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105th Congress
2d Session

COMMITTEE PRINT

Ser. No. 9

CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS

REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*

NOVEMBER 1998

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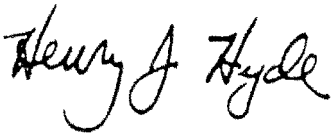
FOREWORD

I am pleased to make available a staff report updating the 1974 Impeachment Inquiry staff report regarding the constitutional grounds for presidential impeachment. This report has been prepared by the staff of the Committee for the use of the Committee on the Judiciary.

It is understood that the views and conclusions contained in the report are staff views and do not necessarily reflect those of the Committee or any of its members.



Henry J. Hyde

November 4, 1998

INTRODUCTION

The United States Constitution provides that "[t]he 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." [1]

In 1974, the House of Representatives directed the Judiciary Committee to investigate whether sufficient grounds existed for the House to impeach President Richard Nixon. The impeachment inquiry staff prepared a memorandum on the constitutional grounds for presidential impeachment. The staff memorandum, entitled *Constitutional Grounds for Presidential Impeachment*, reported on "the history, purpose and meaning of the constitutional phrase, 'Treason, Bribery, or other high Crimes and Misdemeanors.'" [2] Then Judiciary Committee Chairman Peter Rodino, Jr., stated in a foreword that "the views and conclusions contained in the report are staff views and do not necessarily reflect those of the committee or any of its members." [3] In any event, over the ensuing years the memorandum has become one of the leading and most cited sources as to the grounds for impeachment.

In 1998, the Committee has again been directed to investigate whether sufficient grounds exist for the House to impeach a president. On September 11, the House of Representatives passed H.Res. 525, which provided that the Committee review the communication received on September 9 from Independent Counsel Kenneth Starr in which he transmitted his determination that substantial and credible information received by his office might constitute grounds for an impeachment of President Clinton, and determine whether sufficient grounds did in fact exist to recommend to the House that an impeachment inquiry be commenced. [4] After reviewing the evidence submitted, the Committee voted to recommend that an impeachment inquiry be commenced and reported a resolution to the House authorizing an inquiry. On October 8, the House passed H.Res. 581, which directed the Committee to conduct such an inquiry to investigate fully and completely whether sufficient grounds exist for the House to exercise its constitutional power to impeach President Clinton.

The Chairman of the Committee has asked the impeachment inquiry staff to update the 1974 report for the benefit of the Committee's members. The present memorandum was written for that purpose and is designed to be read in conjunction with the 1974 report (which is attached as an appendix).

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[1] U.S. Const. art. II, §4. "The House of Representatives . . . shall have the sole Power of Impeachment." *Id.* at art. I, §2, cl. 5. "The Senate shall have the sole Power to try all Impeachments." *Id.* at art. I, §3, cl. 6. "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." *Id.* at art. I, §3, cl. 7.

[2] Staff of House Comm. on the Judiciary, 93rd Cong., 2d Sess., *Constitutional Grounds for Presidential Impeachment* 3 (Comm. Print 1974)(hereinafter cited as "1974 Staff Report").

[3] *Id.* at iii.

[4] The Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–99 (1994 & Supp. 1996)) provides that an independent counsel "shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment." 28 U.S.C. §595(c) (1994). *See Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Code, Section 595(c)*, H.R. Doc. No. 105–310, 105th Cong., 2d Sess. (1998).

This memorandum takes into account the four impeachment inquiries and three convictions that have taken place since the 1974 report was written. The 1974 report stated that the "American experience with impeachment [is among 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."[5] The present memorandum relies on this insight and will utilize the impeachment proceedings of the last quarter century to provide guidance to the members of this Committee in the difficult duties they must perform.

As with the 1974 report, this memorandum's views and conclusions are those of the staff and do not necessarily reflect those of the Committee or any of its members.

IMPEACHMENT "STANDARDS"

The goal of this memorandum is not to define which offenses in the abstract render a federal official impeachable. The 1974 report recognized why such an effort would be ill-conceived:

> 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.
>
> . . . . [This memorandum] 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.[6]

A commentator, Michael Gerhardt, writes in his recent book *The Federal Impeachment Process: A Constitutional and Historical Analysis,*[7] that both Alexander Hamilton and Supreme Court Justice Joseph Story, the document's greatest nineteenth century interpreter, share this view. He finds that: "[t]he implicit understanding shared by Hamilton and Justice Story was that subsequent generations would have to define on a *case-by-case basis* the political crimes comprising impeachable offenses to replace the federal common law of crimes that never developed."[8] He quotes Hamilton as stating that "the impeachment court could not be 'tied down' by strict rules 'either in the delineation of the offense by the

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[5] *1974 Staff Report, supra* note 2, at 4.
[6] *Id.* at 2.
[7] Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (1996).
[8] *Id.* at 106 (emphasis added).

prosecutors [the House of Representatives] or in the construction of it by the judges [the Senate].'"[9] He quotes Story as stating that "'political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.'"[10]

The impeachment clause is not the only example of a constitutional provision that must be interpreted in the context of the facts of particular cases. The due process clauses of the fifth and fourteenth amendments are others.[11] The Supreme Court has stated that "[i]t is by now well established that 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' . . . '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[12] The Fifth Circuit adds that "'due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.'"[13]

These principles should be kept in mind when interpreting the impeachment proceedings that follow. Different fact patterns might lead to different results.

IMPEACHMENTS OF THE 1980's

Three sitting federal judges were impeached in the 1980's. It is to be hoped that their misdeeds were isolated instances and not indications of a broader problem in our federal judicial system. In any event, they were extremely troubling.

The judicial impeachments of the 1980's provide insights for members of the Committee as they consider possible articles of impeachment against President Clinton. The offenses committed by the three judges that led to their impeachments have some similarities to the offenses President Clinton is charged with committing.

It has been argued, however, that offenses that can lead to impeachment when committed by federal judges do not necessarily rise to this level when committed by a president, because a different constitutional standard applies. The basis for this argument is said to be that Article III judges under the Constitution "shall hold their Offices during good Behavior"[14] and thus that judges are impeachable for "misbehavior" while other federal officials are only impeachable for treason, bribery, and other high crimes and misdemeanors.

The 1974 Staff Report rejected this argument. The report asked whether the good behavior clause "limit[s] the relevance of the . . .

---

[9] *Id.* at 105 (footnote omitted), *quoting The Federalist* No. 65, at 396 (Alexander Hamilton) Clinton Rossiter ed., 1961).

[10] Gerhardt, *supra* note 7, at 105–06 (footnote omitted), *quoting* J. Story, *Commentaries on the Constitution* (R. Rotunda & J. Nowak eds., 1987).

[11] "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

[12] *Gilbert* v. *Homar*, 138 L. Ed.2d 121, 127 (1997), *quoting Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895 (1961) & *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court has developed a three factor balancing test to help determine the specific dictates of due process. *See Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

[13] *Hernandez* v. *Cremer*, 913 F.2d 230, 237 (5th Cir. 1990), *quoting Continental Air Lines, Inc.* v. *Dole*, 784 F.2d 1245, 1248 (5th Cir. 1986) (*quoting Woodbury* v. *McKinnon*, 447 F.2d 839, 843 (5th Cir. 1971)(*quoting Hannah* v. *Larche*, 363 U.S. 420, 442 (1960)).

[14] U.S. Const. art. III, § 1.

impeachments of judges with respect to presidential impeachment standards as has been argued by some[ ]"[15] The report answered "It does not . . . [T]he only impeachment provision . . . included in the Constitution . . . applies to all civil officers, including judges, and defines impeachment offenses as 'Treason, Bribery, and other high Crimes and Misdemeanors.'"[16]

The conclusion of the staff report is bolstered by the findings of the National Commission on Judicial Discipline and Removal, chaired by Robert Kastenmeier, former Chairman of the Committee's then Subcommittee on Courts, Civil Liberties and the Administration of Justice and one of the House managers during the Senate trial of Judge Claiborne. The Commission concluded that "the most plausible reading of the phrase 'during good Behavior' is that it means tenure for life, subject to the impeachment power. . . . The ratification debates about the federal judiciary seem to have proceeded on the assumption that good-behavior tenure meant removal only through impeachment and conviction."[17]

The record of the judicial impeachments which follows also argues against different standards for impeachable offenses when committed by federal judges as when committed by presidents.

A. THE IMPEACHMENT OF JUDGE CLAIBORNE[18]

U.S. District Court Judge Harry E. Claiborne was impeached in 1986. At the time of his impeachment, he was serving a sentence in federal prison for filing false federal income tax returns. Judge Claiborne had signed written declarations that the returns were made under penalty of perjury. The crimes of violating the Internal Revenue Code for which he was convicted formed the basis for the three articles of impeachment on which he was also convicted.

The judgement by Congress regarding Judge Claiborne was harsh. Hamilton Fish, ranking member of the Judiciary Committee and one of the House managers in the Senate trial, stated that:

> Judge Claiborne's actions raise fundamental questions about public confidence in, and the public's perception of, the Federal court system. They serve to undermine the confidence of the American people in our judicial system. . . . Judge Claiborne is more than a mere embarrassment. He is a disgrace—an affront—to the judicial office and the judicial branch he was appointed to serve.[19]

Committee Chairman and House manager Peter Rodino, Jr., said on the Senate floor that:

> Judge Harry E. Claiborne is, and will forever remain, a convicted felon—a man who cannot legitimately preside over judicial proceedings, who cannot with any respect for decency pass judgement on other persons, and who cannot hope to maintain the trust and the respect of the American people.

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[15] *1974 Staff Report, supra* note 2, at 17.

[16] *Id.*

[17] National Commission on Judicial Discipline and Removal, *Report of the National Commission on Judicial Discipline and Removal* 17–18 (1993)(footnote omitted).

[18] *See* Appendix 1 for sources and a description of the articles of impeachment and the proceedings against Judge Claiborne.

[19] 132 Cong. Rec. H4713 (daily ed. July 22, 1986).

. He has earned a mark of shame, which the evidence proves is sadly but unequivocally deserved.[20]

The record of Judge Claiborne's impeachment proceedings says much about what offenses might justify impeachment. The proceedings make it clear that an individual can be impeached for conduct not related to his or her official duties. Hamilton Fish stated that "[i]mpeachable conduct does not have to occur in the course of the performance of an officer's official duties. Evidence of misconduct, misbehavior, high crimes, and misdemeanors can be justified upon one's private dealings as well as one's exercise of public office. That, of course, is the situation in this case."[21]

Representative Fish's views were reinforced by now chairman of the Judiciary Committee and then House manager Henry Hyde, who stated that "the decision to impeach and convict . . . stands as an admonition to others in public life. It is an opportunity for Congress to restate and reemphasize the standards of both personal and professional conduct expected of those holding high Federal office."[22] House manager Romano Mazzoli stated that impeachment reached "corruption, maladministration, gross neglect of duties and other public and private improprieties committed by judges and high Government officials which rendered them unfit to continue in office."[23]

Additional evidence that personal misconduct can lead to impeachment is provided by the fact that Judge Claiborne's motion that the Senate dismiss the articles of impeachment for failure to state impeachable offenses was unsuccessful. One of the arguments his attorney made for the motion was that "there is no allegation . . . that the behavior of Judge Claiborne in any way was related to misbehavior in his official function as a judge; it was private misbehavior."[24]

Representative Kastenmeier responded by stating that "it would be absurd to conclude that a judge who had committed murder, mayhem, rape, or perhaps espionage in his private life, could not be removed from office by the U.S. Senate."[25] Kastenmeier's response was repeated by the House of Representatives in its pleading opposing Claiborne's motion to dismiss.[26]

The House went on to state that:

> [Claiborne's] narrow view of impeachable offenses expressly was offered and *rejected* by the Framers of the Constitution.
>
> . . . . As originally drafted, the impeachment clause provided that the President should be "removable on impeachment and conviction of malpractice or neglect of duty." . . . The provision was subsequently revised to make the President impeachable for "treason, bribery or corruption." . . . Colonel

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[20] 132 Cong. Rec. S15,495–96 (daily ed. Oct. 7, 1986).
[21] 132 Cong. Rec. H4713 (daily ed. July 22, 1986).
[22] 132 Cong. Rec. H4716 (daily ed. July 22, 1986).
[23] 132 Cong. Rec. H4717 (daily ed. July 22, 1986).
[24] *Hearings Before the Senate Impeachment Trial Committee*, 99th Cong., 2d Sess. 77 (1986) (hereinafter cited as "*Senate Claiborne Hearings*") (statement of Judge Claiborne's counsel, Oscar Goodman). *See also Memorandum in Support of Motion to Dismiss the Articles of Impeachment on the Grounds They Do Not State Impeachable Offenses* 3 (hereinafter cited as "*Claiborne Motion*"), *reprinted in Senate Claiborne Hearings* at 245, 246.
[25] *Senate Claiborne Hearings*, *supra* note 24, at 81.
[26] U.S. House of Representatives, *Opposition to Motion to Dismiss Articles of Impeachment for Failure to State Impeachable Offenses* 2 (hereinafter cited as "*Opposition to Claiborne Motion*"), *reprinted in Senate Claiborne Hearings*, *supra* note 24, at 441, 442.

> Mason moved to add the phrase "or maladministration" after "bribery." . . . In response, James Madison objected that "maladministration" was too narrow a standard. Mason soon withdrew his amendment and substituted the phrase "or other high crimes and misdemeanors." This formulation was accepted, along with an amendment to extend the impeachment sanction to the Vice President and all other civil officers. . . . The Framers thus rejected . . . the concepts of professional "malpractice" or "maladministration" as the sole basis for the impeachment of federal officials.
>
> The contrary position urged by Judge Claiborne is incompatible with common sense and the orderly conduct of government. Little can be added to the succinct argument of Representative Clayton in 1913 on this identical point, during the impeachment proceedings involving Judge Charles Swayne:
>
> > . . . . [The contention is that] however serious the crime, the misdemeanor, or misbehavior of the judge may be, if it can be said to be extrajudicial, he can not be impeached. To illustrate this contention, the judge may have committed murder or burglary and be confined under a sentence in a penitentiary for any period of time, however long, but because he has not committed the murder or burglary in his capacity as judge he can not be impeached. That contention, carried out logically, might lead to the very defeat of the performance of the function confided to the judicial branch of the government.
>
> . . . . As also noted in one commentary:
>
> > An act or a course of misbehavior which renders scandalous the personal life of a public officer, shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed functions.
>
> Thus, Judge Claiborne's argument is both inaccurate and illogical in its extraordinary premise that a federal judge may intentionally commit a felonious act outside his judicial functions and automatically find protection from the impeachment sanction.[27]

Senator Charles Mathias, Jr., chairman of the impeachment trial committee, referred Judge Claiborne's motion to the full Senate, it having jurisdiction over the articles of impeachment.[28] He did state, however, that:

> [I]t is my opinion . . . that the impeachment power is not as narrow as Judge Claiborne suggests. There is neither historical nor logical reason to believe that the Framers of the Constitution sought to prohibit the House from impeaching . . . an officer of the United States who had committed treason or bribery or any other high crime or misdemeanor which is a serious offense against the government of the United States and which indicates that the official is unfit to exercise public responsibil-

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[27] *Opposition to Claiborne Motion, supra* note 26, at 3–5 (citations omitted)(emphasis in original).

[28] *Senate Claiborne Hearings, supra* note 24, at 113.

ities, but which is an offense which is technically unrelated to the officer's particular job responsibilities.[29]

The Senate never voted on Judge Claiborne's motion. However, the Senate was clearly not swayed by the arguments contained therein because the body later voted to convict Judge Claiborne. The Senate thus agreed with the House that private improprieties could be, and were in this instance, impeachable offenses.

The rejection of Judge Claiborne's motion also provides evidence that the offenses that can lead to impeachment are similar for both judges and presidents. The motion argued that "[t]he standard for impeachment of a judge is different than that for other officers" and that the Constitution limited "removal of the judiciary to acts involving misconduct related to discharge of office."[30]

Judge Claiborne's attorney stated to the Senate trial committee that:

> [B]ecause of the separation of powers contemplated by the framers . . . . the standard for impeachment of a Federal judge is distinct from the standard of impeachment for the President, Vice President, or other civil officers of the United States because as we know, under article II, section 4, the President, Vice President, and civil officers may be removed on impeachment for conviction of treason, bribery, or other high crimes and misdemeanors.
>
> It is our contention that the Federal judiciary, in order to remain an independent branch, has a different standard, a separate and distinct standard, as far as the ability or the disability to be impeached, and that is that the impeachment process would take place if in fact the judge, who is the sole . . . lifetime appointment of all the officers which are referred to in the Constitution, is not on good behavior, a separate and distinct standard than that which is applicable to the elected officials and the officials who are appointed for a specific term.[31]

Judge Claiborne's attorney was arguing that federal judges are not "civil officers" and thus that the impeachment standard in article II, section 4, does not apply; instead, "misbehavior" would be the grounds for impeaching a federal judge.[32] He admitted his theory would fall if the Senate concluded that a federal judge was a civil officer.[33]

Representative Kastenmeier responded that "reliance on the term 'good behavior' as stating a sanction for judges is totally misplaced and virtually all commentators agree that that is directed to affirming the life tenure of judges during good behavior. It is not to set them down, differently, as judicial officers from civil officers."[34] He further stated that "[n]or . . . is there any support for the notion that . . . Federal judges are not civil officers of the United States, subject to the impeachment clause of article II of the Constitution."[35]

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[29] *Id.* at 113–14.
[30] *Claiborne Motion, supra* note 24, at 4.
[31] *Senate Claiborne Hearings, supra* note 24, at 76–77 (statement of Oscar Goodman).
[32] *Id.* at 78–79. *See also Claiborne Motion, supra* note 24, at 3–4.
[33] *Senate Claiborne Hearings, supra* note 24, at 79.
[34] *Id.* at 81–82.
[35] *Id.* at 81.

Kastenmeier's argument was repeated by the House of Representatives.[36] The House stated that:

> If lack of good behavior were the sole standard for impeaching federal judges, then a different standard would apply to civil officers other than judges. Nowhere in the proceedings of the Constitutional Convention was such a distinction made. On the contrary, the proceedings of the Convention show an intention to limit the grounds of impeachment for all civil officers, including federal judges, to those contained in Article II.
>
> On August 20, 1787, a committee was directed to report on "a mode of trying the supreme Judges in cases of impeachment." The committee reported back on August 22 that "the Judges should be triable by the Senate." . . . Several days later, a judicial removal provision was added to the impeachment clause. On September 8, 1787, the judicial removal clause was deleted and the impeachment clause was expanded to include the Vice President and all civil officers. . . . In so doing, the Constitutional Convention rejected a dual test of "misbehavior" for judges and "high crimes and misdemeanors" for all other federal officials.
>
> In Federalist No. 79, Alexander Hamilton confirmed this reading of the Convention's actions with respect to the impeachment standard:
>
> > The precautions for [judges'] responsibility, are comprised in the article respecting impeachments. . . . This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our Constitution with respect to our own judges.[37]

Again, while the Senate never voted on Claiborne's motion, it did vote to convict the judge. The Senate was not convinced by Claiborne's argument that the standard of impeachable offenses was different for judges than for presidents.

In addition to the two articles charging him with filing false tax returns, Judge Claiborne was found guilty on an article of impeachment that found that by willfully and knowingly falsifying his income on his tax returns, he had "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts."

B. THE IMPEACHMENT OF JUDGE NIXON[38]

U.S. District Court Judge Walter L. Nixon, Jr. was impeached in 1989. At the time of his impeachment, he was serving a sentence in federal prison for making false statements to a federal grand jury. He made the false statements in an attempt to conceal his involvement with an aborted state prosecution for drug smuggling against the son of a man who had benefitted Judge Nixon financially with a "sweetheart" oil and gas investment. Judge Nixon lied about whether he had discussed the case with the state prosecutor

[36] *Opposition to Claiborne Motion, supra* note 26.
[37] *Id.* at 6–7 (citations omitted).
[38] *See* Appendix 1 for sources and a description of the articles of impeachment and the proceedings against Judge Nixon.

and had influenced the state prosecutor to essentially drop the case. Judge Nixon was acquitted of the charge of accepting an illegal gratuity. The perjury convictions alone formed the basis of the two articles of impeachment on which he was found guilty.

As with Judge Claiborne, Congress was harsh in its judgement of Judge Nixon. Representative Don Edwards, chairman of the Judiciary Committee's subcommittee that held hearings on Judge Nixon and a House manager in the Senate trial, stated before the Senate trial committee that the judge had "disobeyed the law, soiled his own reputation, and undermined the integrity of the judiciary."[39] As to why the crime was so heinous, Edwards further stated that "[t]he crime for which he was convicted, lying to a grand jury in testimony under oath, is particularly serious because a judge must bear the awesome responsibility of swearing witnesses, judging credibility, and finding the truth in cases that come before him."[40] There was only one answer—impeachment: "The pattern of lies, concealment and deceit on the part of Judge Nixon led the committee, by clear and convincing evidence, to the unavoidable conclusion that he must be impeached."[41] On the Senate floor, Edwards asked "[i]s a man who repeatedly lied fit to hold the high office of Federal judge? I hope you agree that the answer is obvious."[42]

James Sensenbrenner, ranking member of the Judiciary Committee's subcommittee that held hearings on Judge Nixon, and a House manager, also emphasized the damage done by Nixon's perjury:

> Our hearings have produced clear and convincing evidence that Judge Nixon lied to the law enforcement authorities during the investigation of the criminal case as well as to the Federal grand jury. . . . Judge Nixon thwarted the entire fact finding process by defining the "truth, the whole truth, and nothing but the truth" as only that which was convenient for Judge Nixon to disclose at that particular time.[43]

Representative Charles Schumer, a member of the Judiciary Committee, reiterated that perjury was worthy of impeachment:

> [This] is a case where some of the charges were dropped and the only conviction was for perjury.
>
> Perjury, of course, is a very difficult, difficult thing to decide; but as we looked and examined all of the records and in fact found many things that were not in the record it became very clear to us that this impeachment was meritorious.

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[39] *Hearings Before the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Walter L. Nixon, Jr., a Judge of the United States District Court for the Southern District of Mississippi, for High Crimes and Misdemeanors*, 101st Cong., 1st Sess. 304 (1989)(hereinafter cited as "*Senate Nixon Hearings*").

[40] 135 Cong. Rec. 8816 (1989).

[41] 135 Cong. Rec. 8817 (1989).

[42] *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., a Judge of the United States District Court for the Southern District of Mississippi*, S. Doc. No. 101–22, 101st Cong., 1st Sess. 367 (1989)(hereinafter cited as "*Proceedings of the United States Senate*"). Senator Herbert Kohl asked whether concealing information from a grand jury is the same as perjury. Representative Edwards responded that "the managers firmly believe that if you make an affirmative statement to a grand jury and purposely leave material facts out, that would constitute perjury." *Id.* at 418.

[43] 135 Cong. Rec. 8820 (1989).

My colleagues, in conclusion, impeachment is a grave issue. In this case it is deserved.[44]

Judge Nixon argued that the third article of impeachment should be dismissed. This article stated that "Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States . . . and brought disrepute on the Federal courts and the administration of justice by the federal courts . . . ." It charged that he did this by making a total of 14 false statements to officials from the Department of Justice and the Federal Bureau of Investigation and to a federal grand jury, all regarding the events surrounding the drug smuggling prosecution.

One of Judge Nixon's arguments against article III was that "[t]hese allegations do not make out an impeachable offense . . . ."[45] Judge Nixon's contention was that "an impeachable offense may be only (i) a judge's abuse of office or (ii) grave criminal acts."[46] Nixon stated that this was the intent of the framers of the Constitution, who only intended impeachment to "protect the community from abuse of the public trust and misconduct in office"[47] and who believed that "'[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.'"[48]

Nixon argued that article III of the impeachment resolution did not allege either crimes or abuses of office, but instead focused on his "general reputation and character."[49] The framers' goal would be thwarted by article III, which "alleges vague and subjective offenses," and "encompasses almost any act that the political majority may fine offensive or distasteful, thereby exposing a judge to impeachment for controversial acts or conduct."[50] Under the standard of article III, a judge could be impeached for "issuing unpopular judicial decisions," "smoking marijuana" as a youth, "driving while intoxicated," associating with "disreputable members of the community," "openly engaging in an extramarital affair," or "attending a meeting of the Communist Party."[51] Finally, "[w]hat evidence or facts will a Senator examine to determine whether the courts have been brought into disrepute . . . [o]r whether public confidence has been undermined?"[52]

Judge Nixon complained that:

> In recent impeachments . . . the House has become enamored of the tactical device of charging the respondent with being a generally bad person who has brought discredit on the

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[44] 135 Cong. Rec. 8822 (1989).

[45] *Judge Nixon's Motion to Dismiss Impeachment Article III* 1 (June 23, 1989), *reprinted in Senate Nixon Hearings, supra* note 39, at 121. The other arguments were that article III contained allegations that were "redundant and multiplicitous" of allegations in other articles of impeachment and that the article was so "complex and confusing" that it was both "unfair and completely unworkable." *Judge Nixon's Motion to Dismiss Impeachment Article III* at 1–2.

[46] *Memorandum in Support of Judge Nixon's Motion to Dismiss Impeachment Article III* 3 (hereinafter cited as *"Memorandum in Support of Nixon Motion"*), *reprinted in Senate Nixon Hearings, supra* note 39, at 123, 127. Judge Nixon thus disagrees with Judge Claiborne, stating that "[I] do not argue that impeachment is . . . limited [to acts performed in an official capacity] and agree that private criminal offenses of a grave nature are also impeachable offenses." *Memorandum in Support of Nixon Motion* at 7 n.3.

[47] *Id.* at 7 (footnote omitted).

[48] *Id.* at 11–12, *quoting The Federalist* No. 78, at 466 (Alexander Hamilton).

[49] *Memorandum in Support of Nixon Motion, supra* note 46, at 15.

[50] *Id.* at 3–4.

[51] *Id.* at 16.

[52] *Id.* at 17.

> judiciary. . . . Judge Claiborne . . . [was] convicted on such [a] "catch-all" article[]. . . . Both Judges Hastings and Nixon now face similar catch-all articles. The Senate should no longer allow such a blatantly unfair prosecutorial device. . . .[53]

The House of Representatives responded by arguing that article III was "modeled on articles of impeachment from prior cases that focus on the impact of a judge's misconduct on the integrity of the judiciary."[54] Article III was "modeled upon 'omnibus' or 'catch-all' articles of impeachment presented by the House and voted on by the Senate in *every impeachment trial* this century that resulted in conviction. . . . Past 'omnibus' impeachment articles contain phraseology virtually identical to that alleged in Article III. . . ."[55]

The House then pointed out that Judge Nixon had conceded that criminal conduct constituted an impeachable offense and therefore must agree that "the alleged concealment of information by committing perjury before a federal grand jury, a federal crime . . . state[s] an impeachable offense."[56]

The House argued that it was not charging Judge Nixon with just being a "bad person," but with committing specific acts which raised doubts about his integrity and that of the judicial system.[57] Specifically:

> Giving false testimony under oath to a grand jury is a crime. . . . Because truth is such an indispensable element of our judicial system, with federal judges entrusted with the important task of assessing credibility and finding the truth in cases that come before them, the notion of permitting a proven liar to sit on the bench strikes at the heart of the integrity of the judicial process.
>
> It is difficult to imagine an act more subversive to the legal process [than] lying from the witness stand. . . . If a judge's truthfulness cannot be guaranteed, if he sets less than the highest standard for candor, how can ordinary citizens who appear in court be expected to abide by their testimonial oath?[58]

The House asserted that "[t]he Framers would applaud both Judge Nixon's criminal prosecution and his removal from office."[59]

The Senate voted to deny Judge Nixon's motion to dismiss the third article of impeachment by a vote of 34 to 63.[60] It had done the same when Judge Hastings made a similar motion as to an omnibus article.[61]

The Senate did vote in the end to find Judge Nixon not guilty as charged in article III.[62] A possible explanation for this vote is provided by Senator Herbert Kohl, who found Judge Nixon guilty

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[53] *Id.* at 14.

[54] United States House of Representatives, *The House of Representatives' Response to Judge Nixon's Motion to Dismiss Impeachment Article III* 5 (hereinafter cited as *"Response to Nixon Motion"*), *reprinted in Senate Nixon Hearings, supra* note 39, at 261, 265.

[55] *Response to Nixon Motion, supra* note 54, at 8 (emphasis in original).

[56] *Id.* at 5–6.

[57] *Id.* at 6–7.

[58] United States House of Representatives, *The House of Representatives' Brief in Support of the Articles of Impeachment* 58–59, *reprinted in Proceedings of the United States Senate, supra* note 42, at 28, 88–89.

[59] *Response to Nixon Motion, supra* note 54, at 8.

[60] *Proceedings of the United States Senate, supra* note 42, at 431.

[61] 135 Cong. Rec. 4533 (1989). *See* footnotes 124–25 and accompanying text.

[62] *Proceedings of the United States Senate, supra* note 42, at 436.

as charged in articles I and II but found him not guilty on article III:

> Article III is phrased in the disjunctive. It says that Judge Nixon concealed his conversations through "one or more" of 14 false statements. This wording presents a variety of problems. First of all, it means that Judge Nixon can be convicted even if two thirds of the Senate does not agree on which of his particular statements were false. . . .
>
> The House is telling us that it's OK to convict Judge Nixon on article III even if we have different visions of what he did wrong. But that's not fair to Judge Nixon, to the Senate, or to the American people. . . .
>
> Article III reminds me of the kind [of] menu that some Chinese restaurants use. We are asked to choose a combination of selections from column "A" and from column "B." This complicates our deliberations and puts a tremendous burden on the accused.
>
> I realize that we have used omnibus articles before. But they did not contain the word "OR," and they did not allege 14 crimes. In the Claiborne case, for example, the omnibus article accused him of just two crimes—falsifying tax returns in 1979 and 1980.
>
> But my basic objection is more fundamental: the prosecution should not be allowed to use a shotgun or blunderbuss. We should send a message to the House: "Please do not bunch up your allegations. From here on out, charge each act of wrongdoing in a separate count. Follow the example of prosecutors in court." . . . [E]ven if article III is technically permissible under the Constitution, Congress can do better.[63]

In any event, the Senate voted to convict Judge Nixon on two articles of impeachment, both founded upon his making false statements to a grand jury. The body seems to have agreed with the House of Representatives as to the seriousness of such perjury.

C. THE IMPEACHMENT OF JUDGE HASTINGS[64]

U.S. District Court Judge Alcee L. Hastings was impeached in 1989. He had been acquitted of charges that he and a friend had conspired to solicit a $150,000 bribe from defendants in a racketeering and embezzlement case heard by Judge Hastings in exchange for lenient sentencing. However, in a separate trial, a jury convicted his alleged co-conspirator on these charges, and it was alleged that Judge Hastings won acquittal by committing perjury on the witness stand. Judge Hastings' involvement in the bribery scheme and his perjury in his criminal trial formed the basis of the eight articles of impeachment on which he was convicted.

As with the other judges, the reaction of Congress was harsh. John Conyers, who was chairman of the Subcommittee on Criminal Justice (which held the investigatory hearings into Judge Hastings' conduct) and a House manager, stated that the judge was "the architect of his own undoing" and that "[w]e did not wage th[e] civil rights struggle merely to replace one form of judicial corruption for

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[63] *Id.* at 449–50.

[64] *See* Appendix 1 for sources and a description of the articles of impeachment and the proceedings against Judge Hastings.

another."[65] George Gekas, ranking member of the Subcommittee and a House manager, said that "this look that we have just given into the conduct of Alcee Hastings makes one sick in the stomach."[66]

Hamilton Fish, ranking member of the Judiciary Committee and a House manager, stated that "Judge Hastings . . . sought to sell his judicial office for private gain—and later perverted the legal process by testifying falsely. Such conduct cannot be tolerated in a public official responsible for dispensing equal justice under the law."[67]

The House of Representatives' position before the Senate was that "[e]ach and every one of the fourteen instances of false testimony charged in the Articles of Impeachment justifies Judge Hastings' removal from the Federal bench."[68] Further, "[f]ew actions are more subversive of the legal process than lying on the stand. A judge who has sought to mislead persons engaged in any aspect of the legal process is unfit to remain on the bench."[69]

Judge Hastings was found guilty by the Senate on seven of the 12 articles involving false testimony and on the article stating that he was a participant in the bribery conspiracy. It is clear from his impeachment that perjury is an impeachable offense.

The Senate found Judge Hastings not guilty on the last article of impeachment, which charged that through his actions, he undermined "confidence in the integrity and impartiality of the judiciary and betray[ed] the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts." The Senate had earlier, though, refused to dismiss this article.

IMPEACHMENT PROCEEDINGS AGAINST PRESIDENT NIXON[70]

President Richard Nixon resigned in 1974 after the Judiciary Committee had approved three articles of impeachment against him. The articles generally revolved around the 1972 burglary at the Washington, D.C., headquarters of the Democratic National Committee and the president's role in the ensuing cover-up of the break-in.

The Committee characterized the first article as charging that:

> President Nixon, using the power of his high office, engaged, personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of the unlawful entry into the headquarters of the Democratic National Committee in Washington, D.C., for the purpose of securing political intelligence; to cover

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[65] 134 Cong. Rec. 20,214 (1988).
[66] 134 Cong. Rec. 20,215 (1988).
[67] 134 Cong. Rec. 20,217 (1988).
[68] United States House of Representatives, *Revised Pretrial Statement of the House of Representatives* 3 (July 7, 1989), *reprinted in Hearings Before the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings, a Judge of the United States District Court for the Southern District of Florida, for High Crimes and Misdemeanors*, 101st Cong., 1st Sess. 941, 943 (1989). This might be considered hyperbole in that it only takes conviction on one article of impeachment to remove a federal official from office.
[69] *Revised Pretrial Statement of the House of Representatives, supra* note 68, at 17.
[70] *See* Appendix 1 for sources and a description of the articles of impeachment articles and the proceedings against President Nixon.

up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.[71]

The Committee believed that this course of conduct by President Nixon required "perjury, destruction of evidence, obstruction of justice, all crimes. But, most important, it required deliberate, contrived, and continuing deception of the American people."[72] The Committee went on to say that:

> [His] actions resulted in manifest injury to the confidence of the nation and great prejudice to the cause of law and justice, and was subversive of constitutional government. His actions were contrary to his trust as President and unmindful of the solemn duties of his high office. It was this serious violation of Richard M. Nixon's constitutional obligations as President, and not the fact that violations of Federal criminal statutes occurred, that lies at the heart of Article I.[73]

The Committee characterized the second article as charging that:

> President Nixon, using the power of the office of President of the United States, repeatedly engaged in conduct which violated the constitutional rights of citizens; which impaired the due and proper administration of justice and the conduct of lawful inquiries, or which contravened the laws governing agencies of the executive branch and the purposes of these agencies.[74]

As to this article, the Committee believed that:

> [I]t is the duty of the President not merely to live by the law but to see that law faithfully applied. Richard M. Nixon has repeatedly and willfully failed to perform that duty. He has failed to perform it by authorizing and directing actions that violated or disregarded the rights of citizens and that corrupted and attempted to corrupt the lawful functioning of executive agencies. He has failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates that interfered with lawful investigations and impeded the enforcement of the laws.
>
> The conduct of Richard M. Nixon has constituted a repeated and continuing abuse of the powers of the Presidency. . . . This abuse of the powers of the President was carried out by Richard M. Nixon . . . for his own political advantage, not for any legitimate governmental purpose and without due consideration for the national good.[75]

The Committee characterized the third article as charging that President Nixon failed "without lawful cause or excuse and in willful disobedience of the subpoenas of the House, to produce papers and things that the Committee had subpoenaed in the course of its impeachment inquiry . . . ."[76]

The Committee believed that:

> [I]n refusing to comply with limited, narrowly drawn subpoenas . . . the President interfered with the exercise of the

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[71] *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93–1305, 93rd Cong., 2d Sess. 10 (1974)(hereinafter cited as "*Impeachment of Richard M. Nixon*").
[72] *Id.* at 136.
[73] *Id.*
[74] *Id.* at 10.
[75] *Id.* at 180.
[76] *Id.* at 10–11.

House's function as the "Grand Inquest of the Nation." Unless the defiance of the Committee's subpoenas under these circumstances is considered grounds for impeachment, it is difficult to conceive of any President acknowledging that he is obliged to supply the relevant evidence necessary for Congress to exercise its constitutional responsibility in an impeachment proceeding.[77]

The impeachment proceedings against President Nixon have become the most famous, or infamous, in the history of the republic. Unfortunately, it is impossible to know how the House of Representatives and the Senate would have viewed the articles of impeachment.

However, it can be said that the first article emphasized the obstruction of justice by President Nixon and the second article emphasized his abuse of power. The first article charged that President Nixon tried to delay, impede, and obstruct the investigation of the break-in at the Democratic National Committee by engaging in activities such as making false and misleading statements to the public and to governmental investigators, counseling witnesses to give false or misleading statements to such investigators and in judicial and congressional proceedings, withholding evidence and information from such investigators, approving surreptitious payments to witnesses to obtain their silence or influence their testimony, and interfering in the conduct of federal investigations.

The second article charged that President Nixon violated the constitutional rights of citizens, impaired the administration of justice and contravened the laws governing executive agencies by engaging in activities such as trying to obtain data on persons from the Internal Revenue Service and causing the agency to engage in improper audits, using executive branch personnel to conduct improper investigations, keeping a secret investigative unit in his office, failing to act when he knew or had reason to know that subordinates were trying to impede governmental investigations, and interfering with agencies of the executive branch.

CONCLUSION

Our nation's recent experience with impeachments under the United States Constitution provides a number of clear guiding principles for those who must conduct future impeachment inquiries, draft future articles of impeachment, and vote on those articles:

- First, in most instances of impeachment since 1974, making false and misleading statements under oath has been the most common compelling basis for impeachment—whether it is before a jury, a grand jury, or on a tax return.
- Second, the constitutional standard for impeachable offenses is the same for federal judges as it is for presidents and all other civil officers.
- Third, impeachable offenses can involve both personal and professional misconduct.

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[77] *Id.* at 213.

- Fourth, impeachable offenses do not have to be federal or state crimes.[78]

The research conducted by the staff in 1974, and this update, are meant to provide guidance and background to members as they prepare to undertake this constitutional responsibility of determining whether or not any acts allegedly committed by the president rise to the level of an impeachable offense. Impeachment is a unique and distinct procedure established by the Constitution. Each member must decide for himself or herself, after the conclusion of the fact-finding process and in the light of historical precedents, based on his or her own judgment and conscience, whether the proven acts constitute a High Crime or Misdemeanor.

[78] This was also the conclusion of the 1974 Staff Report. *See 1974 Staff Report, supra* note 2, at 22–25.

APPENDIXES

APPENDIX 1

RECENT AMERICAN IMPEACHMENT PROCEEDINGS

1. PRESIDENT RICHARD NIXON

A. PROCEEDINGS IN THE HOUSE

Various resolutions to impeach President Nixon were introduced and referred to the Judiciary Committee.[79] The House adopted H.Res. 702 on November 15, 1973, which provided additional funds for the Committee for purposes of considering the resolutions.[80] On February 6, 1974, the House adopted H.Res. 803, a resolution that authorized the Committee to investigate whether grounds existed to impeach President Nixon.[81] From May 9, 1974, until July 17, 1974, the impeachment inquiry staff made presentations to the Committee of the results of their investigation and the Committee heard witnesses.[82]

Beginning on July 24, 1974, the Committee considered a resolution containing two articles of impeachment, and on July 27, 1974, the Committee agreed to an amended version of the first article by a vote of 27 to 11.[83] On July 29, 1974, the Committee approved an amended version of the second article by a vote of 28 to 10.[84] On July 30, 1974, an additional article (regarding the president's failure to produce items demanded by congressional subpoenas) was offered and was adopted by a vote of 21 to 17.[85]

Also on July 30, the Committee considered and rejected (by votes of 12–26) two additional articles. The first charged that President Nixon authorized and concealed from Congress the bombing of Cambodia in derogation of the powers of Congress. The second charged the president with filing false income tax returns for the years 1969–72 and having received unlawful emoluments in the form of government expenditures at properties at San Clemente, California, and Key Biscayne, Florida.[86]

President Nixon resigned on August 9, 1974.[87] The Judiciary Committee report, which recommended that the House impeach President Nixon and which adopted articles of impeachment, was

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[79] *Impeachment of Richard M. Nixon, supra* note 71, at 6.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 9.
[83] *Id.* at 10.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 11.
[87] 3 *Deschler's Precedents of the United States House of Representatives*, H. Doc. No. 94–661, 94th Cong., 2d Sess., Ch. 14, § 15.13, 638 (1974).

accepted by the House through the passage of H.Res. 1333 on August 20, 1974.[88] No further proceedings occurred.

B. ARTICLES OF IMPEACHMENT[89]

Article I charged that President Nixon had violated his constitutional duty to faithfully execute his office, preserve, protect, and defend the Constitution, and take care that the laws be faithfully executed by interfering with the investigation of events relating to the June 17, 1972, unlawful entry at the Washington, D.C., headquarters of the Democratic National Committee for the purpose of securing political intelligence. Using the powers of his office, the president "engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities."

Implementation of the course of conduct included (1) making or causing to be made false or misleading statements to investigative officers and employees of the United States, (2) withholding relevant and material evidence or information from such persons, (3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to such persons as well as in judicial and congressional proceedings, (4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force and congressional committees, (5) approving, condoning, and acquiescing in surreptitious payments for the purpose of obtaining the silence of or influencing the testimony of witnesses, potential witnesses or participants in the unlawful entry or other illegal activities, (6) endeavoring to misuse the Central Intelligence Agency, (7) disseminating information received from the Department of Justice to subjects of investigations, (8) making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough investigation of "Watergate" had taken place, and (9) endeavoring to cause prospective defendants and persons convicted to expect favored treatment or rewards in return for silence or false testimony. President Nixon "acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States."

Article II charged that the President had violated his constitutional duty to faithfully execute his office, preserve, protect, and defend the Constitution, and take care that the laws be faithfully executed by "repeatedly engag[ing] in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies."

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[88] *Id.* at 642.

[89] *Impeachment of Richard M. Nixon, supra* note 71, at 1–4.

The president did such by (1) personally and through subordinates trying to obtain for purposes not authorized by law confidential information maintained by the Internal Revenue Service and causing the IRS to engage in improper tax audits and investigations, (2) misusing the FBI, the Secret Service and other executive personnel by directing them to conduct improper electronic surveillance and other investigations and permitting the improper use of information so obtained, (3) authorizing the maintenance of a secret investigative unit within the office of the president, partially financed with campaign contributions, which unlawfully utilized resources of the CIA and engaged in covert and unlawful activities and attempted to prejudice the constitutional right of an accused individual to a fair trial, (4) failing to act when he knew or had reason to know that subordinates were trying to impede and frustrate inquiries by governmental entities into the break-in at the Democratic National Committee and the cover-up and other matters, and (5) knowingly misusing the executive power by interfering with agencies of the executive branch, including the FBI, the Department of Justice, and the CIA, in violation of his duty to take care that the laws be faithfully executed. He acted "in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States."

Article III charged that the president had violated his constitutional duty to faithfully execute his office, preserve, protect, and defend the Constitution, and take care that the laws be faithfully executed by, without lawful cause or excuse, failing to produce items relating to "Watergate" as directed by subpoenas issued by the Judiciary Committee and willfully disobeying such subpoenas. President Nixon had thus interposed the powers of the presidency against the lawful subpoenas of the House of Representatives, "assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House. . . ." He acted "in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States."

C. PROCEEDINGS IN THE SENATE

None.

2. DISTRICT JUDGE HARRY CLAIBORNE

A. PROCEEDINGS IN THE HOUSE

Harry E. Claiborne was a judge of the United States District Court for the District of Nevada. A resolution to impeach him, H.Res. 461, was introduced June 3, 1986, and referred to the Judiciary Committee.[90] An investigatory hearing into the conduct of Judge Claiborne was held on June 19, 1986, by the Subcommittee on Courts, Civil Liberties and the Administration of Justice.[91] On June 24, 1986, the Subcommittee amended H.Res. 461 and passed it by a 15 to 0 vote; on June 26, 1986, the full Committee amended

[90] *Impeachment of Judge Harry E. Claiborne*, H.R. Rep. 99–688, 99th Cong., 2d Sess. 1 (1986).
[91] *Id.* at 4.

the resolution and ordered it favorably reported to the House by a vote of 35 to 0.[92] On June 30, 1986, the Judicial Conference of the United States notified the House that it had made its own determination that Judge Claiborne's conduct in violating section 7206(1) of the Internal Revenue Code could constitute grounds for impeachment under Article I of the Constitution.[93] On July 22, 1986, the House agreed to H.Res. 461 by a vote of 406 to 0.[94]

B. ARTICLES OF IMPEACHMENT[95]

Article I charged that, while serving as a federal judge, Judge Claiborne had filed an income tax return for 1979, knowing that it substantially understated his income. The return, filed with the Internal Revenue Service, was verified by a written declaration that it was made under penalty of perjury. A jury found beyond a reasonable doubt that Judge Claiborne had failed to report substantial income in violation of federal law.

Article II charged that, while serving as a federal judge, Judge Claiborne had filed an income tax return for 1980, knowing that it substantially understated his income. The return, filed with the Internal Revenue Service, was verified by a written declaration that it was made under penalty of perjury. A jury found beyond a reasonable doubt that Judge Claiborne had failed to report substantial income in violation of federal law.

Article III charged that, while serving as a federal judge, Judge Claiborne had been found guilty of making and subscribing false income tax returns for 1979 and 1980 in violation of federal law and was sentenced to two years imprisonment (with the terms of imprisonment to be served concurrently) and a fine of $5000 for each violation.

Article IV charged that Judge Claiborne was "required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States" and was "required to uphold the integrity of the judiciary and to perform the duties of his office impartially." The article concluded that by willfully and knowingly falsifying his income on his tax returns, he had "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts."

C. PROCEEDINGS IN THE SENATE

Pursuant to S.Res. 481 and rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, a committee of twelve Senators received evidence and heard testimony relating to the articles of impeachment and then provided the transcripts of the proceedings to the Senate.[96] Rule XI does not allow the trial committee to make recommendations to the Senate as to

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[92] *Id.* at 6–7.

[93] 132 Cong. Rec. H4712 (daily ed. July 22, 1986). Forwarding a determination that a judge's impeachment might be warranted is the severest disciplinary action against a judge that the Judicial Conference can take under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. *See* 28 U.S.C. § 372(c)(8)(a) (1994).

[94] 132 Cong. Rec. H4721 (daily ed. July 22, 1986).

[95] 132 Cong. Rec. S15,760–61 (daily ed. Oct. 9, 1986).

[96] 132 Cong. Rec. S11,673 (daily ed. Aug. 14, 1986).

how Senators should vote on articles of impeachment.[97] The Senate found Judge Claiborne guilty as charged in article I by a vote of 87 to 10 (with one "present") and guilty as charged in article II by a vote of 90 to 7 (with one "present").[98] He was found not guilty on article III by vote of 46 (guilty) to 17 (not guilty) with 35 "present"—a two-thirds majority of Senators present being required for conviction on an article of impeachment.[99] Judge Claiborne was convicted of the charge in article IV by vote of 89 to 8 (with one "present").[100]

3. DISTRICT JUDGE WALTER NIXON

A. PROCEEDINGS IN THE HOUSE

Walter L. Nixon, Jr., was a judge of the United States District Court for the Southern District of Mississippi. A federal jury convicted Judge Nixon of two counts of perjury on February 9, 1986 (acquitting him of an illegal gratuity count), and he was sentenced to five years imprisonment on each count, the terms to run concurrently.[101] Subsequent to the exhaustion of his appellate rights, on March 15, 1988, the Judicial Conference transmitted to the House of Representatives a determination that Judge Nixon's impeachment might be warranted.[102] On March 17, 1988, H.Res. 407, a bill impeaching Judge Nixon, was introduced and referred to the Judiciary Committee, which in turn referred it to the Subcommittee on Civil and Constitutional Rights.[103] The Subcommittee's investigation, including hearings, proceeded to the end of the 100th Congress.[104] H.Res. 87, impeaching Judge Nixon, was introduced on February 22, 1989, and also referred to the Subcommittee on Civil and Constitutional Rights.[105] On March 21, 1989, the Subcommittee amended the resolution and voted 8 to 0 to favorably report it to the full Judiciary Committee, which, on April 25, 1989, voted 34 to 0 to report the resolution favorably to the House floor.[106] On May 10, 1989, the House passed H.Res. 87 by vote of 417 to 0.[107]

B. ARTICLES OF IMPEACHMENT[108]

Article I charged that in testimony before a grand jury investigating his business relationship with an individual and a state prosecutor's handling of a drug smuggling prosecution of that individual's son, Judge Nixon knowingly made a false or misleading state-

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[97] *On the Impeachment of Harry E. Claiborne*, S. Rep. No. 99-511, 99th Cong., 2d Sess. 1 (1986).

[98] 132 Cong. Rec. S15,760-61 (daily ed. Oct. 9, 1986).

[99] 132 Cong. Rec. S15,761 (daily ed. Oct. 9, 1986). *See* U.S. Const. art. I, §3, cl. 6. The reason for the Senate's vote on this article might have been that many Senators were concerned that in voting in favor of the article, they wouldn't be making their own finding of guilt, but would be accepting as dispositive the jury verdict. *See* 132 Cong. Rec. S15,763 (daily ed. Oct. 9, 1986)(statement of Senator Bingaman) & 132 Cong. Rec. S15,767 (daily ed. Oct. 9, 1986)(statement of Senator Specter).

[100] 132 Cong. Rec. S15,762 (daily ed. Oct. 9, 1986).

[101] *Impeachment of Walter L. Nixon, Jr.*, H.R. Rep. No. 101-36, 101st Cong., 1st Sess. 12 (1989).

[102] *Id.* at 13.

[103] *Id.*

[104] *Id.* at 14-15.

[105] *Id.* at 15.

[106] *Id.* at 15-16.

[107] 135 Cong. Rec. 8823 (1989).

[108] *Proceedings of the United States Senate*, *supra* note 42, at 432-35.

ment in violation of his oath to tell the truth to the effect that he never discussed the prosecution with the state prosecutor.

Article II charged that in testimony before the same grand jury, Judge Nixon knowingly made a false or misleading statement in violation of his oath to tell the truth to the effect that he never influenced anyone with respect to the drug smuggling case.

Article III charged that by virtue of his office, Judge Nixon had "raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts. . . ." It was charged that after entering into an oil and gas investment with an individual, Judge Nixon had conversations with a state prosecutor and others relative to a pending criminal proceedings in state court in which the individual's son was facing drug conspiracy charges. Judge Nixon was charged with concealing those conversations through a series of false or misleading statements knowingly made to an attorney from the Department of Justice and a special agent of the FBI. He was also charged with concealing those conversations by knowingly making a series of false or misleading statements to a federal grand jury during testimony under oath.

C. PROCEEDINGS IN THE SENATE

On May 11, 1989, the Senate passed S.Res. 128.[109] The resolution, in conjunction with rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, provided that a committee of twelve Senators would receive evidence and hear testimony relating to the articles of impeachment against Judge Nixon and provide the transcripts of its proceedings to the Senate. The committee carried out its duties and transmitted a record of its proceedings to the Senate on October 16, 1989.[110] On November 3, 1989, the Senate first rejected Judge Nixon's motion for a trial by the full Senate by vote of 7 to 90.[111] It also rejected his motion to dismiss impeachment article III by vote of 34 to 63.[112] He was then found guilty on article I by vote of 89 to 8 and on article II by vote of 78 to 19, and not guilty on article III by a vote of 57 (guilty) to 40.[113]

D. MISCELLANEOUS

Judge Nixon's claim that the Senate had not properly tried him under the impeachment clause of the Constitution was rejected by the Supreme Court in *Nixon* v. *United States* [114] as non-justiciable, involving a political question that should be left to the Senate to decide. He had alleged that Senate rule XI, which allowed a committee of Senators to hear evidence and report to the full Senate regarding articles of impeachment, violated article I, section 3,

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[109] 135 Cong. Rec. 8989 (1989).
[110] *Proceedings of the United States Senate*, *supra* note 42, at 363.
[111] *Id.* at 430.
[112] *Id.* at 431.
[113] *Id.* at 432–36.
[114] 506 U.S. 224 (1993).

clause 6 of the Constitution, which provides that the "Senate shall have the sole Power to try all Impeachments."

4. DISTRICT JUDGE ALCEE HASTINGS

A. PROCEEDINGS IN THE HOUSE

Alcee L. Hastings was a judge of the United States District Court for the Southern District of Florida. On February 4, 1983, a federal jury acquitted Judge Hastings of charges that he and a friend had conspired to solicit a bribe from defendants in a criminal case heard by Judge Hastings (while in a separate trial, a jury had convicted his alleged co-conspirator on these charges).[115] On March 17, 1987, the Chief Justice of the United States, acting on behalf of the Judicial Conference, transmitted a determination to the House of Representatives stating that Judge Hastings had engaged in conduct that might constitute one or more grounds for impeachment.[116] The Subcommittee on Criminal Justice investigated the matter and held numerous hearings.[117] It was learned that Judge Hastings had allegedly improperly disclosed confidential information that he had received while supervising a wiretap.[118] On July 7, 1988, the Subcommittee unanimously voted to adopt articles of impeachment that were introduced as H.Res. 499; on July 26, 1988, the Committee voted to adopt the resolution, as amended, by a vote of 32 to 1 (two of the 17 articles were adopted by voice vote).[119] On August 3, 1988, the resolution was passed by the House by a vote of 413 to 3 with 4 members answering "present."[120]

B. ARTICLES OF IMPEACHMENT[121]

Article I charged that in 1981, Judge Hastings and a friend engaged in a conspiracy to obtain $150,000 from defendants in a racketeering and embezzlement case tried before Judge Hastings in return for sentences which would not require incarceration.

Article II charged that during the course of his defense while on trial for the conspiracy, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had entered into an agreement to seek the $150,000 bribe.

Article III charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had agreed to modify the sentences of the defendants in the racketeering and embezzlement case in return for the bribe.

Article IV charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had agreed in connection with the bribe to return property of the defendants in the racketeering and embezzlement case that he had previously ordered forfeited.

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[115] *Impeachment of Alcee L. Hastings,* H.R. Rep. No. 100–810, 100th Cong., 2d Sess. at 8 (1988).
[116] *Id.* at 7.
[117] *Id.* at 10.
[118] *Id.* at 9.
[119] *Id.* at 12–13.
[120] 134 Cong. Rec. 20,221 (1988).
[121] 134 Cong. Rec. 20,206–07 (1988).

Article V charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had appeared at a hotel to demonstrate his participation in the bribery scheme.

Article VI charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he expected his co-conspirator to show up at his hotel room one day.

Article VII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he instructed his law clerk to prepare an order returning property to the defendants in the racketeering and embezzlement case in furtherance of the bribery scheme.

Article VIII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether a telephone conversation with his co-conspirator was made in furtherance of the bribery scheme.

Article IX charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether certain letters were fabricated in an effort to hide the bribery scheme.

Article X charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually spoken to a certain individual during a phone call that was being offered as exculpatory evidence.

Article XI charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually spoken to a certain individual during a phone call that was being offered as exculpatory evidence.

Article XII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually spoken to a certain individual during a phone call that was being offered as exculpatory evidence.

Article XIII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he could actually reach a certain individual at a certain phone number.

Article XIV charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually made two phone calls that were being offered as exculpatory evidence.

Article XV charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding his motive in taking an airline trip after his co-conspirator had been arrested.

Article XVI charged that while acting as supervising judge of a federal wiretap, Judge Hastings revealed to certain individuals highly confidential information disclosed by the wiretap. The disclosure thwarted, and ultimately led to the termination of, an investigation by federal law enforcement agents.

Article XVII charged that through his actions, Judge Hastings undermined "confidence in the integrity and impartiality of the judiciary and betray[ed] the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts."

C. PROCEEDINGS IN THE SENATE

On September 30, 1988, the Senate passed S.Res. 480 to carry the impeachment proceedings against Judge Hastings over to the 101st Congress."[122] On March 16, 1989, the Senate agreed to S.Res. 38.[123] The resolution, in conjunction with rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, provided that a committee of twelve Senators would receive evidence and hear testimony relating to the articles of impeachment and provide transcripts of its proceedings to the Senate. The same day, the Senate dismissed two motions of Judge Hastings, the first seeking the dismissal of articles of impeachment I–XV based upon his prior acquittal and the ensuing lapse of time, and the second seeking the dismissal of article XVII for its failure to state an impeachable offense.[124] The first motion lost by a vote of 1 to 92 and the second motion lost by a vote of 0 to 93.[125]

The trial committee sent a record of its proceedings to the Senate on October 2, 1989.[126] On October 20, 1989, the Senate found Judge Hastings to be: guilty on article I by a vote of 69 to 26; guilty on article II by a vote of 68 to 27; guilty on article III by a vote of 69 to 26; guilty on article IV by a vote of 67 to 28; guilty on article V by a vote of 67 to 28; not guilty on article VI by a vote of 48 (guilty) to 47; guilty on article VII by a vote of 69 to 26; guilty on article VIII by a vote of 68 to 27; guilty on article IX by a vote of 70 to 25; not guilty on article XVI by a vote of 0 to 95; and not guilty on article XVII by a vote of 60 (guilty) to 35.[127] The Senate did not vote on articles X through XV.

D. MISCELLANEOUS

Judge Hastings (with Judge Walter Nixon as intervening plaintiff) brought suit to stop the impeachment proceedings alleging that the Senate's use of a trial committee violated article I, section 3, clause 6 of the Constitution and thus denied him due process.[128] The court found the complaint to be a non-justiciable political question.[129] Subsequent to his removal from office, Judge Hastings brought suit challenging his impeachment on similar grounds. While Hastings initially prevailed, his victory did not survive the Supreme Court's decision in *Nixon* v. *United States*.[130]

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[122] 134 Cong. Rec. 26,867–68 (1988).
[123] 135 Cong. Rec. 4533 (1989).
[124] 135 Cong. Rec. 4532–33 (1989).
[125] *Id.*
[126] 135 Cong. Rec. 22,639 (1989).
[127] 135 Cong. Rec. 25,330–35 (1989).
[128] *Hastings* v. *United States Senate*, 716 F. Supp. 38 (D.D.C. 1989).
[129] *Id.* at 40. The court also rejected other claims of Judge Hastings, including that his fifth amendment right against double jeopardy was being violated because he was being impeached after having been acquitted in a criminal trial, and that he was being denied the effective assistance of counsel because the Senate would not pay his attorney's fees. *Id.* at 41–42.
[130] *Hastings* v. *United States*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded*, 988 F.2d 1280 (D.C. Cir. 1993), *dismissed* 837 F. Supp. 3 (D.D.C. 1993).

APPENDIX 2

Constitutional Grounds for Presidential Impeachment, report written in 1974 by the impeachment inquiry staff of the House Committee on the Judiciary.

93d Congress
2d Session } HOUSE COMMITTEE PRINT

CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT

REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
SECOND SESSION

FEBRUARY 1974

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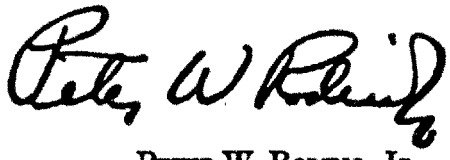
Foreword

I am pleased to make available a staff report regarding the constitutional grounds for presidential impeachment prepared for the use of the Committee on the Judiciary by the legal staff of its impeachment inquiry.

It is understood that the views and conclusions contained in the report are staff views and do not necessarily reflect those of the committee or any of its members.



PETER W. RODINO, JR.

FEBRUARY 22, 1974.

Contents

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 constitutional 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 pur-

[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).

poses. Chief among them was 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 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]

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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 "saivo," 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 skilful 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 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.

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 non-statutory 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, 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]

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[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*).
[16] Simpson, *supra* n. 6, at 144.
[17] Simpson, *supra* n. 6, at 144.

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 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,

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[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 a 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.

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 explicity 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.[25a]

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

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[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.

[25a] A number of suggestions for a Council to the President were made during the Convention. Only one was voted on, and it was rejected three states to eight. This proposal, by George Mason, called for a privy council of six members—two each from the eastern, middle, and southern states—selected by the Senate for staggered six-year terms, with two leaving office every two years. 2 Farrand 537, 542.

Gouverneur Morris and Charles Pinckney, both of whom spoke in opposition to other proposals for a council, suggested a privy council composed of the Chief Justice and the heads of executive departments. Their proposal, however, expressly provided that the President "shall in all cases exercise his own judgment, and either conform to [the] opinions [of the council] or not as he may think proper." Each officer who was a member of the council would "be responsible for his opinion on the affairs relating to his particular Department" and liable to impeachment and removal from office "for neglect of duty malversation, or corruption." 2 Farrand 342–44.

Morris and Pinckney's proposal was referred to the Committee on Detail, which reported a provision for an expanded privy council including the President of the Senate and the Speaker of the House. The council's duty was to advise the President "in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." 2 Farrand 367. This provision was never brought to a vote or debated in the Convention.

Opponents of a council argued that it would lessen executive responsibility. A council, said James Wilson, "oftener serves to cover, than prevent malpractices." 1 Farrand 97. And the Committee of Eleven, consisting of one delegate from each state, to which proposals for a council to the President as well as other questions of policy were referred, decided against a council, on the ground that the President, "by persuading his Council—to concur in his wrong measures, would acquire their protection for them." 2 Farrand 542.

Some delegates thought the responsibility of the President to be "chimerical": Gunning Beford because "he could not be punished for mistakes." 2 Farrand 43; Elbridge Gerry, with respect to nomination for offices, because the President could "always plead ignorance." 2 Farrand 539. Benjamin Franklin favored a Council because it "would not only be a check on a bad President but a relief to a good one." He asserted that the delegates had "too much . . . fear [of] cabals in appointments by a number," and "too much confidence in those of single persons." Experience, he said, showed that "caprice, the intrigues of favorites & mistresses, &c." were "the means most prevalent in monarchies." 2 Farrand 542.

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 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.

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[26] *The Federalist* No. 70, at 459–61 (Modern Library ed.) (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 ed.) (hereinafter cited as Elliot.)

[30] Elliot 104.

[31] 2 Elliot 480 (emphasis in original).

Impeachment had been included 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 Gouveneur 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]

James Madison of Virginia argued in favor of impeachment stating that some provision was "indispensible" 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

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[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 criticised 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.

[40] 2 Farrand 65–66.

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] 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.[44]

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. 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

[41] 2 Farrand 65.
[42] 2 Farrand 67.
[43] 2 Farrand 66.
[44] See Appendix B for a chronological account of the Convention's deliberations on impeachment and related issues.
[45] 2 Farrand 523.
[46] 2 Farrand 550.
[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).

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 misdeameanor." 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 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 farmers meant when they adopted them.[56] Chief Justice Marshall wrote of another such phrase:

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[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.

[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).

> 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] 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

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[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.
[62] 3 Elliot 486.

> 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 wilful 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 had 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 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

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[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.

[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 Presidents 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.

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]

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]

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[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 Constitution 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.

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]

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

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[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.

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 hold their Offices during good Behaviour," 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 express 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 non-judicial officers.

Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder.

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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. See Appendix B for a brief synopsis of each impeachment.

[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.

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 removed 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

[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."

[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

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 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

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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.

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. 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.

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[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.

[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.

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 individual 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 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 Crimes 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

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[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."

[3] See part II.B, *supra*, pp. 7–17.

[4] See part II.B.2, *supra*, pp. 11–13.

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 phrase "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 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

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[5] See part II.A. *supra*, pp. 5–7.
[6] See part II.B.2. *supra*, pp. 12–13.
[7] See *Id.*, p. 11.
[8] See part II.B.3. *supra*, pp. 13–15.
[9] 4 Elliot 114.
[10] 3 Elliot 240.
[11] See part II.B.1. *supra* p. 9; part II.B.3. *supra*, pp. 13–15, 16.
[12] *Federalist* No. 70, at 461.
[13] *Id.* at 459.

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 its 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 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.

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[14] See Part II.C. *supra*, pp. 13–17.

[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 non-criminal sanction, such as removal of a corporate officer for misconduct breaching his duties to the corporation.

[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.

If criminality is to be the basic element of impeachable 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 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 Crimes and Misdemeanors."

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[17] It appears from the annotations to the Revised Statutes of 1873 that bribery was not made a federal crime until 1790 for judges, 1853 for Members of Congress, and 1863 for other civil officers. *U.S. Rev. Stat.*, Title LXX, Ch. 6, §§ 5499–502. This consideration strongly suggests that conduct not amounting to statutory bribery may nonetheless constitute the constitutional "high Crime and Misdemeanor" of bribery.

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 on 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, dismissible 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 consitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. 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 derogation 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.

Appendixes

APPENDIX A

Proceedings of the Constitutional Convention, 1787

Selection, term and impeachment of the executive

The Convention first considered the question of removal of the executive on June 2, in Committee of the Whole in debate of the Virginia Plan for the Constitution, offered by Edmund Randolph of Virginia on May 29. Randolph's *seventh* resolution provided: "that a National Executive be instituted; to be chosen by the National Legislature for the term of [ ] years . . . and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation." [1] Randolph's *ninth* resolution provided for a national judiciary, whose inferior tribunals in the first instance and the supreme tribunal in the last resort would hear and determine (among other things) "impeachments of any National officers." (I:22)

On June 1, the Committee of the Whole debated, but postponed the question whether the executive should be a single person. It then voted, five states to four, that the term of the executive should be seven years. (I:64) In the course of the debate on this question, Gunning Bedford of Delaware, who "was strongly opposed to so long a term as seven years" and favored a triennial election with ineligibility after nine years, commented that "an impeachment would reach misfeasance only, not incapacity," and therefore would be no cure if it were found that the first magistrate "did not possess the qualifications ascribed to him, or should lose them after his appointment." (I:69)

On June 2, the Committee of the Whole agreed, eight states to two, that the executive should be elected by the national legislature. (I:77) Thereafter, John Dickenson of Delaware moved that the executive be made removable by the national legislature on the request of a majority of the legislatures of the states. It was necessary, he argued, "to place the power of removing somewhere," but he did not like the plan of impeaching the great officers of the government and wished to preserve the role of the states. Roger Sherman of Connecticut suggested that the national legislature should be empowered to remove the executive at pleasure (I:85), to which George Mason of Virginia replied that "[s]ome mode of displacing an unfit magistrate" was indispensable both because of "the fallibility of those who choose" and "the corruptibility of the man chosen." But Mason strongly opposed making the executive "the mere creature of the Legislature" as violation of the fundamental principle of good government. James Madison of Virginia and James Wilson of Pennsylvania argued against Dickenson's motion because it would put small states on an

[1] 1 *The Records of the Federal Convention* 21 (M. Farrand ed. 1911). All references hereafter in this appendix are given parenthetically in the text and refer to the volume and page of Farrand (e.g., I: 21).

equal basis with large ones and "enable a minority of the people to prevent ye removal of an officer who had rendered himself justly criminal in the eyes of a majority; open the door for intrigues against him in states where his administration, though just, was unpopular; and tempt him to pay court to particular states whose partisans he feared or wished to engage in his behalf. (I:86) Dickenson's motion was rejected, with only Delaware voting for it. (I:87).

The Committee of the Whole then voted, seven states to two, that the executive should be made ineligible after seven years (I: 88).

On motion of Hugh Williamson of North Carolina, the Committee agreed, apparently without debate, to add the clause "and to be removable on impeachment & conviction of mal-practice or neglect of duty." (I:88)

SINGLE EXECUTIVE

The Committee then returned to the question whether there should be a single executive. Edmund Randolph argued for a plural executive, primarily because "the permanent temper of the people was adverse to the very semblance of Monarchy." (I:88) (He had said on June 1, when the question was first discussed, that he regarded a unity in the executive as "the foetus of monarchy." (I:66)). On June 4, the Committee resumed debate of the issue, with James Wilson making the major argument in favor of a single executive. The motion for a single executive was agreed to, seven states to three. (I:97).

George Mason of Virginia was absent when the vote was taken; he returned during debate on giving the executive veto power over legislative acts. In arguing against the executive's appointment and veto power, he commented that the Convention was constituting "a more dangerous monarchy" than the British government, "an elective one." (I:101). He never could agree, he said "to give up all the rights of the people to a single Magistrate. If more than one had been fixed on, greater powers might have been entrusted to the Executive"; and he hoped that the attempt to give such powers would have weight later as an argument for a plural executive. (I:102).

On June 13, the Committee of the Whole reported its actions on Randolph's propositions to the Convention. (I: 228–32) On June 15, William Patterson of New Jersey proposed his plan as an alternative. Patterson's resolution called for a federal executive elected by Congress, consisting of an unstated number of persons, to serve for an undesignated term and to be ineligible for a second term, removable by Congress on application by a majority of the executives of the states. The major purpose of the Patterson plan was to preserve the equality of state representation provided in the Articles of Confederation, and it was on this issue that it was rejected. (II: 242–45) The Randolph resolutions called for representation on the basis of population in both houses of the legislature. (I: 229–30) The Patterson resolution was debated in the Committee of the Whole on June 16, 18, and 19. The Committee agreed seven states to three, to re-report Randolph's resolutions as amended, thereby adhering to them in preference to Patterson's. (I:322)

SELECTION OF THE EXECUTIVE

On July 17, the Convention began debate on Randolph's ninth resolution as amended and reported by the Committee of the Whole. The consideration by the Convention of the resolution began with unanimous agreement that the executive should consist of a single person. (II: 29) The Convention then turned to the mode of election. It voted against election by the people instead of the legislature, proposed by Gouverneur Morris of Pennsylvania, one state to nine. (II: 32) Gouverneur Morris had argued that if the executive were appointed and impeachable by the legislature, he "will be the mere creature" of the legislature (II: 29), a view which James Wilson reiterated, adding that "it was notorious" that the power of appointment to great offices "was most corruptly managed of any that had been committed to legislative bodies." (II: 32)

Luther Martin of Maryland then proposed that the executive be chosen by electors appointed by state legislators, which was rejected eight states to two, and election by the legislature was passed unanimously. (II: 32)

TERM OF THE EXECUTIVE

The Convention voted six states to four to strike the clause making the President ineligible for reelection. In support of reeligibility, Gouverneur Morris argued that ineligibility "tended to destroy the great motive to good behaviour, the hope of being rewarded by a re-appointment. It was saying to him, make hay while the sun shines." (II: 33)

The question of the President's term was then considered. A motion to strike the seven year term and insert "during good behavior" failed by a vote of four states to six. (II: 36) In his Journal of the Proceedings, James Madison suggests that the "probable object of this motion was merely to enforce the argument against re-eligibility of the Executive Magistrate, by holding out a tenure during good behavior as the alternative for keeping him independent of the Legislature." (II: 33) After this vote, and a vote not to strike seven years, it was unanimously agreed to reconsider the question of the executive's re-eligibility. (II: 36)

JURISDICTION OF JUDICIARY TO TRY IMPEACHMENTS

On July 18, the Convention considered the resolution dealing with the Judiciary. The mode of appointing judges was debated, George Mason suggesting that this question "may depend in some degree on the mode of trying impeachments, of the Executive." If the judges were to try the executive, Mason contended, they surely ought not be appointed by him. Mason opposed executive appointment; Gouverneur Morris, who favored it, agreed that it would be improper for the judges to try an impeachment of the executive, but suggested that this was not an argument against their appointment by the executive. (II: 41-42) Ultimately, after the Convention divided evenly on a

proposal for appointment by the Executive with advice and consent of the second branch of the legislature, the question was postponed. (II: 44) The Convention did, however, unanimously agree to strike the language giving the judiciary jurisdiction of "impeachments of national officers." (II: 46)

REELECTION OF THE EXECUTIVE

On July 19, the Convention again considered the eligibility of the executive for reelection. (II: 51) The debate on this issue reintroduced the question of the mode of election of the executive, and it was unanimously agreed to reconsider generally the constitution of the executive. The debate suggests the extent of the delegates' concern about the independence of the executive from the legislature. Gouverneur Morris, who favored reeligibility, said:

> One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny.... (II: 52)

The ineligibility of the executive for reelection, he argued, "will destroy the great incitement to merit public esteem by taking away the hope of being rewarded with a reappointment. . . . It will tempt him to make the most of the Short space of time allotted him, to accumulate wealth and provide for his friends. . . . It will produce violations of the very Constitution it is meant to secure," as in moments of pressing danger an executive will be kept on despite the forms of the Constitution. And Morris described the impeachability of the executive as "a dangerous part of the plan. It will hold him in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest. He will be the tool of a faction, of some leading demagogue in the Legislature." (II: 53)

Morris proposed a popularly elected executive, serving for a two year term, eligible for reelection, and not subject to impeachment. He did "not regard . . . as formidable" the danger of his unimpeachability:

> There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence. (II:53–54)

The remarks of other delegates also focused on the relationship between appointment by the legislature and reeligibility, and James Wilson remarked that "the unanimous sense" seemed to be that the executive should not be appointed by the legislature unless he was ineligible for a second time. As Elbridge Gerry of Massachusetts remarked, "[Making the executive eligible for reappointment] would make him absolutely dependent." (II:57) Wilson argued for popular election, and Gerry for appointment by electors chosen by the state executives.

SELECTION, REELECTION AND TERM OF THE EXECUTIVE

Upon reconsidering the mode of appointment, the Convention voted six States to three for appointment by electors and eight States to two that the electors should be chosen by State legislatures. (The ratio of electors among the States was postponed.) It then voted eight States to two against the executive's ineligibility for a second term. (II:58) A seven-year term was rejected, three States to five; and a six-year term adopted, nine States to one (II:58–59).

IMPEACHMENT OF THE EXECUTIVE

On July 20, the Convention voted on the number of electors for the first election and on the apportionment of electors thereafter. (II:63) It then turned to the provision for removal of the executive on impeachment and conviction for "mal-practice or neglect of duty." After debate, it was agreed to retain the impeachment provision, eight states to two. (II:69) This was the only time during the Convention that the purpose of impeachment was specifically addressed.

Charles Pinckney of South Carolina and Gouverneur Morris moved to strike the impeachment clause, Pinckney observing that the executive "[ought not to] be impeachable whilst in office." (A number of State constitutions then provided for impeachment of the executive only after he had left office.) James Wilson and William Davie of North Carolina argued that the executive should be impeachable while in office, Davie commenting:

> If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected.

Davie called his impeachability while in office "an essential security for the good behaviour of the Executive." (II:64)

Gouverneur Morris, reiterating his previous argument, contended that the executive "can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence." He also questioned whether impeachment would result in suspension of the executive. If it did not, "the mischief will go on"; if it did, "the impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach." (II:64–65)

As the debate proceeded, however, Gouverneur Morris changed his mind. During the debate, he admitted "corruption & some few other offenses to be such as ought to be impeachable," but he thought they should be enumerated and defined. (II: 65) By the end of the discussion, he was, he said, "now sensible of the necessity of impeachments, if the Executive was to continue for any time in office." He cited the possibility that the executive might "be bribed by a greater interest to betray his trust." (II:68) While one would think the King of England well secured against bribery, since "[h]e has as it were a fee simple in the whole Kingdom," yet, said Morris, "Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery." (II: 68–69) Other causes of impeachment were "[c]orrupting his electors" and "incapacity," for which "he should be punished not as a man, but as an officer, and punished only by degradation from his office." Morris concluded: "This Magistrate is not the King

but the prime-Minister. The people are the King." He added that care should be taken to provide a mode for making him amenable to justice that would not make him dependent on the legislature. (II: 69)

George Mason of Virginia was a strong advocate of the impeachability of the executive; no point, he said, "is of more importance than that the right of impeachment should be continued":

> 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.

(This comment was in direct response to Gouverneur Morris's original contention that the executive could "do no criminal act without Coadjutors who may be punished.") Mason went on to say that he favored election of the executive by the legislature, and that one objection to electors was the danger of their being corrupted by the candidates. This, he said, "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?" (II: 65)

Benjamin Franklin supported impeachment as ' favorable to the Executive." At a time when first magistrates could not formally be brought to justice, "where the chief Magistrate rendered himself obnoxious. . . . recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character." It was best to provide in the Constitution "for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." (II: 65)

James Madison argued that it was "indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate." A limited term "was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." (II: 65–66) It could not be presumed that all or a majority of a legislative body would lose their capacity to discharge their trust or be bribed to betray it, and the difficulty of acting in concert for purposes of corruption provided a security in their case. But in the case of the Executive to be administered by one man, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic." (II: 66)

Charles Pinckney reasserted that he did not see the necessity of impeachments and that he was sure "they ought not to issue from the Legislature who would . . . hold them as a rod over the Executive and by that means effectually destroy his independence," rendering his legislative revisionary power in particular altogether insignificant. (II: 66)

Elbridge Gerry argued for impeachment as a deterrent: "A good magistrate will not fear them. A bad one ought to be kept in fear of them." He hoped that the maxim that the chief magistrate could do no wrong "would never be adopted here." (II: 66)

Rufus King argued against impeachment from the principle of the separation of powers. The judiciary, it was said, would be impeach-

able, but that was because they held their place during good behavior and "[i]t is necessary therefore that a forum should be established for trying misbehaviour." (II:66) The executive, like the legislature and the Senate in particular, would hold office for a limited term of six years; "he would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it." Like legislators, therefore, "he ought to be subject to no intermediate trial, by impeachment." (II:67) Impeachment is proper to secure good behavior of those holding their office for life; it is unnecessary for any officer who is elected for a limited term, "the periodical responsibility to the electors being an equivalent security." (II:68)

King also suggested that it would be "most agreeable to him" if the executive's tenure in office were good behaviour; and impeachment would be appropriate in this case, "provided an independent and effectual forum could be advised." He should not be impeachable by the legislature, for this "would be destructive of his independence and of the principles of the Constitution." (II:67)

Edmund Randolph agreed that it was necessary to proceed "with a cautious hand" and to exclude "as much as possible the influence of the Legislature from the business." He favored impeachment, however:

> The propriety of impeachments was a favorite principle with him; Guilt wherever found ought to be punished. 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. (II:67)

Charles Pinckney rejoined that the powers of the Executive "would be so circumscribed as to render impeachment unnecessary," (II:68)

SELECTION OF THE EXECUTIVE

On July 24, the decision to have electors choose the executive was reconsidered, and the national legislature was again substituted, seven states to four. (II:101) It was then moved to reinstate the one-term limitation, which led to discussion and motions with respect to the length of his term—eleven years, fifteen years, twenty years ("the medium life of princes"—a suggestion possibly meant, according to Madison's journal, "as a caricature of the previous motions"), and eight years were offered. (II:102) James Wilson proposed election for a term of six years by a small number of members of the legislature selected by lot. (II:103) The election of the executive was unanimously postponed. (II:106) On July 25, the Convention rejected, four states to seven, a proposal for appointment by the legislature unless the incumbent were reeligible in which case the choice would be made by electors appointed by the state legislatures. (II:111) It then rejected, five states to six, Pinckney's proposal for election by the legislature, with no person eligible for more than six years in any twelve. (II:115)

The debate continued on the 26th, and George Mason suggested reinstituting the original mode of election and term reported by the Committee of the Whole (appointment by the legislature, a seven-year term, with no reeligibility for a second term). (II:118–19) This was

agreed to, seven states to three. (II:120) The entire resolution on the executive was then adopted (six states to three) and referred to a five member Committee on Detail to prepare a draft Constitution. (II:121)

PROVISIONS IN THE DRAFT OF AUGUST 6

The Committee on Detail reported a draft on August 6. It included the following provisions with respect to impeachment:

> The House of Representatives shall have the sole power of impeachment. (Art. IV, sec. 6)
>
> [The President] shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. . . . He [The President] shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption. (Art. X, sec. 2)
>
> The Jurisdiction of the Supreme Court shall extend . . . to the trial of impeachments of Officers of the United States. . . . In cases of impeachment . . . this jurisdiction shall be original. . . . The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) . . . to . . . Inferior Courts. . . . (Art. XI, sec. 3)
>
> The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury. (Art. XI, sec. 4)
>
> Judgment, in cases of Impeachment, shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honour, 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. (Art. XI, sec. 5) (II: 178–79, 185–87)

The draft provided, with respect to the executive:

> The Executive Power of the United States shall be vested in a single person. His stile shall be "The President of the United States of America;" and his title shall be, "His Excellency". He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time. (Art. X, sec. 1) (II: 185)

Article IV, section 6 was unanimously agreed to by the Convention on August 9. (II: 231) On August 22, a prohibition of bills of attainder and ex post facto laws was voted, the first unanimously and the second seven states to three. (II: 376) On August 24, the Convention considered Article X, dealing with the Executive. It unanimously approved vesting the power in a single person. (II: 401) It rejected, nine states to two, a motion for election "by the people" rather than by the Legislature. (II:402) It then amended the provision to provide for "joint ballot" (seven states to four), rejected each state having one vote (five states to six), and added language requiring a majority of the votes of the members present for election (ten states to one). (II:403) Gouverneur Morris proposed election by "Electors to be chosen by the people of the several States," which failed five states

to six; then a vote on the "abstract question" of selection by electors failed, the States being evenly divided (four states for, four opposed, two divided, and Massachusetts absent). (II: 404)

On August 25, the clause giving the President pardon power was unanimously amended so that cases of impeachment were excepted, rather than a pardon not being pleadable in bar of impeachment. (II: 419–20)

On August 27, the impeachment provision of Article X was unanimously postponed at the instance of Gouverneur Morris, who thought the Supreme Court an improper tribunal. (II: 427) A proposal to make judges removable by the Executive on the application of the Senate and House was rejected, one state to seven. (II: 429)

EXTRADITION: "HIGH MISDEMEANOR"

On August 28, the Convention unanimously amended the extradition clause, which referred to any person "charged with treason, felony or high misdemeanor in any State, who shall flee from justice" to strike "high misdemeanor" and insert "other crime." The change was made "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." (II: 443)

FORUM FOR TRIAL OF IMPEACHMENTS

On August 31, those parts of the Constitution that had been postponed were referred to a committee with one member from each state—the Committee of Eleven. (II: 473) On September 4, the Committee reported to the Convention. It proposed that the Senate have power to try all impeachments, with concurrence of two-thirds of the members present required for a person to be convicted. The provisions concerning election of the President and his term in office were essentially what was finally adopted in the Constitution, except that the Senate was given the power to choose among the five receiving the most electoral votes if none had a majority. (II: 496–99) The office of Vice President was created, and it was provided that he should be ex officio President of the Senate "except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside." (II:498) The provision for impeachment of the President was amended to delete "corruption" as a ground for removal, reading:

> He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason, or bribery.... (II:499)

The Convention postponed the Committee's provision making the Senate the tribunal for impeachments "in order to decide previously on the mode of electing the President." (II:499)

SELECTION OF THE PRESIDENT

Gouverneur Morris explained "the reasons of the Committee and his own" for the mode of election of the President:

> The 1st was the danger of intrigue & faction if the appointmt. should be made by the Legislature. 2 the inconveniency of an ineligibility required by that mode in order to lessen its evils.

3 The difficulty of establishing a Court of Impeachments, other than the Senate which would not be so proper for the trial nor the other branch for the impeachment of the President, if appointed by the Legislature, 4 No body had appeared to be satisfied with an appointment by the Legislature. 5. Many were anxious even for an immediate choice by the people—6—the indispensible necessity of making the Executive independent of the Legislature. (II:500)

The "great evil of cabal was avoided" because the electors would vote at the same time throughout the country at a great distance from each other: "[i]t would be impossible also to corrupt them." A conclusive reason, said Gouverneur Morris, for having the Senate the judge of impeachments rather than the Supreme Court was that the Court "was to try the President after the trial of the impeachment." (II:500) Objections were made that the Senate would almost always choose the President. Charles Pinckney asserted, "It makes the same body of men which will in fact elect the President his Judges in case of an impeachment." (II:501) James Wilson and Edmund Randolph suggested that the eventual selection should be referred to the whole legislature, not just the Senate; Gouverneur Morris responded that the Senate was preferred "because fewer could then, say to the President, you owe your appointment to us. He thought the President would not depend so much on the Senate for his re-appointment as on his general good conduct." (II:502) Further consideration on the report was postponed until the following day.

On September 5 and 6, a substantial number of amendments were proposed. The most important, adopted by a vote of ten states to one, provided that the House, rather than the Senate, should choose in the event no person received a majority of the electoral votes, with the representation from each state having one vote, and a quorum of two-thirds of the states being required. (II: 527–28) This amendment was supported as "lessening the aristocratic influence of the Senate," in the words of George Mason. Earlier, James Wilson had criticized the report of the Committee of Eleven as "having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate," who would have, in fact, the appointment of the President, and through his dependence on them the virtual appointment to other offices (including the judiciary), would make treaties, and would try all impeachments. "[T]he Legislative, Executive & Judiciary powers are all blended in one branch of the Government. . . . [T]he President will not be the man of the people as he ought to be, but the Minion of the Senate." (II: 522–23)

ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

On September 8, the Convention considered the clause referring to impeachment and removal of the President for treason and bribery. George Mason asked, "Why is the provision restrained to Treason & bribery only?" Treason as defined by the Constitution, he said, "will not reach many great and dangerous offenses. . . . Attempts to subvert the Constitution may not be Treason . . ." Not only was treason limited, but it was "the more necessary to extend: the power of impeachments" because bills of attainder were forbidden. Mason moved to add "maladministration" after "bribery". (II:550)

James Madison commented, "So vague a term will be equivalent to a tenure during pleasure of the Senate," and Mason withdrew "maladministration" and substituted "high crimes & misdemeanors . . . agst. the State." This term was adopted, eight states to three. (II: 550)

TRIAL OF IMPEACHMENTS BY THE SENATE

Madison then objected to trial of the President by the Senate and after discussion moved to strike the provision, stating a preference for a tribunal of which the Supreme Court formed a part. He objected to trial by the Senate, "especially as [the President] was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent." (II: 551)

Gouverneur Morris (who had said of "maladministration" that it would "not be put in force and can do no harm"; an election every four years would "prevent maladministration" II: 550) argued that no tribunal other than the Senate could be trusted. The Supreme Court, he said, "were too few in number and might be warped or corrupted." He was against a dependence of the executive on the legislature, and considered legislative tyranny the great danger. But, he argued, "there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out." (II: 551)

Charles Pinckney opposed the Senate as the court of impeachments because it would make the President too dependent on the legislature. "If he opposes a favorite law, the two Houses will combine against him, and under the influence of heat and faction throws him out of office." Hugh Williamson of North Carolina replied that there was "more danger of too much lenity than of too much rigour towards the President," considering the number of respects in which the Senate was associated with the President. (II: 51)

After Madison's motion to strike out the provision for trial by the Senate failed, it was unanimously agreed to strike "State" and insert "United States" after "misdemeanors against." "in order to remove ambiguity." (II:551) It was then agreed to add: "The vice-President and other Civil officers of the U.S. shall be removed from office on impeachment and conviction as aforesaid."

Gouverneur Morris moved to add a requirement that members of the Senate would be on oath in an impeachment trial, which was agreed to, and the Convention then voted, nine states to two, to agree to the clause for trial by the Senate. (II: 552–53)

COMMITTEE ON STYLE AND ARRANGEMENT

A five member Committee on Style and Arrangement was appointed by ballot to arrange and revise the language of the articles agreed to by the Convention. (II:553) The Committee reported a draft on September 12. The Committee, which made numerous changes to shorten and tighten the language of the Constitution, had dropped the expression "against the United States" from the description of grounds for impeachment, so the clause read, "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." (II: 600)

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SUSPENSION UPON IMPEACHMENT

On September 14, John Rutledge and Gouverneur Morris moved "that persons impeached be suspended from their office until they be tried and acquitted. (II: 612) Madison objected that the President was already made too dependent on the legislature by the power of one branch to try him in consequence of an impeachment by the other. Suspension he argued, "will put him in the power of one branch only," which can at any moment vote a temporary removal of the President in order "to make way for the functions of another who will be more favorable to their views." The motion was defeated, three states to eight. (II: 613).

No further changes were made with respect to the impeachment provision or the election of the President. On September 15, the Constitution was agreed to, and on September 17 it was signed and the Convention adjourned. (II: 650)

APPENDIX B

American Impeachment Cases

1. SENATOR WILLIAM BLOUNT (1797–1799)

a. Proceedings in the House

The House adopted a resolution in 1797 authorizing a select committee to examine a presidential message and accompanying papers regarding the conduct of Senator Blount.[1] The committee reported a resolution that Blount "be impeached for high crimes and misdemeanors," which was adopted without debate or division.[2]

b. Articles of Impeachment

Five articles of impeachment were agreed to by the House without amendment (except a "mere verbal one").[3]

Article I charged that Blount, knowing that the United States was at peace with Spain and that Spain and Great Britain were at war with each other, "but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof," conspired and contrived to promote a hostile military expedition against the Spanish possessions of Louisiana and Florida for the purpose of wresting them from Spain and conquering them for Great Britain. This was alleged to be "contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof."

Article II charged that Blount knowing of a treaty between the United States and Spain and "disregarding his high station, and the stipulations of the . . . treaty, and the obligations of neutrality," conspired to engage the Creek and Cherokee nations in the expedition against Louisiana and Florida. This was alleged to be contrary to Blount's duty of trust and station as a Senator, in violation of the treaty and of the obligations of neutrality, and against the laws, peace, and interest of the United States.

Article III alleged that Blount, knowing that the President was empowered by act of Congress to appoint temporary agents to reside among the Indians in order to secure the continuance of their friendship and that the President had appointed a principal temporary agent, "in the prosecution of his criminal designs and of his conspiracies" conspired and contrived to alienate the tribes from the President's agent and to diminish and impair his influence with the tribes, "contrary to the duty of his trust and station as a Senator and the peace and interests of the United States."

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[1] 5 Annals of Cong. 440–41 (1797).
[2] *Id.* 459.
[3] *Id.* 951.

Article IV charged that Blount, knowing that the Congress had made it lawful for the President to establish trading posts with the Indians and that the President had appointed an interpreter to serve as assistant post trader, conspired and contrived to seduce the interpreter from his duty and trust and to engage him in the promotion and execution of Blount's criminal intentions and conspiracies, contrary to the duty of his trust and station as a Senator and against the laws, treaties, peace and interest of the United States.

Article V charged that Blount, knowing of the boundary line between the United States and the Cherokee nation established by treaty, in further prosecution of his criminal designs and conspiracies and the more effectually to accomplish his intention of exciting the Cherokees to commence hostilities against Spain, conspired and contrived to diminish and impair the confidence of the Cherokee nation in the government of the United States and to create discontent and disaffection among the Cherokees in relation to the boundary line. This was alleged to be against Blount's duty and trust as a Senator and against impeachment was dismissed.

c. Proceedings in the Senate

Before Blount's impeachment, the Senate had expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." [4] At the trial a plea was interposed on behalf of Blount to the effect that (1) a Senator was not a "civil officer," (2) having already been expelled, Blount was no longer impeachable, and (3) no crime or misdemeanor in the execution of the office had been alleged. The Senate voted 14 to 11 that the plea was sufficient in law that the Senate ought not to hold jurisdiction.[5] The impeachment was dismissed.

2. DISTRICT JUDGE JOHN PICKERING (1803–1804)

a. Proceedings in the House

A message received from the President of the United States, regarding complaints against Judge Pickering, was referred to a select committee for investigation in 1803.[6] A resolution that Pickering be impeached "of high crimes and misdemeanors" was reported to the full House the same year and adopted by a vote of 45 to 8.[7]

b. Articles of Impeachment

A select committee was appointed to draft articles of impeachment.[8] The House agreed unanimously and without amendment to the four articles subsequently reported.[9] Each article alleged high crimes and misdemeanors by Pickering in his conduct of an admiralty proceeding by the United States against a ship and merchandise that allegedly had been landed without the payment of duties.

Article I charged that Judge Pickering, "not regarding, but with intent to evade" an act of Congress, had ordered the ship and merchandise delivered to its owner without the production of any certifi-

[4] *Id.* 43–44.
[5] *Id.* 2319 (1799).
[6] 12 ANNALS OF CONG. 460 (1803).
[7] *Id.* 642.
[8] 13 ANNALS OF CONG. 380 (1803).
[9] *Id.* 794–95.

cate that the duty on the ship or the merchandise had been paid or secured, "contrary to [Pickering's] trust and duty as judge . . ., and to the manifest injury of [the] revenue." [10]

Article II charged that Pickering, "with intent to defeat the just claims of the United States," refused to hear the testimony of witnesses produced on behalf of the United States and, without hearing testimony, ordered the ship and merchandise restored to the claimant "contrary to his trust and duty, as judge of the said district court, in violation of the laws of the United States, and to the manifest injury of their revenue." [11]

Article III charged that Pickering, "disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the United States, and thereby to impair the public credit, did absolutely and positively refuse to allow" the appeal of the United States on the admiralty proceedings, "contrary to his trust and duty as judge of the said district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice." [12]

Article IV charged:

> That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, . . . did appear upon the bench of the said court, for the purpose of administering justice [on the same dates as the conduct charged in articles I–III], in a state of total intoxication, . . . and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States, and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge, and degrading to the honor and dignity of the United States.[13]

c. Proceedings in the Senate

The Senate convicted Judge Pickering on each of the four articles by a vote of 19 to 7.[14]

d. Miscellaneous

The Senate heard evidence on the issue of Judge Pickering's sanity, but refused by a vote of 19 to 9 to postpone the trial.[15]

3. JUSTICE SAMUEL CHASE (1804–1805)

a. Proceedings in the House

In 1804 the House authorized a committee to inquire into the conduct of Supreme Court Justice Chase.[16] On the same day that Judge Pickering was convicted in the Senate, the House adopted by a vote of

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[10] *Id.* 319.
[11] *Id.* 320–21.
[12] *Id.* 321–22.
[13] *Id.* 322.
[14] *Id.* 366–67.
[15] *Id.* 362–63.
[16] *Id.* 375.

73 to 32 a resolution reported by the committee that Chase be impeached of "high crimes and misdemeanors."[17]

b. Articles of Impeachment

After voting separately on each, the House adopted eight articles.[18]

Article I charged that, "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them 'faithfully and impartially, and without respect to persons' [a quotation from the judicial oath prescribed by statute]," Chase, in presiding over a treason trial in 1800, "did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust" by:

(1) delivering a written opinion on the applicable legal definition of treason before the defendant's counsel had been heard;

(2) preventing counsel from citing certain English cases and U.S. statutes; and

(3) depriving the defendant of his constitutional privilege to argue the law to the jury and "endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact" in reaching their verdict.

In consequence of this "irregular conduct" by Chase, the defendant was deprived of his Sixth Amendment rights and was condemned to death without having been represented by counsel "to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately, rest the liberty and safety of the people." [19]

Article II charged that, "prompted by a similar spirit of persecution and injustice," Chase had presided over a trial in 1800 involving a violation of the Sedition Act of 1798 (for defamation of the President, and, "with intent to oppress and procure the conviction" of the defendant, allowed an individual to serve on the jury who wished to be excused because he had made up his mind as to whether the publication involved was libelous.[20]

Article III charged that, "with intent to oppress and procure the conviction" of the defendant in the Sedition Act prosecution, Chase refused to permit a witness for the defendant to testify "on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact." [21]

Article IV charged that Chase's conduct throughout the trial was "marked by manifest injustice, partiality, and intemperance":

(1) in compelling defendant's counsel to reduce to writing for the court's inspection the questions they wished to ask the witness referred to in article III;

(2) in refusing to postpone the trial although an affidavit had been filed stating the absence of material witnesses on behalf of the defendant;

(3) in using "unusual, rude and contemptuous expressions" to defendant's counsel and in "falsely insinuating" that they wished

[17] *Id.* 1180.
[18] 14 ANNALS OF CONG. 747–62 (1804).
[19] *Id.* 728–29.
[20] *Id.* 729.
[21] *Id.*

to excite public fears and indignation and "to produce that insubordination to law to which the conduct of the judge did, at the same time, manifestly tend";

(4) in "repeated and vexatious interruptions of defendant's counsel, which induced them to withdraw from the case"; and

(5) in manifesting "an indecent solicitude" for the defendant's conviction, "unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice." [22]

Article V charged that Chase had issued a bench warrant rather than a summons in the libel case, contrary to law.[23]

Article VI charged that Chase refused a continuance of the libel trial to the next term of court, contrary to law and "with intent to oppress and procure the conviction" of the defendant.[24]

Article VII charged that Chase, "disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer" by refusing to discharge a grand jury and by charging it to investigate a printer for sedition, with intention to procure the prosecution of the printer, "thereby degrading his high judicial functions and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare." [25]

Article VIII charged that Chase, "disregarding the duties and dignity of his judicial character," did "pervert his official right and duty to address" a grand jury by delivering "an intemperate and inflammatory political harangue with intent to excite the fears and resentment" of the grand jury and the people of Maryland against their state government and constitution, "a conduct highly censurable in any, but peculiarly indecent and unbecoming" in a Justice of the Supreme Court. This article also charged that Chase endeavored "to excite the odium" of the grand jury and the people of Maryland against the government of the United States "by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partisan." [26]

c. Proceedings in the Senate

Justice Chase was acquitted on each article by votes ranging from 0–34 not guilty on Article V to 19–15 guilty on Article VIII.[27]

4. DISTRICT JUDGE JAMES H. PECK (1830–1831)

a. Proceedings in the House

The House adopted a resolution in 1830 authorizing an inquiry respecting District Judge Peck.[28] The Judiciary Committee reported a resolution that Peck "be impeached of high misdemeanors in office" to the House, which adopted it by a vote of 123 to 49.[29]

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[22] *Id.* 729–30.
[23] *Id.* 730.
[24] *Id.*
[25] *Id.* 730–31.
[26] *Id.* 731.
[27] *Id.* 665–69 (1805).
[28] H.R. Jour., 21st Cong., 1st Sess. 138 (1830).
[29] 6 Cong. Deb. 819 (1830).

b. Article of Impeachment

After the House voted in favor of impeachment, a committee was appointed to prepare articles. The single article proposed and finally adopted by the House charged that Peck, "unmindful of the solemn duties of his station," and "with interest in wrongfully and unjustly to oppress, imprison, and otherwise injure" an attorney who had published a newspaper article criticizing one of the judge's opinions, had brought the attorney before the court and, under "the color and pretences" of a contempt proceeding, had caused the attorney to be imprisoned briefly and suspended from practice for eighteen months. The House charged that Peck's conduct resulted in "the great disparagement of public justice, the abuse of judicial authority, and . . . the subversion of the liberties of the people of the United States." [30]

c. Proceedings in the Senate

The trial in the Senate focused on two issues. One issue was whether Peck, by punishing the attorney for writing a newspaper article, had exceeded the limits of judicial contempt power under Section 17 of the Judiciary Act of 1789. The other contested issue was the requirement of proving wrongful intent.

Judge Peck was acquitted on the single article with twenty-one Senators voting in favor of conviction and twenty-two Senators against.[31]

5. DISTRICT JUDGE WEST H. HUMPHREYS (1862)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Humphreys was adopted in 1862.[32] Humphreys was subsequently impeached at the recommendation of the investigating committee.[33]

b. Articles of Impeachment

Soon after the adoption of the impeachment resolution, seven articles of impeachment were agreed to by the House without debate.[34]

Article I charged that in disregard of his "duties as a citizen . . . and unmindful of the duties of his . . . office" as a judge, Humphreys "endeavor[ed] by public speech to incite revolt and rebellion" against the United States; and publicly declared that the people of Tennessee had the right to absolve themselves of allegiance to the United States.

Article II charged that, disregarding his duties as a citizen, his obligations as a judge, and the "good behavior" clause of the Constitution, Humphreys advocated and agreed to Tennessee's ordinance of secession.

Article III charged that Humphreys organized armed rebellion against the United States and waged war against them.

Article IV charged Humphreys with conspiracy to violate a civil war statute that made it a criminal offense "to oppose by force the authority of the Government of the United States."

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[30] *Id.* 869. For text of article, see H.R. JOUR., 21st Cong., 1st Sess. 591–96 (1830).
[31] 7 CONG. DEB. 45 (1831).
[32] CONG. GLOBE, 37th Cong., 2d Sess. 229 (1862).
[33] *Id.* 1966–67.
[34] *Id.* 2205.

Article V charged that, with intent to prevent the administration of the laws of the United States and to overthrow the authority of the United States, Humphreys had failed to perform his federal judicial duties for nearly a year.

Article VI alleged that Judge Humphreys had continued to hold court in his state, calling it the district court of the Confederate States of America. Article VI was divided into three specifications, related to Humphreys' acts while sitting as a Confederate judge. The first specification charged that Humphreys endeavored to coerce a Union supporter to swear allegiance to the Confederacy. The second charged that he ordered the confiscation of private property on behalf of the Confederacy. The third charged that he jailed Union sympathizers who resisted the Confederacy.

Article VII charged that while sitting as a Confederate judge, Humphreys unlawfully arrested and imprisoned a Union supporter.

c. Proceedings in the Senate

Humphreys could not be personally served with the impeachment summons because he had fled Union territory.[35] He neither appeared at the trial nor contested the charges.

The Senate convicted Humphreys of all charges except the confiscation of property on behalf of the Confederacy, which several Senators stated had not been properly proved.[36] The vote ranged from 38–0 guilty on Articles I and IV to 11–24 not guilty on specification two of Article VI.

6. PRESIDENT ANDREW JOHNSON (1867–1868)

a. Proceedings in the House

The House adopted a resolution in 1867 authorizing the Judiciary Committee to inquire into the conduct of President Johnson.[37] A majority of the committee recommended impeachment,[38] but the House voted against the resolution, 108 to 57.[39] In 1868, however, the House authorized an inquiry by the Committee on Reconstruction, which reported an impeachment resolution after President Johnson had removed Secretary of War Stanton from office. The House voted to impeach, 128–47.[40]

b. Articles of Impeachment

Nine of the eleven articles drawn by a select committee and adopted by the House related solely to the President's removal of Stanton. The removal allegedly violated the recently enacted Tenure of Office Act,[41] which also categorized it as a "high misdemeanor."[42]

The House voted on each of the first nine articles separately; the tenth and eleventh articles were adopted the following day.

Article I charged that Johnson,

> unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should

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[35] *Id.* 2617.
[36] *Id.* 2950.
[37] CONG. GLOBE, 39th Cong., 2d Sess. 320–21 (1867).
[38] H.R. REP. NO. 7, 40th Cong., 1st Sess. 59 (1867).
[39] CONG. GLOBE, 40th Cong., 2d Sess. 68 (1867).
[40] CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868).
[41] Act of March 2, 1867, 14 Stat. 430.
[42] *Id.* § 6.

> take care that the laws be faithfully executed, did unlawfully and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton.

Article I concluded that President Johnson had committed " a high misdemeanor in office." [43]

Articles II and III characterized the President's conduct in the same terms but charged him with the allegedly unlawful appointment of Stanton's replacement.

Article IV charged that Johnson, with intent, unlawfully conspired with the replacement for Stanton and Members of the House of Representatives to "hinder and prevent" Stanton from holding his office.

Article V, a variation of the preceding article, charged a conspiracy to prevent the execution of the Tenure of Office Act, in addition to a conspiracy to prevent Stanton from holding his office.

Article VI charged Johnson with conspiring with Stanton's designated replacement, "by force to seize, take and possess" government property in Stanton's possession, in violation of both an "act to define and punish certain conspiracies" and the Tenure of Office Act.

Article VII charged the same offense, but as a violation of the Tenure of Office Act only.

Article VIII alleged that Johnson, by appointing a new Secretary of War, had, "with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War," violated the provisions of the Tenure of Office Act.

Article IX charged that Johnson, in his role as Commander in Chief, had instructed the General in charge of the military forces in Washington that part of the Tenure of Office Act was unconstitutional, with intent to induce the General, in his official capacity as commander of the Department of Washington, to prevent the execution of the Tenure of Office Act.

Article X, which was adopted by amendment after the first nine articles, alleged that Johnson,

> unmindful of the high duties of his office and the dignity and proprieties thereof, . . . designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach, the Congress of the United States, [and] to impair and destroy the regard and respect of all good people . . . for the Congress and legislative power thereof . . .

by making "certain intemperate, inflammatory, and scandalous harangues." In addition the same speeches were alleged to have brought the high office of the President into "contempt, ridicule, and disgrace, to the great scandal of all good citizens."

Article XI combined the conduct charged in Article X and the nine other articles to allege that Johnson had attempted to prevent the execution of both the Tenure of Office Act and an act relating to army appropriations by unlawfully devising and contriving means by which he could remove Stanton from office.

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[43] For text of articles, see CON. GLOBE, 40th Cong., 2d Sess. 1603–18, 1642 (1868).

c. Proceedings in the Senate

The Senate voted only on Articles II, III, and XI, and President Johnson was acquitted on each, 35 guilty—19 not guilty, one vote short of the two-thirds required to convict.[44]

d. Miscellaneous

All of the articles relating to the dismissal of Stanton alleged indictable offenses. Article X did not allege an indictable offense, but this article was never voted on by the Senate.

7. DISTRICT JUDGE MARK H. DELAHAY (1873)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Delahay was adopted by the House in 1872.[45] In 1873 the committee proposed a resolution of impeachment for "high crimes and misdemeanors in office," which the House [46] adopted.

b. Subsequent Proceedings

Delahay resigned before articles of impeachment were prepared, and the matter was not pursued further by the House. The charge against him had been described in the House as follows:

> The most grevious charge, and that which is beyond all question, was that his personal habits unfitted him for the judicial office, that he was intoxicated off the bench as well as on the bench.[47]

8. SECRETARY OF WAR WILLIAM W. BELKNAP (1876)

a. Proceedings in the House

In 1876 the Committee on Expenditures in the War Department [48] unanimously recommended impeachment of Secretary Belknap "for high crimes and misdemeanors while in office," and the House unanimously adopted the resolution.[49]

b. Articles of Impeachment

Five articles of impeachment were drafted by the Judiciary Committee [50] and adopted by the House, all relating to Belknap's allegedly corrupt appointment of a military post trader. The House agreed to the articles as a group, without voting separately on each.[51]

Article I charged Belknap with "high crimes and misdemeanors in office" for unlawfully receiving sums of money, in consideration for the appointment, made by him as Secretary of War.[52]

Article II charged Belknap with a "high misdemeanor in office" for "willfully, corruptly, and unlawfully" taking and receiving money in return for the continued maintenance of the post trader.[53]

Article III charged that Belknap was "criminally disregarding his duty as Secretary of War, and basely prostituting his high office to

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[44] CONG. GLOBE SUPP., 40th Cong., 2d Sess. 415 (1868).
[45] CONG. GLOBE, 42d Cong., 2d Sess. 1808 (1872).
[46] CONG. GLOBE, 42d Cong., 3d Sess. 1900 (1873).
[47] *Id.*
[48] The Committee was authorized to investigate the Department of the Army generally. 13 CONG. REC. 414 (1876).
[49] 14 CONG. REC. 1426–33 (1876).
[50] 15 CONG. REC. 2081–82 (1876).
[51] *Id.* 2160.
[52] *Id.* 2159.
[53] *Id.*

his lust for private gain," when he "unlawfully and corruptly" continued his appointee in office, "to the great injury and damage of the officers and soldiers of the United States" stationed at the military post. The maintenance of the trader was also alleged to be "against public policy, and to the great disgrace and detriment of the public service." [54]

Article IV alleged seventeen separate specifications relating to Belknap's appointment and continuance in office of the post trader.[55]

Article V enumerated the instances in which Belknap or his wife had corruptly received "divert large sums of money." [56]

c. Proceedings in the Senate

The Senate failed to convict Belknap on any of the articles, with votes on the articles ranging from 35 guilty—25 not guilty to 37 guilty—25 not guilty.[57]

d. Miscellaneous

In the Senate trial, it was argued that because Belknap had resigned prior to his impeachment the case should be dropped. The Senate, by a vote of 37 to 29, decided that Belknap was amenable to trial by impeachment.[58] Twenty-two of the Senator voting not guilty on each article, nevertheless indicated that in their view the Senate had no jurisdiction.[59]

9. DISTRICT JUDGE CHARLES SWAYNE (1903–1905)

a. Proceedings in the House

The House adopted a resolution in 1903 directing an investigation by the Judiciary Committee of District Judge Swayne.[60] The committee held hearings during the next year, and reported a resolution that Swayne be impeached "of high crimes and misdemeanors" in late 1904.[61] The House agreed to the resolution unanimously.

b. Articles of Impeachment

After the vote to impeach, thirteen articles were drafted and approved by the House in 1905.[62] However, only the first twelve articles were presented to the Senate.[63]

Article I charged that Swayne had knowingly filed a false certificate and claim for travel expenses while serving as a visiting judge, "whereby he has been guilty of a high crime and misdemeanor in said office."

Articles II and III charged that Swayne, having claimed and received excess travel reimbursement for other trips, had "misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office."

Articles IV and V charged that Swayne, having appropriated a private railroad car that was under the custody of a receiver of his court

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[54] *Id.*
[55] *Id.*
[56] *Id.* 2160.
[57] 19 CONG. REC. 343–57 (1876).
[58] *Id.* 76.
[59] *Id.* 342–57.
[60] 38 CONG. REC. 103 (1903).
[61] 39 CONG. REC. 247–48 (1904).
[62] H.R. REP. No. 3477, 58th Cong., 3d Sess. (1905).
[63] 39 CONG. REC. 1056–58 (1905).

and used the car, its provisions, and a porter without making compensation to the railroad. "was and is guilty of an abuse of judicial power and of a high misdemeanor in office."

Articles VI and VII charged that for periods of six years and nine years, Judge Swayne had not been a bona fide resident of his judicial district, in violation of a statute requiring every federal judge to reside in his judicial district. The statute provided that "for offending against this provision [the judge] shall be deemed guilty of a high misdemeanor." The articles charged that Swayne "willfully and knowingly violated" this law and "was and is guilty of a high misdemeanor in office."

Articles VIII, IX, X, XI and XII charged that Swayne improperly imprisoned two attorneys and a litigant for contempt of court. Articles VIII and X alleged that the imprisonment of the attorneys was done "maliciously and unlawfully" and Articles IX and XI charged that these imprisonments were done "knowingly and unlawfully." Article XI charged that the private person was imprisoned "unlawfully and knowingly." Each of these five articles concluded by charging that by so acting, Swayne had "misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and a high misdemeanor in office."

c. Proceedings in the Senate

A majority of the Senate voted acquittal on all articles.[64]

10. CIRCUIT JUDGE ROBERT W. ARCHBALD (1912–1913)

a. Proceedings in the House

The House authorized an investigation by the Judiciary Committee on Circuit Judge Archbald of the Commerce Court in 1912.[65] The Committee unanimously reported a resolution that Archbald be impeached for "misbehavior and for high crimes and misdemeanors." and the House adopted the resolution, 223 to 1.[66]

b. Articles of Impeachment

Thirteen Articles of impeachment were presented and adopted simultaneously with the resolution for impeachment.

Article I charged that Archbald "willfully, unlawfully, and corruptly took advantage of his official position . . . to induce and influence the officials" of a company with litigation pending before his court to enter into a contract with Archbald and his business partner to sell them assets of a subsidiary company. The contract was allegedly profitable to Archbald.[67]

Article II also charged Archbald with "willfully, unlawfully, and corruptly" using his position as judge to influence a litigant then before the Interstate Commerce Commission (who on appeal would be before the Commerce Court) to settle the case and purchase stock.[68]

Article III charged Archbald with using his official position to obtain a leasing agreement from a party with suits pending in the Commerce Court.[69]

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[64] *Id.* 3467–72.
[65] 48 CONG. REC. 5242 (1912).
[66] *Id.* 8933.
[67] *Id.* 8904.
[68] *Id.* 8905.
[69] *Id.*

Article IV alleged "gross and improper conduct" in that Archbald had (in another suit pending in the Commerce Court) "secretly, wrongfully, and unlawfully" requested an attorney to obtain an explanation of certain testimony from a witness in the case, and subsequently requested argument in support of certain contentions from the same attorney, all "without the knowledge or consent" of the opposing party.[70]

Article V charged Archbald with accepting "a gift, reward or present" from a person for whom Archbald had attempted to gain a favorable leasing agreement with a potential litigant in Archbald's court.[71]

Article VI again charged improper use of Archbald's influence as a judge, this time with respect to a purchase of an interest in land.

Articles VII through XII referred to Archbald's conduct during his tenure as district court judge. These articles alleged improper and unbecoming conduct constituting "misbehavior" and "gross misconduct" in office stemming from the misuse of his position as judge to influence litigants before his court, resulting in personal gain to Archbald. He was also charged with accepting a "large sum of money" from people likely "to be interested in litigation" in his court, and such conduct was alleged to "bring his . . . office of district judge into disrepute." [72] Archbald was also charged with accepting money "contributed . . . by various attorneys who were practitioners in the said court"; and appointing and maintaining as jury commissioner an attorney whom he knew to be general counsel for a potential litigant.[73]

Article XIII summarized Archbald's conduct both as district court judge and commerce court judge, charging that Archbald had used these offices "wrongfully to obtain credit," and charging that he had used the latter office to affect "various and diverse contracts and agreements," in return for which he had received hidden interests in said contracts, agreements, and properties.[74]

c. Proceedings in the Senate

The Senate found Archbald guilty of the charges in five of the thirteen articles, including the catch-all thirteenth. Archbald was removed from office and disqualified from holding any future office.[75]

11. DISTRICT JUDGE GEORGE W. ENGLISH (1925–1926)

a. Proceedings in the House

The House adopted a resolution in 1925 directing an inquiry into the official conduct of District Judge English. A subcommittee of the Judiciary Committee took evidence in 1925 and recommended impeachment.[76] In March 1926, the Judiciary Committee reported an impeachment resolution and five articles of impeachment.[77] The House adopted the impeachment resolution and the articles by a vote of 306 to 62.[78]

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[70] *Id.*
[71] *Id.*
[72] *Id.* 8906.
[73] *Id.*
[74] *Id.*
[75] S. Doc. No. 1140, 62d Cong., 3d Sess. 1620–49 (1913).
[76] H.R. Doc. No. 145, 69th Cong., 1st Sess. (1925).
[77] 67 Cong. Rec. 6280 (1926).
[78] *Id.* 6735.

Judge English resigned six days before the date set for trial in the Senate. The House Managers stated that the resignation in no way affected the right of the Senate to try the charges, but recommended that the impeachment proceedings be discontinued.[79] The recommendation was accepted by the House, 290 to 23.[80]

b. Articles of Impeachment

Article I charged that Judge English "did on divers and various occasions so abuse the powers of his high office that he is hereby charged with tyranny and oppression, whereby he has brought the administration of justice in [his] court . . . into disrepute, and . . . is guilty of misbehavior falling under the constitutional provision as ground for impeachment and removal from office." The article alleged that the judge had "willfully, tyrannically, oppressively and unlawfully" disbarred lawyers practicing before him, summoned state and local officials to his court in an imaginary case and denounced them with profane language, and without sufficient cause summoned two newspapermen to his court and threatened them with imprisonment. It was also alleged that Judge English stated in open court that if he instructed a jury that a man was guilty and they did not find him guilty, he would send the jurors to jail.

Article II charged that Judge English knowingly entered into an "unlawful and improper combination" with a referee in bankruptcy, appointed by him, to control bankruptcy proceedings in his district for the benefit and profit of the judge and his relatives and friends, and amended the bankruptcy rules of his court to enlarge the authority of the bankruptcy receiver, with a view to his own benefit.

Article III charged that Judge English "corruptly extended favoritism in diverse matters," "with the intent to corruptly prefer" the referee in bankruptcy, to whom English was alleged to be "under great obligations, financial and otherwise."

Article IV charged that Judge English ordered bankruptcy funds within the jurisdiction of his court to be deposited in banks of which he was a stockholder, director and depositor, and that the judge entered into an agreement with each bank to designate the bank a depository of interest-free bankruptcy funds if the bank would employ the judge's son as a cashier. These actions were stated to have been taken "with the wrongful and unlawful intent to use the influence of his . . . office as judge for the personal profit of himself" and his family and friends.

Article V alleged that Judge English's treatment of members of the bar and conduct in his court during his tenure had been oppressive to both members of the bar and their clients and had deprived the clients of their rights to be protected in liberty and property. It also alleged that Judge English "at diverse times and places, while acting as such judge, did disregard the authority of the laws, and . . . did refuse to allow . . . the benefit of trial by jury, contrary to his . . . trust and duty as judge of said district court, against the laws of the United States and in violation of the solemn oath which he had taken to administer equal and impartial justice." Judge English's conduct in making decisions and orders was alleged to be such "as to excite fear and distrust and to inspire a widespread belief, in and beyond his judicial district

[79] 68 Cong. Rec. 297 (1926).
[80] *Id.* 302.

. . . that causes were not decided in said court according to their merits," "[a]ll to the scandal and disrepute" of his court and the administration of justice in it. This "course of conduct" was alleged to be "misbehavior" and "a misdemeanor in office."

c. Proceedings in the Senate

The Senate, being informed by the Managers for the House that the House desired to discontinue the proceedings in view of the resignation of Judge English, approved a resolution dismissing the proceedings by a vote of 70 to 9.[81]

12. DISTRICT JUDGE HAROLD LOUDERBACK (1932–1933)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Louderback was adopted by the House in 1932. A subcommittee of the Judiciary Committee took evidence. The full Judiciary Committee submitted a report in 1933, including a resolution that the evidence did not warrant impeachment, and a brief censure of the Judge for conduct prejudicial to the dignity of the judiciary.[82] A minority consisting of five Members recommended impeachment and moved five articles of impeachment from the floor of the House.[83] The five articles were adopted as a group by a vote of 183 to 143.[84]

b. Articles of Impeachment

Article I charged that Louderback "did . . . so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior." It alleged that Louderback used "his office and power of district judge in his own personal interest" by causing an attorney to be appointed as a receiver in bankruptcy at the demand of a person to whom Louderback was under financial obligation. It was further alleged that the attorney had received "large and exorbitant fees" for his services; and that these fees had been passed on to the person whom Louderback was to reimburse for bills incurred on Louderback's behalf.

Article II charged that Louderback had allowed excessive fees to a receiver and an attorney, described as his "personal and political friends and associates," and had unlawfully made an order conditional upon the agreement of the parties not to appeal from the allowance of fees. This was described as "a course of improper and unlawful conduct as a Judge." It was further alleged that Louderback "did not give his fair, impartial, and judicial consideration" to certain objections; and that he "was and is guilty of a course of conduct oppressive and unjudicial."

Article III charged the knowing appointment of an unqualified person as a receiver, resulting in disadvantage to litigants in his court.

Article IV charged that "misusing the powers of his judical office for the sole purpose of enriching" the unqualified receiver mentioned in Article III, Louderback failed to give "fair, impartial, and judicial

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[81] *Id.* 344, 348.
[82] 76 CONG. REC. 4913 (1933); H.R. REP. No. 2065, 72d Cong., 2d Sess. 1 (1933).
[83] 76 CONG. REC. 4914 (1933); H.R. REP. No. 2065, 72d Cong., 2d Sess. 13 (1933).
[84] 76 CONG. REC. 4925 (1933).

consideration" to an application to discharge the receiver; that "sitting in a part of the court to which he had not been assigned at the time," he took jurisdiction of a case although knowing that the facts and law compelled dismissal; and that this conduct was "filled with partiality and favoritism" and constituted "misbehavior" and a "misdemeanor in office."

Article V, as amended, charged that "the reasonable and probable result" of Louderback's actions alleged in the previous articles "has been to create a general condition of widespread fear and distrust and disbelief in the fairness and disinterestedness" of his official actions. It further alleged that the "general and aggregate result" of the conduct had been to destroy confidence in Louderback's court, "which for a Federal judge to destroy is a crime and misdemeanor of the highest order." [85]

c. Proceedings in the Senate

A motion by counsel for Judge Louderback to make the original Article V more definite was consented to by the Managers for the House, resulting in the amendment of that Article.[86]

Some Senators who had not heard all the testimony felt unqualified to vote upon Articles I through IV, but capable of voting on Article V, the omnibus or "catchall" article.[87]

Judge Louderback was acquitted on each of the first four articles, the closest vote being on Article I (34 guilty, 42 not guilty). He was then acquitted on Article V, the vote being 45 guilty, 34 not guilty—short of the two-thirds majority required for conviction.

13. DISTRICT JUDGE HALSTED L. RITTER (1933–1936)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Ritter was adopted by the House in 1933.[88] A subcommittee of the Judiciary Committee took evidence in 1933 and 1934. A resolution that Ritter "be impeached for misbehavior, and for high crimes and misdemeanors," and recommending the adoption of four articles of impeachment, was reported to the full House in 1936, and adopted by a vote of 181 to 146.[89] Before trial in the Senate, the House approved a resolution submitted by the House Managers, replacing the fourth original articles with seven amended ones, some charging new offenses.[90]

b. Articles of Impeachment

Article I charged Ritter with "misbehavior" and "a high crime and misdemeanor in office," in fixing an exorbitant attorney's fee to be paid to Ritter's former law partner, in disregard of the "restraint of propriety . . . and . . . danger of embarrassment"; and in "corruptly and unlawfully" accepting cash payments from the attorney at the time the fee was paid.

Article II charged that Ritter, with others, entered into an "arrangement" whose purpose was to ensure that bankruptcy property

[85] 77 CONG. REC. 1857, 4086 (1933).
[86] *Id.* 1852, 1857.
[87] *Id.* 4082.
[88] *Id.* 4575.
[89] 80 CONG. REC. 3066–3092 (1936).
[90] *Id.* 4597–4601.

would continue in litigation before Ritter's court. Rulings by Ritter were alleged to have "made effective the champertous undertaking" of others, but Ritter was not himself explicitly charged with the crime of champerty or related criminal offenses. Article II also repeated the allegations of corrupt and unlawful receipt of funds and alleged that Judge Ritter "profited personally" from the "excessive and unwarranted" fees, that he had received a free room at a hotel in receivership in his court, and that he "wilfully failed and neglected to perform his duty to conserve the assets" of the hotel.

Article III, as amended, charged Ritter with the practice of law while on the bench, in violation of the Judicial Code. Ritter was alleged to have solicited and received money from a corporate client of his old law firm. The client allegedly had large property interests within the territorial jurisdiction of Ritter's court. These acts were described as "calculated to bring his office into disrepute," and as a "high crime and misdemeanor."

Article IV, added by the Managers of the House, also charged practice of law while on the bench, in violation of the Judicial Code.

Articles V and VI, also added by the Managers, alleged that Ritter had violated the Revenue Act of 1928 by willfully failing to report and pay tax on certain income received by him—primarily the sums described in Articles I through IV. Each failure was described as a "high misdemeanor in office."

Article VII (*former Article IV amended*) charged that Ritter was guilty of misbehavior and high crimes and misdemeanors in office because "the reasonable and probable consequence of [his] actions or conduct . . . as an individual or . . . judge, is to bring his court into scandal and disrepute," to the prejudice of his court and public confidence in the administration of justice in it, and to "the prejudice of public respect for and confidence in the Federal judiciary," rendering him "unfit to continue to serve as such judge." There followed four specifications of the "actions or conduct" referred to. The first two were later dropped by the Managers at the outset of the Senate trial; the third referred to Ritter's acceptance (not alleged to be corrupt or unlawful) of fees and gratuities from persons with large property interests within his territorial jurisdiction. The fourth, or omnibus, specification was to "his conduct as detailed in Articles I, II, III and IV hereof, and by his income-tax evasions as set forth in Articles V and VI hereof."

Before the amendment of Article VII by the Managers, the omnibus clause had referred only to Articles I and II, and not to the criminal allegations about practice of law and income tax evasion.

c. Proceedings in the Senate

Judge Ritter was acquitted on each of the first six articles, the guilty vote on Article I falling one vote short of the two-thirds needed to convict. He was then convicted on Article VII—the two specifications of that Article not being separately voted upon—by a single vote, 56 to 28.[21] A point of order was raised that the conviction under Article VII was improper because on the acquittals on the substantive charges of Articles I through VI. The point of order was overruled by the Chair, the Chair stating, "A point of order is made as to Article VII

[21] S. Doc. No. 200, 74th Cong., 2d Sess. 637–38 (1936).

in which the respondent is charged with general misbehavior. It is a separate charge from any other charge." [92]

d. Miscellaneous

After conviction, Judge Ritter collaterally attacked the validity of the Senate proceedings by bringing in the Court of Claims an action to recover his salary. The Court of Claims dismissed the suit on the ground that no judicial court of the United States has authority to review the action of the Senate in an impeachment trial.[93]

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[92] *Id.* 638.
[93] Ritter v. United States, 84 Ct. Cl. 293, 300, *cert denied*, 300 U.S. 668 (1936).

APPENDIX C

Secondary Sources on the Criminality Issue

The Association of the Bar of the City of New York, *The Law of Presidential Impeachment and Removal* (1974). The study concludes that impeachment is not limited to criminal offenses but extends to conduct undermining governmental integrity.

Bayard, James, *A Brief Exposition of the Constitution of the United States*, (Hogan & Thompson, Philadelphia, (1833). A treatise on American constitutional law concluding that ordinary legal forms ought not to govern the impeachment process.

Berger, Raoul, *Impeachment: The Constitutional Problems*, (Harvard University Press, Cambridge, 1973). A critical historical survey of English and American precedents concluding that criminality is not a requirement for impeachment.

Bestor, Arthur, "Book Review, Berger, *Impeachment: The Constitutional Problems*," 49 *Wash. L. Rev.* 225 (1973). A review concluding that the thrust of impeachment in English history and as viewed by the framers was to reach political conduct injurious to the commonwealth, whether or not the conduct was criminal.

Boutwell, George, *The Constitution of the United States at the End of the First Century*, (D. C. Heath & Co., Boston, 1895). A discussion of the Constitution's meaning after a century's use, concluding that impeachment had not been confined to criminal offenses.

Brant, Irving, *Impeachment: Trials & Errors*, (Alfred Knopf, New York, 1972). A descriptive history of American impeachment proceedings, which concludes that the Constitution should be read to limit impeachment to criminal offenses, including the common law offense of misconduct in office and including violations of oaths of office.

Bryce, James, *The American Commonwealth*, (Macmillan Co., New York, 1931) (reprint). An exposition on American government concluding that there was no final decision as to whether impeachment was confined to indictable crimes. The author notes that in English impeachments there was no requirement for an indictable crime.

Burdick, Charles, *The Law of the American Constitution*, (G. T. Putnam & Sons, New York, 1922). A text on constitutional interpretation concluding that misconduct in office by itself is grounds for impeachment.

Dwight, Theodore, "Trial by Impeachment." 6 *Am. L. Reg. (N.S.)* 257 (1867). An article on the eve of President Andrew Johnson's impeachment concluding that an indictable crime was necessary to make out an impeachable offense.

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Foster, Roger, *Commentaries on the Constitution of the United States*, (Boston Book Co., Boston, 1896), vol. I. A discussion of constitutional law concluding that in light of English and American history any conduct showing unfitness for office is an impeachable offense.

Lawrence, William, "A Brief of the Authorities upon the Law of Impeachable Crimes and Misdemeanors," *Congressional Globe Supplement*, 40th Congress, 2d Session, at 41 (1868). An article at the time of Andrew Johnson's impeachment concluding that indictable crimes were not needed to make out an impeachable offense.

Note, "The Exclusiveness of the Impeachment Power under the Constitution," 51 *Harv. L. Rev.* 330 (1937). An article concluding that the Constitution included more than indictable crimes in its definition of impeachable offenses.

Note, "Vagueness in the Constitution: The Impeachment Power," 25 *Stan. L. Rev.* 908 (1973). This book review of the Berger and Brant books concludes that neither author satisfactorily answers the question whether impeachable offenses are limited to indictable crimes.

Pomeroy, John, *An Introduction to the Constitutional Law of the United States*, (Hurd and Houghton, New York 1870). A consideration of constitutional history which concludes that impeachment reached more than ordinary indictable offenses.

Rawle, William, *A View of the Constitution of the United States*, (P. H. Nicklin, Philadelphia, 1829, 2 vol. ed.). A discussion of the legal and political principles underlying the Constitution, concluding on this issue that an impeachable offense need not be a statutory crime, but that reference should be made to non-statutory law.

Rottschaefer, Henry, *Handbook of American Constitutional Law*, (West, St. Paul, 1939). A treatise on the Constitution concluding that impeachment reached any conduct showing unfitness for office, whether or not a criminal offense.

Schwartz, Bernard, *A Commentary on the Constitution of the United States*, vol. I, (Macmillan, New York, 1963). A treatise on various aspects of the Constitution which concludes that there was no settled definition of the phrase "high Crimes and Misdemeanors," but that it did not extend to acts merely unpopular with Congress. The author suggests that criminal offenses may not be the whole content of the Constitution on this point, but that such offenses should be a guide.

Sheppard, Furman, *The Constitutional Textbook*, (George W. Childs, Philadelphia, 1855). A text on Constitutional meaning concluding that impeachment was designed to reach any serious violation of public trust, whether or not a strictly legal offense.

Simpson, Alex., *A Treatise on Federal Impeachments*, (Philadelphia Bar Association, Phila., 1916) (reproduced in substantial part in 64 *U.Pa.L.Rev.* 651 (1916)). After reviewing English and American impeachments and available commentary, the author concludes that an indictable crime is not necessary to impeach.

Story, Joseph, *Commentaries on the Constitution of the United States*, vol. 1, 5th edition, (Little, Brown & Co., Boston 1891). A commentary by an early Supreme Court Justice who concludes that impeachment reached conduct not indictable under the criminal law.

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Tucker, John, *The Constitution of the United States*, (Callaghan & Co., Chicago, 1899), vol. 1. A treatise on the Constitution concluding that impeachable offenses embrace willful violations of public duty whether or not a breach of positive law.

Wasson, Richard, *The Constitution of the United States: Its History and Meaning* (Bobbs-Merrill, Indianapolis, 1927). A short discussion of the Constitution concluding that criminal offenses do not exhaust the reach of the impeachment power of Congress. Any gross misconduct in office was thought an impeachable offense by this author.

Watson, David, *The Constitution of the United States*, (Callaghan & Co., Chicago, 1910), volumes I and II. A treatise on Constitutional interpretation concluding that impeachment reaches misconduct in office whether or not criminal.

Wharton, Francis, *Commentaries on Law*, (Kay & Bro., Philadelphia, 1884). A treatise by an author familiar with both criminal and Constitutional law. He concludes that impeachment reached willful misconduct in office that was normally indictable at common law.

Willoughby, Westel, *The Constitutional Law of the United States*, vol. III, 2nd edition, (Baker, Voorhis & Co., New York, 1929). The author concludes that impeachment was not limited to offenses made criminal by federal statute.

Yankwich, Leon, "Impeachment of Civil Officers under the Federal Constitution," 26 *Geo. L. Rev.* 849 (1938). A law review article concluding that impeachment covers general official misconduct whether or not a violation of law.

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CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS MINORITY VIEWS

REPORT BY THE MINORITY STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*

JOHN CONYERS, JR., *Ranking Minority Member*

DECEMBER 1998

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I. INTRODUCTION

This report has been prepared by the Minority Staff and Minority Investigative Staff of the Committee on the Judiciary to address the constitutional standards for impeachment that should govern the inquiry resulting from the September 9, 1998 Referral by the Office of Independent Counsel Kenneth W. Starr (hereinafter the "OIC").

The Majority's Report, entitled *Constitutional Grounds for Presidential Impeachment: Modern Precedents* (hereinafter "Majority Staff Report"), attempts to update the report on impeachment standards prepared by Committee staff during the Watergate proceedings.[1] However, in our view, this affirms the emphasis that the Minority has always placed on a threshold inquiry into the proper constitutional understanding of "other high Crimes and Misdemeanors." During debate in the Committee and on the floor of the House on H. Res. 581,[2] Minority Members offered alternative impeachment inquiry resolutions that would have commenced the instant inquiry with a detailed consideration of the constitutional standards governing removal of a president.[3] Minority Members explained that such a thorough review might well lead to the conclusion that none of the allegations contained in the Referral, even if taken as true, would rise to the level of an impeachable offense, thereby eliminating the need for further inquiry. In this regard, therefore, we would have hoped that any effort to update the Watergate Staff Report would have been undertaken in a bipartisan and serious manner.

Unfortunately, the Majority Staff Report—rather than providing an "update" of the Watergate Staff Report—attempts to re-write more than two hundred years of history without any input from the Minority[4] in a transparent effort to broaden the historically accepted standards for presidential impeachment. The mere fact that the

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[1] Staff of House Comm. on the Judiciary, 93rd Cong., 2d Sess. (Comm. Print 1974) *Constitutional Grounds For Presidential Impeachment* ("*Watergate Staff Report*").

[2] On September 11, 1998, the House of Representatives passed H. Res. 525, which directed the Committee to receive and review the OIC's Referral, and to "determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced." On October 8, 1998, the House passed H. Res. 581, which directed the Committee to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach William Jefferson Clinton, President of the United States of America." The resolution further instructed the Committee to "report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper."

[3] On November 11, 1998, Representatives Conyers and Scott, the Ranking Members on the Committee and the Subcommittee on the Constitution, asked that this issue be resolved before the Committee moved on into what could be a drawn out and polarizing factual inquiry. Letter from John Conyers, Jr., Ranking Minority Member, House Committee on the Judiciary, and Robert C. Scott, Ranking Minority Member, Subcommittee on the Constitution, to Henry H. Hyde, Chairman, House Committee on the Judiciary (Nov. 11, 1998). Chairman Hyde rejected that request by letter dated November 13, 1998.

[4] The Minority was first formally notified about this undertaking on November 5, when a draft copy of the Majority Staff Report was presented to the Minority staff. The Minority was not asked to contribute to or participate in the drafting process. The following day, November 6, the Majority Staff Report was published as a Committee print and posted on the Internet.

Majority Staff Report was released before the November 9 hearing on impeachment standards indicates that the Majority is more interested in reaching a pre-set conclusion than in engaging a more contemplative consideration of relevant precedent.

The Majority Staff Report reaches four conclusions: (1) since 1974, making false and misleading statements under oath has been the most common basis for impeachment; (2) the standard for impeachable offenses is the same for federal judges as it is for presidents; (3) impeachable offenses can involve both personal and professional misconduct; and (4) impeachable offenses do not have to be federal or state crimes.[5] Other than the fourth finding, which was a conclusion of the Watergate Staff, the Majority's conclusions are misleading if not outright false. Contrary to the positions taken in the Majority Staff Report, this report will show that historical precedent establishes that impeachable offenses should be closely tied to official, not private misconduct unrelated to office; and past judicial impeachments do not serve as precedent for impeaching a president based on private misconduct.

II. Historical Precedent Establishes that Impeachable Offenses Should be Closely Tied to Official, Not Private Misconduct

The Majority Staff Report attempts an "end run" around the constitutional requirement that there be a substantial nexus between alleged misconduct by a chief executive and his official duties before such misconduct can rise to the level of an impeachable offense. Although there are no judicial precedents which spell out the meaning of the Constitution's impeachment clause, an examination of the historical precedents, including the Watergate Staff Report and impeachment proceedings against President Nixon, clearly establishes that a president should only be impeached for conduct which constitutes an abuse or subversion of the powers of the executive office.

Under Article II, Section 4 of the Constitution, impeachment is only warranted for conduct which falls within the constitutional parameters of "Treason, Bribery, or other high Crimes and Misdemeanors."[6] As an initial matter, it is important to note that the juxtaposition of such serious offenses of Treason and Bribery with the phrase "other high Crimes and Misdemeanors" serves as an important indicator of how the latter term should be defined. In other words, it seems clear that the Framers intended that such "other high Crimes and Misdemeanors" must be in the nature of large scale abuses of public office—similar to treason and bribery.[7] Indeed a review by the Congressional Research Service of nearly 700 years of precedent from English and American impeachment prece-

[5] *Majority Staff Report, supra* at 16–17

[6] Treason is defined in the Constitution, art. III, Sec. 3, cl. 1, and in statute, 18 U.S.C. §2381, to mean levying war against the United States or adhering to their enemies, giving them aid and comfort. Bribery is not defined in the Constitution, although it was an offense at common law. The First Congress enacted a bribery statute, the Act of April 30, 1790, 1 Stat. 112, 117, which, with some amendment, is now codified at 18 U.S.C. §201.

[7] This reading is an example of the standard rule of construction known in Latin as *"eiusdem generis,"* or "of the same kind." It basically provides that when a general word occurs after a number of specific words, the meaning of the general word is limited to the kind or class of things in which the specific words fall.

dent was unable to reveal a single impeachment case based solely on private misconduct.

It is also important to note that the word "high" modifies both "Crimes" and "Misdemeanors." As the history of that term makes clear, the Framers did not entrust Congress with the power to impeach a popularly elected President simply upon a showing that the executive committed a "misdemeanor" crime as we now understand the term—as a minor offense usually punishable by a fine or brief period of incarceration. Instead, an examination of the relevant historical precedents indicates that a president may only be impeached for conduct which constitutes an egregious abuse or subversion of the powers of the executive office.

A. INTENT OF THE FRAMERS

A historical review indicates that the Framers intended the operation of the impeachment clause to be premised on grave abuse of executive authority. This is evident by the use of the terms "other high Crimes and Misdemeanors" in English Parliamentary history, its actual drafting at the Constitutional Convention, the ratification debates in the states, and subsequent comments and actions by the Framers.

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 the English parliament. The phrase was a term of art in English parliamentary practice and had a special historical meaning different from the ordinary meaning of the discrete terms "crimes" and "misdemeanors." In particular, "high misdemeanors" referred to a category of offenses that subverted the system of government.[8]

In its report on the historical roots of the impeachment process, the staff of the Watergate impeachment inquiry offered the following summary of these English historical precedents:

> 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, corruptions and betrayal of trust. Second, the phrase "high Crimes and Misdemeanors" was confined to parliamentary impeachments, it had no roots in the ordinary criminal law, and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.[9]

With regard to the actual drafting of the Constitution's impeachment clause, it is clear the Framers intended impeachment to be a very limited remedy, reserved for the most egregious misconduct subversive of government. This is why at the outset, delegates such as Gouvernor Morris and James Madison objected to the use of broad impeachment language. Morris argued that "corruption & some few other offences to be such as ought to be impeachable; but

[8] Historians have traced the earliest use of the terms "high Crimes and Misdemeanors" to the impeachment of the Earl of Suffolk in 1386. *See* Raoul Berger, Impeachment: The Constitutional Problems, 59 (1973) ("Berger").

[9] *Watergate Staff Report, supra* note 1, at 7.

thought the cases ought to be enumerated & defined,"[10] while Madison noted that impeachment was only necessary to be used to "*defend[] the Community* against the incapacity, negligence or perfidy of the chief Magistrate."[11]

The critical drafting occurred on September 8, 1787, and is described in the Watergate Staff Report:

> 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."
>
> 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 [an English official being impeached in India] 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.
>
> Mason then moved to add the word "maladministration" to the other two grounds. 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.
>
> 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. . . .[12]

It is important to emphasize the narrowness of the phrase "other high Crimes and Misdemeanors" was confirmed by the addition of the language "against the State." Madison wrote that the delegates revised the phrase to "other high Crimes and Misdemeanors *against the United States*" in order to "remove ambiguity."[13] This language reflects the Convention's view that only offenses against the political order should provide a basis for impeachment. Although the phrase "against the United States" was eventually deleted by the Committee of Style that produced the final Constitution,[14] the Committee of Style was directed not to change the

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[10] Berger, *supra* note 8, at 65.
[11] *Id.* (emphasis added).
[12] *Watergate Staff Report*, *supra* note 1, at 11–12 (citations omitted).
[13] 2 Max Farrand, The Records of the Federal Convention of 1781, 551 (Rev. ed. 1967) (emphasis added).
[14] *Id.* at 600

meaning of any provision.[15] It is therefore clear that the phrase was dropped as a redundancy and its deletion was not intended to have any substantive impact.[16]

The ratification debates in the states also serve to highlight the narrow purpose and scope of the impeachment clause. For example, the Virginia ratifiers believed that possible impeachment counts would lie against the president where he had received "emoluments" from a foreign power,[17] pardoned his own crimes or crimes he advised,[18] or had summoned the representatives of only a few states to ratify a treaty.[19] Likewise, the North Carolina Assembly thought that concealing or giving false information to the Senate in order to bring about legislation harmful to the country could constitute an impeachable offense.[20]

The construction that "other high Crimes and Misdemeanors" should be limited to serious abuses of official power is further confirmed by the commentary of prominent Framers and early constitutional commentators. Supreme Court Justice James Wilson, who played a major role at the Constitutional Convention, wrote: "[I]mpeachments are proceedings of a political nature . . . confined to political characters charging only political crimes and misdemeanors and culminating only in political punishments."[21]

Significantly, Alexander Hamilton, another leading Framer, wrote in Federalist No. 65 that impeachable offenses "proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust." He stressed that those offenses "may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[22]

Hamilton's view was endorsed a generation later by Justice Joseph Story in his *Commentaries on the Constitution* when he wrote, "[impeachable offenses] are committed by public men in violation of their public trust and duties. . . . Strictly speaking, then, the impeachment power partakes of a political character, as it respects injuries to the society in its political character."[23] Justice Story added that impeachable offenses "peculiarly injure the commonwealth by the abuse of high offices of trust."[24]

The improprieties of Alexander Hamilton and Congress' reaction, shortly after the adoption of the Constitution, serve to illuminate further the Framers' narrow intent. During the winter of 1792–1793, while Congress was investigating the alleged financial misdealings of then Secretary of Treasury Alexander Hamilton, he was forced to admit that he had made improper payments to James Reynolds in order to prevent public disclosure of an adulterous relationship Hamilton had engaged in with Reynolds' wife. Hamilton

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[15] *Id.* at 553.

[16] *See Fenton, The Scope of the Impeachment Power*, 65 N. W. L. Rev. 719, 740 (1970). *See also* summary of impeachment precedents prepared by David Overlock Stewart, Peter K. Levitt, and Marc L. Kesselman of Ropes & Gray, Sept. 29, 1998 (on file with Minority Staff) ("Ropes & Gray Memorandum").

[17] Edmund Randolph, 3 J. Elliot, The Debate in the Several State Conventions on the Adoption of the Federal Constitution 486 (reprint of 2d ed.) (Virginia Convention).

[18] George Mason, 3 Elliot 497–98 (Virginia Convention).

[19] James Madison, 3 Elliot 500 (Virginia Convention).

[20] James Iredell, 4 Elliot 127 (North Carolina Convention).

[21] James Wilson, The Works of James Wilson 426 (R. McCloskey, ed., 1967).

[22] Alexander Hamilton, The Federalist Papers, 65 (C. Rossiter, ed., 1991).

[23] 2 Joseph Story, Commentaries on the Constitution § 744 (1st ed. 1833).

[24] *Id.*

even went to the length of having Mrs. Reynolds burn incriminating correspondence and promised to pay for the Reynolds' travel costs to leave town. When Congress learned of this course of events, they decided the matter was private, not public, and did not pursue any impeachment proceedings.[25]

B. WATERGATE STAFF REPORT

Contrary to the position taken in the Majority Staff Report, a fair reading of the Watergate Staff Report does not support equating impeachable offenses with personal misconduct unrelated to public office.[26] We do agree that it is clear—as the Majority Staff Report states—that one of the principal conclusions of the Watergate Staff Report is that a violation of the criminal laws is not a prerequisite for impeachment.[27] Far more significant for purposes of the OIC Referral, however, is that the Watergate Staff Report went on to conclude that the mere occurrence of criminal misconduct does not necessarily support a charge of impeachment. Instead, the Watergate Staff Report asserts that in order to justify presidential impeachment, it is necessary to establish that the misconduct is so grave as to threaten our constitutional form of government or the president's duties thereunder:

> 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.* [28]

It is also important to note that during the Watergate inquiry, the Republican Minority did not disagree with this latter contention. Although the Republicans unsuccessfully argued that criminal misconduct should be a prerequisite to impeachment, they did not challenge the proposition that the misconduct must rise to constitutional proportions to warrant impeachment. In their separate views prepared to the Committee's Report on the final articles of impeachment, Minority members wrote: "[I]t is our judgment, based upon . . . constitutional history that the framers . . . intended that the President should be removable by the legislative branch *only for serious misconduct dangerous to the system of government established by the Constitution.*" [29]

Similarly, during the Committee debate voting out articles of impeachment, the Republican Ranking Member, Rep. Hutchinson (R-

[25] Richard N. Rosenfield, *Founding Fathers Didn't Flinch—Alexander Hamilton's Misstep was Deemed a Private Matter that didn't Affect his Service to the Nation*, L.A. Times, Sept. 18, 1998, at B9. *See also* The Papers of Alexander Hamilton (Harold C. Syrett, ed. 1974).

[26] *Majority Staff Report, supra* at 16.

[27] *See, e.g., Watergate Staff Report, supra* note 1, at 24.

[28] *Id.* at 27 (emphasis added).

[29] *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93–1305, 93rd Cong., 2d Sess. 10, at 365 (1974) ("*Watergate Committee Report*") (citations omitted) (emphasis added).

MI), explicitly embraced a similar definition of "impeachable offenses" by arguing that "a president can be impeached for the commission of crimes and misdemeanors, which like other crimes to which they are linked in the Constitution, treason and bribery, *are high in the sense that they are crimes directed against or having great impact upon the system of government itself.*"[30]

C. PRESIDENTIAL IMPEACHMENTS

Historical presidential impeachment precedent also demonstrates that, for offenses to be impeachable, they must arise out of a president's public, not private, conduct. As an initial matter, it is instructive to consider the 1868 impeachment of President Andrew Johnson, a Democrat who arose to the presidency after President Lincoln's assassination. He was impeached by the House Republicans because he had removed the Secretary of War, Edwin M. Stanton, who had disagreed with his post-Civil War reconstruction policies. Stanton's removal was said to be inconsistent with the Tenure in Office Act, requiring Senate approval for removal of certain officers.[31]

Although the impeachment of President Andrew Johnson failed in the Senate, it is informative to note that all of the impeachment articles related to alleged public misconduct. The eleven articles of impeachment related to Johnson's removal of Stanton, the impact of that removal on Congressional prerogatives, and its impact on post-Civil War Reconstruction. Accordingly, it is fair to state that although motivated by politics, the impeachment was nonetheless premised on official presidential conduct and alleged harms to the system of government.[32]

During the Senate trial, the President's defenders argued that impeachment could only be based on "a criminal act directly subversive of fundamental principles of government or the public interest."[33] President Johnson was acquitted on May 16, 1868 by a one vote margin. Of particular note, William Pitt Fessenden, a senior Republican, warned of the dangers that a weakly grounded impeachment could have on the Nation:

> [T]he offence for which a Chief Magistrate is removed from office, . . . should be of such a character to commend itself at once to the minds of all right thinking men as, beyond all question, an adequate cause. It should be free from the taint of party; leave no reasonable ground of suspicion upon the motives of those who inflict the penalty, and address itself to the country and the civilized world as a measure justly called for by the gravity of the crime and the necessity for its punishment. Anything less [would] shake the faith of the friends of constitutional liberty in

[30] Howard Fields, High Crimes and Misdemeanors 120 (1978) (emphasis added).

[31] Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430. *See also* William H. Rehnquist, Grand Inquests 212–16 (1992).

[32] *Cong. Globe Supp.*, 40th Cong. 2d Sess., 3–5 (1868). *See also* Michael Les Benedict, The Impeachment and Trial of Andrew Johnson 114–15 (1973); Ropes & Gray Memorandum, *supra* note 16.

[33] *Cong. Globe Supp.*, 40th Cong. 2d Sess. V. II, at 139–40 (April 23, 1868) and 286–89 (April 29, 1868). *See also Cong. Globe Supp.*, 40th Cong. 2d. Sess., at 286–310 (1868).

> the permanency of our free institutions and the capacity of man for self-government.[34]

The circumstances surrounding the proposed impeachment of President Nixon also support the view that impeachment should be limited to threats that undermine the Constitution, not ordinary criminal misbehavior unrelated to a president's official duties. All three of the articles of impeachment approved by the House Judiciary Committee involved misuse of the President's official duties. The First Article—alleging that President Nixon coordinated a cover-up of the Watergate break-in by interfering with numerous government investigations, using the CIA to aid the cover-up, approving the payment of money and offering clemency to obtain false testimony—qualified as a high Crime and Misdemeanor, because "[the President used] *the powers of his high office* [to] engage . . . in a course of conduct or plan designed to delay, impede, and obstruct [the Watergate investigation]."[35] The Second Article—alleging that the President used the IRS as a means of political intimidation and directed illegal wiretapping and other secret surveillance for political purposes—described "*a repeated and continuing abuse of the powers of the Presidency* in disregard of the fundamental principle of the rule of law in our system of government."[36] The Third Article—alleging that President Nixon refused to comply with subpoenas issued by the Judiciary Committee in its impeachment inquiry—was considered impeachable because such subpoena power was essential to "Congress' [ability] to act as the ultimate safeguard against improper presidential conduct."[37]

Even more telling are the circumstances by which the Committee rejected articles of impeachment against President Nixon relating to allegations of income tax evasion. The Majority Staff Report contains no detailed discussion of the debate on this proposed article of impeachment. This omission is surprising considering the Majority's public pronouncements on this issue. For example, a Judiciary Committee spokesman for the Majority recently took issue with an assertion by White House counsel that Judiciary Committee Democrats involved in the Watergate impeachment inquiry voted against including tax evasion charges in the articles of impeachment on the grounds that it involved private, rather than official, misconduct:

> The problem with [Counsel to the President's] statement is that there is absolutely no discussion in the historical record of the Watergate proceedings to support that assertion. In fact, the record indicates that most members voted against the article, not because they considered it private conduct and therefore unimpeachable, but because there was insufficient evidence for the charge or they preferred to focus on the core charges against President Nixon.[38]

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[34] *Id.* at 30.

[35] *Watergate Committee Report*, *supra* note 29, at 133 (emphasis added).

[36] *Id.* at 180 (emphasis added).

[37] *Id.* at 213. A fourth proposed article citing the covert use of the military in Cambodia was rejected "because Nixon was performing his constitutional duty" as Commander-in-Chief, because "Congress had been given sufficient warning of the bombings," and "because the passage of the War Powers Resolution mooted the question raised by the Article." *Id.* at 219.

[38] Legal Times, *Craig is "Rewriting History" On Impeachment Issues* (Nov. 2, 1998) at 27.

In point of fact, the historical record of the Watergate proceedings demonstrates that the lack of a nexus between the tax evasion charges and President Nixon's official duties played an important role in the Committee's ultimate rejection of this proposed article of impeachment. On July 30, 1974, the Judiciary Committee debated a proposed article of impeachment alleging that President Nixon had committed tax fraud when filing his federal income tax returns for the years 1969 through 1972 (tax returns are filed under penalty of perjury). All seventeen Republican members of the Committee joined with nine Democratic members to defeat this proposed article by a vote of 26–12.[39] The primary ground for rejection was that the Article related to the President's private conduct, not an abuse of his authority as President.

The crux of the impeachment article related to allegations that the President understated his income and overstated his deductions for the years 1969 through 1972.[40] In examining the President's tax returns for those four years, the IRS found that he had underreported his taxable income by $796,000; in doing its own calculations, Congress's Joint Committee on Internal Revenue Taxation put the figure at $960,000.[41] The underreporting derived from a $576,000 tax deduction the President had claimed during those years for a gift of his papers to the National Archives.[42]

In the ensuing debate on the article of impeachment concerning this issue, one of the most important themes leading to its rejection was the lack of any sufficient connection between these charges of alleged criminal conduct and the President's official duties. Opponents of this article raised three primary objections: (1) there was no evidence the President had committed tax evasion; (2) tax evasion should be addressed through the criminal law, not impeachment; and (3) tax evasion was not an impeachable offense.[43]

The first argument against the article was that there was no clear and convincing evidence that the President had committed tax fraud.[44] Because the President had relied upon his attorneys and agents in determining his tax responsibilities, he was said to have not fraudulently filed a false tax return and had not committed a criminal act.[45] Only Republican members of the Committee (and only eleven of the seventeen Republicans at that), spoke against the article on the grounds that there was insufficient evidence of tax evasion.[46] This group constituted only eleven of the twenty-six votes against the proposed article; therefore, it is not possible to say that a majority of the votes against the Article opposed it for insufficiency of evidence.[47]

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[39] *Hearings Before the House Comm. on the Judiciary Pursuant to H. Res. 803*, 93d Cong. 2d. Sess. 527 (1974) ("*Debate on Articles of Impeachment*").

[40] The second article of impeachment provided: "[President Nixon] knowingly and fraudulently failed to report [his] income and claimed deductions in the years 1969, 1970, 1971, and 1972 on his Federal income tax returns which were not authorized by law, including deductions for a gift of papers to the United States valued at approximately $576,000." *Watergate Committee Report, supra* note 29, at 220.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Debate on Articles of Impeachment, supra* note 39, at 522, 532.

[46] *See id.* at 51[illegible]–60.

[47] At the time it considered articles of impeachment, the Committee was aware that according to the former Chief of the Criminal Tax Section at the Department of Justice "in the case of

Continued

The opponents also maintained that because tax evasion could be addressed through the criminal law, it was an inappropriate vehicle for determining the President's culpability.[48] As Democratic Member Ray Thornton (D–AR) acknowledged, "there [had] been a breach of faith with the American people with regard to incorrect income tax returns. . . . But . . . these charges may be reached in due course in the regular process of law. This committee is not a tax court nor criminal court nor should it endeavor to become one."[49]

The opponents' final and ultimately most compelling reason for rejecting this article was that tax fraud was not an abuse of power that impeachment was designed to remedy.[50] Republican congressmen explicitly emphasized that personal misconduct could not give rise to an impeachable offense. Congressman Tom Railsback (R–IL) noted that there was "a serious question as to whether something involving [the President's] personal tax liability has anything to do with his conduct of the office of the President."[51] Congressman Lawrence J. Hogan (R–MD), quoted from the impeachment inquiry staff report:

> As a technical term, 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 the Constitution, was historically the criteria for distinguishing a high crime or misdemeanor from an ordinary one.*[52]

Also, Congressman Wiley Mayne (R–IA) reasoned:

> Now, *even if criminal fraud had been proved, . . . then we would still have the question whether it is a high crime or misdemeanor sufficient to impeach under the Constitution,* because that is why we are here, ladies and gentlemen, to determine whether the President should be impeached, not to comb through every minute detail of his personal taxes for the past 6 years, raking up every possible minutia which could prejudice the President on national television.[53]

Similarly, Democratic Congressman Jerome Waldie (D–CA) echoed the Republican distinction between public and private conduct,[54] and opposed the proposed article because "the impeachment process is a process designed to redefine Presidential powers in cases where there has been enormous abuse of those powers and then to limit the powers as a concluding result of the impeachment process."[55]

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an ordinary taxpayer, on the facts as we know them in this instance, the case would be referred to a Grand Jury for prosecution." *Id.* In fact, the President's advisers were criminally prosecuted for their roles in Nixon's tax evasion. *United States* v. *DeMarco,* 394 F. Supp. 611, 614 (D.D.C. 1975).

[48] *Watergate Committee Report, supra* note 29, at 222.
[49] *Debate on Articles of Impeachment, supra* note 39, at 549.
[50] *Watergate Committee Report, supra* note 29, at 222.
[51] *Debate on Articles of Impeachment, supra* note 39, at 524.
[52] *Id.* at 541 (emphasis added).
[53] *Id.* at 545 (emphasis added).
[54] *Id.* at 548.
[55] *Id.*

It is also informative to consider the various incidents over the last 50 years involving alleged presidential impropriety for which impeachment proceedings were *not brought* or considered. This is not to say that impeachment should have been initiated in these cases, merely that the Congress showed restraint in failing to pursue these lines by way of impeachment inquiry. These incidents include the following:

- With regard to Iran-Contra, President Reagan initially declared on national television that there was no arms for hostages transfer. Subsequently, in a January 1987 interview with the Tower Commission, pursuant to the Commission's Iran-Contra investigation, President Reagan stated that he approved an August shipment of arms by Israel to Iran. Then, in a February 1987 interview with the Commission, he recanted his prior statements and said he did not approve the shipment. He also said, contrary to his January statements, that he was surprised when he learned Israel had shipped arms to Iran. Finally, when questioned by Walsh in February, 1990, President Reagan denied any detailed knowledge of the Iran-Contra matter.
- In a deposition with the Office of Independent Counsel Lawrence Walsh, then-Vice President George Bush denied knowledge of the diversion of Iranian arms-sale proceeds to the Contras and denied knowledge of Lieutenant Colonel Oliver North's secret Contra-supply operation. The OIC subsequently found evidence contradicting the Vice President's statements, but he refused to submit to further interviews. Moreover, on December 24, 1992, President Bush pardoned (1) former Defense Secretary Caspar Weinberger; (2) former CIA official Duane R. Clarridge; (3) former National Security Adviser Robert McFarlane; (4) former CIA official Alan D. Fiers, Jr; (5) former State Department official Elliott Abrams; and (6) former CIA official Clair George even though they had all either been indicted or pled guilty pursuant to Lawrence Walsh's Iran-Contra investigation.
- There were widespread claims of a secret "deal" between President Ford and President Nixon, culminating in the pardon received by President Nixon.
- It was widely believed that President Kennedy was involved in a series of illicit sexual relationships while in office, including an illicit sexual relationship with a woman simultaneously associated with a member involved in organized crime. Some have suggested that this relationship could have potentially compromised Department of Justice law enforcement activities.
- Before passage of the Lend-Lease Act, the sale of arms to other nations, including Britain, was prohibited by law. Nonetheless, it is generally agreed that President Roosevelt was secretly and unlawfully transferring arms—including over 20,000 airplanes, rifles, and ammunition—to England.[56]

D. VIEWS OF THE SCHOLARS

A review of the writings by prominent scholars concerning the issue of impeachment further confirms that for presidential wrong-

[56] *The Background and History of Impeachment: Hearing on H. Res. 581 Before the Subcomm. On the Constitution, 105th Cong., 2d Sess. (1998)* (Nov. 9, 1998) (forthcoming) ("Subcommittee Hearing") (Written testimony of Professor Cass Sunstein at 9–10) (citations omitted).

doing to rise to the level of an impeachable offense, it should stem from serious official misconduct against the government. At the outset, it is interesting to note that the question of whether private presidential misconduct could be impeachable was presaged twenty-five years ago by Professor Charles Black, in his seminal work, *Impeachment: A Handbook,* when he posited the following hypothetical:

> Suppose a President transported a woman across a state line or even (as the Mann Act reads) from one point to another within the District of Columbia, for what is quaintly called an "immoral purpose.". . . Or suppose the president actively assisted a young White House intern in concealing the latter's possession of three ounces of marijuana—thus himself becoming guilty of "obstruction of justice." Would it not be preposterous to think that any of this is what the Framers meant when they referred to "Treason, Bribery, and other high Crimes and Misdemeanors," or that any sensible constitutional plan would make a president removable on such grounds?[57]

In a similar vein, Professor Black addresses the question of whether obstruction of justice will always constitute an impeachable offense:

> Here the question has to be whether the obstruction of justice has to do with public affairs and the political system; I would not think impeachable a president's act in helping a child or a friend of his to conceal misdeeds, unless the action were so gross as to make the president unviable as a leader. In many cases his failure to protect some people at some times might result in his being held in contempt by the public. I would have to say the protection of their own people is in all leaders, up to a point, a forgivable sin, and perhaps, even an expectable one; this consideration may go to the issue of "substantiality."[58]

More recently, a large group of legal scholars and academics have offered their views regarding the impeachability of the misconduct alleged by the OIC. On November 6, four hundred thirty Constitutional law professors wrote: "Did President Clinton commit 'high Crimes and Misdemeanors' warranting impeachment under the Constitution? We . . . believe that the misconduct alleged in the report of the Independent Counsel . . . does not cross that threshold. . . . [I]t is clear that Members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment."[59]

One week earlier, four hundred historians issued a joint statement warning that because impeachment has traditionally been reserved for high crimes and misdemeanors in the exercise of execu-

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[57] Charles L. Black, *Impeachment: A Handbook* 35–36 (1974) ("Black").
[58] *Id.* at 45–46.
[59] Letter from more than 400 Constitutional law professors (Nov. 6, 1998) (submitted as part of the Subcommittee Hearing Record).

tive power, impeachment, based on the facts alleged in the OIC Referral, would set a dangerous precedent. "If carried forward, they will leave the Presidency permanently disfigured and diminished, at the mercy as never before of caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be crippled in meeting the inevitable challenges of the future."[60]

Finally, the weight of credible evidence offered at the November 9 hearing on the Background and History of Impeachment also supports the view that impeachment should be limited to abuse of public office, not private misconduct. This point was made by several of the witnesses. For example, Chicago Law Professor Cass Sunstein summarized the standard as follows: "[w]ith respect to the President, the principal goal of the impeachment clause is to allow impeachment for a narrow category of large-scale abuses of authority that come from the exercise of *distinctly presidential powers.* Outside of that category of cases, impeachment is generally foreign to our traditions and prohibited by the Constitution."[61] Professor Sunstein went on to review English Parliamentary precedent, the intent of the Framers and subsequent impeachment practice as all supporting this bedrock principle. In his view, the only exception where purely private conduct would be implicated was in the case of a heinous crime, such as murder or rape:

> [B]oth the original understanding and historical practice converge on a simple principle. The basic point of the impeachment provision is to allow the House of Representatives to impeach the President of the United States for *egregious misconduct that amounts to the abusive misuse of the authority of his office.* This principle does not exclude the possibility that a president would be impeachable for an extremely heinous "private" crime, such as murder or rape. But it suggests that outside such extraordinary (and unprecedented and most unlikely) cases, impeachment is unacceptable.[62]

Father Drinan, a former House Judiciary Committee Member who participated in the Watergate impeachment process, and now a Professor of Law at Georgetown University, reached the same conclusion, testifying that, "the impeachment of a president must relate to some reprehensible exercise of *official* authority. If a president commits treason he has abused his executive powers. Likewise a president who accepts bribes has abused his official powers. The same misuse of official powers must be present in any consideration of a president's engaging in 'other high crimes and misdemeanors.'"[63] Eminent historian Arthur Schlesinger made the same basic distinction between private and public misconduct:

> The question we confront today is whether it is a good idea to lower the bar to impeachment. The charges levied

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[60] *Statement Against the Impeachment Inquiry*, submitted to the Committee by more than 400 historians (Oct. 28, 1998) (submitted as part of the Subcommittee Hearing Record).

[61] *Subcommittee Hearing, supra* note 56 (Written Testimony of Professor Cass Sunstein at 2) (emphasis in original).

[62] *Id.* at 5,7, 8, 11, 12 (emphasis in original).

[63] *Id.* (Written Testimony of Robert F. Drinan, S.J. at 3–7).

> against the President by the Independent Counsel plainly do not rise to the level of treason and bribery. They do not apply to acts committed by a President in his role of public official. They arise from instances of private misbehavior. All the Independent Counsel's charges thus far derive entirely from a President's lies about his own sex life. His attempts to hide personal misbehavior are certainly disgraceful; but if they are to be deemed impeachable, then we reject the standards laid down by the Framers in the Constitution and trivialize the process of impeachment.[64]

Of course, the Majority will argue that these conclusions are not surprising since they were provided by witnesses called by Democratic Members. Aside from the fact that the conclusions of these witnesses are borne out by the great weight of the evidence as detailed above, this argument does not take account of the fact that the one witness jointly selected by the Majority and the Minority—William & Mary Law Professor Michael Gearhardt—concurred in the assessment offered by the Democratic witnesses. That is to say, Professor Gearhardt also testified that impeachment should principally be limited to abuse of public office:

> [There is a] widespread recognition that there is a paradigmatic case for impeachment consisting of the abuse of power. *In the paradigmatic case, there must be a nexus between the misconduct of an impeachable official and the latter's official duties.* It is this paradigm that Hamilton captured so dramatically in his suggestion that impeachable offenses derive from "the abuse or violation of some public trust" and are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. This paradigm is also implicit in the founders' many references to abuses of power as constituting political crimes or impeachable offenses.[65]

Even to the extent other Republican witnesses testified that private misconduct could be impeachable, some cautioned that discretion should be applied before applying this power in all situations. For example, Duke Law Professor William Van Alstyne stated that the allegations by Mr. Starr constituted "low crimes and misdemeanors" and that "[t]he further impeachment pursuit of Mr. Clinton may well not now be particularly worthwhile."[66]

The Constitution Subcommittee hearing also served to expose a number of the fallacies in the Republican arguments calling for a more expansive view of impeachment. For example, Professor McDonald sought to convince the Members that the term "Misdemeanor" in the phrase "high Crimes and Misdemeanors" was intended to incorporate "all indictable offenses which do not amount to a felony [including] perjury."[67] This contention can not only be rebutted by the absurd breadth of the resulting scope of the im-

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[64] *Id.* (Written Statement of Arthur Schlesinger, Jr. at 2).
[65] *Id.* (Written Testimony of Professor Michael Gearhardt at 13–14) (footnotes omitted) (emphasis added).
[66] *Id.* (Written Testimony of Professor William Van Alstyne at 6).
[67] *Id.* (Written Testimony of Professor Forrest McDonald at 7).

peachment clause, but by specific reference to English Parliamentary use as outlined in the Watergate Staff Report:

> 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"—included "high misdemeanors" as one term for positive offenses "against the king and government." . . . "High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process."[68]

Another claim made by Majority witness Charles Cooper and Professors Parker and McDonald was that perjury must be considered a public impeachable offense because it is tantamount to bribery of the court, an offense so public in nature as to obviously be impeachable. Professor Tribe responded by clearly differentiating between the two offenses: "The fallacy, I think, is that bribery always, by definition, involves the corrupt use of official government powers, the powers of whoever is getting bribed. The fact that the officer being impeached acted privately as the briber, and not publicly as the bribee, is irrelevant, because the person who bribes is a full partner in a grave corruption and abuse of government power."

Another argument trotted out by the Republicans was that if the Committee fails to impeach the President for alleged private misconduct, they will be endorsing his actions and sending a signal that the President is "above the law." This is incorrect as a factual matter, as all of the witnesses agreed that the President would be subject to civil sanction while he is in office and criminal prosecution once he left office.[69] Mr. Starr acknowledged that he agreed with this legal interpretation when he testified at the full committee's November 19, 1998 hearing.[70]

Perhaps the response to this argument was most well put by Professor Schlesinger, in responding to a claim by Rep. Inglis (R–SC) that the Professor's view of the scope of impeachment would encourage presidents to lie:

> Far from advocating lying, I think lying is reprehensible. If you would bother to listen to my remarks or read my testimony, I say President Clinton's attempts to hide personal behavior are certainly disgraceful, but if they are deemed impeachable, then we reject a standard laid down by the Framers of the Constitution. That seems to be the nub of the case.

Finally, the argument has been made by Charles Cooper that the President's alleged misconduct, no matter how private in nature, should be treated as an impeachable offense because it violates the president's oath of office to uphold the Constitution and take care

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[68] *Watergate Staff Report*, *supra* note 1, at 12 (footnotes omitted).
[69] *See also* Arlen Specter, *Instead of Impeachment*, N. Y. Times, Nov. 11, 1998, at A27.
[70] *Minority Panel on Constitutional Issues Concerning Impeachment Before the House Judiciary Committee, 105th Cong. 2d Sess.* (October 15, 1998).

that the laws are faithfully executed. As Professor Tribe observed, this argument proves far too much:

> It would follow, since the theory would be that any law violation by a sitting President is a violation of his oath and of the take-care clause, it would follow that you can impeach the President of the United States more easily than any other civil officer of the government. And making the President uniquely vulnerable to removal, especially on a fuzzy standard like virtue, seems to me to be profoundly unwise.

It is also important to recognize that the President's oath of office (I do solemnly swear . . . that *I will faithfully execute the Office of President* of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States[71]) does not address his responsibilities as a private litigant. The commitment memorialized by the oath of office is quite different from the generalized duty of each citizen to obey the law; rather it is an oath to discharge the constitutional responsibilities of the office.[72]

III. Past Judicial Impeachments Do Not Serve as Precedent for Impeaching a President Based on Private Misconduct

The Majority Staff Report attempts to cite selectively the three most recent judicial impeachments as a rationale for permitting the impeachment of a president for purely private misconduct. There are two major problems with the Majority's approach. First, as a general matter, it ignores the fact that the bases for and standards applicable to presidential impeachments are not the same as judicial impeachment. Judicial impeachment has a different pedigree and takes account of differing roles and responsibilities. Second, the Majority's approach mischaracterizes the factual history and context of judicial impeachments as being principally premised on perjury charges. In point of fact, there is nothing in the 1974 Watergate Staff Report which refers to perjury as constituting a stand-alone basis for impeachment, and a careful review of the more recent judicial impeachment cases reveals that they implicated more pervasive public misconduct than perjury.

A. GENERAL DISTINCTIONS BETWEEN JUDICIAL AND PRESIDENTIAL IMPEACHMENTS

A review of the historical record and consideration of the differing responsibilities and roles of presidents and judges under the Constitution make it clear that the positions are and should be subject to differing impeachment considerations. As Professor Sunstein observes in his testimony, "historical practice suggests a

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[71] U.S. Const., art. II, sec. 1 (emphasis added).

[72] In 1866, the Supreme Court described the legal significance of the presidential oath of office as follows:

> [The President] is to "take care that the laws be faithfully executed." He is to execute the laws by the means and in the manner which the laws themselves prescribe. The oath of office cannot be considered as a grant of power. Its effect, is merely to superadd a religious sanction to *what would otherwise be his official duty*, and to bind his conscience against any attempt to *usurp power or overthrow the Constitution*. *Ex Parte Milligan*, 71 U.S. 2, 50–51 (1866) (emphasis added).

broader power to impeach judges than Presidents, and indeed it suggests a special congressional reluctance to proceed against the President."[73]

This is true for several reasons. First, almost all of the debate during the Constitutional Convention concerning impeachment focused on the power to remove the President. Judges and other civil officers were included as possible subjects of impeachment only near the end of the debate. According to noted impeachment scholar Raoul Berger:

> One thing is clear: in the impeachment debate the Convention was almost exclusively concerned with the President. The extent to which the President occupied center stage can be gathered from the fact that the addition to the impeachment clause of the "Vice president and all civil officers" only took place on September 8, shortly before the Convention adjourned.[74]

The absence of extended discussion makes clear that the historical debates on how to define impeachable offenses did not have judges in mind.

Second, the duties of the judicial office entail differing responsibilities than the president, which must be taken into account in developing impeachment standards. Although we would not go as far as to assert that judges are necessarily subject to a higher standard of impeachment by virtue of Article III's "good behavior" requirement[75]—as some have done[76]—it seems clear that the differing responsibilities attendant on the federal bench entail a different approach to impeachment. Likewise, constitutional scholars have long recognized that the nature of the responsibilities of the official facing impeachment play a crucial role in determining whether particular conduct may rise to the level of an impeachable offense. In his textbook on impeachment, Professor Gearhardt writes:

> [t]he different duties or circumstances of impeachable officials might justify different bases for their respective impeachments. In the case of federal judges, the good behavior clause is meant to guarantee not that they may be impeached on the basis of a looser standard than the president or other impeachable officials, but rather that they may be impeached on a basis that takes into account their special duties or functions.[77]

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[73] *Id.* at 12.

[74] Berger, *supra* note 8 at 100.

[75] Article III, Sec. 1 of the Constitution provides that judges "Shall hold their Offices during good Behaviour. . . ."

[76] For example, in proposing articles of impeachment against Supreme Court Justice William Douglas, then Minority Leader Gerald Ford maintained that, for members of the judicial branch, "an additional and much stricter requirement [than high crimes and misdemeanors] is imposed . . ., namely, "good behavior." *See* 3 Deschler's Precedents of the House of Representatives, H. Doc. 94–661, ch. 14, §2.11, at 452–55 (1974) (citing 116 Cong. Rec. 11912–14, 91st Cong. 2d Sess. (Sept. 17, 1970)). *See also Subcommittee Hearing, supra* note 56 (Written Testimony of Griffin B. Bell at 15–16) ("[the view] that federal judges are subject to a loose impeachment standard because they are removable for misbehavior while all other impeachable officials are removable—by impeachment—only for "Treason, Bribery, or other high Crimes and Misdemeanors" . . . appears to me to be the only one that makes sense.").

[77] Michael Gerhardt, *The Federal Impeachment Process*, 106–107 (1996).

The important role played by a federal district court judge, therefore, in administering oaths, sitting in judgment, and wielding the power to deprive citizens of their liberty or even their life make it especially appropriate that offenses against the judicial system or related offenses not directly tied to official acts may merit impeachment.

These same distinctions were at issue during the Watergate era. When the prospect of impeachment proceedings against President Nixon arose, one of the crucial questions was whether a President could be impeached for conduct that did not constitute a violation of criminal laws. Although judges had previously been impeached for non-criminal conduct, these precedents were of little relevance to the persons wrestling with the appropriate standards for presidential impeachments. According to John Labovitz, one of the principal drafters of the Watergate Staff Report:

> For both practical and legal reasons, however, these cases [involving the impeachment of judges] did not necessarily affect the grounds for impeachment of a president. The practical reason was that it seemed inappropriate to determine the fate of an elected chief executive on the basis of law developed in proceedings aimed at petty misconduct by obscure judges. The legal reason was that the Constitution provides that judges shall serve during good behavior. This clause could be interpreted as a separate standard for the impeachment of judges or it could be interpreted as an aid in applying the term "high crimes and misdemeanors" to judges. Whichever interpretation was adopted, it was clear that the clause made a difference in judicial impeachments, confounding the application of these cases to presidential impeachments.[78]

Third, the removal of an inferior federal judge does not involve the titanic confrontation between coordinate branches of government that arises in a presidential impeachment. The anti-democratic consequences of removing a popularly-elected president are not raised by removing an appointed federal judge. As Professor Tribe explained:

> [t]here is the brute fact that when we put the President on trial we are placing one federal branch in a position to sit in judgment on another, empowering the Congress essentially to decapitate the Executive Branch in a single stroke—and without the safeguards of judicial review. Neither of the other two branches of government is embodied in a single individual, so the application of the Impeachment Clause to the President of the United States involves the uniquely solemn act of having one branch essentially overthrow another. Moreover, in doing so, the legislative branch essentially cancels the results of the most solemn

[78] John R. Labovitz, *Presidential Impeachment* 92-93 (1978). *See also* Minority Views to Watergate Committee Report, *supra* note 29, at 370. (concluding that judicial impeachments "resting upon 'general misbehavior,' in whatever degree, cannot be an appropriate guide for impeachment of an elected officer serving for a fixed term. The impeachments of federal judges are also different from the case of a President. . . .")

> collective act of which we as a constitutional democracy are capable: the national election of a president.[79]

As is accurately detailed in the Watergate Staff Report, one of the concerns voiced by the Framers in defining impeachable offenses was that if the definition was too expansive, then the balance of powers between the Executive and the Legislative branches of government would be tipped in favor of Congress, with disastrous results for the strong, centralized leadership that they envisioned.[80] Again, according to Professor Berger:

> [T]he framers did not adopt "misconduct in office" or "maladministration." "Maladministration" was in fact rejected on Madison's suggestion, and "high crimes and misdemeanors" was adopted in its place. True, the rejection was grounded on Madison's protest that "maladministration" would place tenure at "the pleasure of the Senate," as well it might if all petty misconduct in office were impeachable. But this interchange, it will be recalled, had reference to removal of the President, *which poses quite different problems from removal of judges.* [81]

These "balance of power" concerns, of course, are not in play to nearly the same degree when Congress is confronted with the question of judicial impeachments. It is not surprising, therefore, that such impeachments have been far more common in our history and have been triggered by misconduct that in some instances could not have justified presidential impeachments. There are some 900 federal judges, but only one president. Federal judges are appointed for life and cannot be removed by any alternative method apart from impeachment. Presidents serve at most for two fixed terms, and can be removed after one term by the will of the people.[82] No such accountability exists in cases involving judicial misconduct. Thus, for Congress to reverse the choice of the electorate and remove the nation's leader raises concerns of a wholly different magnitude than are at issue in judicial proceedings.

B. SPECIFIC DISTINCTIONS BETWEEN THE CONDUCT THAT FORMED THE BASIS FOR THE IMPEACHMENTS OF JUDGES CLAIBORNE, NIXON AND HASTINGS AND THE PRESIDENT'S ALLEGED MISCONDUCT

Despite the best efforts of the Majority Staff Report to recast the entire nature of impeachment as rising or falling on perjury in the three judicial impeachment cases that have occurred since 1974, a close review of the facts of these cases indicates that official misconduct remains the touchstone of judicial impeachment, and the recent judicial cases do not support the notion that a president may be impeached for private misconduct. Judge Claiborne was impeached, while he was in prison and collecting his judicial salary, for income tax evasion (which was specifically rejected as a ground for impeachment of President Nixon), and had previously been

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[79] *Subcommittee Hearing, supra* note 56 (Written Testimony of Professor Laurence H. Tribe at 14).

[80] *See, e.g., Watergate Staff Report, supra* note 1, at 26.

[81] Berger, *supra* note 8, at 206 (emphasis added).

[82] As Gouvernor Morris assured his fellow delegates at the Constitutional Convention in Philadelphia, "an election every four years will prevent maladministration." Farrand, *supra* note 13, at 550.

charged with illegally soliciting a bribe. Judge Alcee Hastings and Walter Nixon committed perjury in connection with criminal proceedings concerning their public and official duties, not civil depositions into their private conduct. The statements by both Hastings and Nixon were directly material to the proceedings and to the underlying criminal charges against them.

1. Judge Harry Claiborne

After being convicted and sentenced to prison for filing false federal income tax returns, Judge Claiborne was impeached and removed from office in 1986. Judge Claiborne had signed written declarations that the returns were made under penalty of perjury. In addition to two articles charging him with filing false tax returns, Judge Claiborne was found guilty on an article of impeachment alleging that his willful tax evasion had "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts."[83] At the time of his impeachment, Judge Claiborne was serving time in federal prison while continuing to collect his annual judicial salary of $78,700.

Significantly, the Majority Staff Report completely fails to note that Judge Claiborne had also been prosecuted for bribery. Namely, he had allegedly received $30,000 from a Las Vegas brothel owner in return for being influenced in the performance of his official acts—*i.e.,* decisions regarding motions in a case pending before him.[84] Although a trial on this charge resulted in a hung jury, it is difficult to deny that evidence of serious public corruption informed the government's ultimate ability to prosecute and convict, and the Judiciary's and Congress' decision to seek and achieve Judge Claiborne's impeachment and removal from office.

Moreover, the debate on the House floor in the Claiborne case made it clear that the conduct justifying impeachment was closely linked to the special duties and responsibilities of a federal judge. The former chairman of the Judiciary Committee, Peter Rodino (D–NJ), summarized these sentiments in his statement on the House floor:

> As Members of this body have recognized in prior judicial impeachments, the judges of our Federal courts of law occupy a unique position of trust and responsibility in our system of government: They are the only members of any branch that hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with the special prerogative of judicial independence comes the most exacting standard of public and private conduct. . . . The high standard of behavior for judges is inscribed in article III of the Constitution, which provides that judges "shall hold their Offices during good behavior . . ."[85]

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[83] *Majority Staff Report, supra* at 22 (citing 132 *Cong. Rec.* S15,760–61 (Oct. 9, 1986)).

[84] *See United States* v. *Claiborne,* 727 F.2d 842, 843.

[85] 132 *Cong. Rec.* H4712 (July 22, 1986). The Committee Report also observed that "Good behavior, as that phrase is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. Those entrusted with the duties of judicial office have the high re-

Another recurring argument during the impeachment debate on the House floor was the impossibility of removing a federal judge, who serves a life term, without resort to the impeachment process. Several congressmen expressed special outrage that Judge Claiborne, while serving a prison term, was continuing to receive his full salary and would be entitled to return to the federal bench upon completing his prison term.[86]

Under these circumstances, it is clear that Judge Claiborne would have been unable to discharge credibly his judicial responsibilities upon his release from prison. It does not follow, however, that any income tax evasion by a future president would inevitably merit the drastic remedy of impeachment, which President Nixon's case powerfully confirms. As Professor Tribe observed at the Subcommittee hearing: "The theme of [Judge Claiborne's] impeachment, its whole theory, was not that private improprieties can lead to impeachment whenever they cast a general cloud over the individual's fitness and virtue; it was that private improprieties can justify impeachment when it renders the individual fundamentally unable to carry out his or her official duties. It is not too hard to see, without opening a Pandora's box, that a judge convicted of perjury could not credibly preside over trials for the rest of his life, swearing in witnesses, imprisoning or sentencing to death some that he finds guilty."

2. Judge Walter Nixon

The 1989 impeachment proceedings involving Walter Nixon of the Southern District of Mississippi are distinguishable on similar grounds. Like Judge Claiborne, he had already been convicted and sentenced to prison for perjury before his impeachment.[87] The underlying facts concerned Nixon's intervention with a local prosecutor to obtain favorable treatment for a drug case involving the son of one of Nixon's partners in lucrative oil and mineral investments. After investigation by the FBI, Judge Nixon appeared before a grand jury and denied any discussion of the drug charges with the prosecutor. Testimony by the prosecutor, as well as the business partner, was to the contrary. On these facts, Nixon was convicted on two counts of perjury, which formed the basis for his impeachment.

In sharp contrast to the false statements being alleged by the OIC, Judge Nixon's perjury was undoubtedly material to a criminal proceeding directed against him and his false statements were offered in direct rebuttal to charges that he had misused the powers of his office. The debate on Judge Nixon's articles of impeachment emphasized that his criminal misconduct was fundamentally inconsistent with his *judicial* responsibilities. Rep. Sensenbrenner (R–WI), in calling for Judge Nixon's impeachment, noted that "A Federal judge must decide the credibility of witnesses, and find the

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sponsibility of ensuring the fair and impartial administration of justice, which in large part rest on the public confidence and respect for the judicial process." H. Rep. No. 99–688, at 23 (1986).

[86] *See generally, id.* (statements of Rep. Fish, Rep. Moorhead, Rep. Glickman, Rep. Mazzoli, Rep. DeWine, Rep. Rudd, Rep. Vucanovich).

[87] *See Majority Staff Report, supra* at 24 (discussing the articles and votes) (citations omitted).

truth in cases that come before him."[88] Senator Grassley (R–IA) made a similar point during the impeachment debate:

> To be entrusted with a lifetime office that has the potential power of depriving individuals of their liberty and property, is, indeed, a very great responsibility. Consequently, a Federal judge must subscribe to the highest ethical and moral standards. At a minimum, in their words and deeds, judges must be beyond reproach or suspicion in order for there to be integrity and impartiality in the administration of justice and independence in the operation of our judicial system.[89]

3. Judge Alcee Hastings

In 1981, Federal District Judge Alcee Hastings of the Southern District of Florida was tried and acquitted on charges of conspiracy to solicit and accept a bribe.[90] Several years later, on recommendation of the Judicial Conference of the United States, the House of Representatives adopted seventeen articles of impeachment charging Hastings with conspiracy, perjury, and fabrication of evidence. The Senate convened an impeachment trial committee to take evidence and then, after hearings in 1989, voted to convict on eight articles of impeachment.

The charges involved a conspiracy between Judge Hastings and a District of Columbia lawyer, William Borders, to obtain $150,000 from defendants convicted of racketeering and related offenses in exchange for sentences that did not require incarceration. The government's case at trial indicated that Borders had approached the defendants through an intermediary and had offered to be "helpful" with his friend Judge Hastings, who was presiding over the case. The intermediary informed the FBI, which subsequently obtained evidence through an undercover operation.

At his trial, Hastings claimed that his frequent conversations with Borders during the period in question related to other matters. The Committee found that claim to lack credibility under the circumstances. Because Hastings' perjury was found to have assisted his acquittal, it was the basis for his subsequent impeachment. A post-trial memorandum by the House of Representatives Judiciary Committee investigative staff concerning Judge Hastings emphasized that "[i]n each instance [of false testimony, Judge Hastings] was addressing a critical part of the case. In each instance, he needed to explain away incriminating evidence."[91]

As with Judge Nixon, the context of the Judge Hastings' alleged perjury was crucial. It concerned a defense to criminal charges alleging that he had sold his office for money. The central underlying allegation of bribery is, of course, one of the few impeachable offenses specifically designated in the language of the Constitution.

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[88] 135 *Cong. Rec.* S14493, S14499 (Nov. 1, 1989).

[89] 135 *Cong. Rec.* S14633, S14638 (Nov. 3, 1989) (statement of Sen. Charles E. Grassley).

[90] *See Majority Staff Report, supra* at 25 (discussing the articles and votes) (citations omitted). A challenge to the Senate procedure and a review of the impeachment history appear in *Hastings* v. *United States*, 802 F. Supp. 490 (D.D.C. 1992).

[91] United States House of Representatives, In re Impeachment of Judge Alcee Hastings, Post Trial Memorandum of the House Judiciary Investigative Staff, Sept. 25, 1989, at 95–96 (on file with Committee Staff). *See also* Ed Henry, *Top Dem Wants New Look at Hastings Impeachment*, Roll Call, May 19, 1997 (Discussing claim by a whistleblower that FBI agent may have lied in order to seek Hastings' conviction).

There was little doubt, therefore, that false statements designed to conceal such an offense qualified as grounds for impeachment when commited by a federal district court judge.

IV. Conclusion

Is the country now prepared to pursue the first ever impeachment of a president based on private misconduct unrelated to the powers of public office?

The very text of the Constitution provides most of the answer—simply put, it is difficult to argue credibly that the offenses alleged by the OIC can in any way be likened to the very public and very corrupt offenses of Treason and Bribery. The history and background of impeachment further confirm that if we are to remain true to the intent of the Framers, the 1974 Watergate Report, and our specific experiences with impeachment, Congress will not choose to take the Nation down the treacherous course of impeachment in a case where only non-official misconduct is alleged.

Efforts by the Majority to construe the OIC Referral as constituting an ever expanding series of statutory legal violations so that the President's conduct appears to pose a threat to our constitutional form of government are neither credible nor compelling. Nor do the facts alleged by the OIC approximate in scope or magnitude the very public wrongdoing alleged during Watergate.

Resort to judicial impeachment precedents does not take the OIC Referral any further as a constitutional matter. No amount of sophistry can detract from the historical fact, as the Watergate Staff Report concluded, that judicial impeachments are premised on misconduct which exceeds constitutional constraints, are grossly incompatible with office or constitute abuse of official power. And nothing in the three post-Watergate judicial impeachments contradicts these fundamental touchstones of impeachment.

Impeachment has been variously referred to as an "atom bomb" and a "caged lion." Now is not the time to unleash that lion's rage on an already weary nation, to alter fundamentally the balance of power between the executive and legislative branches, or to turn more than 200 years of impeachment precedent on its head.

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REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

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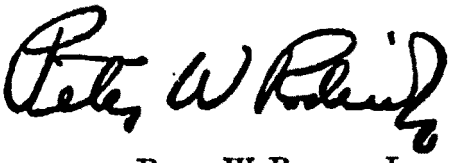
Foreword

I am pleased to make available a staff report regarding the constitutional grounds for presidential impeachment prepared for the use of the Committee on the Judiciary by the legal staff of its impeachment inquiry.

It is understood that the views and conclusions contained in the report are staff views and do not necessarily reflect those of the committee or any of its members.



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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 constitutional 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 pur-

[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).

poses. Chief among them was 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 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]

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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 skilful 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 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.

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 non-statutory 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, 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]

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[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*).
[16] Simpson, *supra* n. 6, at 144.
[17] Simpson, *supra* n. 6, at 144.

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 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,

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[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 a 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.

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 explicity 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.[25a]

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

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[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.

[25a] A number of suggestions for a Council to the President were made during the Convention. Only one was voted on, and it was rejected three states to eight. This proposal, by George Mason, called for a privy council of six members—two each from the eastern, middle, and southern states—selected by the Senate for staggered six-year terms, with two leaving office every two years. 2 Farrand 537, 542.

Gouverneur Morris and Charles Pinckney, both of whom spoke in opposition to other proposals for a council, suggested a privy council composed of the Chief Justice and the heads of executive departments. Their proposal, however, expressly provided that the President "shall in all cases exercise his own judgment, and either conform to [the] opinions [of the council] or not as he may think proper." Each officer who was a member of the council would "be responsible for his opinion on the affairs relating to his particular Department" and liable to impeachment and removal from office "for neglect of duty malversation, or corruption." 2 Farrand 342–44.

Morris and Pinckney's proposal was referred to the Committee on Detail, which reported a provision for an expanded privy council including the President of the Senate and the Speaker of the House. The council's duty was to advise the President "in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." 2 Farrand 307. This provision was never brought to a vote or debated in the Convention.

Opponents of a council argued that it would lessen executive responsibility. A council, said James Wilson, "oftener serves to cover, than prevent malpractices." 1 Farrand 97. And the Committee of Eleven, consisting of one delegate from each state, to which proposals for a council to the President as well as other questions of policy were referred, decided against a council, on the ground that the President, "by persuading his Council—to concur in his wrong measures, would acquire their protection for them." 2 Farrand 542.

Some delegates thought the responsibility of the President to be "chimerical": Gunning Beford because "he could not be punished for mistakes." 2 Farrand 43; Elbridge Gerry, with respect to nomination for offices, because the President could "always plead ignorance." 2 Farrand 539. Benjamin Franklin favored a Council because it "would not only be a check on a bad President but a relief to a good one." He asserted that the delegates had "too much . . . fear [of] cabals in appointments by a number," and "too much confidence in those of single persons." Experience, he said, showed that "caprice, the intrigues of favorites & mistresses, &c." were "the means most prevalent in monarchies." 2 Farrand 542.

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 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.

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[26] *The Federalist* No. 70, at 459–61 (Modern Library ed.) (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 ed.) (hereinafter cited as Elliot.)

[30] Elliot 104.

[31] 2 Elliot 480 (emphasis in original).

Impeachment had been included 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]

James Madison of Virginia argued in favor of impeachment stating that some provision was "indispensible" 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

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[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.

[40] 2 Farrand 65–66.

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] 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.[44]

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. 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

[41] 2 Farrand 65.
[42] 2 Farrand 67.
[43] 2 Farrand 66.
[44] See Appendix B for a chronological account of the Convention's deliberations on impeachment and related issues.
[45] 2 Farrand 523.
[46] 2 Farrand 550.
[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).

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 misdeameanor." 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 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 farmers meant when they adopted them.[56] Chief Justice Marshall wrote of another such phrase:

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[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.

[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).

> 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] 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

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[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.
[62] 3 Elliot 486.

> 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 wilful 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 had 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 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

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[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.

[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 Presidents 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.

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]

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]

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[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 Constitution 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.

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]

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

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[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.

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 hold their Offices during good Behaviour," 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 express 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 non-judicial officers.

Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder.

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[83] 1 *J. Story Commentaries on the Constitution of the United States*, § 764, at 550 (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. See Appendix B for a brief synopsis of each impeachment.

[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.

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 removed 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

[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."

[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

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 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

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.

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. 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.

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[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.

[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.

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 individual 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.

Executive branch was established to execute the laws of the land.
Congress had promulgated laws to protect us and our markets from loan/bank fraud and deceptive practices.
The American Dream of Homeownership has become a bastion of fraud perpetrated against the citizens and treasury of America.

While these unconscionable crimes were being committed it was/is the policy of this administration not to prosecute fraud for housing. This fact is widely known throughout the FBI and other enforcement agencies. The costs of these crimes have already exceeded $2 trillion. This figure does not include the social impact/cost of millions of broken families, crimes, drug and alcohol addiction directly attributed to financial stress. This financial stress was created by citizens being deceived and enslaved with loans that should have never been originated. Although these millions of borrowers will be unable to seek redress given the "unclean hands" doctrine These laws were promulgated to maintain the mission statement of the banking agencies which are to 'maintain stability, safety, soundness and public confidence in our banking system.

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 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 Crimes 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

[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."

[3] See part II.B, *supra*, pp. 7–17.

[4] See part II.B.2, *supra*, pp. 11–13.

Which would be more devastating to our country?
A nuclear attact.
Bankruptcy and/or substantial devaluation of our currency. (especially given he global perception of our President and his adminsitration)

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 phrase "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 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

[5] See part II.A. *supra*, pp. 5–7.
[6] See part II.B.2. *supra*, pp. 12–13.
[7] See *Id.*, p. 11.
[8] See part II.B.3. *supra*, pp. 13–15.
[9] 4 Elliot 114.
[10] 3 Elliot 240.
[11] See part II.B.1, *supra* p. 9; part II.B.3. *supra*, pp. 13–15, 16.
[12] *Federalist* No. 70, at 461.
[13] *Id.* at 459.

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 its 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 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.

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[14] See Part II.C. *supra*, pp. 13–17.

[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 non-criminal sanction, such as removal of a corporate officer for misconduct breaching his duties to the corporation.

[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 8–18, *supra*, show the understanding that impeachable conduct may, but need not, involve criminal conduct.

If criminality is to be the basic element of impeachable 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 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 Crimes and Misdemeanors."

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[17] It appears from the annotations to the Revised Statutes of 1873 that bribery was not made a federal crime until 1790 for judges, 1853 for Members of Congress, and 1863 for other civil officers. *U.S. Rev. Stat.*, Title LXX, Ch. 6, §§ 5499–502. This consideration strongly suggests that conduct not amounting to statutory bribery may nonetheless constitute the constitutional "high Crime and Misdemeanor" of bribery.

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 on 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, dismissible 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 consitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. 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 derogation 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.

Appendixes

APPENDIX A

Proceedings of the Constitutional Convention, 1787

Selection, Term and Impeachment of the Executive

The Convention first considered the question of removal of the executive on June 2, in Committee of the Whole in debate of the Virginia Plan for the Constitution, offered by Edmund Randolph of Virginia on May 29. Randolph's *seventh* resolution provided: "that a National Executive be instituted; to be chosen by the National Legislature for the term of [ ] years . . . and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation." [1] Randolph's *ninth* resolution provided for a national judiciary, whose inferior tribunals in the first instance and the supreme tribunal in the last resort would hear and determine (among other things) "impeachments of any National officers." (I:22)

On June 1, the Committee of the Whole debated, but postponed the question whether the executive should be a single person. It then voted, five states to four, that the term of the executive should be seven years. (I:64) In the course of the debate on this question, Gunning Bedford of Delaware, who "was strongly opposed to so long a term as seven years" and favored a triennial election with ineligibility after nine years, commented that "an impeachment would reach misfeasance only, not incapacity," and therefore would be no cure if it were found that the first magistrate "did not possess the qualifications ascribed to him, or should lose them after his appointment." (I:69)

On June 2, the Committee of the Whole agreed, eight states to two, that the executive should be elected by the national legislature. (I:77) Thereafter, John Dickenson of Delaware moved that the executive be made removable by the national legislature on the request of a majority of the legislatures of the states. It was necessary, he argued, "to place the power of removing somewhere," but he did not like the plan of impeaching the great officers of the government and wished to preserve the role of the states. Roger Sherman of Connecticut suggested that the national legislature should be empowered to remove the executive at pleasure (I:85), to which George Mason of Virginia replied that "[s]ome mode of displacing an unfit magistrate" was indispensable both because of "the fallibility of those who choose" and "the corruptibility of the man chosen." But Mason strongly opposed making the executive "the mere creature of the Legislature" as violation of the fundamental principle of good government. James Madison of Virginia and James Wilson of Pennsylvania argued against Dickenson's motion because it would put small states on an

[1] 1 *The Records of the Federal Convention* 21 (M. Farrand ed. 1911). All references hereafter in this appendix are given parenthetically in the text and refer to the volume and page of Farrand (e.g., I: 21).

equal basis with large ones and "enable a minority of the people to prevent ye removal of an officer who had rendered himself justly criminal in the eyes of a majority; open the door for intrigues against him in states where his administration, though just, was unpopular; and tempt him to pay court to particular states whose partisans he feared or wished to engage in his behalf. (I:86) Dickenson's motion was rejected, with only Delaware voting for it. (I:87).

The Committee of the Whole then voted, seven states to two, that the executive should be made ineligible after seven years (I:88).

On motion of Hugh Williamson of North Carolina, the Committee agreed, apparently without debate, to add the clause "and to be removable on impeachment & conviction of mal-practice or neglect of duty." (I:88)

SINGLE EXECUTIVE

The Committee then returned to the question whether there should be a single executive. Edmund Randolph argued for a plural executive, primarily because "the permanent temper of the people was adverse to the very semblance of Monarchy." (I:88) (He had said on June 1, when the question was first discussed, that he regarded a unity in the executive as "the foetus of monarchy." (I:66)). On June 4, the Committee resumed debate of the issue, with James Wilson making the major argument in favor of a single executive. The motion for a single executive was agreed to, seven states to three. (I:97).

George Mason of Virginia was absent when the vote was taken; he returned during debate on giving the executive veto power over legislative acts. In arguing against the executive's appointment and veto power, he commented that the Convention was constituting "a more dangerous monarchy" than the British government, "an elective one." (I:101). He never could agree, he said "to give up all the rights of the people to a single Magistrate. If more than one had been fixed on, greater powers might have been entrusted to the Executive"; and he hoped that the attempt to give such powers would have weight later as an argument for a plural executive. (I:102).

On June 13, the Committee of the Whole reported its actions on Randolph's propositions to the Convention. (I:228–32) On June 15, William Patterson of New Jersey proposed his plan as an alternative. Patterson's resolution called for a federal executive elected by Congress, consisting of an unstated number of persons, to serve for an undesignated term and to be ineligible for a second term, removable by Congress on application by a majority of the executives of the states. The major purpose of the Patterson plan was to preserve the equality of state representation provided in the Articles of Confederation, and it was on this issue that it was rejected. (II:242–45) The Randolph resolutions called for representation on the basis of population in both houses of the legislature. (I:229–30) The Patterson resolution was debated in the Committee of the Whole on June 16, 18, and 19. The Committee agreed seven states to three, to re-report Randolph's resolutions as amended, thereby adhering to them in preference to Patterson's. (I:322)

SELECTION OF THE EXECUTIVE

On July 17, the Convention began debate on Randolph's ninth resolution as amended and reported by the Committee of the Whole. The consideration by the Convention of the resolution began with unanimous agreement that the executive should consist of a single person. (II: 29) The Convention then turned to the mode of election. It voted against election by the people instead of the legislature, proposed by Gouverneur Morris of Pennsylvania, one state to nine. (II: 32) Gouverneur Morris had argued that if the executive were appointed and impeachable by the legislature, he "will be the mere creature" of the legislature (II: 29), a view which James Wilson reiterated, adding that "it was notorious" that the power of appointment to great offices "was most corruptly managed of any that had been committed to legislative bodies." (II: 32)

Luther Martin of Maryland then proposed that the executive be chosen by electors appointed by state legislators, which was rejected eight states to two, and election by the legislature was passed unanimously. (II: 32)

TERM OF THE EXECUTIVE

The Convention voted six states to four to strike the clause making the President ineligible for reelection. In support of reeligibility, Gouverneur Morris argued that ineligibility "tended to destroy the great motive to good behaviour, the hope of being rewarded by a re-appointment. It was saying to him, make hay while the sun shines." (II: 33)

The question of the President's term was then considered. A motion to strike the seven year term and insert "during good behavior" failed by a vote of four states to six. (II: 36) In his Journal of the Proceedings, James Madison suggests that the "probable object of this motion was merely to enforce the argument against re-eligibility of the Executive Magistrate, by holding out a tenure during good behavior as the alternative for keeping him independent of the Legislature." (II: 33) After this vote, and a vote not to strike seven years, it was unanimously agreed to reconsider the question of the executive's re-eligibility. (II: 36)

JURISDICTION OF JUDICIARY TO TRY IMPEACHMENTS

On July 18, the Convention considered the resolution dealing with the Judiciary. The mode of appointing judges was debated, George Mason suggesting that this question "may depend in some degree on the mode of trying impeachments, of the Executive." If the judges were to try the executive, Mason contended, they surely ought not be appointed by him. Mason opposed executive appointment; Gouverneur Morris, who favored it, agreed that it would be improper for the judges to try an impeachment of the executive, but suggested that this was not an argument against their appointment by the executive. (II: 41-42) Ultimately, after the Convention divided evenly on a

proposal for appointment by the Executive with advice and consent of the second branch of the legislature, the question was postponed. (II: 44) The Convention did, however, unanimously agree to strike the language giving the judiciary jurisdiction of "impeachments of national officers." (II: 46)

REELECTION OF THE EXECUTIVE

On July 19, the Convention again considered the eligibility of the executive for reelection. (II: 51) The debate on this issue reintroduced the question of the mode of election of the executive, and it was unanimously agreed to reconsider generally the constitution of the executive. The debate suggests the extent of the delegates' concern about the independence of the executive from the legislature. Gouverneur Morris, who favored reeligibility, said:

> One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny.... (II: 52)

The ineligibility of the executive for reelection, he argued, "will destroy the great inciteiment to merit public esteem by taking away the hope of being rewarded with a reappointment. . . . It will tempt him to make the most of the Short space of time allotted him, to accumulate wealth and provide for his friends. . . . It will produce violations of the very Constitution it is meant to secure," as in moments of pressing danger an executive will be kept on despite the forms of the Constitution. And Morris described the impeachability of the executive as "a dangerous part of the plan. It will hold him in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest. He will be the tool of a faction, of some leading demagogue in the Legislature." (II: 53)

Morris proposed a popularly elected executive, serving for a two year term, eligible for reelection, and not subject to impeachment. He did "not regard . . . as formidable" the danger of his unimpeachability:

> There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence. (II:53-54)

The remarks of other delegates also focused on the relationship between appointment by the legislature and reeligibility, and James Wilson remarked that "the unanimous sense" seemed to be that the executive should not be appointed by the legislature unless he was ineligible for a second time. As Elbridge Gerry of Massachusetts remarked, "[Making the executive eligible for reappointment] would make him absolutely dependent." (II:57) Wilson argued for popular election, and Gerry for appointment by electors chosen by the state executives.

SELECTION, REELECTION AND TERM OF THE EXECUTIVE

Upon reconsidering the mode of appointment, the Convention voted six States to three for appointment by electors and eight States to two that the electors should be chosen by State legislatures. (The ratio of electors among the States was postponed.) It then voted eight States to two against the executive's ineligibility for a second term. (II:58) A seven-year term was rejected, three States to five; and a six-year term adopted, nine States to one (II:58–59).

IMPEACHMENT OF THE EXECUTIVE

On July 20, the Convention voted on the number of electors for the first election and on the apportionment of electors thereafter. (II:63) It then turned to the provision for removal of the executive on impeachment and conviction for "mal-practice or neglect of duty." After debate, it was agreed to retain the impeachment provision, eight states to two. (II:69) This was the only time during the Convention that the purpose of impeachment was specifically addressed.

Charles Pinckney of South Carolina and Gouverneur Morris moved to strike the impeachment clause, Pinckney observing that the executive "[ought not to] be impeachable whilst in office." (A number of State constitutions then provided for impeachment of the executive only after he had left office.) James Wilson and William Davie of North Carolina argued that the executive should be impeachable while in office, Davie commenting:

> If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected.

Davie called his impeachability while in office "an essential security for the good behaviour of the Executive." (II:64)

Gouverneur Morris, reiterating his previous argument, contended that the executive "can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence." He also questioned whether impeachment would result in suspension of the executive. If it did not, "the mischief will go on"; if it did, "the impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach." (II:64–65)

As the debate proceeded, however, Gouverneur Morris changed his mind. During the debate, he admitted "corruption & some few other offenses to be such as ought to be impeachable," but he thought they should be enumerated and defined. (II:65) By the end of the discussion, he was, he said, "now sensible of the necessity of impeachments, if the Executive was to continue for any time in office." He cited the possibility that the executive might "be bribed by a greater interest to betray his trust." (II:68) While one would think the King of England well secured against bribery, since "[h]e has as it were a fee simple in the whole Kingdom," yet, said Morris, "Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery." (II:68–69) Other causes of impeachment were "[c]orrupting his electors" and "incapacity," for which "he should be punished not as a man, but as an officer, and punished only by degradation from his office." Morris concluded: "This Magistrate is not the King

Numerous reports have shown a dramatic increase in the number of meetings between President Bush and Federal Reserve Chairman Alan Greenspan prior to the 2004 election. It is further documented that the unlawful declines in lending dramatically increased in 2004 during the election year.

lies and fraud became the foundation of Bush's ownership society and the American Dream of Homeownership. Strikingly similar to the 935 false statements that led us to War in Iraq, a campaign of orchestrated lies within our financial markets have jeopardized our nation's security, solvency and the well being of our citizens.

but the prime-Minister. The people are the King." He added that care should be taken to provide a mode for making him amenable to justice that would not make him dependent on the legislature. (II:69)

George Mason of Virginia was a strong advocate of the impeachability of the executive; no point, he said, "is of more importance than that the right of impeachment should be continued":

> 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.

(This comment was in direct response to Gouverneur Morris's original contention that the executive could "do no criminal act without Coadjutors who may be punished.") Mason went on to say that he favored election of the executive by the legislature, and that one objection to electors was the danger of their being corrupted by the candidates. This, he said, "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?" (II:65)

Benjamin Franklin supported impeachment as "favorable to the Executive." At a time when first magistrates could not formally be brought to justice, "where the chief Magistrate rendered himself obnoxious. . . . recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character." It was best to provide in the Constitution "for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." (II: 65)

James Madison argued that it was "indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate." A limited term "was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." (II: 65-66) It could not be presumed that all or a majority of a legislative body would lose their capacity to discharge their trust or be bribed to betray it, and the difficulty of acting in concert for purposes of corruption provided a security in their case. But in the case of the Executive to be administered by one man, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic." (II: 66)

Charles Pinckney reasserted that he did not see the necessity of impeachments and that he was sure "they ought not to issue from the Legislature who would . . . hold them as a rod over the Executive and by that means effectually destroy his independence," rendering his legislative revisionary power in particular altogether insignificant. (II: 66)

Elbridge Gerry argued for impeachment as a deterrent: "A good magistrate will not fear them. A bad one ought to be kept in fear of them." He hoped that the maxim that the chief magistrate could do no wrong "would never be adopted here." (II: 66)

Rufus King argued against impeachment from the principle of the separation of powers. The judiciary, it was said, would be impeach-

able, but that was because they hold their place during good behavior and "[i]t is necessary therefore that a forum should be established for trying misbehaviour." (II:66) The executive, like the legislature and the Senate in particular, would hold office for a limited term of six years; "he would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it." Like legislators, therefore, "he ought to be subject to no intermediate trial, by impeachment." (II:67) Impeachment is proper to secure good behavior of those holding their office for life; it is unnecessary for any officer who is elected for a limited term, "the periodical responsibility to the electors being an equivalent security." (II:68)

King also suggested that it would be "most agreeable to him" if the executive's tenure in office were good behaviour; and impeachment would be appropriate in this case, "provided an independent and effectual forum could be advised." He should not be impeachable by the legislature, for this "would be destructive of his independence and of the principles of the Constitution." (II:67)

Edmund Randolph agreed that it was necessary to proceed "with a cautious hand" and to exclude "as much as possible the influence of the Legislature from the business." He favored impeachment, however:

> The propriety of impeachments was a favorite principle with him; Guilt wherever found ought to be punished. 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. (II:67)

Charles Pinckney rejoined that the powers of the Executive "would be so circumscribed as to render impeachment unnecessary," (II:68)

SELECTION OF THE EXECUTIVE

On July 24, the decision to have electors choose the executive was reconsidered, and the national legislature was again substituted, seven states to four. (II:101) It was then moved to reinstate the one-term limitation, which led to discussion and motions with respect to the length of his term—eleven years, fifteen years, twenty years ("the medium life of princes"—a suggestion possibly meant, according to Madison's journal, "as a caricature of the previous motions"), and eight years were offered. (II:102) James Wilson proposed election for a term of six years by a small number of members of the legislature selected by lot. (II:103) The election of the executive was unanimously postponed. (II:106) On July 25, the Convention rejected, four states to seven, a proposal for appointment by the legislature unless the incumbent were reeligible in which case the choice would be made by electors appointed by the state legislatures. (II:111) It then rejected, five states to six, Pinckney's proposal for election by the legislature, with no person eligible for more than six years in any twelve. (II:115)

The debate continued on the 26th, and George Mason suggested reinstituting the original mode of election and term reported by the Committee of the Whole (appointment by the legislature, a seven-year term, with no reeligibility for a second term). (II:118-19) This was

agreed to, seven states to three. (II:120) The entire resolution on the executive was then adopted (six states to three) and referred to a five member Committee on Detail to prepare a draft Constitution. (II:121)

PROVISIONS IN THE DRAFT OF AUGUST 6

The Committee on Detail reported a draft on August 6. It included the following provisions with respect to impeachment:

> The House of Representatives shall have the sole power of impeachment. (Art. IV, sec. 6)
>
> [The President] shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. . . . He [The President] shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption. (Art. X, sec. 2)
>
> The Jurisdiction of the Supreme Court shall extend . . . to the trial of impeachments of Officers of the United States. . . . In cases of impeachment . . . this jurisdiction shall be original. . . . The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) . . . to . . . Inferior Courts. . . . (Art. XI, sec. 3)
>
> The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury. (Art. XI, sec. 4)
>
> Judgment, in cases of Impeachment, shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honour, 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. (Art. XI, sec. 5) (II: 178–79, 185–87)

The draft provided, with respect to the executive:

> The Executive Power of the United States shall be vested in a single person. His stile shall be "The President of the United States of America;" and his title shall be, "His Excellency". He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time. (Art. X, sec. 1) (II: 185)

Article IV, section 6 was unanimously agreed to by the Convention on August 9. (II: 231) On August 22, a prohibition of bills of attainder and ex post facto laws was voted, the first unanimously and the second seven states to three. (II: 376) On August 24, the Convention considered Article X, dealing with the Executive. It unanimously approved vesting the power in a single person. (II: 401) It rejected, nine states to two, a motion for election "by the people" rather than by the Legislature. (II:402) It then amended the provision to provide for "joint ballot" (seven states to four), rejected each state having one vote (five states to six), and added language requiring a majority of the votes of the members present for election (ten states to one). (II:403) Gouverneur Morris proposed election by "Electors to be chosen by the people of the several States," which failed five states

to six; then a vote on the "abstract question" of selection by electors failed, the States being evenly divided (four states for, four opposed, two divided, and Massachusetts absent). (II: 404)

On August 25, the clause giving the President pardon power was unanimously amended so that cases of impeachment were excepted, rather than a pardon not being pleadable in bar of impeachment. (II: 419-20)

On August 27, the impeachment provision of Article X was unanimously postponed at the instance of Gouverneur Morris, who thought the Supreme Court an improper tribunal. (II: 427) A proposal to make judges removable by the Executive on the application of the Senate and House was rejected, one state to seven. (II: 429)

EXTRADITION: "HIGH MISDEMEANOR"

On August 28, the Convention unanimously amended the extradition clause, which referred to any person "charged with treason, felony or high misdemeanor in any State, who shall flee from justice" to strike "high misdemeanor" and insert "other crime." The change was made "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." (II: 443)

FORUM FOR TRIAL OF IMPEACHMENTS

On August 31, those parts of the Constitution that had been postponed were referred to a committee with one member from each state—the Committee of Eleven. (II: 473) On September 4, the Committee reported to the Convention. It proposed that the Senate have power to try all impeachments, with concurrence of two-thirds of the members present required for a person to be convicted. The provisions concerning election of the President and his term in office were essentially what was finally adopted in the Constitution, except that the Senate was given the power to choose among the five receiving the most electoral votes if none had a majority. (II: 496-99) The office of Vice President was created, and it was provided that he should be ex officio President of the Senate "except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside." (II:498) The provision for impeachment of the President was amended to delete "corruption" as a ground for removal, reading:

> He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason, or bribery.... (II:499)

The Convention postponed the Committee's provision making the Senate the tribunal for impeachments "in order to decide previously on the mode of electing the President." (II:499)

SELECTION OF THE PRESIDENT

Gouverneur Morris explained "the reasons of the Committee and his own" for the mode of election of the President:

> The 1st was the danger of intrigue & faction if the appointmt. should be made by the Legislature. 2 the inconveniency of an ineligibility required by that mode in order to lessen its evils.

> 3 The difficulty of establishing a Court of Impeachments, other than the Senate which would not be so proper for the trial nor the other branch for the impeachment of the President, if appointed by the Legislature, 4 No body had appeared to be satisfied with an appointment by the Legislature. 5. Many were anxious even for an immediate choice by the people—6—the indispensible necessity of making the Executive independent of the Legislature. (II:500)

The "great evil of cabal was avoided" because the electors would vote at the same time throughout the country at a great distance from each other; "[i]t would be impossible also to corrupt them." A conclusive reason, said Gouverneur Morris, for having the Senate the judge of impeachments rather than the Supreme Court was that the Court "was to try the President after the trial of the impeachment." (II:500) Objections were made that the Senate would almost always choose the President. Charles Pinckney asserted, "It makes the same body of men which will in fact elect the President his Judges in case of an impeachment." (II:501) James Wilson and Edmund Randolph suggested that the eventual selection should be referred to the whole legislature, not just the Senate; Gouverneur Morris responded that the Senate was preferred "because fewer could then, say to the President, you owe your appointment to us. He thought the President would not depend so much on the Senate for his re-appointment as on his general good conduct." (II:502) Further consideration on the report was postponed until the following day.

On September 5 and 6, a substantial number of amendments were proposed. The most important, adopted by a vote of ten states to one, provided that the House, rather than the Senate, should choose in the event no person received a majority of the electoral votes, with the representation from each state having one vote, and a quorum of two-thirds of the states being required. (II: 527–28) This amendment was supported as "lessening the aristocratic influence of the Senate," in the words of George Mason. Earlier, James Wilson had criticized the report of the Committee of Eleven as "having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate," who would have, in fact, the appointment of the President, and through his dependence on them the virtual appointment to other offices (including the judiciary), would make treaties, and would try all impeachments. "[T]he Legislative, Executive & Judiciary powers are all blended in one branch of the Government. . . . [T]he President will not be the man of the people as he ought to be, but the Minion of the Senate." (II: 522–23)

ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

On September 8, the Convention considered the clause referring to impeachment and removal of the President for treason and bribery. George Mason asked, "Why is the provision restrained to Treason & bribery only?" Treason as defined by the Constitution, he said, "will not reach many great and dangerous offenses. . . . Attempts to subvert the Constitution may not be Treason . . ." Not only was treason limited, but it was "the more necessary to extend: the power of impeachments" because bills of attainder were forbidden. Mason moved to add "maladministration" after "bribery". (II:550)

James Madison commented, "So vague a term will be equivalent to a tenure during pleasure of the Senate," and Mason withdrew "maladministration" and substituted "high crimes & misdemeanors . . . agst. the State." This term was adopted, eight states to three. (II: 550)

TRIAL OF IMPEACHMENTS BY THE SENATE

Madison then objected to trial of the President by the Senate and after discussion moved to strike the provision, stating a preference for a tribunal of which the Supreme Court formed a part. He objected to trial by the Senate, "especially as [the President] was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent." (II: 551)

Gouverneur Morris (who had said of "maladministration" that it would "not be put in force and can do no harm"; an election every four years would "prevent maladministration" II: 550) argued that no tribunal other than the Senate could be trusted. The Supreme Court, he said, "were too few in number and might be warped or corrupted." He was against a dependence of the executive on the legislature, and considered legislative tyranny the great danger. But, he argued, "there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out." (II: 551)

Charles Pinckney opposed the Senate as the court of impeachments because it would make the President too dependent on the legislature. "If he opposes a favorite law, the two Houses will combine against him, and under the influence of heat and faction throws him out of office." Hugh Williamson of North Carolina replied that there was "more danger of too much lenity than of too much rigour towards the President," considering the number of respects in which the Senate was associated with the President. (II: 51)

After Madison's motion to strike out the provision for trial by the Senate failed, it was unanimously agreed to strike "State" and insert "United States" after "misdemeanors against," "in order to remove ambiguity." (II:551) It was then agreed to add: "The vice-President and other Civil officers of the U.S. shall be removed from office on impeachment and conviction as aforesaid."

Gouverneur Morris moved to add a requirement that members of the Senate would be on oath in an impeachment trial, which was agreed to, and the Convention then voted, nine states to two, to agree to the clause for trial by the Senate. (II: 552–53)

COMMITTEE ON STYLE AND ARRANGEMENT

A five member Committee on Style and Arrangement was appointed by ballot to arrange and revise the language of the articles agreed to by the Convention. (II:553) The Committee reported a draft on September 12. The Committee, which made numerous changes to shorten and tighten the language of the Constitution, had dropped the expression "against the United States" from the description of grounds for impeachment, so the clause read, "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." (II: 600)

SUSPENSION UPON IMPEACHMENT

On September 14, John Rutledge and Gouverneur Morris moved "that persons impeached be suspended from their office until they be tried and acquitted. (II: 612) Madison objected that the President was already made too dependent on the legislature by the power of one branch to try him in consequence of an impeachment by the other. Suspension he argued, "will put him in the power of one branch only," which can at any moment vote a temporary removal of the President in order "to make way for the functions of another who will be more favorable to their views." The motion was defeated, three states to eight. (II: 613).

No further changes were made with respect to the impeachment provision or the election of the President. On September 15, the Constitution was agreed to, and on September 17 it was signed and the Convention adjourned. (II: 650)

APPENDIX B

American Impeachment Cases

1. Senator William Blount (1797–1799)

a. Proceedings in the House

The House adopted a resolution in 1797 authorizing a select committee to examine a presidential message and accompanying papers regarding the conduct of Senator Blount.[1] The committee reported a resolution that Blount "be impeached for high crimes and misdemeanors," which was adopted without debate or division.[2]

b. Articles of Impeachment

Five articles of impeachment were agreed to by the House without amendment (except a "mere verbal one").[3]

Article I charged that Blount, knowing that the United States was at peace with Spain and that Spain and Great Britain were at war with each other, "but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof," conspired and contrived to promote a hostile military expedition against the Spanish possessions of Louisiana and Florida for the purpose of wresting them from Spain and conquering them for Great Britain. This was alleged to be "contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof."

Article II charged that Blount knowing of a treaty between the United States and Spain and "disregarding his high station, and the stipulations of the . . . treaty, and the obligations of neutrality," conspired to engage the Creek and Cherokee nations in the expedition against Louisiana and Florida. This was alleged to be contrary to Blount's duty of trust and station as a Senator, in violation of the treaty and of the obligations of neutrality, and against the laws, peace, and interest of the United States.

Article III alleged that Blount, knowing that the President was empowered by act of Congress to appoint temporary agents to reside among the Indians in order to secure the continuance of their friendship and that the President had appointed a principal temporary agent, "in the prosecution of his criminal designs and of his conspiracies" conspired and contrived to alienate the tribes from the President's agent and to diminish and impair his influence with the tribes, "contrary to the duty of his trust and station as a Senator and the peace and interests of the United States."

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[1] 5 Annals of Cong. 440–41 (1797).
[2] *Id.* 459.
[3] *Id.* 951.

Article IV charged that Blount, knowing that the Congress had made it lawful for the President to establish trading posts with the Indians and that the President had appointed an interpreter to serve as assistant post trader, conspired and contrived to seduce the interpreter from his duty and trust and to engage him in the promotion and execution of Blount's criminal intentions and conspiracies, contrary to the duty of his trust and station as a Senator and against the laws, treaties, peace and interest of the United States.

Article V charged that Blount, knowing of the boundary line between the United States and the Cherokee nation established by treaty, in further prosecution of his criminal designs and conspiracies and the more effectually to accomplish his intention of exciting the Cherokees to commence hostilities against Spain, conspired and contrived to diminish and impair the confidence of the Cherokee nation in the government of the United States and to create discontent and disaffection among the Cherokees in relation to the boundary line. This was alleged to be against Blount's duty and trust as a Senator and against impeachment was dismissed.

c. Proceedings in the Senate

Before Blount's impeachment, the Senate had expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator."[4] At the trial a plea was interposed on behalf of Blount to the effect that (1) a Senator was not a "civil officer," (2) having already been expelled, Blount was no longer impeachable, and (3) no crime or misdemeanor in the execution of the office had been alleged. The Senate voted 14 to 11 that the plea was sufficient in law that the Senate ought not to hold jurisdiction.[5] The impeachment was dismissed.

2. DISTRICT JUDGE JOHN PICKERING (1803–1804)

a. Proceedings in the House

A message received from the President of the United States, regarding complaints against Judge Pickering, was referred to a select committee for investigation in 1803.[6] A resolution that Pickering be impeached "of high crimes and misdemeanors" was reported to the full House the same year and adopted by a vote of 45 to 8.[7]

b. Articles of Impeachment

A select committee was appointed to draft articles of impeachment.[8] The House agreed unanimously and without amendment to the four articles subsequently reported.[9] Each article alleged high crimes and misdemeanors by Pickering in his conduct of an admiralty proceeding by the United States against a ship and merchandise that allegedly had been landed without the payment of duties.

Article I charged that Judge Pickering, "not regarding, but with intent to evade" an act of Congress, had ordered the ship and merchandise delivered to its owner without the production of any certifi-

[4] *Id.* 43–44.
[5] *Id.* 2310 (1799).
[6] 12 ANNALS OF CONG. 460 (1803).
[7] *Id.* 642.
[8] 13 ANNALS OF CONG. 380 (1803).
[9] *Id.* 794–95.

cate that the duty on the ship or the merchandise had been paid or secured, "contrary to [Pickering's] trust and duty as judge . . ., and to the manifest injury of [the] revenue." [10]

Article II charged that Pickering, "with intent to defeat the just claims of the United States," refused to hear the testimony of witnesses produced on behalf of the United States and, without hearing testimony, ordered the ship and merchandise restored to the claimant "contrary to his trust and duty, as judge of the said district court, in violation of the laws of the United States, and to the manifest injury of their revenue." [11]

Article III charged that Pickering, "disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the United States, and thereby to impair the public credit, did absolutely and positively refuse to allow" the appeal of the United States on the admiralty proceedings, "contrary to his trust and duty as judge of the said district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice." [12]

Article IV charged:

> That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, . . . did appear upon the bench of the said court, for the purpose of administering justice [on the same dates as the conduct charged in articles I–III], in a state of total intoxication, . . . and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States, and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge, and degrading to the honor and dignity of the United States.[13]

c. Proceedings in the Senate

The Senate convicted Judge Pickering on each of the four articles by a vote of 19 to 7.[14]

d. Miscellaneous

The Senate heard evidence on the issue of Judge Pickering's sanity, but refused by a vote of 19 to 9 to postpone the trial.[15]

3. JUSTICE SAMUEL CHASE (1804–1805)

a. Proceedings in the House

In 1804 the House authorized a committee to inquire into the conduct of Supreme Court Justice Chase.[16] On the same day that Judge Pickering was convicted in the Senate, the House adopted by a vote of

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[10] *Id.* 319.
[11] *Id.* 320–21.
[12] *Id.* 321–22.
[13] *Id.* 322.
[14] *Id.* 366–67.
[15] *Id.* 362–63.
[16] *Id.* 375.

73 to 32 a resolution reported by the committee that Chase be impeached of "high crimes and misdemeanors."[17]

b. Articles of Impeachment

After voting separately on each, the House adopted eight articles.[18]

Article I charged that, "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them 'faithfully and impartially, and without respect to persons' [a quotation from the judicial oath prescribed by statute]," Chase, in presiding over a treason trial in 1800, "did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust" by:

(1) delivering a written opinion on the applicable legal definition of treason before the defendant's counsel had been heard;

(2) preventing counsel from citing certain English cases and U.S. statutes; and

(3) depriving the defendant of his constitutional privilege to argue the law to the jury and "endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact" in reaching their verdict.

In consequence of this "irregular conduct" by Chase, the defendant was deprived of his Sixth Amendment rights and was condemned to death without having been represented by counsel "to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately, rest the liberty and safety of the people."[19]

Article II charged that, "prompted by a similar spirit of persecution and injustice," Chase had presided over a trial in 1800 involving a violation of the Sedition Act of 1798 (for defamation of the President, and, "with intent to oppress and procure the conviction" of the defendant, allowed an individual to serve on the jury who wished to be excused because he had made up his mind as to whether the publication involved was libelous.[20]

Article III charged that, "with intent to oppress and procure the conviction" of the defendant in the Sedition Act prosecution, Chase refused to permit a witness for the defendant to testify "on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact."[21]

Article IV charged that Chase's conduct throughout the trial was "marked by manifest injustice, partiality, and intemperance":

> (1) in compelling defendant's counsel to reduce to writing for the court's inspection the questions they wished to ask the witness referred to in article III;
>
> (2) in refusing to postpone the trial although an affidavit had been filed stating the absence of material witnesses on behalf of the defendant;
>
> (3) in using "unusual, rude and contemptuous expressions" to defendant's counsel and in "falsely insinuating" that they wished

[17] *Id.* 1180.
[18] 14 ANNALS OF CONG. 747–62 (1804).
[19] *Id.* 728–29.
[20] *Id.* 729.
[21] *Id.*

to excite public fears and indignation and "to produce that insubordination to law to which the conduct of the judge did, at the same time, manifestly tend";

(4) in "repeated and vexatious interruptions of defendant's counsel, which induced them to withdraw from the case"; and

(5) in manifesting "an indecent solicitude" for the defendant's conviction, "unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice." [22]

Article V charged that Chase had issued a bench warrant rather than a summons in the libel case, contrary to law.[23]

Article VI charged that Chase refused a continuance of the libel trial to the next term of court, contrary to law and "with intent to oppress and procure the conviction" of the defendant.[24]

Article VII charged that Chase, "disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer" by refusing to discharge a grand jury and by charging it to investigate a printer for sedition, with intention to procure the prosecution of the printer, "thereby degrading his high judicial functions and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare." [25]

Article VIII charged that Chase, "disregarding the duties and dignity of his judicial character," did "pervert his official right and duty to address" a grand jury by delivering "an intemperate and inflammatory political harangue with intent to excite the fears and resentment" of the grand jury and the people of Maryland against their state government and constitution, "a conduct highly censurable in any, but peculiarly indecent and unbecoming" in a Justice of the Supreme Court. This article also charged that Chase endeavored "to excite the odium" of the grand jury and the people of Maryland against the government of the United States "by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partisan." [26]

c. Proceedings in the Senate

Justice Chase was acquitted on each article by votes ranging from 0–34 not guilty on Article V to 10–15 guilty on Article VIII.[27]

4. DISTRICT JUDGE JAMES H. PECK (1830–1831)

a. Proceedings in the House

The House adopted a resolution in 1830 authorizing an inquiry respecting District Judge Peck.[28] The Judiciary Committee reported a resolution that Peck "be impeached of high misdemeanors in office" to the House, which adopted it by a vote of 123 to 49.[29]

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[22] *Id.* 729–30.
[23] *Id.* 730.
[24] *Id.*
[25] *Id.* 730–31.
[26] *Id.* 731.
[27] *Id.* 665–69 (1805).
[28] H.R. Jour., 21st Cong., 1st Sess. 138 (1830).
[29] 6 Cong. Deb. 819 (1830).

b. Article of Impeachment

After the House voted in favor of impeachment, a committee was appointed to prepare articles. The single article proposed and finally adopted by the House charged that Peck, "unmindful of the solemn duties of his station." and "with interest in wrongfully and unjustly to oppress, imprison, and otherwise injure" an attorney who had published a newspaper article criticizing one of the judge's opinions, had brought the attorney before the court and, under "the color and pretences" of a contempt proceeding, had caused the attorney to be imprisoned briefly and suspended from practice for eighteen months. The House charged that Peck's conduct resulted in "the great disparagement of public justice, the abuse of judicial authority, and . . . the subversion of the liberties of the people of the United States." [30]

c. Proceedings in the Senate

The trial in the Senate focused on two issues. One issue was whether Peck, by punishing the attorney for writing a newspaper article, had exceeded the limits of judicial contempt power under Section 17 of the Judiciary Act of 1789. The other contested issue was the requirement of proving wrongful intent.

Judge Peck was acquitted on the single article with twenty-one Senators voting in favor of conviction and twenty-two Senators against.[31]

5. DISTRICT JUDGE WEST H. HUMPHREYS (1862)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Humphreys was adopted in 1862.[32] Humphreys was subsequently impeached at the recommendation of the investigating committee.[33]

b. Articles of Impeachment

Soon after the adoption of the impeachment resolution, seven articles of impeachment were agreed to by the House without debate.[34]

Article I charged that in disregard of his "duties as a citizen . . . and unmindful of the duties of his . . . office" as a judge, Humphreys "endeavor[ed] by public speech to incite revolt and rebellion" against the United States; and publicly declared that the people of Tennessee had the right to absolve themselves of allegiance to the United States.

Article II charged that, disregarding his duties as a citizen, his obligations as a judge, and the "good behavior" clause of the Constitution, Humphreys advocated and agreed to Tennessee's ordinance of secession.

Article III charged that Humphreys organized armed rebellion against the United States and waged war against them.

Article IV charged Humphreys with conspiracy to violate a civil war statute that made it a criminal offense "to oppose by force the authority of the Government of the United States."

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[30] *Id.* 869. For text of article, see H.R. JOUR., 21st Cong., 1st Sess. 591–96 (1830).
[31] 7 CONG. DEB. 45 (1831).
[32] CONG. GLOBE, 37th Cong., 2d Sess. 229 (1862).
[33] *Id.* 1966–67.
[34] *Id.* 2205.

Article V charged that, with intent to prevent the administration of the laws of the United States and to overthrow the authority of the United States, Humphreys had failed to perform his federal judicial duties for nearly a year.

Article VI alleged that Judge Humphreys had continued to hold court in his state, calling it the district court of the Confederate States of America. Article VI was divided into three specifications, related to Humphreys' acts while sitting as a Confederate judge. The first specification charged that Humphreys endeavored to coerce a Union supporter to swear allegiance to the Confederacy. The second charged that he ordered the confiscation of private property on behalf of the Confederacy. The third charged that he jailed Union sympathizers who resisted the Confederacy.

Article VII charged that while sitting as a Confederate judge, Humphreys unlawfully arrested and imprisoned a Union supporter.

c. Proceedings in the Senate

Humphreys could not be personally served with the impeachment summons because he had fled Union territory.[35] He neither appeared at the trial nor contested the charges.

The Senate convicted Humphreys of all charges except the confiscation of property on behalf of the Confederacy, which several Senators stated had not been properly proved.[36] The vote ranged from 38–0 guilty on Articles I and IV to 11–24 not guilty on specification two of Article VI.

6. PRESIDENT ANDREW JOHNSON (1867–1868)

a. Proceedings in the House

The House adopted a resolution in 1867 authorizing the Judiciary Committee to inquire into the conduct of President Johnson.[37] A majority of the committee recommended impeachment,[38] but the House voted against the resolution, 108 to 57.[39] In 1868, however, the House authorized an inquiry by the Committee on Reconstruction, which reported an impeachment resolution after President Johnson had removed Secretary of War Stanton from office. The House voted to impeach, 128–47.[40]

b. Articles of Impeachment

Nine of the eleven articles drawn by a select committee and adopted by the House related solely to the President's removal of Stanton. The removal allegedly violated the recently enacted Tenure of Office Act,[41] which also categorized it as a "high misdemeanor."[42]

The House voted on each of the first nine articles separately; the tenth and eleventh articles were adopted the following day.

Article I charged that Johnson,

> unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should

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[35] *Id.* 2617.
[36] *Id.* 2950.
[37] CONG. GLOBE, 39th Cong., 2d Sess. 320–21 (1867).
[38] H.R. REP. NO. 7, 40th Cong., 1st Sess. 59 (1867).
[39] CONG. GLOBE, 40th Cong., 2d Sess. 68 (1867).
[40] CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868).
[41] Act of March 2, 1867, 14 Stat. 430.
[42] *Id.* § 6.

> take care that the laws be faithfully executed, did unlawfully and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton.

Article I concluded that President Johnson had committed "a high misdemeanor in office."[43]

Articles II and III characterized the President's conduct in the same terms but charged him with the allegedly unlawful appointment of Stanton's replacement.

Article IV charged that Johnson, with intent, unlawfully conspired with the replacement for Stanton and Members of the House of Representatives to "hinder and prevent" Stanton from holding his office.

Article V, a variation of the preceding article, charged a conspiracy to prevent the execution of the Tenure of Office Act, in addition to a conspiracy to prevent Stanton from holding his office.

Article VI charged Johnson with conspiring with Stanton's designated replacement, "by force to seize, take and possess" government property in Stanton's possession, in violation of both an "act to define and punish certain conspiracies" and the Tenure of Office Act.

Article VII charged the same offense, but as a violation of the Tenure of Office Act only.

Article VIII alleged that Johnson, by appointing a new Secretary of War, had, "with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War," violated the provisions of the Tenure of Office Act.

Article IX charged that Johnson, in his role as Commander in Chief, had instructed the General in charge of the military forces in Washington that part of the Tenure of Office Act was unconstitutional, with intent to induce the General, in his official capacity as commander of the Department of Washington, to prevent the execution of the Tenure of Office Act.

Article X, which was adopted by amendment after the first nine articles, alleged that Johnson,

> unmindful of the high duties of his office and the dignity and proprieties thereof, . . . designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach, the Congress of the United States, [and] to impair and destroy the regard and respect of all good people . . . for the Congress and legislative power thereof . . .

by making "certain intemperate, inflammatory, and scandalous harangues." In addition the same speeches were alleged to have brought the high office of the President into "contempt, ridicule, and disgrace, to the great scandal of all good citizens."

Article XI combined the conduct charged in Article X and the nine other articles to allege that Johnson had attempted to prevent the execution of both the Tenure of Office Act and an act relating to army appropriations by unlawfully devising and contriving means by which he could remove Stanton from office.

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[43] For text of articles, see CON. GLOBE, 40th Cong., 2d Sess. 1603–18, 1642 (1868).

c. Proceedings in the Senate

The Senate voted only on Articles II, III, and XI, and President Johnson was acquitted on each: 35 guilty—19 not guilty, one vote short of the two-thirds required to convict.[44]

d. Miscellaneous

All of the articles relating to the dismissal of Stanton alleged indictable offenses. Article X did not allege an indictable offense, but this article was never voted on by the Senate.

7. DISTRICT JUDGE MARK H. DELAHAY (1873)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Delahay was adopted by the House in 1872.[45] In 1873 the committee proposed a resolution of impeachment for "high crimes and misdemeanors in office," which the House [46] adopted.

b. Subsequent Proceedings

Delahay resigned before articles of impeachment were prepared, and the matter was not pursued further by the House. The charge against him had been described in the House as follows:

> The most grevious charge, and that which is beyond all question, was that his personal habits unfitted him for the judicial office, that he was intoxicated off the bench as well as on the bench.[47]

8. SECRETARY OF WAR WILLIAM W. BELKNAP (1876)

a. Proceedings in the House

In 1876 the Committee on Expenditures in the War Department [48] unanimously recommended impeachment of Secretary Belknap "for high crimes and misdemeanors while in office," and the House unanimously adopted the resolution.[49]

b. Articles of Impeachment

Five articles of impeachment were drafted by the Judiciary Committee [50] and adopted by the House, all relating to Belknap's allegedly corrupt appointment of a military post trader. The House agreed to the articles as a group, without voting separately on each.[51]

Article I charged Belknap with "high crimes and misdemeanors in office" for unlawfully receiving sums of money, in consideration for the appointment, made by him as Secretary of War.[52]

Article II charged Belknap with a "high misdemeanor in office" for "willfully, corruptly, and unlawfully" taking and receiving money in return for the continued maintenance of the post trader.[53]

Article III charged that Belknap was "criminally disregarding his duty as Secretary of War, and basely prostituting his high office to

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[44] CONG. GLOBE SUPP., 40th Cong., 2d Sess. 415 (1868).
[45] CONG. GLOBE, 42d Cong., 2d Sess. 1808 (1872).
[46] CONG. GLOBE, 42d Cong., 3d Sess. 1900 (1873).
[47] *Id.*
[48] The Committee was authorized to investigate the Department of the Army generally. 13 CONG. REC. 414 (1876).
[49] 14 CONG. REC. 1426–33 (1876).
[50] 15 CONG. REC. 2081–82 (1876).
[51] *Id.* 2160.
[52] *Id.* 2159.
[53] *Id.*

his lust for private gain," when he "unlawfully and corruptly" continued his appointee in office, "to the great injury and damage of the officers and soldiers of the United States" stationed at the military post. The maintenance of the trader was also alleged to be "against public policy, and to the great disgrace and detriment of the public service." [54]

Article IV alleged seventeen separate specifications relating to Belknap's appointment and continuance in office of the post trader.[55]

Article V enumerated the instances in which Belknap or his wife had corruptly received "divert large sums of money." [56]

c. Proceedings in the Senate

The Senate failed to convict Belknap on any of the articles, with votes on the articles ranging from 35 guilty—25 not guilty to 37 guilty—25 not guilty.[57]

d. Miscellaneous

In the Senate trial, it was argued that because Belknap had resigned prior to his impeachment the case should be dropped. The Senate, by a vote of 37 to 29, decided that Belknap was amenable to trial by impeachment.[58] Twenty-two of the Senator voting not guilty on each article, nevertheless indicated that in their view the Senate had no jurisdiction.[59]

9. DISTRICT JUDGE CHARLES SWAYNE (1903–1905)

a. Proceedings in the House

The House adopted a resolution in 1903 directing an investigation by the Judiciary Committee of District Judge Swayne.[60] The committee held hearings during the next year, and reported a resolution that Swayne be impeached "of high crimes and misdemeanors" in late 1904.[61] The House agreed to the resolution unanimously.

b. Articles of Impeachment

After the vote to impeach, thirteen articles were drafted and approved by the House in 1905.[62] However, only the first twelve articles were presented to the Senate.[63]

Article I charged that Swayne had knowingly filed a false certificate and claim for travel expenses while serving as a visiting judge, "whereby he has been guilty of a high crime and misdemeanor in said office."

Articles II and III charged that Swayne, having claimed and received excess travel reimbursement for other trips, had "misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office."

Articles IV and V charged that Swayne, having appropriated a private railroad car that was under the custody of a receiver of his court

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[54] *Id.*
[55] *Id.*
[56] *Id.* 2160.
[57] 19 CONG. REC. 343–57 (1876).
[58] *Id.* 76.
[59] *Id.* 342–57.
[60] 38 CONG. REC. 103 (1903).
[61] 39 CONG. REC. 247–48 (1904).
[62] H.R. REP. No. 3477, 58th Cong., 3d Sess. (1905).
[63] 39 CONG. REC. 1056–58 (1905).

and used the car, its provisions, and a porter without making compensation to the railroad, "was and is guilty of an abuse of judicial power and of a high misdemeanor in office."

Articles VI and VII charged that for periods of six years and nine years, Judge Swayne had not been a bona fide resident of his judicial district, in violation of a statute requiring every federal judge to reside in his judicial district. The statute provided that "for offending against this provision [the judge] shall be deemed guilty of a high misdemeanor." The articles charged that Swayne "willfully and knowingly violated" this law and "was and is guilty of a high misdemeanor in office."

Articles VIII, IX, X, XI and XII charged that Swayne improperly imprisoned two attorneys and a litigant for contempt of court. Articles VIII and X alleged that the imprisonment of the attorneys was done "maliciously and unlawfully" and Articles IX and XI charged that these imprisonments were done "knowingly and unlawfully." Article XI charged that the private person was imprisoned "unlawfully and knowingly." Each of these five articles concluded by charging that by so acting, Swayne had "misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and a high misdemeanor in office."

c. Proceedings in the Senate

A majority of the Senate voted acquittal on all articles.[64]

10. CIRCUIT JUDGE ROBERT W. ARCHBALD (1912–1913)

a. Proceedings in the House

The House authorized an investigation by the Judiciary Committee on Circuit Judge Archbald of the Commerce Court in 1912.[65] The Committee unanimously reported a resolution that Archbald be impeached for "misbehavior and for high crimes and misdemeanors," and the House adopted the resolution, 223 to 1.[66]

b. Articles of Impeachment

Thirteen Articles of impeachment were presented and adopted simultaneously with the resolution for impeachment.

Article I charged that Archbald "willfully, unlawfully, and corruptly took advantage of his official position . . . to induce and influence the officials" of a company with litigation pending before his court to enter into a contract with Archbald and his business partner to sell them assets of a subsidiary company. The contract was allegedly profitable to Archbald.[67]

Article II also charged Archbald with "willfully, unlawfully, and corruptly" using his position as judge to influence a litigant then before the Interstate Commerce Commission (who on appeal would be before the Commerce Court) to settle the case and purchase stock.[68]

Article III charged Archbald with using his official position to obtain a leasing agreement from a party with suits pending in the Commerce Court.[69]

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[64] *Id.* 8467–72.
[65] 48 CONG. REC. 5242 (1912).
[66] *Id.* 8933.
[67] *Id.* 8904.
[68] *Id.* 8905.
[69] *Id.*

Article IV alleged "gross and improper conduct" in that Archbald had (in another suit pending in the Commerce Court) "secretly, wrongfully, and unlawfully" requested an attorney to obtain an explanation of certain testimony from a witness in the case, and subsequently requested argument in support of certain contentions from the same attorney, all "without the knowledge or consent" of the opposing party.[70]

Article V charged Archbald with accepting "a gift, reward or present" from a person for whom Archbald had attempted to gain a favorable leasing agreement with a potential litigant in Archbald's court.[71]

Article VI again charged improper use of Archbald's influence as a judge, this time with respect to a purchase of an interest in land.

Articles VII through XII referred to Archbald's conduct during his tenure as district court judge. These articles alleged improper and unbecoming conduct constituting "misbehavior" and "gross misconduct" in office stemming from the misuse of his position as judge to influence litigants before his court, resulting in personal gain to Archbald. He was also charged with accepting a "large sum of money" from people likely "to be interested in litigation" in his court, and such conduct was alleged to "bring his . . . office of district judge into disrepute."[72] Archbald was also charged with accepting money "contributed . . . by various attorneys who were practitioners in the said court"; and appointing and maintaining as jury commissioner an attorney whom he knew to be general counsel for a potential litigant.[73]

Article XIII summarized Archbald's conduct both as district court judge and commerce court judge, charging that Archbald had used these offices "wrongfully to obtain credit," and charging that he had used the latter office to affect "various and diverse contracts and agreements," in return for which he had received hidden interests in said contracts, agreements, and properties.[74]

c. Proceedings in the Senate

The Senate found Archbald guilty of the charges in five of the thirteen articles, including the catch-all thirteenth. Archbald was removed from office and disqualified from holding any future office.[75]

11. DISTRICT JUDGE GEORGE W. ENGLISH (1925–1926)

a. Proceedings in the House

The House adopted a resolution in 1925 directing an inquiry into the official conduct of District Judge English. A subcommittee of the Judiciary Committee took evidence in 1925 and recommended impeachment.[76] In March 1926, the Judiciary Committee reported an impeachment resolution and five articles of impeachment.[77] The House adopted the impeachment resolution and the articles by a vote of 306 to 62.[78]

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[70] *Id.*
[71] *Id.*
[72] *Id.* 8006.
[73] *Id.*
[74] *Id.*
[75] S. Doc. No. 1140, 62d Cong., 3d Sess. 1620–49 (1913).
[76] H.R. Doc. No. 145, 69th Cong., 1st Sess. (1925).
[77] 67 Cong. Rec. 6280 (1926).
[78] *Id.* 6735.

Judge English resigned six days before the date set for trial in the Senate. The House Managers stated that the resignation in no way affected the right of the Senate to try the charges, but recommended that the impeachment proceedings be discontinued.[79] The recommendation was accepted by the House, 290 to 23.[80]

b. Articles of Impeachment

Article I charged that Judge English "did on divers and various occasions so abuse the powers of his high office that he is hereby charged with tyranny and oppression, whereby he has brought the administration of justice in [his] court . . . into disrepute, and . . . is guilty of misbehavior falling under the constitutional provision as ground for impeachment and removal from office." The article alleged that the judge had "willfully, tyrannically, oppressively and unlawfully" disbarred lawyers practicing before him, summoned state and local officials to his court in an imaginary case and denounced them with profane language, and without sufficient cause summoned two newspapermen to his court and threatened them with imprisonment. It was also alleged that Judge English stated in open court that if he instructed a jury that a man was guilty and they did not find him guilty, he would send the jurors to jail.

Article II charged that Judge English knowingly entered into an "unlawful and improper combination" with a referee in bankruptcy, appointed by him, to control bankruptcy proceedings in his district for the benefit and profit of the judge and his relatives and friends, and amended the bankruptcy rules of his court to enlarge the authority of the bankruptcy receiver, with a view to his own benefit.

Article III charged that Judge English "corruptly extended favoritism in diverse matters," "with the intent to corruptly prefer" the referee in bankruptcy, to whom English was alleged to be "under great obligations, financial and otherwise."

Article IV charged that Judge English ordered bankruptcy funds within the jurisdiction of his court to be deposited in banks of which he was a stockholder, director and depositor, and that the judge entered into an agreement with each bank to designate the bank a depository of interest-free bankruptcy funds if the bank would employ the judge's son as a cashier. These actions were stated to have been taken "with the wrongful and unlawful intent to use the influence of his . . . office as judge for the personal profit of himself" and his family and friends.

Article V alleged that Judge English's treatment of members of the bar and conduct in his court during his tenure had been oppressive to both members of the bar and their clients and had deprived the clients of their rights to be protected in liberty and property. It also alleged that Judge English "at diverse times and places, while acting as such judge, did disregard the authority of the laws, and . . . did refuse to allow . . . the benefit of trial by jury, contrary to his . . . trust and duty as judge of said district court, against the laws of the United States and in violation of the solemn oath which he had taken to administer equal and impartial justice." Judge English's conduct in making decisions and orders was alleged to be such "as to excite fear and distrust and to inspire a widespread belief, in and beyond his judicial district

[79] 68 CONG. REC. 297 (1926).
[80] *Id.* 302.

. . . that causes were not decided in said court according to their merits," "[a]ll to the scandal and disrepute" of his court and the administration of justice in it. This "course of conduct" was alleged to be "misbehavior" and "a misdemeanor in office."

c. Proceedings in the Senate

The Senate, being informed by the Managers for the House that the House desired to discontinue the proceedings in view of the resignation of Judge English, approved a resolution dismissing the proceedings by a vote of 70 to 9.[81]

12. DISTRICT JUDGE HAROLD LOUDERBACK (1932–1933)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Louderback was adopted by the House in 1932. A subcommittee of the Judiciary Committee took evidence. The full Judiciary Committee submitted a report in 1933, including a resolution that the evidence did not warrant impeachment, and a brief censure of the Judge for conduct prejudicial to the dignity of the judiciary.[82] A minority consisting of five Members recommended impeachment and moved five articles of impeachment from the floor of the House.[83] The five articles were adopted as a group by a vote of 183 to 143.[84]

b. Articles of Impeachment

Article I charged that Louderback "did . . . so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior." It alleged that Louderback used "his office and power of district judge in his own personal interest" by causing an attorney to be appointed as a receiver in bankruptcy at the demand of a person to whom Louderback was under financial obligation. It was further alleged that the attorney had received "large and exorbitant fees" for his services; and that these fees had been passed on to the person whom Louderback was to reimburse for bills incurred on Louderback's behalf.

Article II charged that Louderback had allowed excessive fees to a receiver and an attorney, described as his "personal and political friends and associates," and had unlawfully made an order conditional upon the agreement of the parties not to appeal from the allowance of fees. This was described as "a course of improper and unlawful conduct as a Judge." It was further alleged that Louderback "did not give his fair, impartial, and judicial consideration" to certain objections; and that he "was and is guilty of a course of conduct oppressive and unjudicial."

Article III charged the knowing appointment of an unqualified person as a receiver, resulting in disadvantage to litigants in his court.

Article IV charged that "misusing the powers of his judical office for the sole purpose of enriching" the unqualified receiver mentioned in Article III, Louderback failed to give "fair, impartial, and judicial

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[81] *Id.* 344, 348.
[82] 76 CONG. REC. 4913 (1933); H.R. REP. No. 2065, 72d Cong., 2d Sess. 1 (1933).
[83] 76 CONG. REC. 4914 (1933); H.R. REP. No. 2065, 72d Cong., 2d Sess. 13 (1933).
[84] 76 CONG. REC. 4925 (1933).

consideration" to an application to discharge the receiver; that "sitting in a part of the court to which he had not been assigned at the time," he took jurisdiction of a case although knowing that the facts and law compelled dismissal; and that this conduct was "filled with partiality and favoritism" and constituted "misbehavior" and a "misdemeanor in office."

Article V, as amended, charged that "the reasonable and probable result" of Louderback's actions alleged in the previous articles "has been to create a general condition of widespread fear and distrust and disbelief in the fairness and disinterestedness" of his official actions. It further alleged that the "general and aggregate result" of the conduct had been to destroy confidence in Louderback's court, "which for a Federal judge to destroy is a crime and misdemeanor of the highest order." [85]

c. Proceedings in the Senate

A motion by counsel for Judge Louderback to make the original Article V more definite was consented to by the Managers for the House, resulting in the amendment of that Article.[86]

Some Senators who had not heard all the testimony felt unqualified to vote upon Articles I through IV, but capable of voting on Article V, the omnibus or "catchall" article.[87]

Judge Louderback was acquitted on each of the first four articles, the closest vote being on Article I (34 guilty, 42 not guilty). He was then acquitted on Article V, the vote being 45 guilty, 34 not guilty—short of the two-thirds majority required for conviction.

13. DISTRICT JUDGE HALSTED L. RITTER (1933–1936)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Ritter was adopted by the House in 1933.[88] A subcommittee of the Judiciary Committee took evidence in 1933 and 1934. A resolution that Ritter "be impeached for misbehavior, and for high crimes and misdemeanors," and recommending the adoption of four articles of impeachment, was reported to the full House in 1936, and adopted by a vote of 181 to 146.[89] Before trial in the Senate, the House approved a resolution submitted by the House Managers, replacing the fourth original articles with seven amended ones, some charging new offenses.[90]

Non-bid contracts

b. Articles of Impeachment

Article I charged Ritter with "misbehavior" and "a high crime and misdemeanor in office," in fixing an exorbitant attorney's fee to be paid to Ritter's former law partner, in disregard of the "restraint of propriety . . . and . . . danger of embarrassment"; and in "corruptly and unlawfully" accepting cash payments from the attorney at the time the fee was paid.

Article II charged that Ritter, with others, entered into an "arrangement" whose purpose was to ensure that bankruptcy property

[85] 77 CONG. REC. 1857, 4086 (1933).
[86] *Id.* 1852, 1857.
[87] *Id.* 4082.
[88] *Id.* 4575.
[89] 80 CONG. REC. 3066–3092 (1936).
[90] *Id.* 4597–4601.

would continue in litigation before Ritter's court. Rulings by Ritter were alleged to have "made effective the champertous undertaking" of others, but Ritter was not himself explicitly charged with the crime of champerty or related criminal offenses. Article II also repeated the allegations of corrupt and unlawful receipt of funds and alleged that Judge Ritter "profited personally" from the "excessive and unwarranted" fees, that he had received a free room at a hotel in receivership in his court, and that he "wilfully failed and neglected to perform his duty to conserve the assets" of the hotel.

Article III, as amended, charged Ritter with the practice of law while on the bench, in violation of the Judicial Code. Ritter was alleged to have solicited and received money from a corporate client of his old law firm. The client allegedly had large property interests within the territorial jurisdiction of Ritter's court. These acts were described as "calculated to bring his office into disrepute," and as a "high crime and misdemeanor."

Article IV, added by the Managers of the House, also charged practice of law while on the bench, in violation of the Judicial Code.

Articles V and VI, also added by the Managers, alleged that Ritter had violated the Revenue Act of 1928 by willfully failing to report and pay tax on certain income received by him—primarily the sums described in Articles I through IV. Each failure was described as a "high misdemeanor in office."

Article VII (*former Article IV amended*) charged that Ritter was guilty of misbehavior and high crimes and misdemeanors in office because "the reasonable and probable consequence of [his] actions or conduct . . . as an individual or . . . judge, is to bring his court into scandal and disrepute," to the prejudice of his court and public confidence in the administration of justice in it, and to "the prejudice of public respect for and confidence in the Federal judiciary," rendering him "unfit to continue to serve as such judge." There followed four specifications of the "actions or conduct" referred to. The first two were later dropped by the Managers at the outset of the Senate trial; the third referred to Ritter's acceptance (not alleged to be corrupt or unlawful) of fees and gratuities from persons with large property interests within his territorial jurisdiction. The fourth, or omnibus, specification was to "his conduct as detailed in Articles I, II, III and IV hereof, and by his income-tax evasions as set forth in Articles V and VI hereof."

Before the amendment of Article VII by the Managers, the omnibus clause had referred only to Articles I and II, and not to the criminal allegations about practice of law and income tax evasion.

c. Proceedings in the Senate

Judge Ritter was acquitted on each of the first six articles, the guilty vote on Article I falling one vote short of the two-thirds needed to convict. He was then convicted on Article VII—the two specifications of that Article not being separately voted upon—by a single vote, 56 to 28.[91] A point of order was raised that the conviction under Article VII was improper because on the acquittals on the substantive charges of Articles I through VI. The point of order was overruled by the Chair, the Chair stating, "A point of order is made as to Article VII

[91] S. Doc. No. 200, 74th Cong., 2d Sess. 637–38 (1936).

in which the respondent is charged with general misbehavior. It is a separate charge from any other charge." [92]

d. Miscellaneous

After conviction, Judge Ritter collaterally attacked the validity of the Senate proceedings by bringing in the Court of Claims an action to recover his salary. The Court of Claims dismissed the suit on the ground that no judicial court of the United States has authority to review the action of the Senate in an impeachment trial.[93]

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[92] *Id.* 638.
[93] Ritter v. United States, 84 Ct. Cl. 203, 300, *cert denied*, 300 U.S. 668 (1936).

APPENDIX C

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Feerick, John, "Impeaching Federal Judges: A Study of the Constitutional Provisions," 39 *Fordham L. Rev.* 1 (1970). An article concluding that impeachment was not limited to indictable crimes but extended to serious misconduct in office.

Fenton, Paul, "The Scope of the Impeachment Power," 65 *Nw. U. L. Rev.* 719 (1970). A law review article concluding that impeachable offenses are not limited to crimes, indictable or otherwise.

Finley, John and John Sanderson, *The American Executive and Executive Methods*, (Century Co., New York, 1908). A book on the presidency concluding that impeachment reaches misconduct in office, which was a common law crime embracing all improprieties showing unfitness to hold office.

Foster, Roger, *Commentaries on the Constitution of the United States*, (Boston Book Co., Boston, 1896), vol. I. A discussion of constitutional law concluding that in light of English and American history any conduct showing unfitness for office is an impeachable offense.

Lawrence, William, "A Brief of the Authorities upon the Law of Impeachable Crimes and Misdemeanors," *Congressional Globe Supplement*, 40th Congress, 2d Session, at 41 (1868). An article at the time of Andrew Johnson's impeachment concluding that indictable crimes were not needed to make out an impeachable offense.

Note, "The Exclusiveness of the Impeachment Power under the Constitution," 51 *Harv. L. Rev.* 330 (1937). An article concluding that the Constitution included more than indictable crimes in its definition of impeachable offenses.

Note, "Vagueness in the Constitution: The Impeachment Power," 25 *Stan. L. Rev.* 908 (1973). This book review of the Berger and Brant books concludes that neither author satisfactorily answers the question whether impeachable offenses are limited to indictable crimes.

Pomeroy, John, *An Introduction to the Constitutional Law of the United States*, (Hurd and Houghton, New York 1870). A consideration of constitutional history which concludes that impeachment reached more than ordinary indictable offenses.

Rawle, William, *A View of the Constitution of the United States*, (P. H. Nicklin, Philadelphia, 1829, 2 vol. ed.). A discussion of the legal and political principles underlying the Constitution, concluding on this issue that an impeachable offense need not be a statutory crime, but that reference should be made to non-statutory law.

Rottschaefer, Henry, *Handbook of American Constitutional Law*, (West, St. Paul, 1939). A treatise on the Constitution concluding that impeachment reached any conduct showing unfitness for office, whether or not a criminal offense.

Schwartz, Bernard, *A Commentary on the Constitution of the United States*, vol. I, (Macmillan, New York, 1963). A treatise on various aspects of the Constitution which concludes that there was no settled definition of the phrase "high Crimes and Misdemeanors," but that it did not extend to acts merely unpopular with Congress. The author suggests that criminal offenses may not be the whole content of the Constitution on this point, but that such offenses should be a guide.

Sheppard, Furman, *The Constitutional Textbook*, (George W. Childs, Philadelphia, 1855). A text on Constitutional meaning concluding that impeachment was designed to reach any serious violation of public trust, whether or not a strictly legal offense.

Simpson, Alex., *A Treatise on Federal Impeachments*, (Philadelphia Bar Association, Phila., 1916) (reproduced in substantial part in 64 *U.Pa.L.Rev.* 651 (1916)). After reviewing English and American impeachments and available commentary, the author concludes that an indictable crime is not necessary to impeach.

Story, Joseph, *Commentaries on the Constitution of the United States*, vol. 1, 5th edition, (Little, Brown & Co., Boston 1891). A commentary by an early Supreme Court Justice who concludes that impeachment reached conduct not indictable under the criminal law.

Thomas, David, "The Law of Impeachment in the United States," 2 *Am. Pol. Sci. Rev.* 378 (1908). A political scientist's view on impeachment concluding that the phrase "high Crimes and Misdemeanors" was meant to include more than indictable crimes. The author argues that English parliamentary history, American precedent, and common law support his conclusion.

Tucker, John, *The Constitution of the United States*, (Callaghan & Co., Chicago, 1899), vol. 1. A treatise on the Constitution concluding that impeachable offenses embrace willful violations of public duty whether or not a breach of positive law.

Wasson, Richard, *The Constitution of the United States: Its History and Meaning* (Bobbs-Merrill, Indianapolis, 1927). A short discussion of the Constitution concluding that criminal offenses do not exhaust the reach of the impeachment power of Congress. Any gross misconduct in office was thought an impeachable offense by this author.

Watson, David, *The Constitution of the United States*, (Callaghan & Co., Chicago, 1910), volumes I and II. A treatise on Constitutional interpretation concluding that impeachment reaches misconduct in office whether or not criminal.

Wharton, Francis, *Commentaries on Law*, (Kay & Bro., Philadelphia, 1884). A treatise by an author familiar with both criminal and Constitutional law. He concludes that impeachment reached willful misconduct in office that was normally indictable at common law.

Willoughby, Westel, *The Constitutional Law of the United States*, vol. III, 2nd edition, (Baker, Voorhis & Co., New York, 1929). The author concludes that impeachment was not limited to offenses made criminal by federal statute.

Yankwich, Leon, "Impeachment of Civil Officers under the Federal Constitution," 26 *Geo. L. Rev.* 849 (1938). A law review article concluding that impeachment covers general official misconduct whether or not a violation of law.

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