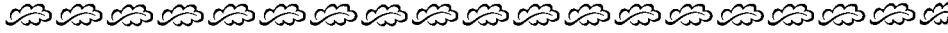


*Alexis de*

# Democracy



TRANSLATED, EDITED, AND WITH AN INTRODUCTION BY



*Tocqueville*  
**in America**

HARVEY C. MANSFIELD AND DELBA WINTHROP

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## Chapter 7 ON POLITICAL JUDGMENT IN THE UNITED STATES

*What the author means by political judgment.—How political judgment is understood in France, England, the United States.—In America, the political judge is occupied only with public officials.—He pronounces removals rather than penalties.—Political judgment, habitual means of government.—Political judgment, as it is intended in the United States, is, despite its mildness and perhaps because of its mildness, a very powerful arm in the hands of the majority.*

By political judgment I mean the decree that a political body, temporarily vested with the right to judge, pronounces.

In absolute governments, it is useless to give judgments extraordinary forms; the prince in whose name the accused is prosecuted, being master of tribunals as of everything else, has no need to seek a guarantee elsewhere than in the idea people have of his power. The sole fear he can conceive is that even the external appearances of justice will not be kept and that in wishing to affirm his authority, it will be dishonored.

But in most free countries, where the majority can never act on tribunals as an absolute prince would do, it has sometimes happened that judicial power is temporarily placed in the hands of the representatives of society themselves. They would rather temporarily confuse the powers in this way than violate the necessary principle of unity of government. England, France, and the United States have introduced political judgment into their laws: it is curious to examine the advantage that these three great peoples have gotten from it.

In England and France, the House of Lords forms the high criminal court of the nation.<sup>1</sup> It does not judge all political offenses, but it can judge them all.

Beside the House of Lords is another political power, vested with the right to accuse. The sole difference that exists on this point between the two countries is this: in England deputies can accuse whomsoever it well pleases them before the Lords, while in France they can prosecute only ministers of the king in this manner.

Furthermore, in both countries the House of Lords has at its disposition all penal laws with which to strike offenders.

1. In addition, the House of Lords in England forms the last stage of appeal in certain civil affairs. See Blackstone, bk. 3, chap. 4 [*Commentaries*, vol. 3, 57].

In the United States as in Europe, one of the two branches of the legislature is vested with the right to accuse, and the other with the right to judge. The [House of] Representatives denounces the guilty one, the Senate punishes him.

But the Senate can be *seised* only by the *representatives*, and the representatives can accuse only *public officials* before it. Thus the Senate has a more restricted competence than the court of lords in France, and the representatives have a more extensive right of accusation than our deputies.

But here is the greatest difference that exists between America and Europe: in Europe, political tribunals can apply all the provisions of the penal code; in America, when they have taken away from a guilty person the public character with which he had been vested and have declared him unworthy of occupying any political office in the future, their right is exhausted and the task of ordinary tribunals begins.

I suppose that the president of the United States has committed a crime of high treason.

The House of Representatives accuses him, the senators pronounce his deposition. Afterwards, he appears before a jury, which alone can take away his freedom or life.

This serves to cast a bright light on the subject that occupies us.

In introducing political judgment into their laws, the Europeans wanted to reach great criminals, whatever was their birth, their rank, or their power in the state. To succeed at it, they have temporarily gathered all the prerogatives of tribunals within one great political body.

The legislator has then been transformed into a magistrate; he can establish the crime, classify it, and punish it. In giving him the rights of a judge, the law has imposed on him all its obligations, and it has bound him to observe all the forms of justice.

When a political tribunal, French or English, has a public official answerable to it, and it pronounces a conviction against him, by that fact it takes his office away from him and can declare him unworthy of occupying any in the future: but here the political removal and interdiction are a consequence of the decree and not the decree itself.

In Europe, political judgment is therefore a judicial act rather than an administrative measure.

The contrary is seen in the United States, and it is easy to be convinced that political judgment there is indeed an administrative measure rather than a judicial act.

It is true that the decree of the Senate is judicial in form; to render it, senators are obliged to conform to the solemnity and usages of the proceeding. It is also judicial in the grounds on which it is founded; the Senate is

generally obliged to take for the basis of its decision an offense of the common law. But it is administrative in its object.

If the principal goal of the American legislator had really been to arm a political body with great judicial power, it would not have confined its action within the circle of public officials, for the most dangerous enemies of the state may not be vested with any office; this is above all true in republics, where the favor of parties is the primary power and where one is often all the stronger for not legally exercising any power.

If the American legislator had wanted to give to society itself the right to prevent great crimes in the manner of the judge, by fear of punishment, he would have put at the disposition of political tribunals all the resources of the penal code; but he furnished them only an incomplete arm that cannot reach the most dangerous of criminals. For a judgment of political interdiction matters little to one who wants to overturn the laws themselves.

The principal goal of political judgment in the United States is therefore to withdraw power from someone who makes a bad use of it and to prevent this same citizen from being vested with it in the future. It is, as one sees, an administrative action to which they have given the solemnity of a [judicial] decree.

In this matter, therefore, the Americans have created something mixed. They have given to administrative removal all the guarantees of political judgment, and they have removed from political judgment its greatest rigors.

This point fixed, everything follows; one then discovers why American constitutions submit all civil officials to the jurisdiction of the Senate and exempt the military from it, whose crimes are nevertheless more to be dreaded. In the civil order, the Americans have so to speak no dismissible officials: some are irremovable, others have their rights by a mandate that cannot be abrogated. In order to take power away from them, it is therefore necessary to judge them all. But the military depend on the head of state, who is himself a civil official. In reaching the head of state, one strikes them all with the same blow.<sup>2</sup>

Now if one comes to compare the European system and the American system in the effects that each produces or can produce, one discovers differences no less tangible.

In France and England political judgment is considered as an extraordinary arm that society ought not to make use of except to save itself in moments of great peril.

One cannot deny that political judgment, as intended in Europe, violates

2. It is not that one can remove an officer's rank, but one can take his command away from him.

the conservative principle of the division of powers and that it constantly threatens the freedom and the lives of men.

Political judgment in the United States makes only an indirect attack on the principle of the division of powers; it does not threaten the existence of citizens; it does not hang over all heads, as in Europe, since it strikes only those who, by accepting public offices, have submitted in advance to its rigors.

It is all at once less dreadful and less efficacious.

Thus the legislators of the United States did not consider it as an extreme remedy for the great ills of society, but as an habitual means of government.

From this point of view, it perhaps exerts more real influence on the social body in America than in Europe. One must not, in fact, allow oneself to be taken in by the apparent mildness of American legislation in what relates to political judgments. One should remark in the first place that in the United States the tribunal that pronounces these judgments is composed of the same elements and is subject to the same influences as the body charged with accusing, which gives an almost irresistible impetus to the vindictive passions of the parties. If political judges in the United States cannot pronounce penalties as severe as political judges in Europe, there are therefore fewer chances of being acquitted by them. Conviction is less dreadful and more certain.

Europeans, in establishing political tribunals, had for their principal object to *punish* the guilty; Americans, to *take power away* from them. Political judgment in the United States is in some fashion a preventive measure. One therefore ought not to fetter the judge with very exact criminal definitions.

Nothing is more frightening than the vagueness of American laws when they define political crimes properly speaking. "The President [. . .] shall be removed from Office on Impeachment for, and Conviction of" (says the Constitution of the United States, art. 1, sec. 4) "Treason, Bribery or other high Crimes and Misdemeanors."\* Most of the state constitutions are still more obscure.

"The senate shall [. . .] hear and determine all impeachments made [. . .] against any officer or officers of the commonwealth," says the constitution of Massachusetts, "for misconduct and maladministration in their offices."<sup>3</sup> "All [. . .] offending against the State, either by maladministration, corruption, neglect of duty, or any other high crime or misdemeanor," says the constitution of Virginia, "shall be impeachable by the house of delegates."<sup>†</sup> There

\*The provisions for impeachment are found in art. 2, sec. 4.

†Virginia constitution of 1830, art. 3, sec. 13.

3. Chap. 1, sec. 2, no. 8.

are some constitutions that, in order to allow an unlimited responsibility to weigh on public officials, do not specify any crime.<sup>4</sup>

But what renders the American laws so dreadful in this matter arises, I will dare to say, from their mildness itself.

We have seen that in Europe, the removal of an official and his political interdiction is one consequence of the penalty and that in America, it is the penalty itself. This is the result: in Europe, political tribunals are vested with terrible rights that they sometimes do not know how to use; and it happens that they do not punish for fear of punishing too much. But in America, they do not recoil before a penalty that does not make humanity tremble: to condemn a political enemy to death in order to take away his power is a horrible assassination in the eyes of all; to declare one's adversary unworthy of possessing that same power and to remove it from him, leaving him his freedom and his life, can appear the honest result of a conflict.

Now, this judgment, so easy to pronounce, is not less the height of misfortune for the common sort among those to whom it applies. Great criminals will doubtless brave its futile rigors; ordinary men will see in it a decree that destroys their position, stains their honor, and condemns them to a shameful idleness worse than death.

Political judgment in the United States therefore exerts an influence on the working of society so much the greater as it seems less dreadful. It does not act directly on the governed, but it renders a majority the entire master of those who govern; it does not give to the legislature an immense power that it could exercise only on the day of a crisis; it allows it to have a moderated, regular power that it can use every day. If the force is less great, on the other hand, the use is more convenient and the abuse easier.

In preventing political tribunals from pronouncing judicial penalties, the Americans therefore seem to me to have prevented the most terrible consequences of legislative tyranny rather than the tyranny itself. And I do not know if, all in all, political judgment, as it is intended in the United States, is not the most formidable arm that has ever been put in the hands of the majority.

When the American republics begin to degenerate, I believe that one will be able to recognize it easily: it will be enough to see if the number of political judgments rises.\*

\*See AT's note XIII, page 694.

4. See the constitutions of Illinois, Maine, Connecticut, and Georgia.