] CAIRD, Jack Simson. Impeachment. House of Commons Library Briefing Paper n. CBP7612 6/2016 <https://commonslibrary.parliament.uk/research-briefings/cbp-7612/>. Accessed 23 January 2021.

[25] FEERICK, John D. Impeaching federal judges: a study of the constitutional provisions. **Fordham Law Review**, New York, v. 39, n. 1, p. 1-58, 1970, p. 13.

American Revolution, colonists and the Crown struggled around judges' tenures: while colonists insisted upon tenures during good behavior, the British prevailed issuing commissions during the pleasure of the Crown. It is not a surprise, though, that Jefferson's Declaration of Independence in 1776 charged King George III to the following: 'He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries'.

After the American Revolution, discussions about impeachment played a key role in the new country. Both in Philadelphia during the Constitutional Convention and later in the ratification process of the Constitution, the framing of the new government had to address and encompass instruments to incentivize and guarantee the accountability of public officials. That is when impeachment came to play in the United States Constitution, as Article II, Section 4 provided that 'the President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors'.

During the Constitutional Convention in Philadelphia, Massachusetts delegate Elbridge Thomas Gerry famously urged the necessity of impeachments. According to James Madison's notes on the debates in the Federal Convention, Gerry expressed that 'a good magistrate will not fear them. A bad one ought to be kept in fear of them'.[26] Also during the Federal Convention, it is interesting to notice that the impeachment of Warren Hastings, Governor General of India, was underway in the British Parliament and influenced the thinking of those in Philadelphia.[27] Of all the newly independent States represented in the Convention only Massachusetts and South Carolina voted against the idea of placing impeachments within the Constitution. As pointed by Max Farrand on his classic account of the Constitutional Convention, only Rufus King (from Massachusetts), Gouverneur Morris (Pennsylvania) and Charles Pickney (South Carolina) "argued against it, unless the executive were to be appointed for life or were to be given too extensive powers".[28]

After establishing impeachment as a necessary feature for the newly created government structure, the Constitutional Convention went on to discuss whether impeachments would be tried by the Judiciary (at the Supreme Court) or by the Legislative itself. According to Farrand, the delegates to the Convention were aware of the practice that granted to the Legislative the sole power of impeachments.[29]

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[26] FARRAND, Max. **The records of the Federal Convention of 1787**. v. 2. New Haven: Yale University Press, 1911. p. 58.

[27] VOLCANSEK, Mary L. British antecedents for U.S. impeachment practices: continuity and change. **The Justice System Journal**, Philadelphia, v. 14, n. 1, p. 40-62, 1990, p. 41.

[28] FARRAND, Max. **The framing of the Constitution of the United States**. New Haven: Yale University Press, 1913. p. 118.

[29] FARRAND, Max. **The framing of the Constitution of the United States**. New Haven: Yale University Press, 1913. p. 130-131.

Focusing on judicial officers, Alexander Hamilton pointed that judicial independence was a key factor leading up to the tenures during good behavior.[30] As stated in *The Federalist n. 78*, 'the standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws'.[31] As for judicial accountability and judges' responsibility, Hamilton expressed in *The Federalist n. 79* that 'the precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges'.[32]

In light of the British precedents and Hamilton's powerful pen, the US Constitution gave the House of Representatives the sole power of impeachment and the Senate the sole power to try all impeachments of all civil officers of the US.[33] The new impeachment framework in the United States of America paved the way for several proceedings at the federal level during the last 234 years, including the impeachment of three presidents, one Supreme Court Justice and at least fourteen federal judges.[34] The United States, thus, became the primary source of impeachment for the last two centuries; more than that, the country followed the British legacy and spread the institution of impeachment around the world.

3. Judicial impeachment in the United States of America

The first question that arises about impeachments under the United States Constitution is the following: what is the scope of impeachable officials according to Article II,

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[30] Article III, Section 1 of the US Constitution provides that 'Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.'

[31] KESLER, Charles R. (Org.). **The federalist papers**. New York: Signet Classics, 2003. p. 464.

[32] KESLER, Charles R. (Org.). **The federalist papers**. New York: Signet Classics, 2003. p. 472-73.

[33] With that in mind, the delegates to the Constitutional Convention crafted what is now Article I, Section 2, Clause 5 and Article I, Section 3, Clause 6 of the Constitution of the United States: *The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment / The Senate shall have the sole Power to try all Impeachments*.

[34] Three others resigned before completion of impeachment proceedings. See: <https://history.house.gov/Institution/Impeachment/Impeachment-List/>. Accessed 23 July 2021.

Section 4 of the Constitution, which reads: *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

Following a strict textual argument, it is safe to say that Article II of the Constitution encompasses the Executive Power. Thus, its Section 4 should only apply to those officers of the United States under the Executive branch. By the same reasoning, Article 3, Section 1 of the Constitution states that *The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour*. No mentions to impeachments are found in Article 3 of the Constitution when it deals with the Judiciary.

Despite this preliminary (and supposed) contradiction, any historical account of the Constitutional Convention and its debates reveals what was behind the minds of the Framers of the Constitution when it comes to judicial impeachment. As pointed by Michael J. Gerhardt, there were no debates addressing the meaning of the phrase "civil officers of the United States". In fact, "even though the Constitution does not expressly refer to the removal of federal judges, the constitutional convention assumed, *The Federalist Papers* expressly acknowledged, and the federal government has acted from its inception as if 'all civil officers of the United States' subject to impeachment includes federal judges".[35]

Raoul Berger, one of the leading scholars on the subject of impeachment in the United States of America, states that "the almost absent-minded inclusion of judges among 'civil officers' undercuts the assumption that the Framers designed impeachment to enforce judicial 'good behavior'".[36] On the contrary, there was no planned link between impeachment and the good behavior standard of Article 3, Section 1, as no civil officers except for judges had their tenures associated and attached to such a standard. In truth – and according to Berger's explanation about the issue of impeachment during the Constitutional Convention – "the paramount concern with impeachment of the President had all but crowded out thought of removal of Justices […]". In other words, the link between impeachment and good behavior of judges was not debated at the Convention, as judges were considered impeachable officers along all other *civil Officers of the United States*.

The enactment of the Constitution and its impeachment framework sparked another debate: does Congress have the power to provide for the removal of federal judges through means other than impeachment? Though this may be an almost endless debate until today, the idea that the basic impeachment framework within the Constitution is the only way to remove a federal fudge is appealing. For James E. Pfander, this issue can be solved by the showing "that the framers of the Constitution consistently expressed the view that impeachment provided the only way to remove a federal

[35] GERHARDT, Michael J. **The federal impeachment process**. Chicago: The University of Chicago Press, 2019. p. 77.

[36] BERGER, Raoul. **Impeachment**: the constitutional problems. Cambridge: Harvard University Press, 1999. p. 154.

judge".[37] More than that, Pfander argues that "the Constitution itself follows the dominant state pattern, assigning the task of removing federal judges to the Senate after and impeachment trial and thereby implicitly but unavoidably foreclosing alternative methods of removal".[38] Following the same path in his constitutional and historical analysis of the federal impeachment process, Michael J. Gerhardt notes that "any proposal for subjecting federal judges to removal at the whim of the president or Congress through some means other than impeachment plainly violates immutable principles of separation of powers limiting the political branches' removal of federal judges".[39]

The Supreme Court of the United States never addressed the question with full force, but some argue that its judgement in United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) shows how the Court thinks about the uniqueness of impeachment for the removal of judges. Writing for the Court in that case, Justice Hugo Black stated that "courts are presided over by judges appointed for life, subject only to removal by impeachment".[40]

Dissenting from this idea and based on Raoul Berger's view of the matter, Irving R. Kaufman says that "it is constitutionally permissible to establish a removal procedure other than impeachment for judges whose conduct falls in the substantive gap between 'high Crimes and Misdemeanors' and violations of 'good Behaviour'".[41] In fact, Berger himself expresses that it is open to Congress pass legislation under the 'necessary and proper' clause "which would give effect of the implications of 'good behavior' and confirm and facilitate judicial removal of judges for 'misbehavior'".[42]

When serving as a representative for the State of Michigan, former United States President Gerald R. Ford worked hard to impeach then-Justice William O. Douglas. During his attempt at the House of Representatives as a minority leader, Ford became famous for two phrases. At first, after asking himself what would be an impeachable offense, Ford declared that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office".[43] Secondly, Ford stated

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[37] PFANDER, James E. Removing federal judges. **The University of Chicago Law Review**, v. 74, n. 4, p. 1227-1250, 2007, p. 1230.

[38] PFANDER, James E. Removing federal judges. **The University of Chicago Law Review**, v. 74, n. 4, p. 1227-1250, 2007, p. 1230.

[39] GERHARDT, Michael J. **The federal impeachment process**. Chicago: The University of Chicago Press, 2019. p. 88.

[40] United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) 16.

[41] KAUFMAN, Irving R. Chilling judicial independence. **Yale Law Journal**, v. 88, n. 4, p.681-716, 1979, p. 692.

[42] BERGER, Raoul. **Impeachment**: the constitutional problems. Cambridge: Harvard University Press, 1999. p. 154.

[43] See Congressional Record at < https://www.congress.gov/bound-congressional-record/1970/04/15/house-section?s=1&r=224>. Accessed 23 July 2021. As pointed my Michael J. Gerhardt, "Ford's observation captures the practical reality of impeachment – that we cannot be sure for what grounds particular officials may be

that "judicial misbehavior can be reached by the body politic through one method and one method only – impeachment".[44]

With such statements, Ford sums up that impeachment as a means of removing unfit judges "can only enhance the esteem and confidence in which the high court is held".[45] For him, "what is central to the entire question of impeachment is neither the privileges and powers of the judicial branch nor the privileges and power of the legislative branch but the primary interest of the public".[46]

Even though it may appear as a contradiction, the legislative capacity for the removal of judges plays a key role when it comes to judicial independence. A brief view of the Constitution of the United States of America might help explaining these connections between impeachment and judicial independence.

At first, the classic thought about judicial independence is well established in the Constitution. In such a scenario, it provides that judges will have their positions secured (tenure) during good behavior and will receive for their services a compensation which shall not be diminished during their continuance in office (Article 3, Section 1). Only with a minimum security background will judges be able to perform their duties without undue interference from the other branches or even from the citizenry. As pointed by Philip B. Kurland, "it should be kept in mind that the provisions for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged".[47]

That said, judicial independence guarantees that a judge will not be threatened for his decision, no matter how unpopular it may be. The security of tenure provides the framework in which a judge shall "be certain that disagreeable views will not lead to personal punishment. Judges should be removable only for the most serious offenses, and then only by an especially cautious procedure".[48] That is exactly when judicial impeachment comes to play in the United States scenario.

In historical terms, the first judicial impeachment to pass in the House of Representatives occurred on March 2, 1803, when Judge John Pickering, then District Judge for the District of New Hampshire, was impeached on charges of intoxication on the bench

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impeached until the House has taken action against them. We cannot be confident about whether something may become the basis for impeachment until it actually has. This is what Ford was saying". See: GERHARDT, Michael J. **The federal impeachment process**. Chicago: The University of Chicago Press, 2019. p. 105.

[44] FORD, Gerald R. Impeachment: a mace for the federal judiciary. **Notre Dame Lawyer**, v. 46, n. 4, p. 669-677, 1971, p. 676.

[45] FORD, Gerald R. Impeachment: a mace for the federal judiciary. **Notre Dame Lawyer**, v. 46, n. 4, p. 669-677, 1971, p. 677.

[46] FORD, Gerald R. Impeachment: a mace for the federal judiciary. **Notre Dame Lawyer**, v. 46, n. 4, p. 669-677, 1971, p. 677.

[47] KURLAND, Philip B. The Constitution and the tenure of federal judges: some notes from history. **The University of Chicago Law Review**, v. 36, n. 4, p. 665-698, 1969, p. 698.

[48] KAUFMAN, Irving R. Chilling judicial independence. **Yale Law Journal**, v. 88, n. 4, p.681-716, 1979, p. 690.

and unlawful handling of property claims. After that, Pickering faced trial by the Senate, where he was found guilty and removed from office. Following Pickering one year later on March 12, 1804, Associate Justice of the United States Supreme Court Samuel Chase was impeached by the House on charges of arbitrary and oppressive conduct of trials while riding circuit.[49] Though impeached by the House, Chase was then acquitted on his Senate trial in what was the only impeachment so far involving a Supreme Court Justice.

The results of Chase's impeachment can be noticed until today as his acquittal on a very partisan judgement, according to Richard B. Lillich "limited the Congressional check of impeachment and thus insulated the judiciary from any substantial direct control by the other branches of government. A contrary result would most certainly have precluded the free and independent judiciary existing today".[50] In any sense, the result was also a key factor for the improvement of the manners of federal judges regarding purely political issues, as "federal judges subsequently refrained from active participation in politics".[51] Judicial independence, thus, gained momentum, as one needs mechanisms to debug the judicial system and impeachment (even with its flaws) was one of those mechanisms (the most extreme in the system, for sure).

Finally, the last judicial impeachment within the federal judiciary occurred on March 11, 2010, when Judge G. Thomas Porteous Jr., then District Judge for the Eastern District of Louisiana, was impeached on charges of accepting bribes and making false statements under penalty of perjury. Porteous Jr. was tried by the Senate, where he was found guilty, removed from office and disqualified from holding any future offices in government.

4. THE CASE OF BRAZIL

As for Brazil, the Constitution of 1824, the first after independence from Portugal, established a constitutional monarchy whose head of government was the Brazilian Emperor himself, aided by a group of ministers. Though the Emperor had full sovereign immunity (*rex non potest peccare*, or the king can do no wrong), his ministers could be

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[49] According to Adam A. Perlin, "In the nineteenth century, Supreme Court Justices were required to ride the circuit, hearing lower courts" cases in addition to their own caseload at the Supreme Court. In 1800, while riding the circuit, Chase delivered three of the most vilified decisions of his career, two of which involved the enforcement of the Sedition Act of 1798.29 That same year, Chase refused to dismiss a grand jury until he had been satisfied that the grand jurors were not trying to protect a seditious printer.30 Then, in 1803, Chase delivered a controversial grand jury charge in Baltimore.31 These acts formed the bases of the articles of impeachment against Chase". See: PERLIN, Adam A. The impeachment of Samuel Chase: redefining judicial independence. **Rutgers Law Review**, v. 62, n. 3, p. 725-789, 2010, p. 732-733.

[50] LILLICH, Richard B. The Chase impeachment. **The American Journal of Legal History**, v. 4, n. 1, p. 49-72, 1960, p. 49.

[51] LILLICH, Richard B. The Chase impeachment. **The American Journal of Legal History**, v. 4, n. 1, p. 49-72, 1960, p. 71.

held responsible for treason, bribery, abuse of power and other offences (Articles 133). These offences often embraced criminal and political proceedings, but formally speaking there was no impeachment during the Brazilian Empire.

The very first Brazilian Constitution established in its article 134 that the law would specify the nature of these ministers' offenses and the way to proceed against them. Following that guideline, on October 15, 1827, such law was approved. It dealt with the responsibility of Ministers, Secretaries and Councilors of the State. The law provided in its article 8º that, pursuant to the Constitution, every citizen would be able to present charges and denounce Ministers, Secretaries and Councilors of the State within three years of the alleged misconduct. These charges would be directed to the lower House for examination and, if accepted, the State authorities would be tried by the upper House (in a proceeding similar to those of American and English impeachments).

During the entire Brazilian Empire (from 1822 until 1889), the Constitution of 1824 was the law of the land. As for judges' tenures and responsibilities, it provided that judges would have life tenure (Article 153). Despite that, the Emperor had the power to suspend them, preceding the hearing of the same Judges of the Council of State (Article 154). But the judges would only be removed from office after a judicial trial with a final decision (Article 155).

After a military *coup d'etat* that established the First Brazilian Republic and overthrew the constitutional monarchy in 1889, the new Brazilian Constitution of 1891, which was heavily modeled under the United States Constitution, officially brought impeachment to the 'United States of Brazil'.[52] The first Brazilian Constitution after the end of monarchical regime followed most of the basic principles and core ideas of the United States Constitution, for example: (i) a presidential republic; (ii) federalism; (iii) no state x church relations; (iv) a bill of rights; (v) separation of powers; (vi) a legislative with two branches; (vii) life tenure for justices of the Supreme Court; (viii) impeachment.

The 1891 Constitution provided for the impeachment of the President of the United States of Brazil in the so called "responsibility crimes" (Article 53 and 54). It also provided that these crimes would be defined in a special (along with the proceedings for accusation and judgements). Repeating the former Constitution of 1824, ordinary federal judges were not formally subject to impeachment procedures under the 1891 Constitution; they had life tenure and would be removed from office only after a final and unappealable court order (Article 57). But the 1891 Constitution, in its Article 57, §2º, excepted Supreme Court judges from that framework, as they were subject to impeachment in the above mentioned "responsibility crimes". Formally speaking, it was the first time judges were expressly subjected to impeachment in the Brazilian legal history.

[52] Formally speaking, "The United States of Brazil" was the name of the country under the 1891 Constitution.

Impeachment in Brazil followed pretty much the same US standards and it was maintained in the next five Constitutions until today (1934, 1937, 1946, 1967 and 1988). Beyond the general principles of impeachment regulated by the Constitution, the current law in Brazil (Federal Law n. 1.079/50) has specific provisions regulating the respective trial procedures. Other than the President and Ministers, the law provides for the impeachment of Supreme Court Justices, which are, until today, basically the only judges in Brazil subject to impeachment.

Federal Law n. 1.079/50 reinforced the idea that Supreme Court judges in Brazil are the only ones subject to impeachment. Along with these particular judges, the law also provided for the impeachment of the Attorney General of the Republic (Article 1º). According to the law, judges of the Supreme Court were subject to the following charges: 1) irregular alteration of a decision or opinion already rendered in a session of the Court; 2) failing to recuse or disqualify themselves in any proceeding in which their impartiality might reasonably be questioned; 3) exercising political activity; 4) being patently reckless in fulfilling the duties of the job; 5) proceeding in a manner incompatible with the honor, dignity and decorum of their functions. In the year 2000, Federal Law n. 10.028 provided another cause for impeachment of Supreme Court judges: budgetary irregularities when in the presidency or administration of the Court.

As for the procedures of judicial impeachment in Brazil (Articles 41 to 73 of the Federal Law n. 1.079/50), the main difference to the other civil officers subject to it (in Brazil) and to the other models of impeachment from abroad is where the procedure starts. In fact, any citizen is allowed to present impeachment charges against a Supreme Court judge before the Senate (and not before the "Câmara dos Deputados", the Brazilian lower house). Once examined by a Senate Special Committee designated by its presidency and accepted preliminarily for deliberation in the Senate floor, the impeachment will be officially initiated and will continue within the same Senate for its final judgment (also according to Article 52, III, of the current 1988 Constitution). Thus, judicial impeachment in Brazil consists of a unicameral procedure instead of a traditional bicameral one.

Even after several attempts to initiate impeachment against Supreme Court judges in Brazil, there is no precedent for such procedures. In the records of the Senate (the upper house of the legislative branch, where the proceedings shall be initiated and tried), there is no history of any preliminarily acceptance by the Senate or even of any designation of Senate Special Committees for the matter. With the rise of sectarian partisanship in Brazilian politics in the last years, there were several impeachment complaints addressed to the Senate, but none of them were referred for further proceedings by the Senate presidency and its board members. Taking into consideration the Senate bylaws and the precedents of the "Supremo Tribunal Federal" (the Brazilian Supreme Court), it is well established that the President of the Senate, along with the

Senate board members, may decide about the preliminary acceptance of an impeachment complaint and reject it if they feel that it is patently inept or lacking just cause.[53] As already mentioned, there is no history of such preliminary acceptance of a judicial impeachment so far.

What is clear, though, is that the worldwide focus on impeaching members of the executive branch rather than judicial officers ends up pushing aside more research on judicial impeachment. That is exactly what this Article wants to address and uncover: the impeachment of judges and judicial independence in a comparative framework. In that sense, the former United States President Gerald R. Ford clearly explains why these impeachment procedures may be of great importance for judicial independence and even for the citizenry: "if the duty of the courts is to protect citizens from bad laws, it is equally the duty of the Congress to protect them from bad judges".[54]

In a nutshell, further studies about judicial impeachment in Brazil (with an obvious focus on our Supreme Court) may renew and reveal its usefulness in promoting judicial efficiency, fairness, independence and accountability. As put by John Nichols in the American context, the same is true to the Brazilian one: it is time to renew the familiarity of the people not merely with the concept of impeachment, "but with its glorious potential to serve as the truest corrective of abuses of constitutional power, and the surest weapon in the defense of the republic".[55]

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[53] See, for example: STF, MS 30672 AgR/DF, Judge Ricardo Lewandowski (rapportuer), 15.9.2011.

[54] FORD, Gerald R. Impeachment: a mace for the federal judiciary. **Notre Dame Lawyer**, v. 46, n. 4, p. 669-677, 1971, p. 677.

[55] NICHOLS, John. **The genius of impeachment**: the Founders' cure for royalism. New York: The New Press, 2006. p. 17.

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