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LEVI HUBBELL AND THE WISCONSIN JUDICIARY: A DILEMMA IN LEGAL ETHICS AND NON-PARTISAN JUDICIAL ELECTIONS

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In August of 1848, the new State of Wisconsin scheduled judicial elections for its five circuit courts. Each of the five judicial districts had been organized to be roughly equivalent in territory and population. The Second Circuit contained the counties of Milwaukee, Waukesha, Jefferson, and Dane.

The first elections for state circuit judge were set for August, 1848. These judicial elections were held at a separate time of the year from other elections to emphasize their non-partisan nature. In the debate over the Wisconsin Constitution, objections to an elected judiciary had centered upon the dangers of partisanship. The debate was resolved with the mandate that elections for state courts be distinctly non-partisan in character. Milwaukee lawyer, Levi Hubbell, saw the judgeship race as an opportunity to fulfill his longtime ambition to hold public office. In his political campaigns and throughout his controversial career on the bench, Hubbell's unorthodox actions came perilously close to unraveling Wisconsin's young code of legal ethics and its insistence upon a non-partisan judiciary.

Having only arrived in Milwaukee in June 21, 1844, Levi Hubbell quickly began to take Milwaukee "by storm," gaining influence in politics and at court within several weeks of his arrival.[1] Born in 1808 in upstate New York, Hubbell had been educated at Union College and upon graduation had read the law with his brother before trying his hand at journalism as the editor of the *Ontario Messenger* in western New York. From 1833 to 1836, he served as Adjutant-General of New York. He

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1. MILWAUKEE SENTINEL, June 22, 1844, at 2. *See also* 1 JOHN R. BERRYMAN, HISTORY OF THE BENCH AND BAR OF WISCONSIN 96 (H.C. Cooper, Jr., & Co. 1898); Karel D. Bicha, *Courts and Criminal Justice: Law Enforcement in Milwaukee County, in* TRADING POST TO METROPOLIS, MILWAUKEE COUNTY'S FIRST 150 YEARS 145, 172 (Ralph Aderman ed., 1987); PARKER MCCOBB REED, THE BENCH AND BAR OF WISCONSIN: HISTORY AND BIOGRAPHY 68 (P.M. Reed 1882).

represented Ithaca in the New York Legislature from 1841 until he left for the west and Milwaukee three years later. Hubbell had recently changed his political affiliation from Whig to Democrat and saw Milwaukee and Wisconsin as locations ripe with opportunity for his great political aspirations.[2]

Active in community affairs, Hubbell worked to keep his name before the public. As a Fire Warden, he wrote a letter to the *Sentinel* when his name was omitted from the credits after a fire in March 1848. The *Sentinel* apologized: "We accidentally omitted to state that Gen. Hubbell . . . was entitled to the credit of having provided bountiful refreshments for the Firemen, after their arduous labors. . . ."[3] Hubbell also became highly visible among the growing number of Irish in Milwaukee, who lived in what was once Walker's Point, the Third Ward, on the south side of the Milwaukee River. At a meeting of the Irish Relief Society at the Courthouse in 1846, he gave a speech urging relief measures for those suffering from the Irish famine.[4] Yet, Hubbell was only rumored to be a candidate for the judgeship. Those who knew him well knew of his aspirations and awaited his formal declaration.

However, Hubbell was not trusted by many among Milwaukee's political establishment since he was a relative newcomer to the city and since his political ambitions appeared to be too all-consuming. Upon his decision to switch political parties from Whig to Democrat, a critic roundly scolded him, noting that Hubbell had served in the New York legislature as an eminent Whig for six years prior to his move to Milwaukee. "Does it look well for men [to change] their political opinions with the popular breath?" Men of the First and Second Wards (on Milwaukee's east and west sides respectively) distrusted Hubbell's opportunism and his open courting of the German Catholic and the Irish vote. The *Sentinel* quoted one Irishman as saying that "strong professions of love for the foreigners, [such as Hubbell's] . . . were always made before the election[s]."[5]

In positioning himself unofficially for election, Hubbell also sought influence through a new club in Milwaukee, "The Sons of New York" (later the "Excelsior Society"). At the organizational meeting of this club in 1846, Hubbell chaired the nominations committee which recom-

2. BERRYMAN, *supra* note 1, at 96.

3. [MILWAUKEE] DAILY SENTINEL AND GAZETTE, Mar. 6, 1848, at 2 [hereinafter DAILY SENTINEL AND GAZETTE].

4. DAILY SENTINEL AND GAZETTE, Dec. 16, 1846, at 1.

5. MILWAUKEE DAILY SENTINEL, Apr. 1, 1845, at 1.

mended a slate of officers also nominating himself as president. Disgruntled at this blatant power-seeking, other members of the society then circumscribed Hubbell's power by naming as Vice Presidents three prominent former New Yorkers.[6]

However, it was very difficult to outmaneuver Levi Hubbell. When the regular Democrats passed him over in 1848 as a delegate to their national convention in Baltimore, he attended the convention on his own and took the floor several times to speak for the Wisconsin Delegation.

With this controversial background, it is no wonder that many men in Milwaukee, some just as ambitious as Hubbell, worried about the means he might use to gain office and power for himself. To stem the growing tide of Irish and German support for a Hubbell nomination, a group of prominent men tried to circumvent him by meeting to select one of their number for the new state circuit court judgeship. These "independents" feared that Hubbell would rally his followers and make an immediate rush to gain Democratic support in the race. Such an action would seriously threaten the rule that Wisconsin's judicial elections were to be strictly nonpartisan. A letter to the Sentinel from a Whig warned boldly:

> [T]hese party nominations bring *party prejudices, party feelings*, party strife into active and virulent operation, where such influences should not be felt in the slightest degree and where their tendency must be wholly to evil.... Let us not then be prevented from doing our duty by "circumstances." Nor is the present state of things adverse to our taking a manly, independent course.... By taking this course we shall gain more real honor for our party than by the election of a dozen partisan Whig Judges.[7]

Soon after Hubbell's entry, the judicial election in the Second District became a three-way race between Hubbell, Francis Randall of Waukesha, and the scholarly Milwaukee lawyer, Abram D. Smith.[8] Aware that he was not the candidate of the independents or of the members of the bar, Hubbell addressed his fellow attorneys in a letter: "I regret that I cannot, if elected, bring to the bench those high attainments and qualities which the elevated station demands, and I call on many of you now,... my professional brethren whom I deem better qualified than myself, and whose election... I would have preferred to

6. DAILY SENTINEL AND GAZETTE, Dec. 30, 1846, at 1; DAILY SENTINEL AND GAZETTE, Jan. 4, 1847, at 1.

7. DAILY SENTINEL AND GAZETTE, July 25, 1848, at 1 (emphasis in original).

8. *Id.*

my own."[9]

In the election itself, Hubbell's strong support among Milwaukee's Catholic Germans and Irish carried the city. However, his victory in this first judgeship race was won with far less than a majority vote. His vote tally of 1606 was a narrow plurality over Smith's 1540 and Randall's 1499, only 34% of the total votes cast. Moreover, the nature of the fiercely partisan campaign set a dangerous precedent for the Wisconsin judiciary.

A letter to the Sentinel condemned Hubbell for making this first "non-partisan" election a clandestinely partisan race. Hubbell himself had earlier predicted that such partisanship would be dangerous in a judicial race:

> I hold, Gentlemen, that this Election *is not*, and cannot be made a *party matter*. Your Judge, when elected, would forfeit all your respect, and stain indelibly his official ermine [judicial robe], were he to permit partisan feelings, to mingle in his decisions. He must hold the scales of Justice, evenly, between men of all parties, of all denominations and of all conditions in the State.[10]

However, the very nature of Hubbell's first election began the process of "staining his ermine." Hubbell would ultimately fulfill the worst aspects of his own prediction and leave behind a judicial record replete with scandal.

In gaining his victory in 1848, Hubbell had relied largely upon the support of ethnic Democrats, the tide of immigrants who were flooding into Milwaukee during the late 1840s. The Irish Third Ward in Milwaukee rallied for Hubbell who had actively courted the Irish vote for over three years. In fact, so populous was the Third Ward that Hubbell's 80% vote tally there in this first judicial race offset his losses in the city's other four wards. Randall or Smith defeated Hubbell among the stalwart Yankees in the First Ward, among the city's Protestant Germans in the Second Ward, and in the other two wards as well. They also defeated him in Waukesha County—carrying all of the towns against him except Menomonee Falls which was very Catholic. Incredulous at Hubbell's narrow victory, the other candidates demanded a recount which dragged on from election day, August 7, to a resolution on September 2.

When the official results were published, it became clear that Hubbell's victory in Milwaukee County gained him the judgeship, even though he lost not only Waukesha, but also Dane and Jefferson Coun-

9. DAILY SENTINEL AND GAZETTE, Aug. 4, 1848, at 2.

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

ties. Perhaps in concentrating on the population center of the District and on the ethnic vote, Hubbell was a pioneer of modern campaign strategy.[11] The division between Smith and Randall also gave Hubbell the victory. The opposition to Hubbell, from both Democrat and Whig groups, was not sufficiently organized.

The Catholic vote in Milwaukee and in Menomonee Falls proved to be decisive. Not only was Hubbell's campaigning criticized, his nomination itself was called into question. A letter to the *Sentinel* noted sharply that the 600 signatures allegedly collected on the petition to nominate Hubbell had been gained by fraud and circulated among the Irish by Hubbell's own men.

> Mr. Hubbell called around him the people of this [Catholic] religious sect, and they were told that Mr. Smith was deadly hostile to their religion, that if he was elected, no [C]atholic would be allowed his oath, that they would be required to swear upon the bible with a cross upon it, and every conceivable falsehood, calculated to inflame the passions and kindle up religious hatred and sectarian bitterness. In this manner he succeeded in uniting almost the entire [C]atholic population against Mr. Smith and in concentrating their strength in his favor.[12]

Hubbell also alienated the conservative wing of the Democratic Party which worked to unseat him three years later.[13]

Hubbell's electioneering thus brought him to the Second Circuit Court under a cloud of criticism which would persist throughout his term on the bench. More significantly, the issue of non-partisanship in judicial elections thus became a controversial one from the very beginning of statehood and remained so thereafter. Yet the citizens, and their attorneys alike, were so weary of the long delay in the establishment of the new state courts that Hubbell experienced a brief "honeymoon" period in his first term on the bench. The *Sentinel* announced the convening of Milwaukee's first Circuit Court session on November 27, 1848. "There is a heavy calendar and a formidable array of counsel, but it is to be considered that our people have been deprived of the luxury of litigation for almost a year."[14]

In early 1850, the newspapers of the Second Judicial Circuit pub-

11. DAILY SENTINEL AND GAZETTE, Aug. 17, 1848, at 2.; DAILY SENTINEL AND GAZETTE, Aug. 18, 1848, at 2; DAILY SENTINEL AND GAZETTE, Aug. 31, 1848, at 2; DAILY SENTINEL AND GAZETTE, Sept. 2, 1848, at 2.

12. DAILY SENTINEL AND GAZETTE, Sept. 1, 1848, at 2.

13. *Id.*

14. DAILY SENTINEL AND GAZETTE, Nov. 28, 1848, at 2.

lished the upcoming court sessions. Hubbell would convene court in Milwaukee County three times for the year, with terms beginning on the first Monday in February, the first Monday in May, and the third Monday in September. In addition, he held court for two terms each in Waukesha, Jefferson and Dane Counties. Beyond these nine terms of Circuit Court, Hubbell also traveled to Madison to hear cases with the Supreme Court. Each court session lasted from two to four weeks depending upon the number of cases upon the docket.[15] Hubbell's early cases forced him to face most of the state's most prominent attorneys—most of whom had openly opposed his election. As Willard Hurst has noted, the formal entry of the state bar associations into the process of assessing qualifications for the judgeship did not begin until after 1870.[16] Prejudice within the bar against Hubbell for his purported bias in favor of both Irishmen and Catholics appearing before his court, and a variety of other irregularities, became a disturbing factor immediately after his election.

There were many other issues in the air as several attorneys contemplated the idea of running against Hubbell for the judgeship three years later in 1851. The citizens of Milwaukee were further inflamed about the matter of temperance reform, a cause sweeping the country in these pre-Civil War decades. An 1849 city temperance ordinance provoked a dangerous storm of protest among Milwaukee's German and Irish citizens. The resulting riots and outrage from the anti-temperance elements of the population might have served as a warning that opposition to a known "wet," such as Hubbell, might be difficult indeed.

Despite these obvious political handicaps, Asahel Finch, a partner in Milwaukee's leading law firm of the 1840s (today's Foley & Lardner) decided to challenge Hubbell who had once been a part of his firm.[17] The *Sentinel* initially praised Finch, a "dry," as a "gentleman of high character, of conceded ability and of long, honorable standing at the Milwaukee Bar."[18] The paper warned however, that partisanship in a judicial race was strictly against the Wisconsin constitution, an ironic reminder of Hubbell's victory three years earlier. "[T]he people of th[is] State have shown themselves averse to party nominations for

15. *Id.*

16. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 130, (1950). *See also* JOHN BRADLEY WINSLOW, THE STORY OF A GREAT COURT (1912); J.H. Kennedy, *Bench and Bar of Milwaukee*, MAGAZINE OF WESTERN HISTORY 4 (July 1887).

17. DAILY SENTINEL AND GAZETTE, July 9, 1851, at 2.

18. DAILY SENTINEL AND GAZETTE, July 10, 1851, at 2.

Judge[s]."[19] *The Sentinel* continued on a warning note: "We add the further hope that the canvass may be conducted in a fair and honorable manner, and without recourse to those personalities which are too often the accompaniment and reproach of our elections."[20] Many Milwaukee lawyers worried that the race would prove to be a bitter one, since Hubbell's departure from Finch's firm several years earlier had not been friendly.

The race became a great personal and partisan battle indeed! Described in several historical accounts as the most bitter of Milwaukee's early elections, the Second Circuit judicial race began in earnest in July, 1851. At the outset, the newspapers within the district lined up in favor of either Hubbell or Finch.[21] Members of the Madison bar, including the "old practitioners," met at the Court House on August 6 and unanimously agreed "to oppose the reelection of Judge Hubbell and to support any fair man against him."[22]

The *Free Democrat* urged the Democrats to abandon their idea of calling a party convention to endorse a candidate. The electors of the district should be left, "free[ly] to chose for themselves, and without regard to party considerations, whom they will have for Circuit Judge.[23] A letter to the Sentinel echoed this warning: "There is a strong feeling, throughout the District of opposition to the re-election of Judge Hubbell, and if this feeling can be united on one candidate, the defeat of Judge Hubbell is morally certain."

As the battle grew more heated, Finch's supporters went out on a limb, using the newspapers, *The Evening Wisconsin* and the *Free Democrat*, to level serious accusations against Hubbell. The charges accused Hubbell of partisan bias toward the Irish in allegedly "packing a jury" with eight out of ten Irishmen in one particular case. Other charges accused Hubbell of letting an armed criminal off with only a $200 fine when the state statutes called for a mandatory jail term for the use of a gun in a crime.

Hubbell remained on the bench throughout the early weeks of the campaign, but then declared himself ill and dismissed the court in mid-September. The *Evening Wisconsin* immediately accused him

19. *Id.*

20. DAILY SENTINEL AND GAZETTE, July 10, 1851, at 2.

21. DAILY SENTINEL AND GAZETTE, July 18, 1848, at 2; THE WATERTOWN CHRONICLE, July 16, 1848, at 1.

22. DAILY SENTINEL AND GAZETTE, Aug. 8, 1851, at 2.

23. DAILY SENTINEL AND GAZETTE, Aug. 5, 1851, at 2.

of "fabricating" his illness, "a sham" so that he "might have time to electioneer." However, all of the charges against Hubbell did little to erode his solid support among the key groups which had elected him three years earlier. Although anger and mistrust of Hubbell was strong in many sectors of the Second Judicial circuit, his political savvy and the advantage of being the incumbent were more powerful.

On election day, September 29, 1851, the *Sentinel* predicted that all hope of defeating Hubbell was lost and that the last minute accusations came only from desperation. "In their despair [they] strike madly and blindly."[24] Finch lost the election by losing the key wards of the City of Milwaukee, although the total vote count was very close: 1683 for Hubbell and 1566 for Finch. Once again as in his election in 1848, Hubbell took the city of Milwaukee through his powerful majority in the Irish Third Ward. Finch's substantial victories in the city's other three wards were not sufficient to overcome this deficit. However, the Yankee First Ward gave Finch a resounding endorsement, a 60% majority, and the Second and Fourth Wards supported him as well.[25]

The jubilant Hubbell supporters believed that their candidate had won a permanent battle against the charges of corruption and favoritism. Within two years, however, Hubbell would become the first Wisconsin Judge to face an impeachment trial.

After his victory, Hubbell faced continuing battles against a myriad of enemies, led by Democrats such as the eminent Edward G. Ryan, the onetime associate of Finch and Lynde and later Chief Justice of the Wisconsin Supreme Court, who bitterly resented Hubbell's power and his flagrant abuse of the judicial system. Ryan and the anti-Hubbell Democrats proceeded to gather evidence against Hubbell to remove him from the bench entirely. Hubbell's mixed record in the Circuit Court, which had not cost him the election, nevertheless brought him before the bar of the state legislature in the notorious impeachment trial of 1853.

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24. DAILY SENTINEL AND GAZETTE, Sept. 29, 1851, at 1.

25. Finch also ran a close second to Hubbell in the German Fifth Ward, eroding some of Hubbell's traditional German support. Finch also carried many of the towns outside of the city in Milwaukee County, and did particularly well in Wauwatosa where his old friend and client George Dousman was very powerful. However, in Waukesha County, Finch lost Brookfield, Pewaukee, and Waukesha itself to Hubbell. He also lost Jefferson County, except Watertown, and Dane County, where Hubbell had the advantage of being the sitting Judge. Within the Second Circuit as a whole, Finch lost by only 900 votes, 4670 to 3694, a percentage gain over Hubbell's closest opponent three years earlier.

The charges against Hubbell were based on his conduct as Judge in a general pattern of judicial misconduct which had also been an issue in the 1851 election. The petition to the State Assembly on January 6, 1853, cited Hubbell for "high crimes and misdemeanors and malfeasance in office." Hubbell had allegedly "acted in his judicial capacity [so] as to require the interposition of the constitutional power of the Assembly." This formal motion for impeachment was considered in due course by a select committee of the Assembly.[26]

On February 23, the committee reported to the full Assembly "charges and specifications against Judge Hubbell and recommended his removal from office 'by address' of both Houses, as provided by the Constitution." According to legal historian Willard Hurst, the procedure of removal "by address" was rarely used in American history. It was, in effect, a more rapid and summary method of removing an official without the slow deliberations of an impeachment hearing and trial. "This authorization," notes Hurst, "was even less defined in historic scope than the power of impeachment."[27] However, Hubbell requested a full trial in the Senate, a Democratic powerhouse, instead of summary removal "by address." As the process then evolved, the full Assembly considered the array of evidence against Hubbell in secret session and on March 3, voted to proceed against Hubbell by "Impeachment at the bar of the Senate."[28]

The trial of Hubbell by the full State Senate began on May 2, 1853, and would result, by law, in either his acquittal or his conviction and removal from office. One observer, noting the preponderance of pro-Hubbell Democrats in the Senate, noted: "The Senate will [either] impeach him or themselves."[29] For the purpose of this impeachment trial the full Senate "resolved itself into a court" and prepared to hear the charges, evidence, and witness testimony regarding "high crimes, misdemeanors, and malfeasance." The prosecution, on behalf of the State Assembly, was managed by the eminent Edward G. Ryan, who had long desired to undo Hubbell. For his defense, Hubbell retained Jonathan Arnold, long considered the most eloquent criminal trial lawyer in Mil-

26. BERRYMAN, *supra* note 1, at 97. *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 325 (1985); 2 RICHARD N. CURRENT, THE HISTORY OF WISCONSIN 215 (William Fletcher Thompson ed., 1976); T.C. LELAND, TRIAL AND IMPEACHMENT OF LEVI HUBBELL, JUDGE OF THE SECOND CIRCUIT COURT, BY THE SENATE OF THE STATE OF WISCONSIN, JUNE 1853 (Beriah Brown 1853).

27. HURST, *supra* note 16, at 137.

28. LELAND, *supra* note 26, at 3-5.

29. WINSLOW, *supra* note 16, at 54.

waukee.

As the trial began, the eleven charges and supporting specifications were read into the record. First, that Hubbell had frequently consulted with both plaintiffs and defendants before him in court, in an unethical manner, and had accepted both "gifts and loans" from men who sought favorable treatment from him. Second, that Hubbell had presided over many cases in his court in which he had a direct monetary interest "to the manifest corruption and scandal of the administration of justice."[30] Specifically, in this matter the State Assembly had voted to impeach Hubbell for repeatedly rendering verdicts on promissory notes of which he was the direct or indirect beneficiary.[31] In professional circles in Milwaukee, conversation about bribes to Hubbell stirred angry responses.[32]

The third charge involved the allegation that Hubbell arbitrarily and with "partiality" sentenced persons in his court to punishments greatly at variance from those prescribed by law "to the manifest corruption and scandal of the administration of justice." To this charge, many attorneys could and did bear witness, as they had frequently observed Judge Hubbell hand down sentences, seemingly at whim, and show blatant favoritism toward other defendants.[33] In one specific case, which outraged many in the Milwaukee Bar, Hubbell as judge granted a divorce to a man whose unsuccessful divorce suit he had earlier managed as an attorney. Moreover, it came to light during the Senate trial that Hubbell had actually consulted with the man about how to proceed before his court to obtain the desired divorce.[34]

The fourth charge accused Hubbell of misusing funds paid into his court as fines, sometimes only one half of which ever reached the public coffer. The fifth charge alleged that Hubbell frequently gave out confidential information from a case to chosen plaintiffs, defendants, or favorite lawyers to help them, thereby bartering his favoritism for return favors, or for a price, as in the first charge.[35]

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30. LELAND, *supra* note 26, at 5-7.

31. In one case, cited in the Senate trial, Hubbell had asked his nephew, Henry Hubbell, to appear in his court as a plaintiff and represent notes as his own which were really Hubbell's. In another case, Finch and Lynde, as counsels for a client against Henry Hubbell, realized the chicanery being used by Hubbell and advised their client to withdraw from the suit since he did not stand any chance in defending himself against a note actually held by the presiding judge.

32. LELAND, *supra* note 26, at 442.

33. *Id.* at 9.

34. *Id.* at 10.

35. *Id.* at 12.

The sixth charge alleged that Hubbell, "used his judicial station and influence for the purpose of inducing females to submit themselves to be debauched by him, contrary to public decency." Hubbell, described in historical accounts as a "suave and handsome widower," was also known among members of the Milwaukee community for his questionable conduct toward unattached women.[36]

There were five other charges of a similar nature attached to the impeachment writ from the Assembly to the Senate, accompanied by a long bill of particulars. The Senate issued subpoenas for evidence and witnesses and began its formal trial hearings on June 6, 1853, with D.C. Reed presiding.[37] One attorney described Smith, a Justice on the Supreme Court, as a man "who has been galled by Hubbell over and over again, and must feel as though the day of retribution had come."[38]

The sixth charge against Hubbell was that of "debauchery." Asahel Finch, a key witness against Hubbell, told the Senate of his accidentally surprising Hubbell in a hotel room in Waukesha where Hubbell was "consulting" with a woman about the case of her husband before his court. When the woman in question took the stand, Finch's credibility was reinforced.[39] She testified that she had indeed come to see Judge Hubbell to beg for a favorable verdict for her husband in his court. At the time they were surprised by Finch, she admitted she had just asked Judge Hubbell "to remove his arm from around her." The manager of the hotel quoted the wife as having told Judge Hubbell, "Business first before pleasure, Mr. Hubbell."[40]

After five weeks of testimony from over fifty witnesses, the Senate heard closing arguments from the defense on July 7 and from Ryan for the prosecution from July 7 through July 11. Perhaps the length of Ryan's closing statement, compared to Arnold's, was an early indication

36. CURRENT, *supra* note 26, at 215.

37. WINSLOW, *supra* note 16, at 55.

38. Finch's first appearance before the Senate as a witness against Hubbell concerned his testimony regarding an $800 note payable to Hubbell from Alexander Mitchell, of the Wisconsin Marine and Fire Insurance Company. In the case to which Finch was a witness, Hubbell wanted to collect on the note, but chose to do so through the unethical device of asking a friend, attorney W.W. Graham, to bring the note to court before him to collect. Finch and Lynde had served on the case as attorneys for Mitchell. (As a fellow member of the Jenny Lind Club, defunct by 1853, Mitchell was reluctant to point the finger at Hubbell.) Finch admitted in his testimony that Hubbell had commented during the trial, somewhat obliquely, that he had "an interest" in the case, but that Hubbell had never specifically admitted that the note under question was really his own.

39. LELAND, *supra* note 26, at 342-46.

40. *Id.* at 55.

of how responsive each man felt the Senate to be toward his case. In Hubbell's defense, a very confident Arnold advanced the position that in a system, such as Wisconsin's, with an elected judiciary, a judge was responsible solely to his constituents—who could vote him in or out, based on his conduct in office. According to Arnold, the state legislature was not the proper authority to pass judgment upon Hubbell. He further asserted that the public had only recently re-elected Judge Hubbell, in a most bitter political contest, with the full knowledge of the great mass of these accusations.[41] Therefore, Arnold argued, Hubbell had already received acquittal at the hands of the people. Arnold further argued that the impeachment and trial itself did not arise from the voters of the Second Circuit, but rather only from Hubbell's political enemies.[42]

In sum, Arnold dismissed, but never actually refuted, the charges against Hubbell. The true culprit, according to Arnold, was the system of an elective judiciary. Hubbell's various "indiscretions and improprieties," Arnold maintained "may be partially accounted for from the very nature of the elective system of the judiciary. It is a blow aimed at the independence of the judge, because it makes them responsible directly to the people." "How natural for a man thus responsible," continued Arnold, "to desire to be popular in office . . . to conciliate the community, not . . . with a view to the right, but with a view to re-election."[43] Therefore, concluded Arnold, the whole impeachment attempt was a reflection upon the system, not upon Hubbell who merely played by its rules. It was a witch-hunt attempt by those jealous of Hubbell's achievements "to drive him from the position bestowed upon him by the people."[44]

After Arnold's defense, Ryan rose to address the Senate, in a tone which reflected not only outrage at Hubbell's various misdemeanors, but outrage too at the boldness and presumption of Arnold's defense. Ryan thundered that the State Assembly *did* truly speak for the people of Wisconsin in bringing Hubbell before the bar of the Senate for trial. He cited the state constitution and precedent in other states and on the federal level to demonstrate that even in an elected judicial system, impeachment by the legislature is the constitutional remedy for malfeasance in office.

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41. LELAND, *supra* note 26, at 564.
42. *Id.*.
43. *Id.* at 610.
44. *Id.* at 611.

Before launching into his impassioned three day summation of the crimes of Levi Hubbell, Ryan shared his personal feelings with the Senate. "I look upon the man [Hubbell] ... and have always looked upon him with simple disgust. But I abhor corruption; and so I have a deep abhorrence of the *Judge*."[45] He then reviewed in great detail all of the charges and evidence against Hubbell. Ryan scoffed at Arnold's defense that Hubbell was merely a product of the system of an elected judiciary. Such a defense condoning the search for "popularity" sickened Ryan:

> I have heard the word popularity so perverted, so abused, that I am sick of the sound in my ears. It is an insult to say that he was driven by the elective judiciary to run after popularity and earn it by means which were not noble, not just, not pure, not honest.[46]

As to Hubbell's vindication by re-election in 1851, Ryan responded: "It is a slander upon the people of the Second Circuit to say that knowing these things they elected him and [condoned] them. The truth is that these charges were then [with one exception] publicly unknown." Ryan pleaded with the Senate:

> I ask this Court to tell the people of this State that the elective judiciary is not that shameful thing; that it was not founded to exterminate the human sense of justice; that it was ordained for the administration of justice, and not as a machinery of personal ambition or personal passion.[47]

Ryan continued his impassioned attack upon Hubbell until noon on Monday, July 11, when he closed after over nineteen hours of summation. Hubbell was an example, he said, of a Judge of easy virtue:

> approaching and approached; solicited and soliciting; lending a judicial ear to whispers which tamper with judicial virtue; ... a rare mockery of judicial virtue on his tongue; promising to set aside verdicts; hinting the vacating of judgments; suggesting settlements for his friends; chambering in private with jurors in the jury room; the naked indiscretion ... of adultery; divorcing women and instructing them in the principles of divorcing, in sacred privacy; ... tampering with the penal judgments of the law; when money was payable into Court, offering to receive part into his own particular pocket, instead of the whole into Court as required by law; advising suitors what course to take in order that

45. *Id.* at 636.
46. *Id.* at 643.
47. *Id.* at 681.

he might help them to accomplish their ends.[48]

Ryan continued,

> There is to be sure in these articles no one great lapse of virtue, no one great prostitution of judicial character; but there is a record running through this defendant's whole judicial career, through his whole judicial circuit, of judicial wantonness, not to call it judicial harlotry.[49]

Ryan ended with the plea, "I ask the Court to say whether this morality, admitted here without a blush, is the judicial morality of the State of Wisconsin?"[50]

Meeting in closed session on the afternoon of July 11, the Senate voted to acquit Judge Hubbell on all of the eleven charges, although the vote was actually tied on the charge that Hubbell had served as judge upon cases upon which he had previously worked as counsel. The vote to acquit Hubbell sent shock waves across the Second Circuit. Many of his partisans and Democrats rejoiced at the news, while many judges and attorneys reacted with dismay and disbelief. One observer wrote that "The House was quite incensed by the decision of the Senate and would not concur with them."[51]

The vote in the Senate was on party lines, with the Democrats holding a solid majority. Ryan had actually been concerned about such an outcome because many witnesses were less forceful in their public testimony than they had been in private. Ryan had warned the Senate that witnesses might fear reprisals from the bench in case of acquittal. The truth, he cautioned, is often shrouded in fear, paralyzing fear—"the fear of judicial vengeance; the fear of judicial tyranny... gagging the tongues of witnesses upon this trial, closing the fountains of truth... vengeance which comes bullying in this court and threatens all engaged in the prosecution!"[52] Butterfield's reaction may have summed up the response of much of the legal community of the Second Circuit: "The great farce is over now. Hubbell is acquitted, but not cleared. And the [I]rish had a great row,—burned Ryan in effigy, drumed [sic] the whole town, and fired the cannon, and Hubbell on a call addressed the mob and made himself a fool, as he always was.[53]

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48. *Id.* at 640.
49. *Id.* at 641.
50. *Id.* at 641.
51. WINSLOW, *supra* note 16, at 57.
52. LELAND, *supra* note 26, at 644.
53. WINSLOW, *supra* note 16, at 57.

After jubilant welcoming ceremonies in Milwaukee, Hubbell continued on the Second Circuit bench until his retirement in 1856 to private practice. Ryan's outrage over the case lasted for many years, even as he gained increasing prominence as an attorney and later as Wisconsin's Chief Justice. He later made some limited peace with Hubbell, as both practiced law in Milwaukee for several decades. In the myriad of changing personal and political ties, Hubbell even offered Ryan his full endorsement in the 1875 election for Chief Justice of the Wisconsin Supreme Court.

Following his acquittal in 1853, Hubbell appeared to proceed more cautiously on the bench until his retirement three years later. Perhaps he had learned to be discrete in dealing with conflicts of interest. In 1861, Hubbell once again changed political affiliations, becoming a Republican during the Civil War. He was rewarded by an appointment as United States Attorney for Wisconsin's eastern district in 1871.

Some historians have labeled Hubbell's trial a purely partisan attempt to bring down a very popular Democrat. However, a thorough reading of the evidence against Hubbell is convincing that while partisanship may explain his acquittal, politics alone can not account for the charges themselves. One biographer of Hubbell admits that, although acquitted, "sufficient evidence was brought against him to cast a shadow over his judicial career."[54]

The ability of a legislative body to remove a judge for crimes and misdemeanors, such as Hubbell's, remained in force. Willard Hurst points to a case similar to Hubbell's in which a judge was successfully impeached in 1913 "for use of his influence as a federal judge to obtain favors from litigants in his court."[55] Legal historian, Lawrence Friedman, argues that in the case of Levi Hubbell, "There was evidence of 'shoddy standards' in his work, but the senators seemed to demand (and did not get) extraordinary proofs of misconduct."[56]

As legal historians continue to debate the questions of legal ethics, judicial conduct, and a non-partisan bench, the career of Levi Hubbell provides an historic yardstick with which to measure current standards and practices.

54. DICTIONARY OF WISCONSIN BIOGRAPHY 181 (1960).

55. HURST, *supra* note 16, at 136.

56. FRIEDMAN, *supra* note 26, at 373.