

# The Law of Presidential Impeachment

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In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Mr. Justice Louis Brandeis

The Constitution provides: "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."<sup>1</sup> The Framers of the Constitution intentionally selected from English law and Parliamentary practice the phrase "high crimes and misdemeanors,"<sup>2</sup> which by then possessed definable content within boundaries<sup>3</sup> established by Parliamentary precedents originating with political offenses separate from the common law of crimes. From this English precedent, the Framers pruned those historical anachronisms attributable to Parliament's mortal struggle with the Crown for supremacy and ministerial responsibility, ultimately bequeathing a doctrine capable of protecting this country against presidential and ministerial offenses — criminal and non-criminal — subversive of the Constitution and its governmental institutions.

This Article will focus upon four influences that together determine the law of presidential impeachment: English law; the Constitutional Convention and state ratifying conventions; American impeachment experience; and public policy considerations. It is the public policy considerations upon which judgment must ultimately be based in our system

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<sup>1</sup> U.S. CONST. art. II, § 4.

<sup>2</sup> Treason and bribery are defined with sufficient specificity to require no clarification. The former is constitutionally defined as "levying war against [the United States], or in adhering to their enemies, giving them aid or comfort." U.S. CONST. art III, § 3. The common law definition of bribery is "the voluntary giving or receiving of anything of value to influence a public officer in the discharge of his official duties." 11 C.J.S. *Bribery* § 1, at 840 (1938).

<sup>3</sup> Established English precedent, known to the Framers of the Constitution, coupled with the debate over the impeachment provisions in the Convention, followed by the American experience in impeachment trials, refute the following characterization of impeachment by then-Representative Gerald Ford:

What, then, is an impeachable offense?

The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. [T]here are few fixed principles among the handful of precedents. 116 CONG. REC. 11,913 (1970).

governed by a body of law that is designed to protect the Republic rather than to punish the offender.

### I. ENGLISH LAW

The American constitutional impeachment clause had its origin in English law.<sup>4</sup> The division of functions between the Senate as both trier of fact and judge of law, and the House as prosecutor originated in the same apportionment of functions in England between Lords and Commons. Hamilton acknowledged that the English experience was "the model from which [impeachment was] borrowed."<sup>5</sup> The debates in the Constitutional Convention and the state ratification conventions<sup>6</sup> clearly indicate that the delegates were aware of the English law and practice of Parliamentary impeachment. Moreover, the term "high crimes and misdemeanors" was taken directly from English Parliamentary law and practice. Story asserted that "what are and what are not high crimes and misdemeanors is to be ascertained by a recurrence to" English law.<sup>7</sup> Accordingly, the general content and structure of the English law of impeachment, being the matrix within which the Framers fashioned the constitutional doctrine of impeachment,<sup>8</sup> become the first source for determining the meaning of "high crimes and misdemeanors."

English impeachment proceedings, recorded as early as the fourteenth century,<sup>9</sup> reflected the prevailing political philosophy:

[T]he ideal to be aimed at by all rulers and princes and their officials was government in accordance with law. . . . It was essentially a court for great men and great causes, and it occasionally seems to have been

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<sup>4</sup> The impeachment of Warren Hastings for high crimes and misdemeanors was voted shortly before the beginning of the Constitutional Convention, and his trial was referred to in the debates. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (M. Farrand ed. 1911) [hereinafter cited as RECORDS].

Furthermore, many of the members of the Convention had studied in England, including nine lawyers who had practiced in England. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL CONVENTION 87 n.160 (1973).

<sup>5</sup> THE FEDERALIST No. 65, at 425 (Modern Library College ed. 1937) (A. Hamilton).

<sup>6</sup> See notes 46-90 *infra* and accompanying text. See also R. BERGER, *supra* note 4, at 122 n.4, where references are made to English history in the state ratification conventions.

<sup>7</sup> 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 799, at 583 (5th ed. 1905).

<sup>8</sup> In speaking for the Managers in the impeachment of Senator William Blount in 1797, James A. Beyard related the relationship between our constitutional provision for impeachment and the English Parliamentary doctrine:

On this subject, the Convention proceeded in the same manner it is manifest they did in many other cases. They considered the object of their legislation as a known thing, having a previous definite existence. Thus existing, their work was solely to mould it into a suitable shape . . . And, therefore, . . . it remains as at common law, with the variance only of the positive provisions of the Constitution.

R. BERGER, *supra* note 4, at 55 n.9, citing F. WHARTON, CRIMINAL LAW 264 (6th ed. 1868).

<sup>9</sup> 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 380 (7th ed. 1956).

thought that it could apply to such causes as *lex Parliamenti* — a law which could do justice even when the ordinary law failed.<sup>10</sup>

The phrase “high crimes and misdemeanors” is first found in the impeachment of the Earl of Suffolk in 1386.<sup>11</sup> Some charges against the Earl involved common law offenses, but others did not.<sup>12</sup> An investigation of later impeachments for “high crimes and misdemeanors” discloses that impeachable conduct often included non-criminal offenses.

The Duke of Suffolk was impeached in 1450 for “high crimes and misdemeanors” consisting of criminal and non-criminal misconduct, which included “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.”<sup>13</sup> Charges against Attorney General Yelverton in 1621 also included non-criminal offenses such as failing to prosecute after commencing suits and exercising authority before it was properly vested in him.<sup>14</sup> Other impeachments for “high crimes and misdemeanors” involving non-criminal charges include the 1680 impeachment of Sir Edward Seymour<sup>15</sup> (misapplication of funds), the 1626 impeachment of the Duke of Buckingham,<sup>16</sup> the 1637 impeachment of Justice Berkley,<sup>17</sup> the 1660 impeachment of Viscount Mordaunt, the 1680 impeachment of Chief Justice Scroggs<sup>18</sup> (abuse of official power), the 1668 impeachment of Peter Pett<sup>19</sup> (neglect of duty), the 1668 impeachment of Sir Richard Gurney,<sup>20</sup> the 1680 impeachment of Chief Justice North<sup>21</sup> (encroachments on Parliament’s prerogatives), the 1624 impeachment of Lord Treasurer Middlesex,<sup>22</sup> and the 1701 impeachment of Lord Halifax<sup>23</sup> (corrupt practices and betrayal of trust).

Two English impeachments for “high crimes and misdemeanors” were particularly significant to the Founders’ understanding of that phrase. First, the 1640 impeachment of the Earl of Strafford, of which the Founders were aware,<sup>24</sup> has been recognized as a watershed in the conflict

<sup>10</sup> *Id.* (footnote omitted).

<sup>11</sup> 1 T. HOWELL, *STATE TRIALS* 84, 91 (Cobbett’s Collection 1810).

<sup>12</sup> STAFF OF THE IMPEACHMENT INQUIRY OF THE HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., *CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT* 5 & nn.7 & 8 (Comm. Print 1974) [hereinafter cited as *CONSTITUTIONAL GROUNDS*].

<sup>13</sup> *Id.* at 6, quoting 4 J. HATSELL, *PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS* 67 (1796).

<sup>14</sup> 2 T. HOWELL, *supra* note 11, at 1136–37.

<sup>15</sup> 8 *id.* at 127–32.

<sup>16</sup> 2 *id.* at 1307–08, 1310, 1316.

<sup>17</sup> 3 *id.* at 1283, 1287–88.

<sup>18</sup> 6 *id.* at 785, 789–91; 8 *id.* at 163–69.

<sup>19</sup> 6 *id.* at 865–67.

<sup>20</sup> 4 *id.* at 159, 162–63.

<sup>21</sup> R. BERGER, *supra* note 4, at 68, 70.

<sup>22</sup> 2 T. HOWELL, *supra* note 11, at 1183, 1239.

<sup>23</sup> 14 *id.* at 293, 296–97.

<sup>24</sup> Berger cites an article by Josiah Quincy, Jr., in the *Boston Gazette*, January 4, 1768, referring to the Strafford impeachment “for high treason in subverting the

between the belief that "the will of the Prince was the source of law" and the view that law had "an independent existence of its own, set above the King as well as above his subjects."<sup>25</sup> Articles of impeachment against Strafford charged:

[H]e . . . hath traitorously endeavored to subvert the Fundamental Law and Government of the Realms . . . and in stead thereof, to introduce Arbitrary and Tyrannical Government against Law . . .<sup>26</sup>

Strafford's impeachment illustrates Parliament's use of impeachment as "the most powerful weapon in the political armoury, short of civil war."<sup>27</sup>

Second, Warren Hastings's 1786 impeachment for "high crimes and misdemeanors," being contemporaneous with the Constitutional Convention, is particularly relevant in defining "high crimes and misdemeanors" as understood in the constitutional debates.<sup>28</sup> The articles of impeachment against Hastings included charges of gross maladministration, corruption in office, and cruelty toward the people of India, over whom he was the first Governor-General.<sup>29</sup> Edmund Burke's opening statement at Hastings's trial supports the contention that "high crimes and misdemeanors" involve misconduct not necessarily circumscribed by the criminal law:

It is by this process, that magistracy which tries and controls all other things, is itself tried and controlled. Other constitutions are satisfied with making good subjects; this is a security for good governors. It is by this tribunal, that statesmen, who abuse their powers, are accused by statesmen, and tried by statesmen, not upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality. It is here, that those, who by the abuse of power have violated the spirit of the law, can never hope for protection from any of its forms: — it is here, that those who have refused to conform themselves to its perfections can never hope to escape through any of its defects.<sup>30</sup>

Thus, under English precedent, "high crimes and misdemeanors" denoted a category of political crimes against the state that was "beyond the reach of ordinary criminal redress," which included: "misapplication of funds . . . abuse of official power . . . neglect of duty . . . encroachment on or contempt of Parliament's prerogatives," and corrupt practices and betrayal of public trust.<sup>31</sup>

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fundamental laws and introducing arbitrary power," in which he suggested that the standard set out in the Strafford impeachment should be followed. R. BERGER, *supra* note 4, at 30 n.107.

<sup>25</sup> *Id.* at 30, quoting G. TREVELYAN, *ILLUSTRATED HISTORY OF ENGLAND* 401 (1956).

<sup>26</sup> Quoted in *CONSTITUTIONAL GROUNDS*, *supra* note 12, at 5.

<sup>27</sup> Quoted in *id.* at 4.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> Quoted in *AMERICAN CIVIL LIBERTIES UNION, HIGH CRIMES AND MISDEMEANORS: WHAT THEY ARE, WHAT THEY AREN'T* 7-8 (1973), quoting 7 *WORKS OF EDMUND BURKE* 13-14 (1839).

<sup>31</sup> R. BERGER, *supra* note 4, at 59, 70.

The weight of authority clearly accepts the thesis that "high crimes and misdemeanors" encompass non-criminal as well as criminal misconduct against the state.<sup>32</sup> Story noted:

[L]ord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws and introduce arbitrary power.<sup>33</sup>

Further, "there is nothing . . . in the English practice . . . which otherwise limits that construction [of the phrase 'high crimes and misdemeanors']; and hence it must be held to mean other than criminal misdemeanors."<sup>34</sup> The phrase "high crimes and misdemeanors," therefore, had an identifiable form and substance "confined to impeachments, without roots in the ordinary criminal law and which . . . had no relation to whether an indictment would lie in the particular circumstances."<sup>35</sup>

Berger describes these common law precedents as a "brooding omnipresence" that gives the phrase "high crimes and misdemeanors" a "limited" and "technical" meaning.<sup>36</sup> This technical meaning is at least partially reflected in Blackstone's *Commentaries on the Laws of England*, described by Madison as "a book which is in every man's hand."<sup>37</sup> Blackstone defines the "first and principal" high misdemeanor as "maladministration of such high officers as are in public trust and employment," usually punished by Parliamentary impeachment.<sup>38</sup> Despite the

<sup>32</sup> "The House of Commons might impeach for whatever was indictable, but they also might impeach in cases where no indictment could be found. . . .

"The learned attorney-general had held that no impeachment could lie unless some law was violated; but the opinion was contrary to the doctrine laid down by the greatest writers on the law of impeachment. Lord Coke did not so limit the power of parliament. He regarded this power as most extensive, and in describing it quoted this remarkable expression: 'That it was so large and capacious that he could not place bounds to it, either in space or time.' In short, this maxim has been laid down as irrefragable, that whatever mischief is done, and no remedy could otherwise be obtained, it is competent for parliament to impeach."

Simpson, *Federal Impeachment*, 64 U. PA. L. REV. 651, 683 (1916), quoting Lord Brougham at the trial of Queen Caroline.

<sup>33</sup> 1 J. STORY, *supra* note 7, § 800, at 584.

<sup>34</sup> Simpson, *supra* note 32, at 686.

<sup>35</sup> R. BERGER, *supra* note 4, at 62; *see id.* at 62 n.36.

<sup>36</sup> *Id.* at 55.

<sup>37</sup> 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS* 501 (1937).

<sup>38</sup> 4 W. BLACKSTONE, *COMMENTARIES* \*122. *See also id.* at 122 n.3, where the United States Constitution (art. II, § 4) is cited in reference to impeachment for maladministration. On the other hand, Blackstone stated, "impeachment . . . is a prosecution of the already known and established law . . ." *Id.* at 259.

Judge Lawrence, however, in his brief on the authorities of impeachment, suggests that the above statement refers to established Parliamentary law recognized as controlling impeachment proceedings rather than common law:

When, therefore, Blackstone says that "an impeachment before the Lords by the Commons of Great Britain in Parliament is a prosecution of the already known and established law, and has been frequently put at practice," he must be understood to refer to the "established" *parliamentary*, not common municipal law, as administered in the ordinary courts, for it was the former that had been frequently put in practice.

CONG. GLOBE, 40th Cong., 2d Sess. 42 (1868).

Founders' reliance upon English precedents, there are distinctions between English and American impeachment mechanisms that limit any attempt to adopt completely a technical English interpretation of the constitutional phrase "high crimes and misdemeanors."

First, the debates in the Constitutional Convention regarding the impeachment clause focused on the presidency, America's closest parallel to a king. Since the King could do no wrong under the English Constitution, he was not subject to impeachment. Parliament developed impeachment as a means of exercising some control over the King's ministers and favorites; impeachment was a weapon for promoting ministerial accountability to the law and responsibility to Parliament. Although it was argued at the Constitutional Convention that the Chief Executive's assistants, and not the Chief Executive, should be subject to impeachment, George Mason repudiated that suggestion:

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.<sup>39</sup>

Contrary to the English experience, Americans adopted the view that the "Magistrate is not the King but the Prime-Minister. The people are the King."<sup>40</sup> Thus, whereas English impeachment was the primary means by which Parliament ultimately achieved ministerial responsibility and primacy over the King, the American process retains only the indirect parallel of helping to maintain separated and balanced powers, with the Chief Executive himself under the law.

A second distinction between English and American impeachment relates to the nature of impeachment itself. The English law of impeachment contemplated a criminal process in Parliament for both political and criminal offenses, with criminal penalties attached. The American law of impeachment retains the political and criminal substantive mix and some criminal procedure, but it was shorn of any criminal penalties. The Framers carefully excised from the English procedure those anachronisms of English law relating to the seminal battle for supremacy between Crown and Parliament. Treason was carefully delimited;<sup>41</sup> bills of attainder were prohibited; penalties for impeachment were confined to the prophylactic and remedial political consequences of removal and disqualification from office; and criminal penalties, if appropriate, were left for subsequent criminal trial.

The Federal provision, not only by the grounds of impeachment, but also by the punishment it provides, justifies the statement that the

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<sup>39</sup> 2 RECORDS, *supra* note 4, at 65.

<sup>40</sup> *Id.* at 69.

<sup>41</sup> 2 J. ELLIOT, *supra* note 37, at 469.

proceeding is not intended to punish the individual for wrong-doing, but merely to remove him from office for political offenses.<sup>42</sup>

The political aspects of impeachment as an offense against the state, its institutions, and its laws, are highlighted in the American law of impeachment. Impeachment serves the purpose of preserving a government of law — it is not concerned with punishment.

In summary, the standard for an impeachable offense as defined by the phrase “high crimes and misdemeanors” cannot properly be formulated without an appreciation of the English historical precedents. Four hundred years of English Parliamentary experience with the phrase indicates that its parameters usually encompassed only the most serious misconduct against the state of a criminal and non-criminal nature. Charges sufficiently grievous to be deemed impeachable offenses included only those that subverted the “fundamental laws” or introduced “arbitrary and tyrannical government against law.”<sup>43</sup> Impeachment was described in the 1725 trial of Lord Chancellor Macclesfield as a proceeding “reserved . . . for the punishment of offenses of a public nature, which may affect the nation.”<sup>44</sup>

Although the use of impeachment in England to remove officials guilty of no more than being primarily loyal to the King rather than to Parliament<sup>45</sup> is illustrative of the fundamental struggle to achieve responsible government with Parliamentary supremacy, such use of impeachment provides no precedent for the American experience. This is particularly apparent when it is understood that the entire impeachment debate in the Great Convention concerned only the impeachment of the Chief Executive, and not that of judges or other public officers.

## II. THE CONSTITUTIONAL FOUNDATIONS

Debates in the Constitutional Convention, in the various state ratifying conventions, and in the first Congress establish that the Framers intended to protect the public interest not only against the possible personal corruption of the Chief Executive but also against the subversion of the Constitution through executive encroachment upon or undermining of governmental branches. Impeachment was seen as a means of dealing not only with presidential criminality, but also with wrongs that did not constitute indictable offenses.<sup>46</sup> If the Framers meant, by adding the phrase

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<sup>42</sup> Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 861 (1938).

<sup>43</sup> 8 T. HOWELL, STATE TRIALS 197–98 (Cobbett's Collection 1810).

<sup>44</sup> 16 *id.* at 1330.

<sup>45</sup> R. BERGER, *supra* note 4, at 3.

<sup>46</sup> It is not without significance that in the many excellent and exhaustive briefs prepared by counsel for respondents in our impeachment proceedings some of which were tried while members of the convention which framed the Constitution still lived, there is no assertion that any member of that convention had expressed the opinion that impeachment was only intended to cover indictable offences.

Simpson, *supra* note 32, at 690.

“high crimes and misdemeanors” to bribery and treason, simply to include “other crimes” as impeachable offenses they could have so stated. Instead, they deliberately selected words of art pregnant with legal meaning derived from Parliamentary precedent. Nevertheless, with equal clarity the Framers rejected proposals to allow presidential impeachment for any but the most serious offenses against the integrity of the state or gross personal corruption.

The initial impeachment provision prescribed that the Executive “would be removeable on impeachment & conviction of mal-practice or neglect of duty.”<sup>47</sup> The Committee of Detail first changed the phrase to “treason, bribery or corruption,” and then in turn to “treason or bribery.” George Mason, citing the Parliamentary impeachment trial of Hastings then in progress, noted that the most serious offenses against the state might not fall within the narrow scope of “treason or bribery”; he proposed adding the word “maladministration” to the clause:

Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined.<sup>48</sup>

When James Madison objected that “so vague a term will be equivalent to a tenure during pleasure of the Senate,”<sup>49</sup> Mason substituted the phrase “high crimes and misdemeanors,” presumably satisfying the need perceived by Madison for known limits and yet extending impeachment beyond treason and bribery to include subversion of the Constitution. The classic phrase from English law was adopted by the Convention without debate.<sup>50</sup>

The Founders’ preoccupation with presidential impeachment led them to speak of “high crimes and misdemeanors” only in terms of “great offenses.”<sup>51</sup> Accordingly, political offenses of a fundamental nature that actually subverted the constitutional structure, though not necessarily constituting indictable crimes, were considered sufficiently serious to warrant impeachment. Thus, although shorn of the criminal sanctions found in English law, American impeachment retained some criminal procedural trappings<sup>52</sup> and a mixed criminal and political substantive

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<sup>47</sup> 1 RECORDS, *supra* note 4, at 88.

<sup>48</sup> 2 *id.* at 550.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 551-52.

<sup>51</sup> R. BERGER, *supra* note 4, at 91. *See also* authorities cited in AMERICAN CIVIL LIBERTIES UNION, *supra* note 30, at 91 n.180.

<sup>52</sup> Article one, section three, gives the Senate “sole power to try all impeachments” and later speaks of no person being “convicted” without the concurrence of two-thirds of the members present; article two, section two, gives the President the “power to grant reprieves and pardons for offences against the United States” but excepts impeachment; article two, section 4, itself speaks of “high crimes”; and article three, section two, states that “the Trial of all crimes, except in cases of impeachment, shall be by jury.” This is the language of criminal procedure.

On the other hand, penalties for impeachment are explicitly limited to political sanctions; impeachment trials were removed from the Supreme Court, where they had been placed in earlier drafts, and lodged in the Senate. Hamilton spoke of the

content. Madison spoke of a President perverting his administration "into a scheme of speculation or oppression";<sup>53</sup> Randolph referred to the impeachment of the President for "abusing his power";<sup>54</sup> and Morris spoke of impeaching the President for "corrupting his electors."<sup>55</sup> Alexander Hamilton described impeachment:

[It is appropriate for] 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.<sup>56</sup>

The argument that the Framers did not view impeachment as an ordinary criminal proceeding is strengthened by the constitutional allowance of criminal proceedings after removal by impeachment. If impeachment were considered an ordinary criminal proceeding, allowing subsequent criminal proceedings on the same offenses would violate the fifth amendment's proscription of double jeopardy. James Wilson noted:

Impeachments . . . come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects: for this reason, the trial and punishment of an offence on an impeachment, is no bar to a trial and punishment of the same offence at common law.<sup>57</sup>

According to a Justice Department study paper, the only specific discussion in the Convention of the phrase "high misdemeanors" took place not within any debate regarding the impeachment provision, but rather in an earlier debate on the "rendition" (extradition) provisions.<sup>58</sup> Assuming that "high" modifies both "crimes" and "misdemeanors," "high misdemeanors" has a meaning in its own right. Either the term "high crimes and misdemeanors" is a unitary phrase, or "misdemeanors" is redundant — a conclusion not favored by rules of constitutional construction. Significantly, the Convention rejected "high misdemeanors" in the interstate rendition (extradition) clause and substituted "other crime," because "high misdemeanors" did not cover "proper" cases — it included some acts not properly "criminal" and thus not subject to extradition.

Joseph Story wrote of impeachment: "[It is] a proceeding purely of a political nature. It is not so much designed to punish an offender as to

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"awful discretion which a court of impeachments must necessarily have" as a reason against giving the Court jurisdiction over impeachments. *THE FEDERALIST* No. 65, at 426 (Modern Library College ed. 1937) (A. Hamilton) (emphasis added).

<sup>53</sup> 2 RECORDS, *supra* note 4, at 65–66.

<sup>54</sup> *Id.* at 67.

<sup>55</sup> *Id.* at 69.

<sup>56</sup> *THE FEDERALIST* No. 65, at 423–24 (Modern Library College ed. 1937) (A. Hamilton).

<sup>57</sup> 1 J. WILSON, WORKS 452 (1804).

<sup>58</sup> U.S. CONST. art. IV, § 2.

secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity."<sup>59</sup> James Wilson's *Lectures on Law*,<sup>60</sup> written immediately after the Convention, is particularly illuminating. Wilson wrote that impeachment is "confined to political characters, to political crimes and misdemeanors, and to political punishments."<sup>61</sup> Ames of Massachusetts, speaking in the first Congress, struck the balance that pervaded the Convention: The "mere intention [to do wrong] would not be cause of impeachment," rather, "there may be numerous causes for removal which do not amount to a crime."<sup>62</sup>

James Iredell, later an Associate Justice of the Supreme Court, spoke of presidential impeachment in the North Carolina ratifying convention: "If he commits any misdemeanor in office, he is impeachable, removable from office . . . . If he commits any crime, he is punishable by the laws of his country . . . ." <sup>63</sup>

After defeating proposals to create a plural executive<sup>64</sup> and a privy council,<sup>65</sup> the Framers finally established a single executive, not only for reasons of efficiency but also to establish unquestioned executive responsibility. When it was suggested early in debate that a constitutional provision for the impeachment of presidential subordinates would be a sufficient check on presidential misbehavior, George Mason answered with the rejoinder previously noted that no man, particularly he who can commit the "most extensive injustice," should be above the law, including the "principal" as well as the "Coadjutors."<sup>66</sup> Madison advocated:

[S]ome provision should be made for defending the Community [against] the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service . . . 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. . . . In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.<sup>67</sup>

Benjamin Franklin added that impeachment of the Chief Executive was essential to avoid political assassination when the Executive had "rendered himself obnoxious."<sup>68</sup> Edmund Randolph also noted reasons for the necessity of impeachment:

<sup>59</sup> 1 J. STORY, *supra* note 7, § 803, at 586-87.

<sup>60</sup> J. WILSON, *WORKS* (1804) (three volumes).

<sup>61</sup> 2 *id.* at 166.

<sup>62</sup> 1 ANNALS OF CONG. 493 (1789).

<sup>63</sup> 4 J. ELLIOT, *supra* note 37, at 109.

<sup>64</sup> 1 RECORDS, *supra* note 4, at 66-67.

<sup>65</sup> 2 *id.* at 537, 542.

<sup>66</sup> *Id.* at 65.

<sup>67</sup> *Id.* at 65-66.

<sup>68</sup> *Id.* at 65.

The Executive will have great opportunities 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.<sup>69</sup>

William Davie of North Carolina argued that the Executive should be impeachable while in office, because “[i]f he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected.”<sup>70</sup> Elbridge Gerry argued in favor of impeachment as a prophylactic against misuse of office, stating his hope that the English legal fiction that the King could do no wrong “would never be adopted here.”<sup>71</sup>

Alexander Hamilton argued against a plural executive on the ground that it would tend to obfuscate the ultimate responsibility for wrongdoing. Such a plan, according to Hamilton, would deprive the people of “the two greatest securities they can have for the faithful exercise of any delegated power,” responsibility to censure and to punish. Divided responsibility leads to a diminution of the restraining force of public opinion and a loss of “the opportunity of discovering with facility and clearness the misconduct of the persons” in order to accomplish “their removal from office, or to their actual punishment in cases which admit of it.”<sup>72</sup>

James Wilson, among the most influential architects of the Constitution and later a Justice of the Supreme Court, discussed at the Pennsylvania ratifying convention the responsibility of the President for acts of his subordinates. Wilson observed:

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*.<sup>73</sup>

While a member of the first Congress, Madison advocated allowing presidential removal of public officers without congressional assent. His reasoning is relevant to the issue of the President’s responsibility for the acts of his appointees:

I think it absolutely necessary that the President should have the power of removing [his appointees] from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment

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<sup>69</sup> *Id.* at 67.

<sup>70</sup> *Id.* at 64.

<sup>71</sup> *Id.* at 66.

<sup>72</sup> THE FEDERALIST No. 70, at 460–61 (Modern Library College ed. 1937) (A. Hamilton).

<sup>73</sup> 2 J. ELLIOT, *supra* note 37, at 480.

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. On the constitutionality of the declaration I have no manner of doubt.<sup>74</sup>

Madison also stated that a President who removed a "meritorious" officer would be subject to impeachment. He noted:

[If the President were to] displace from office a man whose merits require that he should continue in it . . . he will be impeachable by this House before the Senate, for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.<sup>75</sup>

After the Civil War, President Andrew Johnson was impeached by the House for violating the almost surely unconstitutional Tenure of Office Act which proscribed the President's power unilaterally to remove officers appointed by him with the consent of the Senate. Johnson argued in a message to the Senate that the consequences of tramelling a President's power to remove his own appointees left him liable for the acts of officers whom he could no longer control. He stated:

The legal relation is analogous to that of the principal and agent. It is the President upon whom the Constitution devolves, as head of the executive department, the duty to see that the laws be faithfully executed; but as he cannot execute them in person, he is allowed to select his agents, and is made responsible for their acts within just limits. So complete is the presumed delegation of authority in the relation of a head of department to a President, that the Supreme Court of the United States have [*sic*] decided that an order made by a head of department is presumed to be made by the President himself.<sup>76</sup>

In debate at the Virginia ratifying convention over the presidential power to pardon, George Mason questioned whether the President could misuse the executive prerogative to "pardon crimes which were advised by himself," or to "stop inquiry and prevent detection"<sup>77</sup> during an investigation of wrongdoing. James Madison answered this query: "[I]f the President be connected, in any suspicious manner, with any person,

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<sup>74</sup> 1 ANNALS OF CONG. 387 (1789). Madison noted:

It is one of the most prominent features of the constitution, a principle that pervades the whole system, that there should be the highest possible degree of responsibility in all the executive officers thereof; anything, therefore, which tends to lessen this responsibility, is contrary to its spirit and intention . . . . Now if the heads of the executive departments are subjected to removal by the President alone, we have in him security for the good behavior of the officer . . . . This makes him responsible to the great executive power, and makes the President responsible to the public for the conduct of the person he has nominated and appointed to and him in the administration of his department. But if the President shall join in a collusion with this officer, and continue a bad man in office, the case of impeachment will reach the culprit, and drag him forth to punishment.

Id. at 394-95.

<sup>75</sup> 1 *id.* at 517.

<sup>76</sup> Quoted in AMERICAN CIVIL LIBERTIES UNION, *supra* note 30, at 9.

<sup>77</sup> 3 J. ELLIOT, *supra* note 37, at 497.

and there be grounds to believe he will shelter him, the House of Representatives can impeach him . . . .”<sup>78</sup> Iredell, arguing in the North Carolina ratifying convention, asserted:

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.<sup>79</sup>

Messrs. Jones, Bowdoin, and Stillman asserted in the Massachusetts convention that presidential impeachment would lie for “abuse of power”;<sup>80</sup> General Charles Pinckney, a delegate to the Constitutional Convention, stated in the South Carolina ratifying convention that impeachment could be based upon a betrayal of trust;<sup>81</sup> Francis Corbin, in the Virginia Convention, spoke of an abuse of power;<sup>82</sup> Governor Randolph argued that the President could be impeached if he was “dishonest”;<sup>83</sup> Patrick Henry, noting that the British executed high officials for “mal-practices,” stated that impeachment would follow a violation of duty.<sup>84</sup>

Although these descriptive terms are broad and subject to varying interpretations, a theme emerges: Impeachment was to lie if the President violated the trust placed in him by the Constitution and by his oath of office; impeachment would be improper for an honest mistake in judgment or for a partisan difference of opinion, even upon weighty matters. Iredell captured this sentiment in arguing that a President could be impeached only for an abuse of trust — “for an error of the heart, and not of the head.”<sup>85</sup> Randolph also asserted that a judgmental error did not constitute an impeachable offense: “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.”<sup>86</sup>

In short, only offenses of a public nature that harm the state were considered sufficiently grave to warrant impeachment. An early draft of

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<sup>78</sup> *Id.* at 498.

<sup>79</sup> 4 *id.* at 127.

<sup>80</sup> 2 *id.* at 75, 81–86, 168–69.

<sup>81</sup> 4 *id.* at 281. Edward Rutledge agreed. *Id.* at 276.

<sup>82</sup> 3 *id.* at 509–11.

<sup>83</sup> *Id.* at 368.

<sup>84</sup> *Id.* at 397–98.

<sup>85</sup> 4 *id.* at 125–26.

<sup>86</sup> 3 *id.* at 401.

the impeachment clause ended with the phrase "against the United States," which was removed as a matter of style without apparent intent to change the meaning.<sup>87</sup> Iredell told the North Carolina convention that the "occasion [for the exercise of impeachment] will arise from acts of great injury to the community";<sup>88</sup> Governor Johnston said that impeachment "is a mode of trial pointed out for great misdemeanors against the public."<sup>89</sup> Finally, Madison spoke in the first Congress about presidential impeachment for "high crimes and misdemeanors against the United States,"<sup>90</sup> perhaps subconsciously referring back to the earlier draft of the impeachment clause.

### III. THE AMERICAN EXPERIENCE

Thirteen impeachments have been voted by the House, and four have been convicted by the Senate since 1787. Ten of the thirteen involved federal judges;<sup>91</sup> the other three included one cabinet officer, one senator,<sup>92</sup> and one President.<sup>93</sup> All four convictions by the Senate were of federal judges.<sup>94</sup> Generalizations derived from these American precedents have at least two inherent weaknesses. First, although there have been many resolutions and impeachment investigations in the House, the unstated reasons for declining to impeach may not be based upon conclusions of law. Second, since few cases are available for analysis, especially on the issue of presidential impeachment, generalization is difficult. Nonetheless, the charges found in the articles of impeachment give some specific content to the phrase "high crimes and misdemeanors" in terms of the American experience.

Each of the thirteen American impeachments charged misconduct constituting "high crimes and misdemeanors."<sup>95</sup> The varieties of charged misconduct have been reduced to three broad categories:

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<sup>87</sup> United States Dep't of Justice, *Legal Aspects of Impeachment: An Overview, Appendix II — The Law of Impeachment*, at 8, February 22, 1974.

<sup>88</sup> 4 J. ELLIOT, *supra* note 37, at 113.

<sup>89</sup> *Id.* at 48.

<sup>90</sup> 1 ANNALS OF CONG. 388 (1789).

<sup>91</sup> District Judge John Pickering (1803-1804); Supreme Court Justice Samuel Chase (1804-1805); District Judge James Peck (1830-1831); District Judge West Humphreys (1862); District Judge Mark Delahay (1873); District Judge Charles Swayne (1903-1905); Circuit Judge Robert Archbald (1912-1913); District Judge George English (1925-1926); District Judge Harold Louderback (1932-1933); District Judge Halsted Ritter (1933-1936). For a brief analysis of American impeachment cases see CONSTITUTIONAL GROUNDS, *supra* note 12, Appendix B, at 41-57; Fenton, *The Scope of the Impeachment Power*, 65 NW. U.L. REV. 719, 748-58 (1970-71).

<sup>92</sup> The cabinet officer was secretary of War William Belknap (1876). Senator William Blount (1797-1799) was the first person impeached by the House, but the Senate voted fourteen to eleven to dismiss on the ground that a senator was not a "civil officer" within the meaning of the impeachment clause. 7 ANNALS OF CONG. 2319 (1797).

<sup>93</sup> Andrew Johnson (1867-1868).

<sup>94</sup> Pickering, Humphreys, Archbald, and Ritter.

<sup>95</sup> The articles of impeachment "in each of the eight impeachments through 1905 were styled Articles of Impeachment for 'high crimes and misdemeanors.'

(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.<sup>96</sup>

America's first impeachment, involving Senator William Blount in 1797, was grounded on acts encroaching upon the separate powers of a coordinate governmental branch. The articles of impeachment charged Blount with engaging in a conspiracy to compromise the neutrality of the United States in derogation of the constitutional delegation to the Executive of powers to conduct foreign affairs.<sup>97</sup> President Andrew Johnson's impeachment in 1868 similarly involved charges of violating separation of powers by failing properly to respect congressional prerogatives. The articles of impeachment charged Johnson with removing Secretary of War Stanton from office without the advice and consent of the Senate in violation of the Tenure of Office Act.<sup>98</sup> Unlike Blount's charges, apparently involving a non-indictable act, Johnson's charges involved an act prohibited by specific statutory provisions and labelled a "high misdemeanor" as well as a crime. Johnson's impeachment, however, reflected the deeper confrontation between Johnson and congressional reconstruction plans. Thus, the Johnson impeachment in a very real sense involved constitutional issues going to separation of powers, and the indictable offense was but the manufactured tip of a deeper conflict.

The remaining American impeachments involved issues of lesser constitutional dimensions; the articles of impeachment charged personal misbehavior rather than threats to the constitutional underpinnings of the government. Justice Chase (1804) and Judges Pickering (1803), Delahay (1876), Humphreys (1862), and English (1926) were impeached for misconduct incompatible with the proper functioning and purposes of their offices. Pickering's articles of impeachment charged him with "being a man of loose morals and intemperate habits."<sup>99</sup> Humphreys' articles of impeachment charged him with failure to discharge properly his judicial duties, citing as impeachable offenses his prejudice against Union supporters and his joining the Confederacy without resigning his federal judgeship.<sup>100</sup> Similarly, the articles of impeachment against Judge English charged favoritism and breach of public trust and confidence.<sup>101</sup> The impeachment of Associate Supreme Court Justice Chase in 1804 upon

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. . . In all of the [subsequent] impeachments the phrase 'high crimes and misdemeanors' was removed from the introductory clause" and individual articles used the phrase "high crimes and misdemeanors," "misbehavior," or simply "misdemeanor."

Fenton, *The Scope of the Impeachment Power*, 65 Nw. U.L. REV. 719, 724 (1970-71).

<sup>96</sup> CONSTITUTIONAL GROUNDS, *supra* note 12, at 18.

<sup>97</sup> 6 ANNALS OF CONG. 951 (1797).

<sup>98</sup> For text of articles see CONG. GLOBE, 40th Cong., 2d Sess. 1603-18, 1642 (1868).

<sup>99</sup> 12 ANNALS OF CONG. 319-22 (1803).

<sup>100</sup> CONG. GLOBE, 37th Cong., 2d Sess. 1966 (1862).

<sup>101</sup> 67 CONG. REC. 6283-87 (1926).

charges of "arbitrary, oppressive and unjust" conduct most nearly overlaps those impeachments based upon separation of powers. The impeachment proceeding entailed an underlying conflict between the Jeffersonians and the Federalists. The indispensability of an indictable crime was argued in the Senate, and some have concluded that Chase's acquittal signified the adoption of that argument.<sup>102</sup> The better view, however, is that Chase's acquittal was based solely upon his innocence of "high crimes and misdemeanors."<sup>103</sup> Pickering's conviction, largely for drunkenness on the bench, supports this contention and belies the contrary view.

The final category of impeachments, those based upon use of official power for improper purposes, can be divided into two types: "The first type involves vindictive use of their office by federal judges; the second, the use of office for personal gain."<sup>104</sup> The articles of impeachment against Judges Peck (1830), English (1926), and Swayne (1903) included charges for vindictive use of power.<sup>105</sup> The articles of impeachment for Judges Swayne (1903), Archbald (1912), English (1926), Louderback (1932), and Ritter (1936) charged "the use of office for direct or indirect personal monetary gain."<sup>106</sup>

There are at least two generalizations to be drawn from these American precedents. First, the articles of impeachment were generally not concerned with criminal offenses.

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.<sup>107</sup>

Indeed, even those articles that seem to allege unlawful conduct, "do not seem to state criminal conduct,"<sup>108</sup> with the exception of the criminal charges against Humphreys for unlawfully supporting the armed rebellion of the Confederacy. Thus, the contention that articles of impeachment must be drawn in terms of indictable offenses cannot be supported.<sup>109</sup>

<sup>102</sup> 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 293 (1926).

<sup>103</sup> Henry Adams concluded that Chase's acquittal stood only for his innocence of high crimes and misdemeanors. 2 H. ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA* 244 (1962). See also Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 72 (1960).

<sup>104</sup> CONSTITUTIONAL GROUNDS, *supra* note 12, at 20.

<sup>105</sup> See, e.g., 67 CONG. REC. 6281 (1926).

<sup>106</sup> CONSTITUTIONAL GROUNDS, *supra* note 12, at 20; see, e.g., 39 CONG. REC. 1056 (1905).

<sup>107</sup> CONSTITUTIONAL GROUNDS, *supra* note 12, at 21.

<sup>108</sup> *Id.*

<sup>109</sup> In his Brief of Authorities upon the Law of Impeachable Crimes and Misdemeanors, Judge Lawrence states:

The authorities are abundant to show that the phrase "high crimes and misdemeanors," as used in the British and our Constitution, are not limited to crimes defined by statute or as recognized at common law.

CONG. GLOBE, 40th Cong., 2d Sess. 42 (Supp. 1868). In footnote, Judge Lawrence continues:

The focus of the impeachment articles has instead been upon the proper exercise of official power for legitimate purposes. Nine of the impeachment articles against President Johnson charged that he had acted "unmindful of the high duties of his office and of his oath of office,"<sup>110</sup> including his duty to see that the laws were properly executed.

The second conclusion to be drawn from these precedents is "that the grounds [of impeachment] are derived from understanding the nature, functions and duties of the office."<sup>111</sup> Thus, the standard for impeachable offenses applicable to judges and other civil officers is partially distinguishable from the standard applicable to the President. Clearly charges of constitutional violations and gross abuse of power for illegitimate purposes should be included as impeachable offenses regardless of the offender's office. On the other hand, although the criminal laws and personal misconduct outside the purview of the office may constitute impeachable offenses against such civil officers as federal judges, such offenses may not in many cases rise to the level of impeachable offenses against the President.

In any event, the phrase "high crimes and misdemeanors" has been given additional content from American precedents following the Great Convention. The House Committee on the Judiciary, in its report recommending the impeachment of Judge English in 1926, stated:

Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, and also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also for abuses

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If an act to be impeachable must be indictable, then it might be urged that every act which is indictable must be impeachable. But this has never been pretended as the Senate must, therefore, decide what acts are impeachable it cannot be governed by their indictable character.

*Id.* at 42 n\*.

On the other hand, "[i]t has been argued, especially by persons facing impeachment charges, that criminal acts alone justify resort to the unusual processes of impeachment and removal." The Committee on Federal Legislation, The Law of Presidential Impeachment, at 3, Jan. 21, 1974 (New York City Bar Ass'n); *see, e.g.*, 116 CONG. REC. 29,756 (1970) (Memorandum on Impeachment of Federal Judges); James D. St. Clair, An Analysis of the Constitutional Standard for Presidential Impeachment. *See also* I. BRANT, IMPEACHMENT — TRIALS AND ERRORS 3-23 (1972). Nevertheless, the prevalent view is expressed as follows:

History and current events alike explain why "high Crimes and Misdemeanors" were not limited to violations of the criminal laws. [N]o Congress could have predicted the necessity for criminal statutes to proscribe the full range of Presidential "high Crimes and Misdemeanors."

AMERICAN CIVIL LIBERTIES UNION, *supra* note 30, at 10.

For a list of authorities on the issue of criminality see CONSTITUTIONAL GROUNDS, *supra* note 12, at Appendix C.

<sup>110</sup> Quoted in CONSTITUTIONAL GROUNDS, *supra* note 12, at 21.

<sup>111</sup> *Id.*

or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for "a breach of official duties . . ." <sup>112</sup>

Chief Justice Taft also supported this view: "By the liberal interpretation of the term 'high misdemeanor' which the Senate has given, there is now no difficulty in securing the removal of a judge for any reason that shows him unfit." <sup>113</sup> Chief Justice Charles Evans Hughes reached the same conclusion:

According to the weight of opinion, impeachable offenses include, not merely acts that are indictable, but serious misbehavior which may be considered as coming within the category of high crimes and misdemeanors. <sup>114</sup>

Raoul Berger recently completed the most thorough research yet done on American impeachment. He concluded:

It is quite clear that [the view that impeachment lies only for indictable offenses] has not won the assent of the Senate for . . . it has tacitly "settled" that impeachment lies for nonindictable offenses. <sup>115</sup>

In sum, impeachment involves "great offenses" against the state; it is not limited to common law or statutory crimes, and the applicable standard may legitimately vary to some degree depending upon the position and duties of the official involved.

#### IV. BROAD AND COMPREHENSIVE PRINCIPLES OF PUBLIC POLICY: THE LAW OF PRESIDENTIAL IMPEACHMENT

Associate Justice Joseph Story wrote of impeachment in 1833:

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 offences, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged . . . by the habits and rules and principles of diplomacy, of 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 as those which aggravate as those which extenuate or justify the

<sup>112</sup> H.R. REP. NO. 653, 69th Cong., 1st Sess. 9-10 (1926).

<sup>113</sup> Quoted in Yankwich, *Impeachment of Civil Officers under the Federal Constitution*, 26 GEO. L.J. 849, 861 (1938).

<sup>114</sup> C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 19 (1928), quoted in R. BERGER, *supra* note 4, at 58 n.16.

<sup>115</sup> R. BERGER, *supra* note 4, at 56. For a summary of the early cases see Judge Lawrence's Brief of Authorities upon the Law of Impeachable Crimes and Misdemeanors in CONG. GLOBE, 40th Cong., 2d Sess. 41-51 (Supp. 1868).

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.<sup>116</sup>

This is perhaps the most discerning one paragraph commentary that has been written on the nature of American impeachment. And assuming that Story's thinking was focused, as was that of his brethren at the Convention, upon presidential impeachment rather than upon what Berger calls "the ouster of little judges soiled by corruption,"<sup>117</sup> it is especially relevant to presidential impeachment. Story's statement provides an ideal structure for final argument and summation.

Story concludes, as have most officials not facing impeachment proceedings, that impeachment correctly will lie for both "political offenses" and indictable crimes. The meaning of the term "political" relates, of course, to what Burke called "enlarged and solid principles of state morality,"<sup>118</sup> to the concept of "great offenses" against the state, and to the subversion of the constitutional structure; it does not relate to partisan "politics," nor to differences regarding governmental policy, even those of great magnitude and consequence. That such "political offenses" provide a basis for impeachment seems indisputable in view of English history, the debates at the Constitutional Convention and the state ratifying conventions, the proceedings of the first Congress, and the American impeachment experience. Several judgmental norms follow from this seminal fact.

First, the object of impeachment is protection of the state rather than punishment of malefactors. Joseph Story wrote that impeachment was "not so much designed to punish an offender as to secure the state . . ." <sup>119</sup> The Framers carefully assured the security of the state by providing for the removal of an offending official and his disqualification from holding any office of honor or trust. They eliminated punitive overtones by stripping from the English law all criminal penalties attached to impeachment and by relegating punishment to criminal proceedings subsequent to conviction and removal. Thus, the focus of impeachment, particularly at the stage of Senate trial, must always be upon the well-being of the state and not upon retribution.

Second, if Story is right as I believe, neither all crimes nor all political offenses are sufficiently serious to constitute "high crimes and misdemeanors." Clearly, the obstruction of justice by the President or by one acting under his direction, violating both the presidential oath of office and the constitutional mandate to "take care that the laws be faithfully executed" would be sufficient ground for impeachment, conviction, and removal. Similarly, intentional subversion of other depart-

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<sup>116</sup> 1 J. STORY, *supra* note 7, § 764, at 559.

<sup>117</sup> R. BERGER, *supra* note 4, at 127.

<sup>118</sup> See text accompanying note 30 *supra*.

<sup>119</sup> See text accompanying note 59 *supra*.

ments or agencies of the government, or the corruption of the electoral process would be sufficient grounds. In contrast, petty crimes, indicating no more than the existence of a mean spirit in a high place, would not be sufficient ground to unseat a President, regardless of the impact that such offenses might have upon the tenure of a judge. The electorate can deal with such venality in a President, but no similar means is available to deal with a jurist possessing life tenure conditioned only upon his "good behavior." One need not accept the proposition that the Framers intended the "good behavior" clause to place federal judges upon a lower threshold of impeachability<sup>120</sup> than other "civil officers." Rather, as Story indicated, if "broad and comprehensive principles of public policy" are appropriately considered in the profoundly political process of impeachment, then the impact upon the nation of the President's removal or retention is a valid consideration, even though such considerations would be inappropriate in a forum charged with the normal "judicial function" of deciding guilt or innocence without regard for political consequences. In short, the President is to some degree in a category unto himself; he is not by any means above the law, but he is to be judged in part by criteria unique to his own office and not by criteria unique to judges or other civil officers.

Third, Story suggested that offenses must be weighed and evaluated in the context of the past standard of conduct within the particular office. Offenses should be "judged . . . by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practices."<sup>121</sup> Where the presidency is concerned, therefore, offenses should be judged within the framework of "executive custom"; impeachment of the President would demand the commission or omission of acts that negatively departed from the acts of his predecessors.

So stated, if Story's language can be pushed so far, this requirement raises a fundamental issue that places certain principles of justice in conflict. A strong argument can be made that any articles of impeachment against President Nixon should not charge him with a course of conduct that was followed by his predecessors in office. One definition of justice is that like situations are treated alike by the law. What, for example, would be the result if we imposed the following standard suggested by Justice Iredell:

[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 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

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<sup>120</sup> See Simpson, *Federal Impeachment* (pts. 1-2), 64 U. PA. L. REV. 651, 803, 806-08 (1916); R. BERGER, *supra* note 4, at 122 *et seq.*; cf. Kurland, *The Constitution and the Tenure of Federal Judges. Some Notes from History*, 36 U. CHI. L. REV. 665 (1969).

<sup>121</sup> See text accompanying note 116 *supra*.

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.<sup>122</sup>

Had we known what we now know, after the release of the Pentagon Papers, would we have been willing to impeach President Kennedy? Based upon what is now known regarding the origin of the Tonkin Gulf incident, would we have been willing to impeach President Johnson? Can the actions of the Kennedy, Johnson, and Nixon Administrations in conducting the Indo-China War be that clearly distinguished? One can argue that the repeal of the Tonkin Gulf Resolution left the President bereft of what little constitutional cover that unfortunate document provided for a war begat by Executive act. It would have been difficult, nonetheless, to have impeached President Nixon solely for continuing American participation in a war that was initiated and maintained by Presidents Eisenhower, Kennedy, and Johnson, especially when withdrawal was already underway.

Continuing wars unconstitutionally initiated by executive means, impounding funds, even abusing campaign funding by leaning on industries vulnerable to governmental pressure or beholden for licenses or contracts, and using "dirty tricks" in presidential campaigns are all acts that have been committed by prior executives. It could be argued that impeachment should not now be used against the commission of acts that have not previously incurred the sanction of impeachment. The essence of law is that a rule be fashioned that applies generally.

A powerful argument, which ultimately must prevail, can be made for the opposite result. The unfortunate fact that past presidents have avoided sanction for impeachable offenses is no reason to allow future presidents to operate outside the law. It is usually no defense to a charge of violating the law that other lawbreakers have escaped punishment. If we are ever to change an illegal course of conduct, we must inevitably break with the past. If we are to move to the realization of higher levels of legal consciousness and constitutional fidelity, we must finally end streams of increasing abuses, rather than continuing them upon the proposition that past illegal acts become precedent for future illegal acts.

However this theoretical dilemma is met, its practical resolution may not be that difficult. Past procedural precedents would indicate that the House of Representatives will not vote individually upon each of the articles of impeachment that may be proposed by the Committee on the Judiciary. Moreover, should the House vote impeachment, the Senate may very well have before it a number of offenses that do not have the taint of commission by past Presidents. These untainted allegations, representing presumably the strongest case for conviction, would normally be first put to the vote. In the current impeachment proceedings against President

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<sup>122</sup> 4 J. ELLIOT, *supra* note 37, at 127.

Nixon, for example, the list of untainted offenses might include the break-in at the Watergate; those allegations of obstruction of justice, the destruction of evidence, and the subornation of perjury relating to the "cover-up"; the investigation of allegations of possible bribery relating to milk price supports; the attempted corruption of critical governmental agencies possessing coercive powers over citizens — such as the CIA, FBI, IRS, the SEC, and the Anti-Trust Division of the Department of Justice; the corruption of the electoral process; the possible first amendment violations relating to harassment of the press; and the circumstances surrounding the break-in at the offices of Dr. Lewis Fielding. If conviction cannot be obtained upon these untainted offenses, then conviction upon offenses tainted by prior commission, standing alone, would not likely be either possible or desirable. This result follows from the basic purpose of impeachment — the protection of the Republic rather than the punishment of the offender. The backlash that might result from conviction only upon tainted conduct common to past presidents would be both probable and substantial.

Fourth, it follows from Story's characterization of impeachment as a profoundly political process that the "great variety of circumstances" that might be said to "extenuate" the offensive acts ought to be considered. President Nixon's associates, for example, have argued that the civil disobedience and violence that occurred during the latter stages of the Vietnam War somehow excused or mitigated those acts now collectively known as Watergate. Such an argument cannot be tolerated. Louis Brandeis noted the vast disparity between the impact upon society when an individual breaks the law and when government breaks the law. Contempt for law by the government may induce anarchy of a quality not possible of accomplishment by the example of illegal acts of private citizens. Government, the "potent, the omnipresent teacher," must never be allowed such conduct.

Fifth, if the desirability of invoking the impeachment process is to be judged upon grounds relating to its impact on the political community and upon "principles of public policy," then the possible future accomplishments of the President's Administration, together with its future debits, must be considered. These projections must be considered not as political eyewash, which is irrelevant to the issue of guilt or innocence, but rather as appropriate factors to be considered by the congressional and the national forum within which the President ultimately is to be judged. As a part of this, the Congress must, of course, consider the relative harm to be accomplished either by the President's impeachment and conviction or by his exoneration. Will the President's supporters feel cheated of their electoral triumph, thereby poisoning the political atmosphere and giving rise to the politics of conspiracy similar to that which characterized the McCarthy Era? Or will a substantial segment of the population, most particularly the young, view a refusal to impeach or convict the President as a vindication of that view of the law expressed by Francis Bacon: "One

of the Seven was wont to say: 'The laws were like cobwebs; where the small flies were caught, and the great brake through.'"<sup>123</sup> Would we thereby incur massive cynicism toward government and law? Is it possible, with the polarization that still exists regarding the appropriateness and justness of impeaching the President, to avoid one or the other result? Can the impeachment process itself be accomplished with such even-handed fairness and with such obvious non-partisan spirit that one or the other side can be convinced?<sup>124</sup>

Finally, there is little doubt that President Nixon is the latest in a line of "strong" Presidents who have encroached upon the powers of Congress<sup>125</sup> and, in a sense, English impeachment precedents may support a policy of using the impeachment weapon to correct such a constitutional imbalance. Although forced for a time to withhold the impeachment weapon when confronted with Tudor power in the sixteenth century, Parliament reacted strongly in the seventeenth century against Stuart pretensions toward Royal absolutism, by wielding the sword of impeachment with great effect. Ministerial responsibility and Parliamentary supremacy followed. In addition, and of more direct relevance, the concepts repeatedly expressed at the Constitutional Convention relating to presidential offenses worthy of impeachment — "subverting the Constitution," "violation of trust," and the commission of "great offenses" against the state — shared the common base of the Executive's failure to be bound by the rule of law limiting the prerogatives accorded that branch. Perhaps one result of the current crisis will be the accomplishment, at least for a time, of separated powers more evenly balanced. Moreover, in an institutional and fundamental sense, both Vietnam and Watergate, which are to some degree causally linked, stemmed from a sustained imbalance between our political branches. It would initially appear, therefore, that

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<sup>123</sup> F. BACON, *APOTHEGMS* \*181.

<sup>124</sup> It is suggested that the question of allowing television to cover a possible Senate trial be resolved within the context of these questions. It is imperative that there be a broad consensus upon a Senate verdict. The country must, in effect, reach the same conclusion as the Senate, whatever that may be, and do so at approximately the same time — not in retrospect a generation later. In this respect, such a trial cannot be compared to a purely judicial proceeding in which broad community consensus upon the verdict is not essential.

The fundamental political nature of the impeachment event, as repeatedly stressed by Madison, Mason, Wilson, Hamilton, and Story, must remain central to such a decision. Allowing such coverage would demand superlative professional behavior, in which partisan spirit was held in check and substantive and procedural law scrupulously abided. Failure here would result in a backlash of ferocious intensity, or perhaps cynicism and anomie.

<sup>125</sup> The necessity of reciprocal checks of political power . . . has been evinced. . . . To preserve them must be as necessary as to institute them. If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

35 G. WASHINGTON, *WRITINGS* 228–29 (Fitzpatrick ed. 1940).

invoking the impeachment remedy to rectify this condition would be just in terms of the seeming appropriateness of English precedent and constitutional design and sound in terms of public policy.

Our situation, however, is not really analogous to Tudor or Stuart England. We do not use the fearsome impeachment weapon to redress an imbalance causally relating back to major wars and economic crises, and personally to Presidents from Wilson to both Roosevelts, through Truman, Kennedy, and Johnson to Nixon. Congress by default, perhaps more than Presidents by design, has been responsible for this shift in the locus of power. The ultimate weapon of impeachment should be considered only when Executive power has been both expanded beyond bounds safe for republican government and then used to accomplish narrow, personal ends by means destructive of the most fundamental human rights of individuals, with little distinction made between domestic opponents and foreign enemies.

#### V. CONCLUSION

Impeachment, if it comes, should be based upon the commission of "great offenses" that "subvert the Constitution"; such offenses might be indictable crimes or political offenses that undermine the integrity of governmental institutions. Impeachment and conviction must rest, however, upon the proven commission of such acts, rather than upon patterns of individual behavior and governmental mismanagement that have existed for some time but are now revealed by records never before made public. Remedies appropriate to the latter exist both within the criminal law and the electoral and legislative processes. The criminal law is best equipped to accomplish punishment or retribution, while impeachment is designed as a means of political protection for the Republic. Clearly, individual acts have occurred which warrant the investigation that is a part of the process of impeachment. In the national interest, however, final actions of impeachment, conviction, and removal must ultimately be founded upon a national consensus sufficient to "overgrow party interest"<sup>126</sup> and based upon "broad and comprehensive principles of public policy and duty."<sup>127</sup>

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<sup>126</sup> W. WILSON, CONGRESSIONAL GOVERNMENT 275-76 (1901), cited in R. BERGER, *supra* note 4, at 122 n.6.

<sup>127</sup> See text accompanying note 116 *supra*.