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APPENDIX

Report by the Staff of the Impeachment Inquiry on the Constitutional Grounds for Presidential Impeachment, Committee Print, Committee on the Judiciary, 93d Cong. 2d Sess., Feb. 1974

I. Introduction

The Constitution deals with the subject of impeachment and conviction at six places. The scope of the power is set out in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Other provisions deal with procedures and consequences. Article I, Section 2 states:

> The House of Representatives . . . shall have the sole Power of Impeachment.

Similarly, Article I, Section 3, describes the Senate's role:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The same section limits the consequences of judgment in cases of impeachment:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Of lesser significance, although mentioning the subject, are: Article II, Section 2:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article III, Section 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

Before November 15, 1973 a number of Resolutions calling for the impeachment of President Richard M. Nixon had been introduced in the House of Representatives, and had been referred by the Speaker of the House, Hon. Carl Albert, to the Committee on the Judiciary for consideration, investigation and report. On November 15, anticipating the magnitude of the Committee's task, the House voted funds to enable the Committee to carry out its assignment and in that regard to select an inquiry staff to assist the Committee.

On February 6, 1974, the House of Representatives by a vote of 410 to 4

"authorized and directed" the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America."

To implement the authorization (H. Res. 803) the House also provided that "For the purpose of making such investigation, the committee is authorized to require . . . by subpoena or otherwise . . . the attendance and testimony of any person . . . and . . . the production of such things; and . . . by interrogatory, the furnishing of such information, as it deems necessary to such investigation."

This was but the second time in the history of the United States that the House of Representatives resolved to investigate the possibility of impeachment of a President. Some 107 years earlier the House had investigated whether President Andrew Johnson should be impeached. Understandably, little attention or thought has been given the subject of the presidential impeachment process during the intervening years. The Inquiry Staff, at the request of the Judiciary Committee, has prepared this memorandum on constitutional grounds for presidential impeachment. As the factual investigation progresses, it will become possible to state more specifically the constitutional, legal and conceptual framework within which the staff and the Committee work.

Delicate issues of basic constitutional law are involved. Those issues cannot be defined in detail in advance of full investigation of the facts. The Supreme Court of the United States does not reach out, in the abstract, to rule on the constitutionality of statutes or of conduct. Cases must be brought and adjudicated on particular facts in terms of the Constitution. Similarly, the House does not engage in abstract, advisory or hypothetical debates about the precise nature of conduct that calls for the exercise of its constitutional powers; rather, it must await full development of the facts and understanding of the events to which those facts relate.

What is said here does not reflect any prejudgment of the facts or any opinion or inference respecting the allegations being investigated. This memorandum is written before completion of the full and fair factual investigation the House directed be undertaken. It is intended to be a review of the precedents and available interpretive materials, seeking general principles to guide the Committee.

This memorandum offers no fixed standards for determining whether grounds for impeachment exist. The framers did not write a fixed standard. Instead they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.

The House has set in motion an unusual constitutional process, conferred solely upon it by the Constitution, by directing the Judiciary Committee to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach." This action was not partisan. It was supported by the overwhelming majority of both political parties. Nor was it intended to obstruct or weaken the presidency. It was supported by Members firmly committed to the need for a strong presidency and a healthy executive branch of our government. The House of Representatives acted out of a clear sense of constitu-

tional duty to resolve issues of a kind that more familiar constitutional processes are unable to resolve.

To assist the Committee in working toward that resolution, this memorandum reports upon the history, purpose and meaning of the constitutional phrase, "Treason, Bribery, or other high Crimes and Misdemeanors."

II. The Historical Origins of Impeachment

The Constitution provides that the President ". . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The framers could have written simply "or other crimes"—as indeed they did in the provision for extradition of criminal offenders from one state to another. They did not do that. If they had meant simply to denote seriousness, they could have done so directly. They did not do that either. They adopted instead a unique phrase used for centuries in English parliamentary impeachments, for the meaning of which one must look to history.

The origins and use of impeachment in England, the circumstances under which impeachment became a part of the American constitutional system, and the American experience with impeachment are the best available sources for developing an understanding of the function of impeachment and the circumstances in which it may become appropriate in relation to the presidency.

A. The English Parliamentary Practice

Alexander Hamilton wrote, in No. 65 of *The Federalist*, that Great Britain had served as "the model from which [impeachment] has been borrowed." Accordingly, its history in England is useful to an understanding of the purpose and scope of impeachment in the United States.

Parliament developed the impeachment process as a means to exercise some measure of control over the power of the King. An impeachment proceeding in England was a direct method of bringing to account the King's ministers and favorites—men who might otherwise have been beyond reach. Impeachment, at least in its early history, has been called "the most powerful weapon in the political armoury, short of civil war."[1] It played a continuing role in the struggles between King and Parliament that resulted in the formation of the unwritten English constitution. In this respect impeachment was one of the tools used by the English Parliament to create more responsive and responsible government and to redress imbalances when they occurred.[2]

The long struggle by Parliament to assert legal restraints over the unbridled will of the King ultimately reached a climax with the execution of Charles I in 1649 and the establishment of the Commonwealth under Oliver Cromwell. In the course of that struggle, Parliament sought to exert restraints over the King by removing those of his ministers who most effectively advanced the King's absolutist purposes. Chief among them was

1. Plucknett, "Presidential Address" reproduced in 3 *Transactions, Royal Historical Society*, 5th Series, 145 (1952).
2. See generally C. Roberts, *The Growth of Responsible Government in Stuart England* (Cambridge 1966).

Thomas Wentworth, Earl of Strafford. The House of Commons impeached him in 1640. As with earlier impeachments, the thrust of the charge was damage to the state.[3] The first article of impeachment alleged.[4]

> That he . . . hath traiterously endeavored to subvert the Fundamental Laws and Government of the Realms . . . and in stead thereof, to introduce Arbitrary and Tyrannical Government against Law. . . .

The other articles against Strafford included charges ranging from the allegation that he had assumed regal power and exercised it tyrannically to the charge that he had subverted the rights of Parliament.[5]

Characteristically, impeachment was used in individual cases to reach offenses, as perceived by Parliament, against the system of government. The charges, variously denominated "treason," "high treason," "misdemeanors," "malversations," and "high Crimes and Misdemeanors," thus included allegations of misconduct as various as the kings (or their ministers) were ingenious in devising means of expanding royal power.

At the time of the Constitutional (Convention the phrase "high Crimes and Misdemeanors" had been in use for over 400 years in impeachment proceedings in Parliament.[6] It first appears in 1386 in the impeachment of the King's Chancellor, Michael de la Pole, Earl of Suffolk.[7] Some of the charges may have involved common law offenses.[8] Others

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3. Strafford was charged with treason, a term defined in 1352 by the Statute of Treasons. 25 Edw. 3, stat. 5, c. 2 (1352). The particular charges against him presumably would have been within the compass of the general, or "salvo," clause of that statute, but did not fall within any of the enumerated acts of treason. Strafford rested his defense in part on that failure; his eloquence on the question of retrospective treasons ("Beware you do not awake these sleeping lions, by the searching out some neglected moth-eaten records, they may one day tear you and your posterity in pieces: it was your ancestors' care to chain them up within the barricadoes of statutes; be not you ambitious to be more skillful and curious than your forefathers in the art of killing." *Celebrated Trials* 518 [Phila. 1837]) may have dissuaded the Commons from bringing the trial to a vote in the House of Lords: instead they caused his execution by bill of attainder.

4. J. Rushworth, *The Tryal of Thomas Earl of Strafford,* in 8 Historical Collections 8 (1686).

5. Rushworth, *supra* n. 4, at 8–9. R. Berger, *Impeachment: The Constitutional Problems* 30 (1973), states that the impeachment of Strafford ". . . constitutes a great watershed in English constitutional history of which the Founders were aware."

6. See generally A. Simpson, *A Treatise on Federal Impeachments* 81–190 (Philadelphia, 1916) (Appendix of English Impeachment Trials); M. V. Clarke, "The Origin of Impeachment" in *Oxford Essays in Medieval History* 164 (Oxford, 1934). Reading and analyzing the early history of English impeachments is complicated by the paucity and ambiguity of the records. The analysis that follows in this section has been drawn largely from the scholarship of others, checked against the original records where possible.

The basis for what became the impeachment procedure apparently originated in 1341, when the King and Parliament alike accepted the principle that the King's ministers were to answer in Parliament for their misdeeds. C. Roberts, *supra* n. 2, at 7. Offenses against Magna Carta, for example, were failing for technicalities in the ordinary courts, and therefore Parliament provided that offenders against Magna Carta be declared in Parliament and judged by their peers. Clarke, *supra,* at 173.

7. Simpson, *supra* n. 6, at 86; Berger, *supra* n. 5, at 61, Adams and Stevens, *Select Documents of English Constitutional History* 148 (London, 1927).

8. For example, de la Pole was charged with purchasing property of great value from the King while using his position as Chancellor to have the lands appraised at less than they were

plainly did not: de la Pole was charged with breaking a promise he made to the full Parliament to execute in connection with a parliamentary ordinance the advice of a committee of nine lords regarding the improvement of the estate of the King and the realm; "this was not done, and it was the fault of himself as he was then chief officer." He was also charged with failing to expend a sum that Parliament had directed be used to ransom the town of Ghent, because of which "the said town was lost."[9]

The phrase does not reappear in impeachment proceedings until 1450. In that year articles of impeachment against William de la Pole, Duke of Suffolk (a descendant of Michael), charged him with several acts of high treason, but also with "high Crimes and Misdemeanors,"[10] including such various offenses as "advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws" "procuring offices for persons who were unfit, and unworthy of them" and "squandering away the public treasure."[11]

Impeachment was used frequently during the reigns of James I (1603–1625) and Charles I (1628–1649). During the period from 1620 to 1649 over 100 impeachments were voted by the House of Commons.[12] Some of these impeachments charged high treason, as in the case of Strafford; others charged high crimes and misdemeanors. The latter included both statutory offenses, particularly with respect to the Crown monopolies, and nonstatutory offenses. For example, Sir Henry Yelverton, the King's Attorney General, was impeached in 1621 of high crimes and misdemeanors in that he failed to prosecute after commencing suits, and exercised authority before it was properly vested in him.[13]

There were no impeachments during the Commonwealth (1649–1660). Following the end of the Commonwealth and the Restoration of Charles II (1660–1685) a more powerful Parliament expanded somewhat the scope of "high Crimes and Misdemeanors" by impeaching officers of the Crown for such things as negligent discharge of duties[14] and improprieties in office.[15]

The phrase "high Crimes and Misdemeanors" appears in nearly all of the comparatively few impeachments that occurred in the eighteenth century. Many of the charges involved abuse of official power or trust. For example, Edward, Earl of Oxford, was charged in 1701 with "violation of his duty and trust" in that,

worth, all in violation of his oath, in deceit of the King and in neglect of the need of the realm. Adams and Stevens, *supra* n. 7, at 148.

9. Adams and Stevens, *supra* n. 7, at 148–150.

10. 4 Hatsell 67 (Shannon, Ireland, 1971, reprint of London 1796, 1818).

11. 4 Hatsell, *supra* n. 10, at 67, charges 2, 6 and 12.

12. The Long Parliament (1640–48) alone impeached 98 persons. Roberts *supra* n. 2, at 133.

13. 2 Howell *State Trials* 1135, 1136–37 *(charges 1, 2 and 6). See generally* Simpson, *supra* n. 6, at 91–127; Berger, *supra* n. 5, at 67–73.

14. Peter Pett, Commissioner of the Navy, was charged in 1668 with negligent preparation for an invasion by the Dutch, and negligent loss of a ship. The latter charge was predicated on alleged willful neglect in failing to insure that the ship was brought to a mooring. 6 Howell *State Trials* 865, 866–67 *(charges 1, 5).*

15. Chief Justice Scroggs was charged in 1680, among other things, with browbeating witnesses and commenting on their credibility, and with cursing and drinking to excess, thereby bringing "the highest scandal on the public justice of the kingdom." 8 Howell *State Trials* 197, 200 *(charges 7, 8).*

while a member of the King's privy council, he took advantage of the ready access he had to the King to secure various royal rents and revenues for his own use, thereby greatly diminishing the revenues of the crown and subjecting the people of England to "grievous taxes."[16], Oxford was also charged with procuring a naval commission for William Kidd, "known to be a person of ill fame and reputation," and ordering him "to pursue the intended voyage, in which Kidd did commit diverse piracies . . . being thereto encouraged through hopes of being protected by the high station and interest of Oxford, in violation of the law of nations, and the interruption and discouragement of the trade of England."[17]

The impeachment of Warren Hastings, first attempted in 1786 and concluded in 1795,[18] is particularly important because contemporaneous with the American Convention debates. Hastings was the first Governor-General of India. The articles indicate that Hastings was being charged with high crimes and misdemeanors in the form of gross maladministration, corruption in office, and cruelty toward the people of India.[19]

Two points emerge from the 400 years of English parliamentary experience with the phrase "high Crimes and Misdemeanors." First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and betrayal of trust.[20] Second, the phrase "high Crimes and Misdemeanors" was confined to parliamentary impeachments; it had no roots in the ordinary criminal law,[21] and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.

B. The Intention of the Framers

The debates on impeachment at the Constitutional Convention in Philadelphia focus principally on its applicability to the President. The framers sought to create a responsible though strong executive; they hoped, in the words of Elbridge Gerry of Massachusetts, that "the maxim would never be adopted here that the chief Magistrate could do [no] wrong."[22] Impeachment was to be one of the central elements of executive responsibility

16. Simpson, *supra* n. 6, at 144.

17. Simpson, *supra* n. 6, at 144.

18. *See generally* Marshall, *The Impeachment of Warren Hastings* (Oxford, 1965).

19. Of the original resolutions proposed by Edmund Burke in 1786 and accepted by the House as articles of impeachment in 1787, both criminal and non-criminal offenses appear. The fourth article, for example, charging that Hastings had confiscated the landed income of the Begums of Oudh, was described by Pitt as that of all others that bore the strongest marks of criminality, Marshall, *supra*, n. 19, at 53.

The third article, on the other hand, known as the Benares charge, claimed that circumstances imposed upon the Governor-General duty to conduct himself "on the most distinguished principles of good faith, equity, moderation and mildness." Instead, continued the charge, Hastings provoked a revolt in Benares, resulting in "the arrest of the rajah, three revolutions in the country and great loss, whereby the said Hastings is guilty of a high crime and misdemeanor in the destruction of the country aforesaid." The Commons accepted this article, voting 119–79 that these were grounds for impeachment. Simpson, *supra* n. 6, at 168–170; Marshall, supra n. 19, at xv, 46.

20. *See, e.g.*, Berger, *supra* n. 5, at 70–71.

21. Berger, *supra* n. 5, at 62.

22. *The Records of the Federal Convention* 66 (M. Farrand ed. 1911) (brackets in original). Hereafter cited as Farrand.

in the framework of the new government as they conceived it.

The constitutional grounds for impeachment of the President received little direct attention in the Convention; the phrase "other high Crimes and Misdemeanors" was ultimately added to "Treason" and "Bribery" with virtually no debate. There is evidence, however, that the framers were aware of the technical meaning the phrase had acquired in English impeachments.

Ratification by nine states was required to convert the Constitution from a proposed plan of government to the supreme law of the land. The public debates in the state ratifying conventions offer evidence of the contemporaneous understanding of the Constitution equally as compelling as the secret deliberations of the delegates in Philadelphia. That evidence, together with the evidence found in the debates during the First Congress on the power of the President to discharge an executive officer appointed with the advice and consent of the Senate, shows that the framers intended impeachment to be a constitutional safeguard of the public trust, the powers of government conferred upon the President and other civil officers, and the division of powers among the legislative, judicial and executive departments.

1. THE PURPOSE OF THE IMPEACHMENT REMEDY

Among the weaknesses of the Articles of Confederation apparent to the delegates to the Constitutional Convention was that they provided for a purely legislative form of government whose ministers were subservient to Congress. One of the first decisions of the delegates was that their new plan should include a separate executive judiciary, and legislature.[23] However, the framers sought to avoid the creation of a too-powerful executive. The Revolution had been fought against the tyranny of a king and his council, and the framers sought to build in safeguards against executive abuse and usurpation of power. They explicitly rejected a plural executive, despite arguments that they were creating "the foetus of monarchy,"[24] because a single person would give the most responsibility to the office.[25] For the same reason, they rejected proposals for a council of advice or privy council to the executive (footnote omitted).

The provision for a single executive was vigorously defended at the time of the state ratifying conventions as a protection against executive tyranny and wrongdoing. Alexander Hamilton made the most carefully reasoned argument in Federalist No. 70, one of the series of *Federalist Papers* prepared to advocate the ratification of the Constitution by the State of New York. Hamilton criticized both a plural executive and a council because they tend "to conceal faults and destroy responsibility." A plural executive, he wrote, deprives the people of "the two greatest securities they can have for the faithful exercise of any delegated power"—"[r]esponsibility . . . to censure and to punishment." When censure is divided and responsibility uncertain, "the restraints of public opinion . . . lose their efficacy" and "the opportunity of discovering with facility and clearness

23. 1 Farrand 322.

24. 1 Farrand 66.

25. This argument was made by James Wilson of Pennsylvania, who also said that he preferred a single executive as "giving most energy dispatch and responsibility to the office." 1 Farrand 65.

the misconduct of the persons [the public] trust, in order either to their removal from office, or to their actual punishment. in cases which admit of it" is lost.[26] A council, too, "would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the (Chief Magistrate himself."[27] It is, Hamilton concluded, "far more safe [that] there should be a single object for the jealousy and watchfulness of the people; . . . all multiplication of the Executive is rather dangerous than friendly to liberty."[28]

James Iredell, who played a leading role in the North Carolina ratifying convention and later became a justice of the Supreme Court, said that under the proposed Constitution the President "is of a very different nature from a monarch. He is to be . . . personally responsible for any abuse of the great trust reposed in him."[29] In the same convention, William R. Davie, who had been a delegate in Philadelphia, explained that the "predominant principle" on which the Convention had provided for a single executive was "the more obvious responsibility of one person." When there was but one man, said Davie, "the public were never at a loss" to fix the blame.[30]

James Wilson, in the Pennsylvania convention, described the security furnished by a single executive as one of its "very important advantages":

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.[31]

As Wilson's statement suggests, the impeachability of the President was considered to be an important element of his responsibility. Impeachment had been in-

26. *The Federalist* No. 70, at 459–61 (Modern Library ea.) (A. Hamilton) (hereinafter cited as *Federalist*). The "multiplication of the Executive," Hamilton wrote, "adds to the difficulty of detection":

> The circumstances which may have led to any national miscarriage of misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

If there should be "collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?" Id. at 460.

27. *Federalist* No. 70 at 461. Hamilton stated:

> A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad, and are almost always a cloak to his faults. Id. at 462–63.

28. *Federalist* No. 70 at 462.

29. 4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 74 (reprint of 2d ea.) (hereinafter cited as Elliot.)

30. Elliot 104.

31. 2 Elliot 480 (emphasis in original).

cluded in the proposals before the Constitutional Convention from its beginning.[32] A specific provision, making the executive removable from office on impeachment and conviction for "mal-practice or neglect of duty," was unanimously adopted even before it was decided that the executive would be a single person.[33]

The only major debate on the desirability of impeachment occurred when it was moved that the provision for impeachment be dropped, a motion that was defeated by a vote of eight states to two.[34]

One of the arguments made against the impeachability of the executive was that he "would periodically be tried for his behavior by his electors" and "ought to be subject to no intermediate trial, by impeachment."[35] Another was that the executive could "do no criminal act without Coadjutors [assistants] who may be punished."[36] Without his subordinates, it was asserted, the executive "can do nothing of consequence," and they would "be amenable by impeachment to the public Justice."[37]

This latter argument was made by Gouverneur Morris of Pennsylvania, who abandoned it during the course of the debate, concluding that the executive should be impeachable.[38] Before Morris changed his position, however, George Mason had replied to his earlier argument:

> Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.[39]

32. The Virginia Plan, fifteen resolutions proposed by Edmund Randolph at the beginning of the Convention, served as the basis of its early deliberations. The ninth resolution gave the national judiciary jurisdiction over "impeachments of any National officers." 1 Farrand 22.

33. 1 Farrand 88. Just before the adoption of this provision, a proposal to make the executive removable from office by the legislature upon request of a majority of the state legislatures had been overwhelmingly rejected. *Id.* 87. In the course of debate on this proposal, it was suggested that the legislature "should have power to remove the Executive at pleasure"—a suggestion that was promptly criticized as making him "the mere creature of the Legislature" in violation of "the fundamental principle of good Government," and was never formally proposed to the Convention. *Id.* 85–86.

34. 2 Farrand 64, 69.

35. 2 Farrand 67 (Rufus King). Similarly, Gouverneur Morris contended that if an executive charged with a criminal act were reelected, "that will be sufficient proof of his innocence." *Id.* 64.

It was also argued in opposition to the impeachment provision, that the executive should not be impeachable "whilst in office"—an apparent allusion to the constitutions of Virginia and Delaware, which then provided that the governor (unlike other officers) could be impeached only after he left office. *Id.* See 7 Thorpe, *The Federal and State Constitutions* 3818 (1909) and 1 *Id.* 566. In response to this position, it was argued that corrupt elections would result, as an incumbent sought to keep his office in order to maintain his immunity from impeachment. He will "spare no efforts or no means whatever to get himself reelected," contended William R. Davie of North Carolina. 2 Farrand 64. George Mason asserted that the danger of corrupting electors "furnished a peculiar reason in favor of impeachments whilst in office": "Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?" *Id.* 65.

36. 2 Farrand 64.

37. 2 Farrand 54.

38. "This Magistrate is not the King but the prime-Minister. The people are the King." 2 Farrand 69.

39. 2 Farrand 65.

James Madison of Virginia argued in favor of impeachment stating that some provision was "indispensable" to defend the community against "the incapacity, negligence or perfidy of the chief Magistrate." With a single executive, Madison argued, unlike a legislature whose collective nature provided security, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic."[40] Benjamin Franklin supported impeachment as "favorable to the executive"; where it was not available and the chief magistrate had "rendered himself obnoxious," recourse was had to assassination. The Constitution should provide for the "regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.[41] Edmund Randolph also defended "the propriety of impeachments":

> The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided it will be irregularly inflicted by tumults & insurrections.[42]

The one argument made by the opponents of impeachment to which no direct response was made during the debate was that the executive would be too dependent on the legislature—that, as Charles Pinckney put it, the legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."[43]

40. 2 Farrand 65–66.

41. 2 Farrand 65.

42. 2 Farrand 67.

43. 2 Farrand 66.

That issue, which involved the forum for trying impeachments and the mode of electing the executive, troubled the Convention until its closing days. Throughout its deliberations on ways to avoid executive subservience to the legislature, however, the Convention never reconsidered its early decision to make the executive removable through the process of impeachment (footnote omitted).

2. ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

Briefly, and late in the Convention, the framers addressed the question how to describe the grounds for impeachment consistent with its intended function. They did so only after the mode of the President's election was settled in a way that did not make him (in the words of James Wilson) "the Minion of the Senate."[45]

The draft of the Constitution then before the Convention provided for his removal upon impeachment and conviction for "treason or bribery." George Mason objected that these grounds were too limited:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.[46]

Mason then moved to add the word "maladministration" to the other two grounds.

45. 2 Farrand 523.

46. 2 Farrand 550.

Maladministration was a term in use in six of the thirteen state constitutions as a ground for impeachment, including Mason's home state of Virginia.[47]

When James Madison objected that "so vague a term will be equivalent to a tenure during pleasure of the Senate," Mason withdrew "maladministration" and substituted "high crimes and misdemeanors agst. the State," which was adopted eight states to three, apparently with no further debate.[48]

That the framers were familiar with English parliamentary impeachment proceedings is clear. The impeachment of Warren Hastings, Governor-General of India, for high crimes and misdemeanors was voted just a few weeks before the beginning of the Constitutional Convention and George Mason referred to it in the debates.[49] Hamilton, in the *Federalist* No. 65, referred to Great Britain as "the model from which [impeachment] has been borrowed." Furthermore, the framers were well-educated men. Many were also lawyers. Of these, at least nine had studied law in England.[50]

The Convention had earlier demonstrated its familiarity with the term "high misdemeanor."[51] A draft constitution had used "high misdemeanor" in its provision for the extradition of offenders from one state to another.[52] The Convention, apparently unanimously struck "high misdemeanor" and inserted "other crime," "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited.[53]

The "technical meaning" referred to is the parliamentary use of the term "high misdemeanor." Blackstone's *Commentaries on the Laws of England*—a work cited by delegates in other portions of the Convention's deliberations and which Madison later described (in the Virginia ratifying convention) as "a book which is in every man's hand"[54]—included "high misdemeanors" as one term

47. The grounds for impeachment of the Governor of Virginia were "mal-administration, corruption, or other means, by which the safety of the State may be endangered." 7 Thorpe, *The Federal and State Constitution* 3818 (1909).

48. 2 Farrand 550. Mason's wording was unanimously changed later the same day from "agst. the State" to "against the United States" in order to avoid ambiguity. This phrase was later dropped in the final draft of the Constitution prepared by the Committee on Style and Revision, which was charged with arranging and improving the language of the articles adopted by the Convention without altering its substance.

49. *Id.*

50. R. Berger, *Impeachment: The Constitutional Problems* 87, 89 and accompanying notes (1973).

51. As a technical term, a "high" crime signified a crime against the system of government, not merely a serious crime. "This element of injury to the commonwealth—that is, to the state itself and to its constitution—was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one. The distinction goes back to the ancient law of treason, which differentiated 'high' from 'petit' treason." Bestor, Book Review, 49 Wash. L Rev. 255, 263–64 (1973). *See* 4 W. Blackstone, Commentaries 75.

52. The provision (article XV of Committee draft of the Committee on Detail) originally read: "Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence." 2 Farrand 187–88.

This clause was virtually identical with the extradition clause contained in article IV of the Articles of Confederation, which referred to "any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state. . . ."

53. 2 Farrand 443.

54. 3 Elliott 501.

for positive offenses "against the king and government." The "first and principal" high misdemeanor, according to Blackstone, was "mal-administration of such high officers, as are in public trust and employment," usually punished by the method of parliamentary impeachment.[55]

"High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the framers meant when they adopted them.[56] Chief Justice Marshall wrote of another such phrase:

> It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.[57]

3. GROUNDS FOR IMPEACHMENT

Mason's suggestion to add "maladministration," Madison's objection to it as "vague," and Mason's substitution of "high crimes and misdemeanors agst the State" are the only comments in the Philadelphia convention specifically directed to the constitutional language describing the grounds for impeachment of the President. Mason's objection to limiting the grounds to treason and bribery was that treason would "not reach many great and dangerous offences" including "[a]ttempts to subvert the Constitution."[58] His willingness to substitute "high Crimes and Misdemeanors," especially given his apparent familiarity with the English use of the term as evidenced by his reference to the Warren Hastings impeachment, suggests that he believed "high crimes and Misdemeanors" would cover the offenses about which he was concerned.

Contemporaneous comments on the scope of impeachment are persuasive as to the intention of the framers. In *Federalist* No. 65, Alexander Hamilton described the subject of impeachment as:

> those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[59]

Comments in the state ratifying conventions also suggest that those who adopted the Constitution viewed impeachment as a remedy for usurpation or abuse of power or serious breach of trust. Thus, Charles Cotesworth Pinckney of South Carolina stated that the impeachment power of the House reaches "those who behave amiss, or betray their public trust."[60] Edmund Randolph said in the Virginia convention that the President may be impeached if he "misbehaves."[61]

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55. 4 Blackstone's Commentaries 121 (emphasis omitted).

56. *See* Murray v. Hoboken Land Co., 52 U.S. (18 How.) 272 (1856), Davidson v. New Orleans, 96 U.S. 97 (1878); Smith v. Alabama, 124 U.S. 465 (1888).

57. *United States* v. *Burr*, 25 Fed. Cas. 1, 159 (No. 14, 693) (C.C.D. Va. 1807).

58. 2 Farrand 550.

59. *The Federalist* No. 65 at 423–24 (Modern Library ed.) (A. Hamilton) (emphasis in original).

60. 4 Elliot 281.

61. 3 Elliot 201.

He later cited the example of the President's receipt of presents or emoluments from a foreign power in violation of the constitutional prohibition of Article I, section 9.[62] In the same convention George Mason argued that the President might use his pardoning power to "pardon crimes which were advised by himself" or, before indictment or conviction, "to stop inquiry and prevent detection." James Madison responded:

> [I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty. . . .[63]

In reply to the suggestion that the President could summon the Senators of only a few states to ratify a treaty, Madison said,

> Were the President to commit any thing so atrocious . . . he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor.[64]

Edmund Randolph referred to the checks upon the President:

> It has too often happened that powers delegated for the purpose of promoting the happiness of a community have been perverted to the advancement of the personal emoluments of the agents of the people; but the powers of the President are too well guarded and checked to warrant this illiberal aspersion.[65]

Randolph also asserted, however, that impeachment would not reach errors of judgment: "No man ever thought of impeaching a man for an opinion. It would be impossible to discover whether the error in opinion resulted from a willful mistake of the heart, or an involuntary fault of the head."[66]

James Iredell made a similar distinction in the North Carolina convention, and on the basis of this principle said, "I suppose the only instances, in which the President would be liable to impeachment, would be where he has received a bribe, or had acted from some corrupt motive or other."[67] But he went on to argue that the President must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them—in this case, I ask whether, upon an impeachment for a misdemeanor upon such

62. 3 Elliot 486.

63. 3 Elliot 497–98. Madison went on to say, contrary to his position in the Philadelphia convention, that the President could be suspended when suspected, and his powers would devolve on the Vice President, who could likewise be suspended until impeached and convicted, if he were also suspected. *Id.* 498.

64. 3 Elliot 500. John Rutledge of South Carolina made the same point, asking "whether gentlemen seriously could suppose that a President, who has a character at stake, would be such a fool and knave as to join with ten others [two-thirds of a minimal quorum of the Senate] to tear up liberty by the roots, when a full Senate were competent to impeach him." 4 Elliot 268.

65. 3 Elliot 117.

66. 3 Elliot 401.

67. 4 Elliot 126.

an account, the Senate would probably favor him.[68]

In short, the framers who discussed impeachment in the state ratifying conventions, as well as other delegates who favored the Constitution,[69] implied that it reached offenses against the government, and especially abuses of constitutional duties. The opponents did not argue that the grounds for impeachment had been limited to criminal offenses.

An extensive discussion of the scope of the impeachment power occurred in the House of Representatives in the First Session of the First Congress. The House was debating the power of the President to remove the head of an executive department appointed by him with the advice and consent of the Senate, an issue on which it ultimately adopted the position, urged primarily by James Madison, that the Constitution vested the power exclusively in the President. The discussion in the House lends support to the view that the framers intended the impeachment power to reach failure of the President to discharge the responsibilities of his office.[70]

Madison argued during the debate that the President would be subject to impeachment for "the wanton removal of meritorious officers."[71] He also contended that the power of the President unilaterally to remove subordinates was "absolutely necessary" because "it will make him in a peculiar manner, responsible for [the] conduct" of executive officers. It would, Madison said,

> subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.[72]

Elbridge Gerry of Massachusetts, who had also been a framer though he had opposed the ratification of the Constitution, disagreed with Madison's contentions about the impeachability of the President. He could not be impeached for dismissing a good officer, Gerry said, because he would be "doing an act which the Legislature has submitted to his discretion.[73] And he should not be held responsible for the acts of subordinate officers, who were themselves subject to impeachment and should bear their own responsibility.[74]

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68. 4 Elliot 127.

69. For example, Wilson Nicholas in the Virginia convention asserted that the President "is personally amenable for his mal-administration" through impeachment, 3 Elliot 17; George Nicholas in the same convention referred to the President's impeachability if he "deviates from his duty," *id.* 240. Archibald MacLaine in the South Carolina convention also referred to the President's impeachability for "any maladministration in his office," 4 Elliot 47; and Reverend Samuel Stillman of Massachusetts referred to his impeachability for "malconduct," asking, "With such a prospect, who will dare to abuse the powers vested in him by the people?" 2 Elliot 169.

70. Chief Justice Taft wrote with reference to the removal power debate in the opinion for the Court in *Myers* v. *United States,* that constitutional decisions of the First Congress "have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." 272 U.S. 52, 174–75 (1926).

71. 1 Annals of Cong. 498 (1789).

72. *Id.* 372–73.

73. *Id.* 502.

74. *Id.* 535–36. Gerry also implied, perhaps rhetorically, that a violation of the Constitution was grounds for impeachment. If, he said, the Constitution failed to include provision for removal of executive officers, an attempt by the legislature to cure the omission would be an attempt to amend the Constitution. But the Con-

Another framer, Abraham Baldwin of Georgia, who supported Madison's position on the power to remove subordinates, spoke of the President's impeachability for failure to perform the duties of the executive. If, said Baldwin, the President "in a fit of passion" removed "all the good officers of the Government" and the Senate were unable to choose qualified successors, the consequence would be that the President "would be obliged to do the duties himself; or, if he did not, we would impeach him, and turn him out of office, as he had done others."(75)

Those who asserted that the President has exclusive removal power suggested that it was necessary because impeachment, as Elias Boudinot of New Jersey contended, is "intended as a punishment for a crime, and not intended as the ordinary means of re-arranging the Departments."(76) Boudinot suggested that disability resulting from sickness or accident "would not furnish any good ground for impeachment; it could not be laid as treason or bribery, nor perhaps as a high crime or misdemeanor."(77) Fisher Ames of Massachusetts argued for the President's removal power because "mere intention [to do a mischief] would not be cause of impeachment" and "there may be numerous causes for removal which do not amount to a crime."(78) Later in the same speech Ames suggested that impeachment was available if an officer "misbehaves"(79) and for "mal-conduct."(80)

One further piece of contemporary evidence is provided by the *Lectures on Law* delivered by James Wilson of Pennsylvania in 1790 and 1791. Wilson described impeachments in the United States as "confined to political characters, to political crimes and misdemeanors, and to political punishment."(81) And, he said:

> The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: every one should be secure while he observes them.(82)

stitution provided procedures for its amendment, and "an attempt to amend it in any other way may be a high crime or misdemeanor, or perhaps something worse." *Id.* 503.

75. *Id.* John Vining of Delaware commented: "The President. What are his duties? To see the laws faithfully executed; if he does not do this effectually, he is responsible. To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the Constitution, by impeachment, to be presented by their immediate representatives; if they fail here, they have another check when the time of election comes round." *Id.* 572.

76. *Id.* 375.

77. *Id.*

78. *Id.* 474.

79. *Id.* 475.

80. *Id.* 477. The proponents of the President's removal power were careful to preserve impeachment as a supplementary method of removing executive officials. Madison said impeachment will reach a subordinate "whose bad actions may be connived at or overlooked by the President." *Id.* 372. Abraham Baldwin said:

"The Constitution provides for—what? That no bad man should come into office. . . . But suppose that one such could be got in, he can be got out again in despite of the President. We can impeach him, and drag him from his place . . . ." *Id.* 558.

81. Wilson, *Lectures on Law,* in 1 *The Works of James Wilson* 426 (R. McCloskey ed. 1967).

82. *Id.* 425.

From the comments of the framers and their contemporaries, the remarks of the delegates to the state ratifying conventions, and the removal power debate in the First Congress, it is apparent that the scope of impeachment was not viewed narrowly. It was intended to provide a check on the President through impeachment, but not to make him dependent on the unbridled will of the Congress.

Impeachment, as Justice Joseph Story wrote in his *Commentaries on the Constitution* in 1833, applies to offenses of "a political character":

> Not but that crimes of a strictly legal character fall within the scope of the power . . . but that it has a more enlarged operation, and reaches, what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.[83]

C. THE AMERICAN IMPEACHMENT CASES

Thirteen officers have been impeached by the House since 1787: one President, one cabinet officer, one United States Senator, and ten Federal judges.[84] In addition there have been numerous resolutions and investigations in the House not resulting in impeachment. However, the action of the House in declining to impeach an officer is not particularly illuminating. The reasons for failing to impeach are generally not stated, and may have rested upon a failure of proof, legal insufficiency of the grounds, political judgment, the press of legislative business, or the closeness of the expiration of the session of Congress. On the other hand, when the House has voted to impeach an officer, a majority of the Members necessarily have concluded that the conduct alleged constituted grounds for impeachment.[85]

Does Article III, Section 1 of the Constitution, which states that judges "shall

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83. 1 *J. Story Commentaries on the Constitution of the United States*, § 764, at 559 (5th ed. 1905).

84. Eleven of these officers were tried in the Senate. Articles of impeachment were presented to the Senate against a twelfth (Judge English), but he resigned shortly before the trial. The thirteenth (Judge Delahay) resigned before articles could be drawn.

85. Only four of the thirteen impeachments—all involving judges—have resulted in conviction in the Senate and removal from office. While conviction and removal show that the Senate agreed with the House that the charges on which conviction occurred stated legally sufficient grounds for impeachment, acquittals offer no guidance on this question, as they may have resulted from a failure of proof, other factors, or a determination by more than one third of the Senators (as in the Blount and Belknap impeachments) that trial or conviction was inappropriate for want of jurisdiction.

hold their Offices during good Behavior," limit the relevance of the ten impeachments of judges with respect to presidential impeachment standards as has been argued by some? It does not. The argument is that "good behavior" implies an additional ground for impeachment of judges not applicable to other civil officers. However, the only impeachment provision discussed in the Convention and included in the Constitution is Article II, Section 4, which by its expressed terms, applies to all civil officers, including judges, and defines impeachment offenses as "Treason, Bribery, and other high Crimes and Misdemeanors."

In any event, the interpretation of the "good behavior" clause adopted by the House has not been made clear in any of the judicial impeachment cases. Whichever view is taken, the judicial impeachments have involved an assessment of the conduct of the officer in terms of the constitutional duties of his office. In this respect, the impeachments of judges are consistent with the three impeachments of nonjudicial officers.

Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder. This conduct falls into three broad categories: (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.[86]

1. EXCEEDING THE POWERS OF THE OFFICE IN DEROGATION OF THOSE OF ANOTHER BRANCH OF GOVERNMENT

The first American impeachment, of Senator William Blount in 1797, was based on allegations that Blount attempted to incite the Creek and Cherokee Indians to attack the Spanish settlers of Florida and Louisiana, in order to capture the territory for the British. Blount was charged with engaging in a conspiracy to compromise the neutrality of the United States, in disregard of the constitutional provisions for conduct of foreign affairs. He was also charged, in effect, with attempting to oust the President's lawful appointee as principal agent for Indian affairs and replace him with a rival, thereby intruding upon the President's supervision of the executive branch.[87]

The impeachment of President Andrew Johnson in 1868 also rested on allegations that he had exceeded the power of his office and had failed to respect the prerogatives of Congress. The Johnson impeachment grew out of a bitter partisan struggle over the implementation of Reconstruction in the South following the Civil War, Johnson was charged with violation of the Tenure of Office Act, which purported to take away the President's authority to remove members of his own cabinet and specifically provided that violation would be a "high misdemeanor," as well as a crime. Believing the Act unconstitutional, Johnson re-

86. A procedural note may be useful. The House votes both a resolution of impeachment against an officer and articles of impeachment containing the specific charges that will be brought to trial in the Senate. Except for the impeachment of Judge Delahay, the discussion of grounds here is based on the formal articles.

87. After Blount had been impeached by the House, but before trial of the impeachment, the Senate expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator."

moved Secretary of War Edwin M. Stanton and was impeached three days later.

Nine articles of impeachment were originally voted against Johnson, all dealing with his removal of Stanton and the appointment of a successor without the advice and consent of the Senate. The first article, for example, charged that President Johnson,

> unmindful of the high duties of this office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, order in writing the removal of Edwin M. Stanton from the office of Secretary for the Department of War.(88)

Two more articles were adopted by the House the following day. Article Ten charged that Johnson, "unmindful of the high duties of his office, and the dignity and proprieties thereof," had made inflammatory speeches that attempted to ridicule and disgrace the Congress.[89] Article Eleven charged him with attempts to prevent the execution of the Tenure of Office Act, an Army appropriations act, and a Reconstruction act designed by Congress "for the more efficient government of the rebel States." On its face, this article involved statutory violations, but it also reflected the underlying challenge to all of Johnson's post-war policies.

The removal of Stanton was more a catalyst for the impeachment than a fundamental cause.[90] The issue between the President and Congress was which of them should have the constitutional—and ultimately even the military—power to make and enforce Reconstruction policy in the South. The Johnson impeachment, like the British impeachments of great ministers, involved issues of state going to the heart of the constitutional division of executive and legislative power.

2. BEHAVING IN A MANNER GROSSLY INCOMPATIBLE WITH THE PROPER FUNCTION AND PURPOSE OF THE OFFICE

Judge John Pickering was impeached in 1803, largely for intoxication on the bench.(91) Three of the articles alleged errors in a trial in violation of his trust and duty as a judge; the fourth charged that Pickering, "being a man of loose morals and intemperate habits," had appeared on the bench during the trial in a state of total intoxication and had used profane language. Seventy-three years later another judge, Mark Delahay, was impeached for intoxication both on and

88. Article one further alleged that Johnson's removal of Stanton was unlawful because the Senate had earlier rejected Johnson's previous suspension of him.

89. Quoting from speeches which Johnson had made in Washington, D.C., Cleveland, Ohio and St. Louis, Missouri, article ten pronounced these speeches "censurable in any, [and] peculiarly indecent and unbecoming in the Chief Magistrate of the United States." By means of these speeches, the article concluded, Johnson had brought the high office of the presidency "into contempt, ridicule, and disgrace. to the great scandal of all good citizens."

90. The Judiciary Committee had reported a resolution of impeachment three months earlier charging President Johnson in its report with omissions of duty, usurpations of power and violations of his oath of office, the laws and the Constitution in his conflict of Reconstruction. The House voted down the resolution.

91. The issue of Pickering's insanity was raised at trial in the Senate, but was not discussed by the House when it voted to impeach or to adopt articles of impeachment.

off the bench but resigned before articles of impeachment were adopted.

A similar concern with conduct incompatible with the proper exercise of judicial office appears in the decision of the House to impeach Associate Supreme Court Justice Samuel Chase in 1804. The House alleged that Justice Chase had permitted his partisan views to influence his conduct of two trials held while he was conducting circuit court several years earlier. The first involved a Pennsylvania farmer who had led a rebellion against a Federal tax collector in 1789 and was later charged with treason. The articles of impeachment alleged that "unmindful of the solemn duties of his office, and contrary to the sacred obligation" of his oath, Chase "did conduct himself in a manner highly arbitrary, oppressive, and unjust," citing procedural rulings against the defense.

Similar language appeared in articles relating to the trial of a Virginia printer indicted under the Sedition Act of 1798. Specific examples of Chase's bias were alleged, and his conduct was characterized as "an indecent solicitude . . . for the conviction of the accused, unbecoming even a public prosecutor but highly disgraceful to the character of a judge, as it was subversive of justice." The eighth article charged that Chase, "disregarding the duties . . . of his judicial character. . . . did . . . prevert his official right and duty to address the grand jury" by delivering "an intemperate and inflammatory political harangue." His conduct was alleged to be a serious breach of his duty to judge impartially and to reflect on his competence to continue to exercise the office.

Judge West H. Humphreys was impeached in 1862 on charges that he joined the Confederacy without resigning his federal judgeship.(92) Judicial prejudice against Union supporters was also alleged.

Judicial favoritism and failure to give impartial consideration to cases before him were also among the allegations in the impeachment of Judge George W. English in 1926. The final article charged that his favoritism had created distrust of the disinterestedness of his official actions and destroyed public confidence in his court.(93)

3. EMPLOYING THE POWER OF THE OFFICE FOR AN IMPROPER PURPOSE OR PERSONAL GAIN

Two types of official conduct for improper purposes have been alleged in past impeachments. The first type involves vindictive use of their office by federal judges; the second, the use of office for personal gain.

Judge James H. Peck was impeached in 1826 for charging with contempt a lawyer who had publicly criticized one of his decisions, imprisoning him, and ordering his disbarment for 18 months. The House debated whether this single instance of vindictive abuse of power was sufficient to impeach, and decided that it was, alleging that the conduct was unjust, arbitrary, and beyond the scope of Peck's duty.

Vindictive use of power also constituted an element of the charges in two other impeachments. Judge George W.

92. Although some of the language in the articles suggested treason, only high crimes and misdemeanors were alleged, and Humphrey's offenses were characterized as a failure to discharge his judicial duties.

93. Some of the allegations against Judges Harold Louderback (1932) and Halsted Ritter (1936) also involved judicial favoritism affecting public confidence in their courts.

English was charged in 1926, among other things, with threatening to jail a local newspaper editor for printing a critical editorial and with summoning local officials into court in a non-existent case to harangue them. Some of the articles in the impeachment of Judge Charles Swayne (1903) alleged that he maliciously and unlawfully imprisoned two lawyers and a litigant for contempt.

Six impeachments have alleged the use of office for personal gain or the appearance of financial impropriety while in office. Secretary of War William W. Belknap was impeached in 1876 of high crimes and misdemeanors for conduct that probably constituted bribery and certainly involved the use of his office for highly improper purposes-receiving substantial annual payments through an intermediary in return for his appointing a particular post trader at a frontier military post in Indian territory.

The impeachments of Judges Charles Swayne (1903), Robert W. Archbald (1912), George W. English (1926), Harold Louderback (1932) and Halsted L. Ritter (1936) each involved charges of the use of office for direct or indirect personal monetary gain.[94] In the Archbald and Ritter cases, a number of allegations of improper conduct were combined in a single, final article, as well as being charged separately.

In drawing up articles of impeachment, the House has placed little emphasis on criminal conduct. Less than one-third of the eighty-three articles the House has adopted have explicitly charged the violation of a criminal statute or used the word "criminal" or "crime" to describe the conduct alleged, and ten of the articles that do were those involving the Tenure of Office Act in the impeachment of President Andrew Johnson. The House has not always used the technical language of the criminal law even when the conduct alleged fairly clearly constituted a criminal offense, as in the Humphreys and Belknap impeachments. Moreover, a number of articles, even though they may have alleged that the conduct was unlawful, do not seem to state criminal conduct-including Article Ten against President Andrew Johnson (charging inflammatory speeches), and some of the charges against all of the judges except Humphreys.

Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Recitals that a judge has brought his court or the judicial system into disrepute are commonplace. In the impeachment of President Johnson, nine of the articles allege that he acted "unmindful of the high duties of his office and of his oath of office," and several specifically refer to his constitutional duty to take care that the laws be faithfully executed.

The formal language of an article of impeachment, however, is less significant than the nature of the allegations that it contains. All have involved charges of conduct incompatible with continued performance of the office; some have explicitly rested upon a "course of conduct" or have combined disparate charges in a single, final article. Some of the indi-

94. Judge Swayne was charged with falsifying expense accounts and using a railroad car in the possession of a receiver he had appointed. Judge Archbald was charged with using his office to secure business favors from litigants and potential litigants before his court. Judges English, Louderback, and Ritter were charged with misusing their power to appoint and set the fees of bankruptcy receivers for personal profit.

vidual articles seem to have alleged conduct that, taken alone, would not have been considered serious, such as two articles in the impeachment of Justice Chase that merely alleged procedural errors at trial. In the early impeachments, the articles were not prepared until after impeachment had been voted by the House, and it seems probable that the decision to impeach was made on the basis of all the allegations viewed as a whole, rather than each separate charge. Unlike the Senate, which votes separately on each article after trial, and where conviction on but one article is required for removal from office, the House appears to have considered the individual offenses less significant than what they said together about the conduct of the official in the performance of his duties.

Two tendencies should be avoided in interpreting the American impeachments. The first is to dismiss them too readily because most have involved judges. The second is to make too much of them. They do not all fit neatly and logically into categories. That, however, is in keeping with the nature of the remedy. It is intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office.

Past impeachments are not precedents to be read with an eye for an article of impeachment identical to allegations that may be currently under consideration. The American impeachment cases demonstrate a common theme useful in determining whether grounds for impeachment exist-that the grounds are derived from understanding the nature, functions and duties of the office.

III. The Criminality Issue

The phrase "high Crimes and Misdemeanors" may connote "criminality" to some. This likely is the predicate for some of the contentions that only an indictable crime can constitute impeachable conduct. Other advocates of an indictable-offense requirement would establish a criminal standard of impeachable conduct because that standard is definite, can be known in advance and reflects a contemporary legal view of what conduct should be punished. A requirement of criminality would require resort to familiar criminal laws and concepts to serve as standards in the impeachment process. Furthermore, this would pose problems concerning the applicability of standards of proof and the like pertaining to the trial of crimes.[1]

The central issue raised by these concerns is whether requiring an indictable offense as an essential element of impeachable conduct is consistent with the purposes and intent of the framers in establishing the impeachment power and in setting a constitutional standard for the exercise of that power. This issue must be considered in light of the historical evidence of the framers' intent.[2] It

1. See A. Simpson, A *Treatise on Federal Impeachments* 28–29 (1916). It has also been argued that because Treason and Bribery are crimes, "other high Crimes and Misdemeanors" must refer to crimes under the *ejusdem generis* rule of construction. But *ejusdem generis* merely requires a unifying principle. The question here is whether that principle is criminality or rather conduct subversive of our constitutional institutions and form of government.

2. The rule of construction against redundancy indicates an intent not to require criminality. If criminality is required, the word "Misdemeanors" would add nothing to "high Crimes."

is also useful to consider whether the purposes of impeachment and criminal law are such that indictable offenses can, consistent with the Constitution, be an essential element of grounds for impeachment. The impeachment of a President must occur only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses. But this does not mean that the various elements of proof, defenses, and other substantive concepts surrounding an indictable offense control the impeachment process. Nor does it mean that state or federal criminal codes are necessarily the place to turn to provide a standard under the United States Constitution. Impeachment is a constitutional remedy. The framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment.

This view is supported by the historical evidence of the constitutional meaning of the words "high Crimes and Misdemeanors." That evidence is set out above.[3] It establishes that the phrase "high Clrimes and Misdemeanors"—which over a period of centuries evolved into the English standard of impeachable conduct—has a special historical meaning different from the ordinary meaning of the terms "crimes" and "misdemeanors.[4] High misdemeanors" referred to a category of offenses that subverted the system of government. Since the fourteenth century the phrase "high Crimes and Misdemeanors" had been used in English impeachment cases to charge officials with a wide range of criminal and non-criminal offenses against the institutions and fundamental principles of English government.[5]

There is evidence that the framers were aware of this special, non-criminal meaning of the phrase "high Crimes and Misdemeanors" in the English law of impeachment.[6] Not only did Hamilton acknowledge Great Britain as "the model from which [impeachment] has been borrowed," but George Mason referred in the debates to the impeachment of Warren Hastings, then pending before Parliament. Indeed, Mason, who proposed the phase "high Crimes and Misdemeanors," expressly stated his intent to encompass "[a]ttempts to subvert the Constitution."[7]

The published records of the state ratifying conventions do not reveal an intention to limit the grounds of impeachment to criminal offenses[8] James Iredell said in the North Carolina debates on ratification:

> . . . the person convicted is further liable to a trial at common law, and may receive such common-law punishment as belongs to a description of such offences if it be punishable by that law.[9]

Likewise, George Nicholas of Virginia distinguished disqualification to hold office from conviction for criminal conduct:

> If [the President] deviates from his duty, he is responsible to his constituents. . . . He will be absolutely disqualified to hold any place of profit, honor, or trust, and liable to further

3. See part II B. *supra.*

4. See part II B.2. *supra.*

5. See part II.A. *supra.*

6. See part II.B.2. *supra.*

7. See *Id.*

8. See part II.B.3. *supra.*

9. 4 Elliot 114.

punishment if he has committed such high crimes as are punishable at common law.[10]

The post-convention statements and writings of Alexander Hamilton, James Wilson, and James Madison—each a participant in the Constitutional Convention—show that they regarded impeachment as an appropriate device to deal with offenses against constitutional government by those who hold civil office, and not a device limited to criminal offenses.[11] Hamilton, in discussing the advantages of a single rather than a plural executive, explained that a single executive gave the people "the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.[12] Hamilton further wrote: "Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment.[13]

The American experience with impeachment, which is summarized above, reflects the principle that impeachable conduct need not be criminal. Of the thirteen impeachments voted by the House since 1789, at least ten involved one or more allegations that did not charge a violation of criminal law.[14]

Impeachment and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process—removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment;[15] its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since it specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing.[16]

The general applicability of the criminal law also makes it inappropriate as the standard for a process applicable to a highly specific situation such as removal of a President. The criminal law sets a general standard of conduct that all must follow. It does not address itself to the

10. 3 Elliot 240.

11. See part II.B 1. *supra*; part II.B.3. *supra.*

12. Federalist No. 70, at 461.

13. *Id.* at 459.

14. See part II.C. *supra.*

15. It has been argued that "[i]mpeachment is a special form of punishment for crime," but that gross and willful neglect of duty would be a violation of the oath of office and "[s]uch violation, by criminal acts of commission or omission, is the only nonindictable offense for which the President, Vice President, judges or other civil officers can be impeached." I. Brant, *Impeachment, Trials and Errors* 13, 20, 23 (1972). While this approach might in particular instances lead to the same results as the approach to impeachment as a constitutional remedy for action incompatible with constitutional government and the duties of constitutional office, it is, for the reasons stated in this memorandum, the latter approach that best reflects the intent of the framers and the constitutional function of impeachment. At the time the Constitution was adopted, "crime" and "punishment for crime" were terms used far more broadly than today. The seventh edition of Samuel Johnson's dictionary, published in 1785, defines "crime" as "an act contrary to right, an offense; a great fault; an act of wickedness." To the extent that the debates on the Constitution and its ratification refer to impeachment as a form of "punishment" it is punishment in the sense that today would be thought a noncriminal sanction, such as removal of a corporate officer for misconduct breaching his duties to the corporation.

abuses of presidential power. In an impeachment proceeding a President is called to account for abusing powers that only a President possesses.

Other characteristics of the criminal law make criminality inappropriate as an essential element of impeachable conduct. While the failure to act may be a crime, the traditional focus of criminal law is prohibitory. Impeachable conduct, on the other hand, may include the serious failure to discharge the affirmative duties imposed on the President by the Constitution. Unlike a criminal case, the cause for the removal of a President may be based on his entire course of conduct in office. In particular situations, it may be a course of conduct more than individual acts that has a tendency to subvert constitutional government.

To confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.

If criminality is to be the basic element of impeachment conduct, what is the standard of criminal conduct to be? Is it to be criminality as known to the common law, or as divined from the Federal Criminal Code, or from an amalgam of State criminal statutes? If one is to turn to State statutes, then which of those of the States is to obtain? If the present Federal Criminal Code is to be the standard, then which of its provisions are to apply? If there is to be new Federal legislation to define the criminal standard, then presumably both the Senate and the President will take part in fixing that standard. How is this to be accomplished without encroachment upon the constitutional provision that "the sole power" of impeachment is vested in the House of Representatives?

A requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve; to fulfill this function, it must be flexible enough to cope with exigencies not now foreseeable. Congress has never undertaken to define impeachable offenses in the criminal code. Even respecting bribery, which is specifically identified in the Constitution as grounds for impeachment, the federal statute establishing the criminal offense for civil officers generally was enacted over seventy-five years after the Constitutional Convention.[17]

In sum, to limit impeachable conduct to criminal offenses would be incompatible with the evidence concerning the constitutional meaning of the phrase "high Crimes and Misdemeanors" and would frustrate the purpose that the framers intended for impeachment. State

16. It is sometimes suggested that various provisions in the Constitution exempting cases of impeachment from certain provisions relating to the trial and punishment of crimes indicate an intention to require an indictable offense as an essential element of impeachable conduct. In addition to the provision referred to in the text (Article I, Section 3), cases of impeachment are exempted from the power of pardon and the right to trial by jury in Article II, Section 2 and Article III, Section 2 respectively. These provisions were placed in the Constitution in recognition that impeachable conduct may entail criminal conduct and to make it clear that even when criminal conduct is involved, the trial of an impeachment was not intended to be a criminal proceeding. The sources quoted at notes 8–13, supra, show the understanding that impeachable conduct may, but need not, involve criminal conduct.

and federal criminal laws are not written in order to preserve the nation against serious abuse of the presidential office. But this is the purpose of the constitutional provision for the impeachment of a President and that purpose gives meaning to "high Orimes and Misdemeanors."

IV. Conclusion

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense that word was used in English impeachments.

The framers of our Constitution consciously adopted a particular phrase from the English practice to help define the constitutional grounds for removal. The content of the phrase "high Crimes and Misdemeanors" for the framers is to be related to what the framers knew, on the whole, about the English practice—the broad sweep of English constitutional history and the vital role impeachment had played in the limitation of royal prerogative and the control of abuses of ministerial and judicial power.

Impeachment was not a remote subject for the framers. Even as they labored in Philadelphia, the impeachment trial of Warren Hastings, Governor-General of India, was pending in London, a fact to which George Mason made explicit reference in the Convention. Whatever may be said of the merits of Hastings, conduct, the charges against him exemplified the central aspect of impeachment—the parliamentary effort to reach grave abuses of governmental power.

The framers understood quite clearly that the constitutional system they were creating must include some ultimate check on the conduct of the executive, particularly as they came to reject the suggested plural executive. While insistent that balance between the executive and legislative branches be maintained so that the executive would not become the creature of the legislature, dismissable at its will, the framers also recognized that some means would be needed to deal with excesses by the executive. Impeachment was familiar to them. They understood its essential constitutional functions and perceived its adaptability to the American contest.

While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct—undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of govern-

ment. Clearly, these effects can be brought about in ways not anticipated by the criminal law. Criminal standards and criminal courts were established to control individual conduct. Impeachment was evolved by Parliament to cope with both the inadequacy of criminal standards and the impotence of courts to deal with the conduct of great public figures. It would be anomalous if the framers, having barred criminal sanctions from the impeachment remedy and limited it to removal and possible disqualification from office, intended to restrict the grounds for impeachment to conduct that was criminal.

The longing for precise criteria is understandable; advance, precise definition of objective limits would seemingly serve both to direct future conduct and to inhibit arbitrary reaction to past conduct. In private affairs the objective is the control of personal behavior, in part through the punishment of misbehavior. In general, advance definition of standards respecting private conduct works reasonably well. However, where the issue is presidential compliance with the constitutional requirements and limitations on the presidency, the crucial factor is not the intrinsic quality of behavior but the significance of its effect upon our constitutional system or the functioning of our government.

It is useful to note three major presidential duties of broad scope that are explicitly recited in the Constitution: "to take Care that the Laws be faithfully executed," to "faithfully execute the Office of President of the United States" and to "preserve, protect, and defend the Constitution of the United States" to the best of his ability. The first is directly imposed by the Constitution; the second and third are included in the constitutionally prescribed oath that the President is required to take before he enters upon the execution of his office and are, therefore, also expressly imposed by the Constitution.

The duty to take care is affirmative. So is the duty faithfully to execute the office. A President must carry out the obligations of his office diligently and in good faith. The elective character and political role of a President make it difficult to define faithful exercise of his powers in the abstract. A President must make policy and exercise discretion. This discretion necessarily is broad, especially in emergency situations, but the constitutional duties of a President impose limitations on its exercise.

The "take care" duty emphasizes the responsibility of a President for the overall conduct of the executive branch, which the Constitution vests in him alone. He must take care that the executive is so organized and operated that this duty is performed.

The duty of a President to "preserve, protect, and defend the Constitution" to the best of his ability includes the duty not to abuse his powers or transgress their limits—not to violate the rights of citizens, such as those guaranteed by the Bill of Rights, and not to act in derogration of powers vested elsewhere by the Constitution.

Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only

upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.

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