AN EVALUATION OF NEBRASKA'S IMPEACHMENT STANDARD—*STATE v. DOUGLAS*

*No point is of more importance than the right of impeachment should be continued. Shall any man be above justice?**

INTRODUCTION

Except for a brief flurry of excitement in the early 1970's over the prospect of the impeachment of Richard M. Nixon, impeachment at both the state and federal levels remains a little known constitutional process. The significance of the removal process, however, should not be underestimated; its obscurity from public view does not lessen its importance. In any stable representative government, there must be a means available to remove public officials for offenses which "proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[1] Equally important is the need for a clearer understanding of the standard used by a court of impeachment in its determination of what conduct constitutes an impeachable offense to justify removal from office.

The removal process was recently brought to the limelight in the impeachment trial of former Nebraska Attorney General, Paul L. Douglas.[2] It had been nearly one hundered years, 1893, since the Nebraska Supreme Court had convened as a court of impeachment to remove a state civil officer.[3] Douglas was charged with violating several Nebraska statutes[4] and several provisions of the Code of Professional Responsibility ("Code").[5] The Code is the standard governing the conduct of attorneys in Nebraska. The Nebraska Supreme Court, however, held that the Code is not an appropriate standard by which to judge the conduct of the state's highest attorney.[6]

This Comment focuses on the standard set in *State v. Douglas*[7] by which to judge impeachable conduct. This standard is viewed in

---

* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (1911) (quoting Colonel George Mason, a delegate from Virginia, during the constitutional debates).

1. THE FEDERALIST No. 65, at 423 (A. Hamilton).
2. State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).
3. State v. Hastings, 37 Neb. 96, 55 N.W. 774 (1893).
4. L. Res. 277, 88th Leg., 2d Sess., 1984. For a list of the statutes with which Douglas was charged as having violated, see note 32 *infra*.
5. *Id.*
6. *Douglas*, 217 Neb. at 202-03, 349 N.W.2d at 875.
7. 217 Neb. 199, 349 N.W.2d 870 (1984).

light of the history of impeachment and impeachable offenses from their origin in the English parliament through their adaptation by the United States Constitutional Convention. In addition, this Comment examines nearly 200 years of impeachment precedent arising under the federal and Nebraska Constitutions. Only by a thorough analysis of the standards established for impeachment and impeachable offenses from their origin to the present time can one appreciate the significance of the standard for impeachable conduct set forth in the *Douglas* impeachment.[8]

FACTS AND HOLDING

Paul Douglas was elected the Attorney General of Nebraska in 1975.[9] Subsequently, in 1975 and 1976, Douglas and a business associate, Paul Galter, lost large sums of money in commodities speculation.[10] Seeking to recoup their losses, Douglas and Galter ventured into several real estate transactions with Galter's friend, Marvin Copple, then a director of Commonwealth Savings Company ("Commonwealth").[11] To carryout their real estate transactions, Douglas and Galter formed the partnership "P.P.S.S."[12] During the period from 1977 through 1979 the partnership bought, with financing from Commonwealth,[13] seventy-eight real estate lots from Copple for a discounted aggregate price of $668,129,[14] and resold the same lots for a total of $786,417.67.[15] As part of their business dealings, Copple would arrange for P.P.S.S. to sell the properties to third parties.[16] All but eighteen lots were sold to Copple's secretary, Judith Driscoll,[17] who financed these properties through loans from Commonwealth[18] and purchased the lots at a much higher price than the

8. This Comment does not pass judgment upon the guilt or innocence of Paul Douglas, nor upon the propriety of the court's decision that Douglas was not guilty. The purpose of this Comment is to view the supreme court's interpretation of the standard of conduct for impeachable offenses in Nebraska in light of historical precedent and recent interpretations regarding impeachment.

9. *Douglas*, 217 Neb. at 203, 349 N.W.2d at 875.

10. L. Res. 277, *supra* note 4, at 1.

11. *Douglas*, 217 Neb. at 250, 349 N.W.2d at 897 (Hastings, Shanahan, and Grant, JJ. and Moran, D.J., dissenting).

12. *Id.* at 203, 349 N.W.2d at 875.

13. *Id.* at 250, 349 N.W.2d at 897 (Hastings, Shanahan, Grant, JJ., dissenting).

14. *Id.* at 271, 349 N.W.2d at 907 (Shanahan, Grant, Moran, JJ., dissenting).

15. *Id.* at 273, 349 N.W.2d at 907 (Shanahan, and Grant, JJ. and Moran, D.J., dissenting).

16. *Id.* at 267, 349 N.W.2d at 905 (Shanahan, and Grant, JJ. and Moran, D.J., dissenting).

17. *Id.*

18. *Id.* at 271, 349 N.W.2d at 907 (Hastings, Shanahan, and Grant, JJ. and Moran, D.J., dissenting).

partnership had paid.[19] In one way or another, the properties involved in all of these transactions between Copple, Douglas, and Driscoll were mortgaged to Commonwealth.[20] Douglas later maintained that, throughout all of these transactions, he was unaware that Driscoll was borrowing the money from Commonwealth.[21]

On March 14, 1983, Douglas received a letter from the Federal Bureau of Investigation concerning alleged "financial irregularities at Commonwealth."[22] Later that spring, the State Department of Banking and Financing advised him of "possible crimes committed by Marvin Copple."[23] In response, Douglas' office assigned Ruth Ann Galter, Paul Galter's "estranged wife," to investigate the alleged criminal activity at Commonwealth.[24] At no time prior to November 1, 1983, did Douglas reveal the extent of his personal and financial involvement with Commonwealth to the State Department of Banking and Financing or to his own office, even though his office was involved in the investigation.[25] On Novemer 18, 1983, eighteen days after the closing of Commonwealth, Douglas disqualified himself from the Commonwealth investigation and appointed David Domina as the Special Assistant Attorney General to represent the State of Nebraska in all matters involving Commonwealth.[26]

On November 30, 1983, and again on December 12, 1983, Douglas was questioned under oath by David Domina about his involvement with Copple and Commonwealth.[27] Not until February 6, 1984, did Douglas reveal, in a letter to the Special Commonwealth Committee,[28] that he had received an additional $32,500 in fees from Copple, even though he was requested on both the November 30th and December 12th interviews to reveal the full extent of his financial in-

19. *Id.* at 203-05, 349 N.W.2d at 875-76. In one instance, on July 20, 1979, the partnership purchased 12 lots from Copple for $105,000, each deed witnessed by Driscoll, and on the same day, sold the same 12 lots to Driscoll for $120,000, a gross profit to Douglas, through P.P.S.S., of $14,400. *Id.* at 272, 349 N.W.2d at 907 (Hastings, Shanahan, and Grant, JJ. and Moran, D.J., dissenting).

20. *Id.* at 203-05, 349 N.W.2d at 875-76.

21. *Id.* at 218, 349 N.W.2d at 882.

22. *Id.* at 205, 349 N.W.2d at 876.

23. *Id.*

24. *Id.* at 205, 349 N.W.2d at 876. Ms. Galter was indebted to Commonwealth during this investigation. *Id.*

25. *Id.* at 206, 349 N.W.2d at 876.

26. L. Res. 277, *supra* note 4, at 3.

27. 217 Neb. at 209, 349 N.W.2d at 878.

28. *Id.* at 253-54, 349 N.W.2d at 898-99 (Hastings, Shanahan, and Grant, JJ. and Moran, D.J., dissenting). On January 4, 1984, the legislature adopted Legislative Resolution 229, authorizing the Special Commonwealth Committee to investigate alleged misdealings at Commonwealth. Trial Brief of Plaintiff at app. I, *Douglas*.

volvement with Commonwealth and Copple.[29]

These questionable transactions between Douglas and Copple, as well as other unanswered questions, combined with the furor over the loss of millions of dollars by Commonwealth depositors, culminated in hearings before the Special Commonwealth Committee on February 24 and 25, 1984.[30] On March 14, 1984, the Eighty-Eighth Legislature of the State of Nebraska, pursuant to article III, section 17 of the Nebraska Constitution, adopted a resolution of impeachment against Douglas.[31] The resolution was composed of thirty general allegations and six specifications or counts, each of which alleged specific offenses.[32]

The Nebraska Constitution requires a "concurrence of two-thirds

---

29. *Douglas*, 217 Neb. at 252-53, 349 N.W.2d at 898 (Hastings, Shanahan, and Grant, JJ. and Moran, D.J., dissenting).

30. L. Res. 277, *supra* note 4, at 4.

31. *Id.*

32. *Id.* The resolution stated:

SPECIFICATION NUMBER ONE - DUTY NOT TO MISREPRESENT

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. Paul L. Douglas did knowingly misrepresent his knowledge of his receipt of $23,500.00 from Marvin Copple to David Domina in a sworn statement;

3. As a consequence of such knowing misrepresentation, Paul L. Douglas did violate:

A. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 1-102 (A); or,

B. Neb. Rev. Stat. § 28-901 relating to obstructing governmental operations; or,

C. Neb. Rev. Stat. § 28-924 relating to official misconduct; or,

D. Neb. Rev. Stat. § 7-105 relating to the duties of an attorney; or,

E. Neb. Rev. Stat. § 7-106 relating to deceit or collusion by an attorney.

SPECIFICATION NUMBER TWO — DUTY NOT TO LIE

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. Paul L. Douglas did knowlingly misrepresent or knowingly lie to David Domina in a sworn statement, or, to the Counsel on Discipline of the Nebraska State Bar Association in a letter dated on or about December 13, 1983, or, to the Special Commonwealth Committee of the Legislature in a letter response dated on or about February 6, 1984, regarding the issue of whether Paul L. Douglas had knowledge that certain lots purchased from Paul L. Douglas and Paul Galter by one Judy Driscoll were financed by Commonwealth Savings Company;

3. As a consequence of such knowing misrepresentation or knowing lie, Paul L. Douglas did violate:

A. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 1-102(A); or,

B. Neb. Rev. Stat. § 28-901 relating to obstructing governmental operations; or,

C. Neb. Rev. Stat. § 28-924 relating to official misconduct; or,

D. Neb. Rev. Stat. § 7-105 relating to the duties of an attorney; or,

E. Neb. Rev. Stat. § 7-106 relating to deceit or collusion by attorneys.

SPECIFICATION NUMBER THREE — DUTY TO DISQUALIFY

of the members of a Court of Impeachment . . . to convict on any

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. On or about March 14, 1983, Paul L. Douglas in his capacity as Attorney General was notified by virtue of a letter received from the Federal Bureau of Investigation of certain transactions, which were possibly criminal in nature, occurring at Commonwealth Savings Company, and which were similar in nature to certain transactions in which he had engaged in at Commonwealth Savings Company;

3. In the spring of 1983, Paul L. Douglas was informed that Marvin Copple may be guilty of crimes involving Commonwealth Savings Company;

4. In July of 1983, Paul L. Douglas was informed that Marvin Copple may be guilty of crimes involving Commonwealth Savings Company;

5. That at all pertinent times, Paul L. Douglas was acting in his capacity as Attorney General of the State of Nebraska;

6. That notwithstanding Paul L. Douglas' previous business relationships with Marvin Copple and Commonwealth Savings Company, Paul L. Douglas acting in his capacity as Attorney General of the State of Nebraska, accepted employment from the State of Nebraska regarding possible criminal activities involving Marvin Copple or Commonwealth Savings Company without obtaining the consent of his client, the State of Nebraska, after full disclosure at a time when the exercise of his professional judgment on behalf of his client, the State of Nebraska, would be or reasonably might be affected by his financial, business, property, or personal interests;

7. Notwithstanding Paul L. Douglas' previous financial and business dealings with Marvin Copple or Commonwealth Savings Company, Paul L. Douglas failed to decline proffered employment from the State of Nebraska respecting the possible criminal activities regarding Marvin Copple or Commonwealth Savings Company at a time when the exercise of his independent professional judgment, in behalf of his client, the State of Nebraska, was or might likely be, adversely affected by the acceptance of the proffered employment;

8. As a consequence of such actions, Paul L. Douglas did violate:

A. The Code of Professional Responsiblity adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 5-101 (A); or,

B. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 5-105 (A).

SPECIFICATION NUMBER FOUR - DUTY TO AVOID INSIDER BORROWING

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. During 1979, Marvin Copple was an officer or Director of Commonwealth Savings Company;

3. On or about August 18, 1979, Marvin Copple borrowed from Commonwealth Savings Company, directly or indirectly, without first having secured the approval of the Board of Directors of such industrial loan and investment company, the sum of $100,500.00, and Paul L. Douglas aided, abetted or assisted in such borrowing;

4. As a consequence of the foregoing, Paul L. Douglas violated the provisions of Neb. Rev. Stat. § 8-409.06.

SPECIFICATION NUMBER FIVE - DUTY TO INVESTIGATE

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. On or about March 14, 1983, Paul L. Douglas received a copy of a letter from the Federal Bureau of Investigation generally describing financial irregularities occurring at Commonwealth Savings Company;

3. Sometime in March, 1983, Paul L. Douglas met with Barry Lake and Paul Amen, and possibly others, to discuss the F.B.I. letter and financial irregularities;

4. In the spring of 1983, on a date unknown, Barry Lake advised Paul L.

specification."[33] In *Douglas*, a concurrence of five or more judges out of seven was required.[34] The court was divided on specifications one and two, thus precluding a finding of guilt.[35] On specifications three

---

Douglas of possible criminal activity involving Marvin Copple and Commonwealth Savings Company;

5. On or about May 4, 1983, Paul L. Douglas assigned, or consented to the assignment of, Ruth Anne Galter, an Assistant Attorney General, to the Nebraska Department of Banking and Finance for the purpose of assisting said Department in prosecuting "white collar" crime;

6. At all material times, Paul L. Douglas was aware of the fact that Ruth Ann Galter was personally indebted to Commonwealth Savings Company for large sums of money and that she was the estranged wife of Paul Galter;

7. In July of 1983, on a date not known, Ruth Anne Galter advised Paul L. Douglas of the possibility of criminal activity involving Marvin Copple and Commonwealth Savings Company;

8. The Nebraska Department of Banking and Finance made available or would have made available to Paul L. Douglas or Ruth Anne Galter all information it had in its possession regarding alleged criminal activity involving Marvin Copple or Commonwealth Savings Company from and after March 14, 1983;

9. Substantially nothing was done to prosecute or investigate Marvin Copple or Commonwealth Savings Company, from March 14, 1983, until Commonwealth Savings Company was declared insolvent on November 1, 1983, by Paul L. Dougls or any of his subordinates;

10. By virtue of the foregoing, Paul L. Douglas violated the provisions of Neb. Rev. Stat. § 84-205(4) and other laws of the State of Nebraska generally.

SPECIFICATION NUMBER SIX — DUTY TO AVOID EVEN THE APPEARANCE OF IMPROPRIETY

1. The general allegations hereinabove recited are incorporated herin as if set forth verbatim;

2. From approximately 1973 until approximately 1982, Paul L. Douglas engaged in various business transactions with Marvin Copple, Judy Driscoll, or Commonwealth Savings Company which were not in the ordinary course of business, all as more specifically described in the report of Officer Lowe of the Lincoln Police Department, dated February 21, 1984, and the report of David Domina and John Miller, dated January 20, 1984;

3. Paul L. Douglas did not fully and openly and honestly cooperate with Special Assistant Attorney General David Domina in Mr. Domina's investigation into possible acts of official wrongdoing;

4. As a result of the foregoing, Paul L. Douglas violated:

A. The Code of Professional Responsiblity adopted by the Nebraska Supreme Court including, but not limited to, DR 1-102, or,

B. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, including, but not limited to, the ethical considerations related DR 8; or,

C. The Code of Professional Responsiblity adopted by the Nebraska Supreme Court, including, but not limited to, the ethical considerations related DR 9; or,

D. Neb. Rev. Stat. § 7-105 relating to the duties of attorneys; or,

E. Neb. Rev. Stat. § 7-106 relating to deceit or collusion by attorneys; or,

F. Neb. Rev. Stat. § 28-901 relating to obstructing governmental operations; or,

G. Neb. Rev. Stat. § 28-924 relating to official misconduct.

33. NEB. CONST. art. III, § 17.

34. *Id.*

35. *Id.*

through six, the court was unanimous in a verdict of not guilty.[36] In so holding, the court without explanation concluded that the Code was not an appropriate standard by which to determine conduct constituting an impeachable offense.[37]

BACKGROUND

THE HISTORY OF IMPEACHMENT — ENGLISH ROOTS

Any study of state and federal constitutional impeachments would not be complete without an understanding of the origin of impeachment in England. The framers of the United States Constitution were well aware of the dangers of a centralized government, and the need for a means by which the people could replace leaders who abused the powers of their offices.[38] In fact, during the Constitutional Convention, an impeachment was proceeding in England, and the convention delegates referred to it often in their discussion of an appropriate impeachment procedure for the proposed constitution.[39]

The impeachment process had begun in England in the fourteenth century,[40] as a means by which the House of Commons prosecuted before the House of Lords "the most powerful offenders and the highest officers of the Crown."[41] Parliament saw impeachment as a means to make the ministers chosen by the Crown accountable to Parliament, rather than to the King.[42]

The English Parliament saw impeachment as a tool to reach those who, "for one reason or another, were beyond the reach of ordinary criminal redress."[43] Yet, Parliament had not defined in the English law, by act or otherwise, what constituted an impeachable offense; rather, "any offense was impeachable that Parliament chose to so consider."[44] According to one commentator whose views were adopted for use in the impeachment trial of President Andrew Johnson:[45]

---

36. *Id.*

37. *Id.* at 203, 349 N.W.2d at 875.

38. A. SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS 7 (1916). *See also* R. Berger, Impeachment: The Constitutional Problems, 3 (1973).

39. *Id.* The trial of Warren Hastings, then Governor of India, took seven years to try and resulted in an acquittal. *Id.* at 167.

40. A. SIMPSON, *supra* note 38, at 5.

41. R. BERGER, *supra* note 38, at 1.

42. *Id.*

43. *Id.* at 59.

44. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT: SELECTED MATERIALS H.R. DOC. NO. 7, 93rd Cong., 1st sess., 64 (1973) [hereinafter cited as "SELECTED MATERIALS"].

45. A. SIMPSON, *supra* note 38, at 37 (citing Judge Lawrence whose article was originally printed in 6 AM. L. REQ. (N.S.) 641).

> The House of Commons might impeach for whatever was indictable, but they also might impeach in cases where no indictment could be found . . . . In short, this maxim has been laid down as irrefragable, that whatever mischief is done, and no remedy could otherwise be obtained, it is competent for Parliament to impeach.[46]

The English used the phrase "high crimes and misdemeanors in a public office" to describe an impeachable offense.[47] The phrase had its origin in the impeachment proceeding against the Earl of Suffolk in 1386, and was a response to a unique situation in the English common law.[48] The significance of this fact is that the phrase "high crimes and misdemeanors" developed a technical meaning not from the common law, but from the *Lex Parliamentia*,[49] which is the law as it eminated from Parliament in a case-by-case process.[50] In addition to being well aware of the impeachment process, the founding fathers were also familiar with the standard of conduct expected of high officers, and as a result of the parliamentary development understood impeachment to lie for "many offenses not easily definable by law."[51]

AMERICAN IMPEACHMENT

The Federal Constitution

The Constitutional Convention accepted the common law as it then existed in England.[52] The founders "considered the object of their legislation as a known thing, having a previous definite existence. Thus, their work was solely to mold it into a suitable shape."[53] The convention members saw their objective as one to modify the English practice to fit the spirit of the proposed constitution and to avoid what the founders viewed as the abusiveness of certain procedures in England.[54] Impeachment was clearly an English institution borrowed by the founders, "but not before they had subjected it to significant modification that considerably reduced its potential for ar-

---

46. *Id.*
47. R. BERGER, *supra*, note 38, at 61 n.30.
48. *Id.* at 61.
49. Broderick, *Citizens' Guide to Impeachment of a President: Problem Areas*, 23 CATH. U.L. REV. 205, 219 (1973). *See also* R. BERGER, *supra* note 40, at 61. " 'High crimes and misdemeanors' were a category of political crimes against the state, whereas 'misdemeanor' described criminal sanctions for private wrongs . . . for though 'misdemeanor' entered into the ordinary criminal law, it did not become the criterion of 'high misdemeanor' in the parliamentary law of impeachment." *Id.*
50. SELECTED MATERIALS, *supra* note 44, at 58.
51. *Id.* at 29.
52. *Id.*
53. Broderick, *What Are Impeachable Offenses*, 60 A.B.A. J. 415, 417 (1974).
54. *Id.*

bitrary action."[55] Among the English impeachment procedures that the founders changed were as follows:

> 1. In England any citizen could be impeached. The Constitution limits impeachment to the "President, Vice President and all civil officers of the United States."
>
> 2. In England an impeachment was a criminal proceeding, and conviction might bring penalties of loss of life or property and imprisonment. The Constitution expressly removes impeachment from the criminal process. The Senate . . . may convict . . . but the "judgment . . . shall not extend further than to removal from office and disqualification" from future service in any federal office.
>
> 3. In England the king could pardon any person convicted after impeachment. The Constitutional grant of power to the president to "grant reprieves and pardons" carries the express exclusion, "except in cases of impeachment."
>
> 4. In England, the king, as sovereign, could note be impeached. The Constitution expressly provides that the president, as chief executive, may be impeached . . . .
>
> 5. In England other modes existed for removal from office . . . . The Constitution provides no method for removal from office of the president, vice president, or federal judge save by impeachment.
>
> 6. In England the categories of impeachable offenses were open . . . . The Constitution expressly limits impeachable offenses to "Treason . . . Bribery or other high Crimes and Misdemeanors."[56]

Even though the federal impeachment provisions were first interpreted in 1797, in the trial of William Blount,[57] the standard for impeachable offenses stated in article II, section 4 of the Constitution still remains uncertain.[58] The standard set forth in the Constitution calls for impeachment for "Treason, Bribery, and other high Crimes and Misdemeanors."[59] A phrase was originally adopted by the convention to limit impeachable offense to "great offenses."[60] The debate over the use of the words "high crimes and misdemeanors" shows that the founders had a definite idea of the limits of the

55. *Id.*

56. *Id.* at 417-18.

57. Sloan & Garr, *Treason, Bribery, or Other High Crimes and Misdeamnors—A Study of Impeachments*, 47 TEMP. L.Q. 413 (1974).

58. R. BERGER, *supra* note 38, at 54.

59. U.S. CONST. art. II, § 4.

60. R. BERGER, *supra* note 41, at 124.

phrase.[61] During the convention debates, the following debate as to the use of the phrase occurred:

> Col. Mason. Why is the [impeachment] provision restrained to Treason and bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. . . . He movd [sic] to add after "bribery" "or maladministration". . . .
>
> Mr. Madison [countered:] So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> . . . .
>
> Col. Mason withdrew "maladministration" & substituted "other high crimes & misdemeanors" [agst. the State"].[62]

In fact, during the constitutional debates, the Committee on Detail attempted to insert the phrase "high Misdemeanor" into the language of what is now article IV, section 2.[63] The language, as proposed, read: "Any person charged with Treason, Felony or high Misdemeanor who shall flee from Justice be found in any of the [United] States shall be on dem[and] of the executive power of the State from wh[ich] he fled be deliv[ere]d up . . . ."[64] The words "high misdemeanor" were struck out in the final draft and replaced by the phrase "other crime" because the founders felt that "high misdemeanor" had a limited, technical meaning.[65] As one commentator stated so succinctly: "The word 'crimes' was used to negative the thought that the only criminal offences for which an impeachment would lie were 'treason' and 'bribery'; and the word 'misdemeanors' was used to negative the thought that only 'crimes' were impeachable."[66]

As previously noted, the phrase "high crimes and misdemeanors" was used by the English with respect to impeachment exclusively.[67] The founders felt no need to delineate and define the phrase "high crimes and misdemeanors," just as they did not deem it necessary to define "due process of law" or "levying war."[68] When the founders adopted such phrases from the English tradition, they intended that "their historical meaning and construction went along with them as completely as if such meaning and construction had been written out

---

61. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (1911).

62. *Id.* at 550. The motion was passed without further debate. *Id.*

63. *Id.* at 174.

64. *Id.* at 443.

65. A. SIMPSON, *supra* note 38, at 33.

66. *Id.* at 35.

67. *See* notes 47-50 and accompanying text *supra.*

68. SELECTED MATERIALS, *supra* note 44, at 33.

at length upon the face of the instrument itself."[69] Where the founders intended to deviate from the English impeachment precedent, they set it out in the Constitution.[70] The framers "knew exactly the limitations of the phrase [high crimes and misdemeanors], and they repelled the idea that it was to ever be enlarged or diminished."[71] The United States Supreme Court, whose duty it is to interpret the Constitution and preserve the intent of the founders when analyzing constitutional questions, must "look to the history of the times, and examine the state of things existing when it was framed, and adopted, to ascertain the old law, the mischief, and the remedy."[72]

Except for treason and bribery, the Constitution does not specify the acts which constitute impeachable offenses justifying removal from office.[73] The founders viewed impeachment, in light of its parliamentary usage, to include "not only crimes for which an indictment may be brought, but grave political offenses, corruption, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of the state."[74] By adopting the English interpretation of impeachable offenses, the founders found no need to list specific offenses except for treason and bribery, which were impeachable *per se*.[75] One commentator described the reasoning for adopting such an interpretation: "The times change and we change with them. That which would be entirely justifiable at one time, in one place and under one set of circumstances, might be unjustifiable at another time, in another place, and under another set of circumstances."[76]

Alexander Hamilton summarized the intent of the framers with regard to a court of impeachment's power of interpretation, stating that "[the court] can never be tied down by strict rules [as with other crimes], either in the delineation of the offence by the prosecutors, or in the construction of it by the judges."[77] Over two hundred years later, former President Ford, while still a congressman, expressed the view "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

69. *Id.*
70. Broderick, *supra* note 53, at 417.
71. SELECTED MATERIALS, *supra* note 44, at 54.
72. Rhode Island v. Massachusetts, 38 U.S. (12 Pet.) 657, 658 (1838).
73. U.S. CONST. art. II, § 4.
74. Fenton, *The Scope of the Impeachment Power*, 65 NW. U.L. REV. 719, 726 (1970).
75. *See* note 68 and accompanying text *supra*.
76. A. SIMPSON, *supra* note 38, at 50.
77. THE FEDERALIST NO. 65 at 424 (A. Hamilton).

removal."[78]

The standard for impeachable offenses, however, is not arbitrary and completely at the discretion of the legislature.[79] The founders had an intense dislike for unconfined discretion and did not intend to allow unbridled arbitrariness in the application of the standard for impeachable offenses.[80] The founders intended to characterize "misdemeanors" as serious misconduct.[81] They saw themselves as limiting the discretion to those "impeachable offenses . . . which were the subject of impeachment by the practice in Parliament before the Declaration of Independence, except in so far as the practice is repugnant to the language of the Constitution. . . ."[82] An examination of the impeachment proceedings brought under the new Constitution reveals that impeachment has been invoked sparingly since 1787 and, in the majority of cases, within the boundaries of discretion envisioned by the founders.[83]

Federal Impeachments

An examination of the impeachment cases since adoption of the federal Constitution shows that twelve impeachments[84] have been charged by the House of Representatives and tried to the Senate.[85] An examination of these cases shows that the charges involved some nonindictable offenses in addition to indictable offenses.[86] In every case except two, the House passed articles of impeachment for offenses which were not indictable, and in four of the cases, the Senate convicted the accused of impeachment for offenses which were not otherwise indictable.[87] Among the offenses for which they were charged were making electioneering statements, refusing to allow counsel to argue questions of law, neglect of duty, collusion, conflict

78. R. BERGER, *supra* note 38, at 53 n.1.
79. Broderick, *supra* note 49, at 235.
80. *Id.*
81. A. SIMPSON *supra*, note 38, at 51.
82. SELECTED MATERIALS, *supra* note 44, at 70.
83. *Id.*
84. Sloan & Garr, *supra* note 57, at 430. The twelve impeachments included: 1. Senator William Blount (acquitted) (1797); 2. Judge John Pickering (convicted) (1805); 3. Supreme Court Justice Samuel Chase (acquitted) (1805); 4. Judge James Peck (acquitted) (1831); 5. Judge West Humphreys (convicted) (1867); 6. President Andrew Johnson (acquitted) (1867); 7. Secretary of War William Belknap (acquitted) (1876); 8. Judge Charles Swayne (acquitted) (1905); 9. Judge Robert Archbald (convicted) (1912); 10. Judge George English (resigned before Senate trial) (1926); 11. Judge Harold Louderback (acquitted) (1933); 12. Judge Halsted Ritter (convicted) (1936). *Id.* at 430-34.
85. The House of Representatives brings the charges of impeachment and the Senate has the sole power to try all impeachments. U.S. CONST. art. I, §§ 2-3.
86. Sloan & Garr, *supra* note 57, at 434.
87. *Id.* at 434-35.

of interest, partisanship and favoritism, treating members of the bar in a coarse manner, bringing one's court into scandal and disrepute, and prejudicing the court and public confidence.[88]

The significance of these cases lies in the judgment of the court of impeachment that, to justify removal, it is not necessary that the offense be a violation of the law.[89] Most commentators who have studied this precedent from the federal impeachment cases agree that "impeachable offenses include, not merely acts that are indictable, but serious misbehavior which may be considered as coming within the category of high crimes and misdemeanors."[90] In one impeachment, for example, the court held that, even though the defendant was found not guilty of the specific charges against him, he was found guilty of the last count, which was a general charge of prejudicing the public confidence in the administration of justice by bringing his court into scandal and disrepute.[91]

Although these cases do not answer completely the question of what constitutes an impeachable offense under the Constitution, they do demonstrate that impeachable offenses are not limited to statutory offenses.[92] The legislature has broad power, within the boundaries specifically stated in the Constitution and the definition of misdemeanor which carried forward from the English interpretation, to select the appropriate standard of conduct by which to judge the actions of those subject to the impeachment process.[93]

State Impeachments

Although the last federal impeachment was in 1936,[94] there have been several recent impeachments at the state level. Despite the fact that the majority of these impeachments were of members of the judiciary, the cases set the standard used to determine impeachable acts. In Connecticut, at about the same time the *Douglas* trial was proceeding, members of a select committee created by the Connecticut House of Representatives were investigating allegations against a probate judge to determine whether charges of impeachment should be brought against him.[95]

88. *Id.* at 430-34.

89. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 856 (1930).

90. R. BERGER, *supra* note 38, at 58 n.16.

91. Sloan & Garr, *supra* note 57, at 434 (quoting R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 56 (1973)).

92. *Id.* at 442.

93. *Id.* at 451.

94. *See* note 84 *supra*.

95. Kinsella v. Jackle, 193 Conn. 704, —, 475 A.2d 243, 244-46 (1984). The *Douglas* trial commenced on March 26, 1984. *Douglas*, 217 Neb. at 200, 349 N.W.2d at 873-74.

The probate judge had already been investigated by the Connecticut Council on Probate Judicial Conduct, which had recommended public censure.[96] The council, which also had the authority to recommend impeachment to the Connecticut House of Representatives, did not do so.[97] Subsequently, the Connecticut House of Representatives created a special committee to investigate possible impeachable misconduct. The judge claimed that since he had been investigated by Connecticut's Council on Probate Judicial Conduct, the present investigation by the Connecticut House committee was "not within the purview of the impeachment power."[98]

Examining the judge's contention, the Supreme Court of Connecticut (before which the declaratory action was brought) disagreed.[99] The court stated that even though the Connecticut Council on Probate Judicial Conduct had the authority to investigate such matters, its exercise did not deprive the Connecticut House of the constitutional authority to investigate any allegations against the probate judge. More importantly, the high court stated that the state constitution inherently provides that the Connecticut House, within constitutional limitations, has the authority to conduct investigations and hearings into any unresolved questions of impeachable conduct.[100]

The court also addressed the question of what conduct would constitute an impeachable offense in Connecticut. The court stated:

> We trust that in making this interpretation the Senate will be guided by the historical antecedents of the impeachment and removal process as well as interpretations of similar constitutional provisions that have been made by other courts and legal scholars. . . . [T]he Senate should also be aided in the inquiry by reference to the Connecticut Code of Judicial Conduct.[101]

North Carolina also addressed the question of the appropriate standard by which to remove a judge. The decision *In re Nowell*[102] involved a possible censure of a district judge by the North Carolina Judicial Standards Commission for willful misconduct and conduct prejudicial to the administration of justice.[103] The North Carolina Constitution provided that the legislature "shall prescribe a procedure in the censure and removal of judges in addition to impeach-

96. *Kinsella*, 192 Conn. at —, 475 A.2d at 246.
97. *Id.* at —, 475 A.2d at 246.
98. *Id.* at —, 475 A.2d at 246.
99. *Id.* at —, 475 A.2d at 254.
100. *Id.* at —, 475 A.2d at 254-55.
101. *Id.* at —, 475 A.2d at 257.
102. *In re* Nowell, 239 N.C. 235, 237 S.E.2d 246 (1977).
103. *Id.* at —, 237 S.E.2d at 248-49.

ment."[104] This provision was interpreted by the North Carolina court in a later decision[105] not as a substantive change in the impeachment process, but merely as a procedural means to accomplish the same goals as the prior provision without the "cumbersome and antiquated machinery of impeachment."[106] Thus, the constitutional removal procedure was merely a streamlining of the impeachment procedure and not a substantive change in the requirements of impeachable conduct.[107]

In setting forth the appropriate standard, the court "emphasized the futility of an attempt to enumerate in any statute or rule all the possible grounds for removal of a judicial officer. "'Guidelines . . . may be found in the Canons of Ethics applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical standards expected of judicial officers by the community."'[108]

In an older Texas case,[109] the state court set forth the appropriate standard by which to determine impeachable conduct in these words:

> [T]he wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law . . . . Consequently, no attempt was usually made to define impeachable offenses, and the futility as well as the unwisdom [sic] of attempting to do so has been commented upon.[110]

The Texas court held that the state constitution was adopted with the understanding of impeachment as established in English and American parliamentary procedure. Further, the court stated that the offenses which justify impeachment should be determined "according to the principles established by the common-law and the practice of the English Parliament and the parliamentary bodies in America."[111]

Thus, the state courts generally have followed the federal courts' interpretation of impeachable offenses,[112] but, as the above cases

---

104. *Id.* at —, 237 S.E.2d at 251.

105. *In re* Peoples, 296 N.C. 109, —, 250 S.E.2d 890, 919 (1978), *cert. denied*, 442 U.S. 929 (1979).

106. *Id.* at —, 250 S.E.2d at 919.

107. *Id.* at —, 250 S.E.2d at 921.

108. *Nowell*, 239 N.C. at —, 237 S.E.2d at 251-52 (quoting Sarison v. Appellate Division, 265 F. Supp. 455, 458 (E.D. N.Y. 1967).

109. Ferguson v. Maddox, 114 Tex. 85, 263 S.W. 888 (1924).

110. *Id.* at —, 263 S.W. at 892.

111. *Id.* at —, 263 S.W. at 892.

112. *See* Comment, *The Awful Discretion: The Impeachment Experience in the States*, 55 NEB. L. REV. 90, 105 (1975).

demonstrate, the state courts have also incorporated a Code of ethics as an additional standard by which to judge the conduct of the judiciary.

Impeachment in Nebraska

The procedure for impeachment and removal under the Nebraska and federal Constitutions are similar.[113] The Nebraska Constitution provides that the legislature has the sole power of impeachment by a concurrence of a majority of the state senators on any one article of impeachment, and that all civil officers of the state shall be liable for any misdemeanor in office.[114] Upon a legislative vote to impeach, the charges are not tried to the legislative body, but to the Nebraska Supreme Court, where no person can be convicted without a two-thirds concurrence of the members of the court.[115] The Nebraska Supreme Court stated that the purpose of this constitutional provision was to "insure a strictly judicial investigation according to judicial methods."[116] The Nebraska Constitution, like its federal counterpart, provides that a judgment of guilty on any one charge of impeachment will only result in the removal of the official from office and a prohibition against his ever holding another high office in the state.[117] Whether found guilty or innocent, the official may be liable for punishment according to the law.[118] Further, if the official is a member of the bar and the offense is within the purview of the Nebraska Code of Professional Responsibility, he or she may be subject to disciplinary proceedings as well.[119]

The last supreme court interpretation of the Nebraska impeachment procedure and standard of review occurred in 1893, in *State v. Hastings*.[120] The *Hastings* decision involved allegations of alleged improprieties by the attorney general, as a member of the Board of Public Lands and Buildings, with respect to $40,000 appropriated to build a new cell house for the state penitentiary.[121] The supreme court, sitting as a court of impeachment, characterized the impeachment procedure "as a criminal prosecution, in which the state is required to establish the essential elements of the charge beyond a reasonable doubt."[122] In interpreting the provision in the Nebraska

113. *See*, U.S. CONST. art. II, § 4; NEB. CONST. art. III, § 17.
114. NEB. CONST. art. III, § 17.
115. *Id.*
116. State v. Hastings, 37 Neb. 96, 114-15, 55 N.W. 774, 780 (1893).
117. NEB CONST., art. III, § 17.
118. *Id.*
119. *Douglas*, 217 Neb. at 201, 349 N.W.2d at 574.
120. 37 Neb. 96, 53 N.W. 774 (1893).
121. *Id.* at 100-01, 55 N.W. at 770.
122. *Id.* at 118, 55 N.W. at 780.

Constitution relating to what offense amounts to a misdemeanor in office, justifying impeachment and removal, the court stated:

> [A]n impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.[123] The court added:
> [W]here the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office.[124]

Thus, the *Hastings* court interpreted the meaning of "misdemeanor in office" to include offenses which were not necessarily statutory or indictable.[125] The court specifically rejected the view "that an impeachable misdemeanor is necessarily an indictable offense, as too narrow and tending to defeat rather than promote the end for which impeachment as a remedy was designed."[126] Thus, the *Hastings* court held that impeachment would lie for serious indictable as well as nonindictable offenses which, by their very nature, were subversive of a fundamental or essential principle of government.

ANALYSIS

In the *Douglas* impeachment, as in most impeachment proceedings, a major issue was the standard by which to judge the conduct of Attorney General Paul Douglas to decide whether his conduct amounted to an impeachable offense.[127] The standard set out in the Nebraska Constitution calls for removal for "only misdemeanors in office," but does not list or give any definition of a misdemeanor.[128] As previously discussed, the courts must interpret constitutional impeachment provisions in light of the intention of the framers and the

123. *Id.* at 115, 55 N.W. at 780.
124. *Id.* at 116, 55 N.W. at 780.
125. *Id.* at 114, 55 N.W. at 780.
126. *Id.*
127. *Douglas*, 217 Neb. at 201, 349 N.W.2d at 874.
128. NEB. CONST. art. III, § 17. The constitution, however, states that: "Drunkenness shall be cause of impeachment and removal from office." NEB. CONST. art. XV, § 3.

decisions of past courts of impeachments.[129] The *Douglas* court adopted the view that an impeachable offense is one that is "in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest."[130]

Four of the six specifications of impeachment adopted by the legislature contained charges of alleged violations of the Code.[131] In its discussion of specification number three, which dealt with the duty to disqualify and which set out two provisions of the Code as charges, the *Douglas* court discussed the applicability of the Code as a standard for impeachable offenses.[132] The court stated that in the "attempt to prove this charge, the State does not point to any constitutional provision or statute, but rather relies solely on the claimed infraction . . . of the Code of Professional Responsibility."[133] The Code was adopted by the Nebraska Supreme Court to govern the conduct of attorneys in the state[134] and "to develop the conscience and ethics of lawyers in their professional and private lives."[135] As Attorney General, Douglas was an officer of the state,[136] responsible for prosecuting and defending the state's interests. Moreover, he remained a lawyer and member of the bar, subject to its rules and canons.[137]

An analysis of the court's reasoning reveals an inconsistency between the standard applied in *Hastings* and the *Douglas* court's interpretation of that standard. In *Douglas*, the court refused to allow a violation of the Code to constitute a standard by which to judge the conduct of an attorney general.[138] In a sense, the court reverted to the widely rejected position that, in order for an offense to be impeachable, it must necessarily be a statutory or indictable offense. Thus, although the *Douglas* court stated that they were specifically relying on the *Hastings* standard, their interpretation of an impeachable offense is not supported by the *Hastings* decision itself.

This decision, that a violation of the Code is not an appropriate standard by which to judge an attorney general of the state, seems to defeat the purpose of the supreme court's adoption of the Code in the first place. As the preamble to the Code states:

---

129. *See* notes 72, 111 and accompanying text *supra*.
130. *Douglas*, 217 Neb. at 222, 349 N.W.2d at 884.
131. *See* note 32 *supra*.
132. *Douglas*, 217 Neb. at 225, 349 N.W.2d at 885.
133. *Id.* at 224, 349 N.W.2d at 885.
134. *Id.* at 247, 349 N.W.2d 895-96.
135. *Id.*
136. NEB. REV. STAT. § 84-203 (Reissue 1981).
137. *Douglas*, 217 Neb. at 201, 342 N.W.2d at 874.
138. *See* note 7 and accompanying text *supra*.

> Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment."[139]

Violations of the Code may give rise to possible disbarment or suspension from the practice of law,[140] and thus, they relate directly to an attorney general's ability to perform the duties of his office; if disbarred or suspended, he would no longer be able to perform his job as attorney general.[141]

The Nebraska Constitution does not specifically require that an attorney general be a licensed attorney. This omission has sparked discussions as to whether an attorney general needs to be a lawyer and a member of the bar. However,

> it is doubtful whether a non-attorney could fulfill the statutory obligations of the Attorney General without being admitted to the practice of the law by this court [supreme court] since, in essense, the Attorney General must "appear" and represent the state in litigation before the courts of this state, as a lawyer licensed to practice law in the state of Nebraska.[142]

The *Douglas* court stated that "the violation of the Code of Professional Responsibility may form the basis for a disciplinary proceeding, but such violation does not, per se, constitute an impeachable offense."[143] The court seems to miss the forest because of the trees; nowhere in article III of the Nebraska Constitution is any definition of an impeachable offense included.[144] No offense, either statutory or otherwise, is in and of itself an impeachable offense.[145] The *Hastings* court specifically recognized the dangers of impeaching for "technical violations of the law, errors of judgment, mistake of fact, or even neglect of duty."[146]

The constitution does not define the term "misdemeanor"; rather, the term derives its definition from history, precedent, and the circumstances of its application.[147] The legislatures and the courts of impeachment are not free to set arbitrary standards as to

---

139. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, preamble (1981).
140. Brief of Plaintiff at 7, *Douglas*.
141. *Id.*
142. *Id.* at 6.
143. *Douglas*, 217 Neb. at 225, 349 N.W.2d at 885.
144. *See* note 128 and accompanying text *supra*.
145. *See* note 128 and accompanying text *supra*. *But see* NEB. CONST. art. XV, § 3 (lists drunkenness as an impeachable offense).
146. *Hastings*, 37 Neb. at 128, 55 N.W.2d at 885.
147. *See* note 111 and accompanying text *supra*.

which offenses are impeachable. The *Hastings* court rejected any broad political power which would enable a court of impeachment to "decide the case as it wills."[148] The *Hastings* court also rejected the narrow view that "an impeachable offense is necessarily an indictable offense."[149] It emphasized that a court of impeachment must choose a standard which "lies midway between the two extremes."[150]

The very essence of impeachment, both historically and as adopted by the court in *Hastings*, is that an impeachable offense must be of a serious nature.[151] As a result, no matter what standard the court chooses to use for an impeachable offense, the offense itself must be "in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest."[152]

As the review of the English interpretation of the standard, the federal impeachment cases, and the state impeachment cases show, a statutory offense is not a necessary basis for initiating impeachment charges.[153] The Code is a recent advancement adopted by the Nebraska Supreme Court in 1975, and it sets forth ethical standards of conduct that are of a much higher and more stringent character than those of other professions. As stated in the Code's preamble, "Lawyers, as guardians of the law, play a vital role in the preservation of society . . . . A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."[154]

In some situations where a state has adopted a code of ethical conduct for members of its bar, the courts have recognized the applicability of the state's ethical code as a standard by which to judge the conduct of members of the judiciary in impeachment proceedings.[155] A judge stands in the dual capacity as a member of the bar and as a civil officer of the state, as does the Attorney General of Nebraska.[156] Courts have found the Code of Judicial Conduct, as adopted in their states, to be an applicable standard to examine the conduct of

148. *Hastings*, 37 Neb. at 115, 55 N.W. at 780.

149. *Id.*

150. *Id.*

151. *See* notes 128-30 and accompanying text *supra*.

152. Fenton, *supra* note 74, at 747. The commentator stated that "a minor or technical violation of the Judicial Canons of Ethics, of the civil law or even the criminal law would not be impeachable. The violation must be serious, as in the cases of the Four American Judges convicted." *Id. See also* note 90 and accompanying text *supra*.

153. *Hastings*, 37 Neb. at 115, 55 N.W. at 780. Brief for Plaintiff at 6, *Douglas*. *See also* State *ex rel.* Nebraska State Bar Assocation v. Cook, 194 Neb. 364, 367-68, 232 N.W.2d 120, 122 (1975) (complaint founded on Nebraska Code of Professional Responsibility).

154. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, preamble (1981).

155. *See* notes 95-108 and accompanying text *supra*.

156. *See* notes 135-38 and accompanying text *supra*.

judges.[157] If the Code of Judicial Conduct is an applicable standard in the impeachment of judges,[158] the Code of Professional Responsibility is, by analogy, an appropriate standard by which to judge the conduct of an attorney general.

One important point from the Connecticut, North Carolina, and Texas cases is that there are no set offenses in and of themselves which are impeachable.[159] When legislatures and courts of impeachment are acting within their impeachment capacity, they may apply many standards to judge an official's performance of his duties and obligations. When a member of the bar, either as an attorney or as a judge, is an officer of the state and subject to impeachment, the state's canons of ethics is one appropriate standard by which to evaluate official conduct.

The history of impeachment, together with federal and state impeachment proceedings lead to the inescapable conclusion that, in order to be an impeachable offense, the act does not have to be a statutory or indictable offense. A court of impeachment can select any appropriate standard, within the boundaries inherent in impeachment proceedings, to judge the conduct of an impeachable officer of the state. Whatever the standard is, the offense must be serious and within the boundaries of a violation of a fundamental or essential principle of the duty of the officer.

The Code establishes a standard of conduct to judge the professional and private lives of the members of the bar. The Code of Judicial Responsibility is a similiar standard to gauge the conduct of members of the judiciary. It seems logical that when the Code of Judicial Conduct has been used as an applicable standard in the impeachment of a judge, that the Code of Professional Responsibility would be equally applicable to a state's attorney general. A standard which is appropriate to judge the conduct of an attorney in his or her professional capacity is even more applicable when that same person acts in the same professional capacity as an officer of the state.

The activities of every impeachable office in the state must be judged in light of the particular duties and obligations of their respective offices. Paul Douglas, as Attorney General, wore two hats: one was the hat of an impeachable state officer who stood in a fiduciary relationship with the people who elected him; and the second was the hat of an attorney whose client was the State of Nebraska to whom he owed the same high standards of conduct, as promulgated by the

157. *See* notes 101, 108 and accompanying text *supra*.

158. *See* notes 101, 108 *supra*.

159. *See* notes 101, 108, 110 and accompanying text *supra*. *See also* Brief for Plaintiff at 6, Douglas.

Code, that all lawyers in the State of Nebraska owe to their clients. As such, the Code, although not an appropriate standard for non-members of the bar, is an appropriate standard of conduct for an attorney general.

CONCLUSION

In summary, an examination of English, federal, and state standards for impeachable offenses unquestionably leads to the conclusion that the term "misdemeanors" stands for serious non-indictable as well as indictable offenses by a civil officer. It is the duty of a court of impeachment to determine which offenses are so serious as to be impeachable. In doing so, a court should make use of precedents, history, and the statutory and moral standards of conduct expected and demanded of state civil officers. As Attorney General of Nebraska, Paul Douglas was expected to perform in accordance with the standard of conduct expected of a state civil officer, as well as the standard of conduct expected of the state's highest attorney.

These expectations, both statutory and nonstatutory, are of equal importance in an impeachment proceeding because impeachment will lie for nonindictable as well as for indictable offenses. Although the Nebraska Constitution does not state which offenses are impeachable, the Nebraska Supreme Court has required the misconduct to be a serious offense and not merely a technical violation of the law. The very nature of impeachment precludes a legislative body or court of impeachment from making a list of impeachable offenses. To make a list of offenses would be to limit a court of impeachment from reaching many serious offenses due to a particular body's inability to perceive particular conduct which may be deemed impeachable at some future time. What constitutes an impeachable offense is dependant upon the particular circumstances and duties imposed upon the officers in question and whether the acts of the officer have crossed the unwritten boundary of impeachable offenses. It is logical then to conclude that the Code of Professional Responsibility is a proper standard by which to judge the conduct of the Nebraska Attorney General.

Hopefully, the issues addressed in this Comment will never rise again in Nebraska. It is important, however, that the citizens of Nebraska are forever watchful of those in office. The same standards of conduct expected of attorneys in their professional and private lives, as members of the bar, are the minimum standards which must be applied when an attorney acts in a professional capacity as an officer of the state. The citizens of Nebraska are entitled to expect only the highest standards of conduct of those entrusted with public office.

The Code of Professional Responsibility is an appropriately high standard by which to judge the conduct of the Nebraska Attorney General.

To paraphrase Colonel George Mason: no person is above the law.[160]

Terrance DeWald — '87

160. 2 M. FARRAND, *supra* note 61, at 65 (quoting Colonel George Mason, a delegate from Virginia, during the constitutional debates).