

## IMPEACHMENT AND PRESIDENTIAL IMMUNITY FROM JUDICIAL PROCESS

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President Clinton is the first President to be impeached since Andrew Johnson in 1868. The possibility of impeachment emerged last year—nearly out of the blue—from judicial proceedings in which President Clinton was a party. Two constitutional questions running through these events—the scope of impeachment and the exposure of a sitting President to compulsory judicial process—received extensive scrutiny during the Watergate affair. From that misadventure, which led to President Nixon's resignation in 1974, survives a body of conventional academic wisdom and specific legal precedent on both questions. On impeachment the academic consensus is that impeachable offenses are defined in the Constitution as “treason, bribery, or other high crimes and misdemeanors,” the latter terms describing an imprecisely bounded category of serious offenses. The President's exposure to compulsory judicial process, meanwhile, was established definitively in *United States v. Nixon*.<sup>1</sup>

The current imbroglio, therefore, is unfolding under ground rules shaped in the previous episode involving misconduct by a President. In my view, essential constitutional elements at issue in these events are misconceived by the participants and most academic commentators. The prevailing conventional wisdom on impeachment and presidential immunity slights both

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the terms of the Constitution and history. The scope of impeachment, based on a straightforward, indeed unequivocal, reading of the constitutional provisions concerning it, is demonstrably different from the academic consensus. And, when impeachment is correctly understood, the question of the President's immunity from judicial process takes on a different light. It is not a new light, however. Everything that I present here about impeachment and presidential immunity is derived from the text of the Constitution and history contemporaneous with its drafting. I propose, in other words, to exhume the original meaning of the Constitution on these questions.

Although my immediate purpose is to establish the meaning of several constitutional provisions from their language and history, the constitutional scheme of impeachment and presidential immunity that emerges from this exercise, adventitiously perhaps, is far preferable to the grotesque muddle through which we have suffered of late. Judged either by fidelity to the original understanding embodied in the text of the Constitution or just good sense, the view of impeachment and presidential immunity that I expound here is better than what prevails today.

As much of the world is aware, the affair currently slouching through Congress originated in the courts. President Clinton gave a deposition in a civil lawsuit orchestrated by political opponents, having failed to win deferral of that suit on grounds of presidential immunity.<sup>2</sup> The lawsuit was later dismissed as meritless. In the course of his deposition the President denied a sexual relationship in a setting quite apart from the lawsuit. True or false, the President's denial is unremarkable. A civilized person is not supposed to kiss

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<sup>1</sup>418 U.S. 683 (1974).

and tell. Later, in testimony before a federal grand jury, the President reasserted some elements of his deposition statement. The rest I am sure the reader knows. But if not, it is enough to say here that this misadventure, from its beginnings in the courts as a marginal lawsuit, has gained momentum enough to carry it to the threshold of an impeachment trial in the Senate.

Although Americans, and especially legal academic folk, take for granted an imperial judiciary, in most of the world the role of the courts in this affair is unfathomable, even shocking. The exposure of a sitting chief of state to lawsuits, and to compulsory judicial process generally, is almost unheard of outside the United States. As far as I know, it might happen in a theocratic state with an official religion and religious courts, but nowhere else. In discussions with their European counterparts American lawyers sometimes try to put a good face on this affair, despite appearances, as demonstrating that in a democracy no one, including the chief of state, is above the law.<sup>3</sup> A good number of those holding out this pabulum, I suspect, know in their hearts that it is nonsense—that the judicial proceedings involving President Clinton were beyond reason. It is grotesque to have a sitting President tangled up in the courts over what is at worst, or best, an *histoire de couchage*.

The stage was set for these events—and the irony is palpable—in a Supreme Court decision of the Watergate era, *United States v. Nixon*,<sup>4</sup> holding that a sitting President is subject to compulsory judicial process. In its day—1974—*United States v. Nixon* was widely admired as a pathbreaking decision. The question there had not before been directly resolved by a U.S.

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<sup>2</sup>*Clinton v. Jones*, 520 U.S. 681 (1997).

<sup>3</sup>I have overheard a number of such conversations at various conferences in Europe, and even on airplanes to and from such.

court.<sup>5</sup> The detractors of *United States v. Nixon*—and they were few—thought that in the constitutional scheme the President is not subject to a direct judicial command. Impeachment, some argued, was the only way another part of the government could act against a President in office. To this the proponents of *United States v. Nixon*, who were overwhelmingly more numerous, answered that impeachment would often be both insufficient and inapposite. Insufficient, because much misconduct and legal obligation were beyond the reach of impeachment. Inapposite, because impeachment can degenerate into a political circus. Filtered through the courts, by contrast, a case involving the President will receive impartial scrutiny.

These views are wrong in almost all basic respects. To back up this contention, I propose to analyze the constitutional provisions on impeachment and their bearing on presidential immunity. In the process, I shall attempt to get as close as possible to the original meaning of the Constitution on these matters.

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<sup>4</sup>418 U.S. 683 (1974).

<sup>5</sup>The inference has been drawn—erroneously I believe—from the proceedings involving the Burr conspiracy of 1807 that the President is subject to compulsory judicial process. The events in that case establish no such thing. Justice Marshall issued a request to produce a letter held by President Jefferson. Jefferson, who had already turned the letter over to the Attorney General, asked District Attorney George Hay “voluntarily” to make it available in the proceedings. See David Currie, *The President's Evidence* [publication pending in \_\_\_\_]. Currie infers from the proceedings a concession by Justice Marshall of an important measure of presidential immunity. In any event, the *Burr* proceedings did not go beyond the issuance of a request by a court. The real test of presidential immunity—the consequences of a refusal by the President to respond to a subpoena—was not reached in the *Burr* case, and lay in abeyance until *United States v. Nixon*.

## PRESIDENTIAL IMMUNITY

At the outset, there is no smoking gun in the Constitution on the question of presidential immunity—that is, no provision explicitly shielding the President from compulsory judicial process, or the contrary. The closer we get to the original understanding of the Constitution, however, the more likely it seems that a sitting President is not subject to compulsory judicial process, but only to impeachment.

## The Argument from Principle

The President holds the executive power directly under Article II, section 1, of the Constitution. The exercise of power by other executive officers is derived from the President's. There is little question that other officers—cabinet officials, generals, clerks—are subject to compulsory judicial process.<sup>6</sup> Because their power is derivative of the President's, it can be

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<sup>6</sup>Also, when the courts act against anyone else in the executive branch, in both criminal and civil cases, they may do so on the basis of the validity of the *President's* actions. The *consequences* of a President's unlawful acts therefore *are* subject to judicial scrutiny, wholly apart from the President's personal exposure to judicial process. The references that occasionally surface in the debate over presidential immunity to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (court order validly directed to Secretary of Commerce), are wholly inapposite. The following from *Clinton v. Jones*, 520 U.S. 681, \_\_\_, for example, has little or no bearing, therefore, on the central issue in that case: “[W]hen the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952). Despite the serious impact of that decision on the ability of the Executive Branch to accomplish its assigned

transferred to others as necessary or desirable. They can be replaced instantly if detained or impeded by arrest, indictment, subpoena, civil action, or inability. If the President, on the other hand, is indicted or compelled to appear at a hearing, the entire executive power may be impaired, or at least constrained in some degree. If it were possible for another part of the government to act against the President in this way—which would make the United States fundamentally different from any other sovereign nation of the late 18th Century—one would expect it to be clearly stated in the Constitution. And in point of fact, it is. The President is expressly subject to impeachment by the House of Representatives and trial in the Senate. In England, by contrast, the king was beyond the reach of any official action of any part of government, including impeachment. Extension of impeachment to the President was something new, and brought the President more fully within the reach of the law than any European chief of state of the time of the drafting of the Constitution. The silence of the Constitution on the President's exposure to judicial process, in this light, is not neutral, but allows the inference that impeachment is the sole form of official action against a President in office, to the exclusion of judicial process.

This argument is strongly reinforced by further inferences available from the relevant history.

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mission, and the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement, we exercised our Article III jurisdiction to decide whether his official conduct conformed to the law.”

## The Early Understanding

A useful starting point is Joseph Story's *Commentaries*, in which he wrote that because the President's "incidental powers" must include "the power to perform [his duties], without any obstruction," the President "cannot ... be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."<sup>7</sup> The fair import of this comment, I believe, is that the President personally is beyond the reach of the courts and, in civil cases, beyond the reach of any official action, including impeachment. Echoing and extending Story's comment, an 1838 Supreme Court decision, *Kendall v. United States*, states as though a self-evident and eternal verity that

The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."<sup>8</sup>

In both Story's *Commentaries* and *Kendall* appears a common understanding that the President is not subject to compulsory judicial process. Together the import of these excerpts is stronger than either separately. In the *Kendall* dictum standing alone the words "as far as his powers are derived from the constitution" could be construed as limiting its focus to presidential immunity

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<sup>7</sup> J. Story, *Commentaries on the Constitution of the United States* §1563, pp. 418-419 (1833).

<sup>8</sup> 37 U.S. (12 Peters) 524, 609 (1838).

for official acts.<sup>9</sup> Story's comment, however, extends inviolability to the President's person in civil cases. Indeed, in light of Story's comment, the apposed words in *Kendall* can just as easily be understood to mean "as possessor of the executive power under the Constitution" and refer to presidential immunity as broadly as Story does.<sup>10</sup> Either way, the thrust of both comments cuts only in the direction of presidential immunity.

Long before *Kendall*, where the President's immunity from judicial process is expressly understood as a corollary of his exposure to impeachment, the framers of the Constitution had understood a fundamental relation between presidential immunity and impeachment. For them presidential immunity was the premise of the constitutional provisions on impeachment.

There was no hint at the Constitutional Convention of 1787 that the President would ever be subject to judicial command, and not a few implications of the contrary. Moving to closer range, the President's immunity from judicial command is the apparent premise of the extended debate on impeachment of July 20, 1787. There, impeachment was understood on all sides as the *only* way to reach misconduct by the President. Several proponents of the impeachment power urged that, without it, the President would be above the law. George Mason urged: "No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? . . . When great crimes were committed he

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<sup>9</sup>Even so construed the *Kendall* dictum does not, of course, *deny* presidential immunity from judicial process for private acts. It is merely silent on the question.

<sup>10</sup>Justice Story was on the Supreme Court at the time of *Kendall v. United States*, and participated in the decision.

was for punishing the principal as well as the Coadjutors.”<sup>11</sup> Elbridge Gerry “urged the necessity of impeachments,” and “hoped that the maxim would never be adopted here that the chief Magistrate could do <no> wrong.”<sup>12</sup> For Edmund Randolph “[t]he propriety of impeachments was a favorite principle . . . . Should no regular punishment be provided, it will be irregularly inflicted by tumults and insurrections.”<sup>13</sup> Randolph was echoing a similar point of Benjamin Franklin’s:

What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character. It [would] be the best way therefore 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.<sup>14</sup>

Gouverneur Morris, who opposed a broad impeachment power, had previously argued that there was no need for presidential impeachment because “[The President] can do no criminal act without Coadjutors who may be punished.”<sup>15</sup> Morris’s remark, as does Mason’s responding to it,<sup>16</sup> assumes that the President himself is beyond the reach of the courts. Otherwise, both the President and his “coadjutors” could be punished. Indeed, the entire

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<sup>11</sup>2 Max Farrand, *The Records of the Federal Convention of 1787*, at 65 (rev. ed. 1937) [hereafter cited as Farrand].

<sup>12</sup>Id. at 66.

<sup>13</sup>Id. at 67.

<sup>14</sup>Id. at 65.

<sup>15</sup>Id. at 64.

<sup>16</sup>See p.8 above.

discussion of July 20 is meaningless if the President is otherwise subject to judicial power.<sup>17</sup>

In the ensuing two centuries this understanding of presidential immunity lost its mooring, having given way at some point to the notion that a President subject only to impeachment would be in some manner above the law. The precise extent of the President's exposure to judicial process today is far from clear. Joseph Story's view that a President in office cannot be indicted, arrested, or imprisoned apparently still holds.<sup>18</sup> But *United States v. Nixon* clearly holds the President subject personally to compulsory process in criminal proceedings, while *Clinton v. Jones* holds him subject to private civil lawsuits, and the attendant compulsory process, for nonofficial acts. *Clinton v. Jones* also brings its own new formulation of the respective spheres of impeachment and judicial action concerning misconduct, obligations, and liabilities of the President. To the Supreme Court's generalized pronouncement in *United States v. Nixon* ("We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case."<sup>19</sup>) *Clinton v. Jones* adds the more

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<sup>17</sup>At this stage of the deliberations, furthermore, the trier of impeachments was not settled and could still have been the Supreme Court, upon an accusation brought by the House of Representatives. This makes it even less plausible that the President could be subject to judicial power in any other way.

<sup>18</sup>Special prosecutor Starr sent his report on the grand jury to Congress, for possible impeachment, and did not proceed in court. The Independent Counsel statute, to be sure, instructs the special prosecutor to report possible impeachable offenses to Congress, but does not expressly bar proceedings directly against the President. 28 USC §595(c) ("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.").

<sup>19</sup>418 U.S. at 705.

fully articulated proposition that “[w]ith respect to acts taken in his ‘public character’—that is official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages ... [b]ut he is otherwise subject to the laws for his purely private acts.”<sup>20</sup>

Closer scrutiny of the Court’s encapsulation in *Clinton v. Jones* brings out the full incoherence of present law. On its face, the Court’s statement does *not* exclude—indeed invites—possible arrest or indictment of a President for such “purely private acts” as crimes directed at private persons.<sup>21</sup> That is, inescapably, what it means to be “subject to the laws” for “purely private acts.” Murder of a private person, or shoplifting, are not official acts, and being “subject to the laws” (unless the Court is following the semantic usage of *H. Dumpty*<sup>22</sup>) means possible arrest, indictment, and trial. If, on the other hand, the Court did not mean what it manifestly said—and it still holds true that the President is not subject to arrest, indictment, or imprisonment—then a President can be sued in tort but not arrested or indicted for murder. And while you are asking yourself how weird is that, consider as well, in such a patchwork regime of presidential immunity, how exactly a President can be subject to civil suit? Suppose the President just says no, and ignores the suit. Jail for contempt, by hypothesis, is out of the question. Therefore impeachment becomes the backstop of civil suits against the President.

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<sup>20</sup>520 U.S. at \_\_\_\_\_. Does “principally” imply some “minor” exposure to judicial process for official acts?

<sup>21</sup>There is a similar implication in the Court’s pronouncement that “if the federal judiciary may ... direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct.” *Id.* at \_\_\_\_\_.

The view of presidential immunity implicit in *Clinton v. Jones*, when pressed, thus defies reason as well as the available inferences from history.

For many, of course, fidelity to historical meaning is not the sole, or even major concern. Most do, however, want a constitutional scheme that makes good day-to-day sense. In that regard, the urgency of leaving a President exposed to compulsory judicial process depends importantly on the scope of impeachment, as even the Supreme Court appears to understand in *Clinton v. Jones*. If in impeachment we find an instrument sufficient to protect the public at all events against misconduct by the President, then *United States v. Nixon* and *Clinton v. Jones* lose considerable force. An essential step, therefore, in thinking through the question of presidential immunity is to bring the scope of impeachment into the sharpest possible focus.

#### THE SCOPE OF IMPEACHMENT

On this score I have good news. A close reading of the constitutional provisions on impeachment brings a remarkably clear—indeed nearly unequivocal—understanding of the scope of impeachment. And to find it, one need only look closely at the words of the Constitution.

The reader, quite possibly, will react skeptically to this claim. Commentators on impeachment find great uncertainty in the constitutional provisions and relevant history, and differ widely among themselves.<sup>23</sup> If

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<sup>22</sup>See Lewis Carroll, *Through the Looking-Glass* (Signet ed. 1960) at 186 (“When I use a word,” Humpty Dumpty said ... ‘it means just what I choose it to mean—neither more nor less.’”).

<sup>23</sup>A view also surfacing among commentators is that the impeachment provisions, reflecting the political nature of the process, cannot be clearly apprehended. See Michael

there were a clear meaning to be found, wouldn't they know about it? Surely, you may think, scholars have pored over the constitutional provisions on impeachment, especially scholars commenting on the current proceedings. How else would one find out the scope of impeachment? Think again. American lawyers, including constitutional scholars, do not habitually refer to, or even read, the text of the Constitution. Some find that it distracts them from their main concerns.<sup>24</sup>

To confirm this, I suggest the following experiment. Ask an American constitutional scholar (not just any lawyer) about the constitutional provisions on impeachment. The answer will be something like: "Well, the constitution defines impeachable offenses as treason, bribery, and high crimes and misdemeanors."<sup>25</sup> You might also get an outline of the procedure of impeachment. This understanding of impeachment is so widespread that the words "high crimes and misdemeanors" have come to be synonymous in common discourse with "impeachable offenses."<sup>26</sup> A similar understanding can be found in most of the recent scholarly writing on the subject.<sup>27</sup>

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Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 *Tex. L. Rev.* 1, 5 (1989) ("[T]he impeachment clauses ... virtually defy systematic analysis precisely because impeachment is by nature, structure, and design an essentially political process.").

<sup>24</sup>When I outlined the analysis of impeachment presented here to a leading constitutional scholar, the response was, "You're just talking to me about words. I don't care about that."

<sup>25</sup>This experiment is more likely to work, perhaps, on someone who hasn't read this article, but that does not eliminate very many subjects.

<sup>26</sup>See, e.g., Bruce Ackerman, *What Ken Starr Neglected to tell Us*, *New York Times*, September 14, 1998. (asserting "high crimes and misdemeanors" as the constitutional "test" of impeachment).

<sup>27</sup>See, e.g., Raoul Berger, *Impeachment: the Constitutional Problems* (1973) [hereafter cited as Berger]; Irving Brant, *Impeachment* (1972) [hereafter cited as Brant]. But see *The Scope of the Power to Impeach*, 84 *Yale L. J.* 1316 (1975) (student note by Joseph Isenbergh).

Now let's see what the Constitution actually says about impeachment. This will come as a surprise to many readers, including some whose profession is thinking about the Constitution. A close reading of the Constitution, coupled with some exploration of relevant history, reveals that 1) impeachable offenses are not defined in the Constitution, 2) "high crimes and misdemeanors" are an historically well-defined category of offenses aimed specifically against the state, for which removal from office is mandatory upon conviction by the Senate, 3) Congress has the power to impeach and remove civil officers for a range of offenses other than high crimes and misdemeanors, and 4) the Senate can impose sanctions less severe than removal from office—censure, for example—on civil officers convicted of such other offenses.

#### Article II, Section 4

The most widely cited provision on impeachment in the Constitution is Article II, section 4, which reads:

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.

These words do not define impeachable offenses. They are neither literally nor by inference a definition. Rather, they *require* that a President and others, if convicted upon impeachment of various serious offenses, be removed from

office. “Shall be removed” is a command, not a definition.<sup>28</sup> Placed at the end of Article II, this clause says peremptorily that if the President and others are convicted of certain bad acts, Congress must throw them out. Article II, section 4, in short, is a mandatory sentencing provision.

Although it enumerates several impeachable offenses, nothing in Article II, section 4 indicates that it is an *exhaustive* listing. That civil officers *must* be removed for “treason, bribery, or other high crimes and misdemeanors,” does not preclude the existence of other misconduct for which they *may* be impeached and removed. For Article II, section 4, to be an exhaustive listing, “shall be removed for” must be taken as somehow equivalent to “shall be removed *only* for.” When the drafters of the Constitution wanted to give a restrictive definition, however, they knew how to do so unambiguously, as in their definition of treason in Article III, section 3.<sup>29</sup> One has to work quite hard against the text to find in Article II, section 4, a definition of all impeachable offenses rather than a specification of those offenses for which removal from office is mandatory upon conviction.

This reading of Article II, section 4, is systematically confirmed in other provisions on impeachment in the Constitution. The impeachment power is granted to Congress in Article I:

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<sup>28</sup>“Shall” has imperative force everywhere in the Constitution when it occurs in an independent clause. Every command in the Constitution is couched in terms of “shall.” See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-33 (1816). There were exchanges at the Federal Convention confirming that the framers attached imperative force to “shall.” See 2 Farrand at 377, 412-13.

<sup>29</sup>“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” Note the word “only.”

The House of Representatives . . . shall have the sole Power of Impeachment.<sup>30</sup>

. . .

The Senate shall have the sole Power to try all Impeachments.<sup>31</sup>

The term “Impeachment” appears in these provisions without explanation, as though well-understood. Terms so used in the Constitution were taken in 1787 (and sometimes even today) in their established sense.<sup>32</sup> Impeachable offenses both in England and America had included a broad range of misconduct other than “high crimes and misdemeanors.”<sup>33</sup> Thus if Article II, section 4, is to be taken, against its words, as an exhaustive listing of impeachable offenses, it also represents a sharp break with earlier practice. Had the framers intended such a break, they could have accomplished it more clearly than by commanding removal for high crimes and misdemeanors in Article II after providing a general grant of the power to impeach in Article I.

Beyond these generalities, there is more specific confirmation of this reading of Article II, section 4, in Article I, section 3:

Judgment in Cases of Impeachment *shall not extend further than* to removal from Office and disqualification to hold or enjoy an Office of honor, Trust, or Profit under the United States.<sup>34</sup>

The limitation on the severity of judgments bears on the scope of the impeachment power in several ways. First, it confirms the drafters’ ability to

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<sup>30</sup> Article I, section 2.

<sup>31</sup> Article I, section 3.

<sup>32</sup>In 1807, Chief Justice Marshall wrote of another such phrase, “levying war”: “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.” *United States v. Burr* 25 F. Cas. 55, 159 (No. 14,693) (C.C.D. Va. 1807). See also *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925).

<sup>33</sup>See p. \_\_\_ below.

be explicit when departing from English precedents. Article I, section 3, prohibits the more severe penalties allowed in England.<sup>35</sup> Had the framers also wanted to provide for a narrower range of impeachable offenses, they could have put a similar limitation in the Article in which they granted to Congress the powers of impeachment.

Second, the words “judgment . . . shall not extend *further* than to . . .” do allow judgments to extend *less* far than removal and disqualification. Lesser judgments than removal were possible in English impeachments. Among the penalties in impeachments acknowledged by Blackstone, along with severe punishments such as banishment and imprisonment, are forfeiture of office, fines, perpetual disability, and “discretionary censure, regulated by the nature and aggravations of the offence committed.”<sup>36</sup> It can hardly have been beyond the framers’ powers, had they wanted to foreclose any other possibility, to write that the *only* judgments in cases of impeachment shall be removal and disqualification. At least one 18th century lawyer was able to express that idea unambiguously. Thomas Jefferson's 1783 draft of a proposed constitution

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<sup>34</sup>(Emphasis added.)

<sup>35</sup>As the framers were well aware, see Berger, note 24 above, at 4 n.21, 30 n.107, 87 n.160, 122 n.4 143 n.97, the English House of Lords had handed down a wide variety of judgments in impeachment cases. *Compare*, for example, the cases of Henry Sacheverell, 15 State Trials 1, 39, 474 (Howell 1710) (temporary suspension from preaching) *and* of Theophilis Field, 2 State Trials 1087, 1118 (Howell 1620) (censure), *with* the case of Lord Lovat, 18 State Trials 529, 838 (Howell 1746) (hanging, drawing and quartering).

<sup>36</sup>4 William Blackstone, *Commentaries* \*121, \*141 [hereafter cited as Blackstone]. It may, to be sure, be difficult in the case of fines and damages to determine whether or not they are “lesser” judgments than removal and disqualification. Blackstone suggests that fines are lesser penalties than forfeiture of office. 4 Blackstone, \*140-41. In any event, there do exist judgments of the same nature as removal and disqualification that clearly extend “less far,” such as censure, enjoining misconduct, or temporary suspension.

for Virginia contains the following: “[A]nd the *only* sentence they shall have authority to pass shall be that of deprivation and future incapacity of office.”<sup>37</sup>

Third, and most importantly, Article I, section 3, undercuts any reading of Article II, section 4, as a comprehensive statement of impeachable offenses. With removal and disqualification the outer limits of a range of judgments, Article II, section 4—which commands only one of the extreme judgments permitted in Article 1, section 3—would be badly drafted as the vehicle for defining the entire range of impeachable offenses. It follows that Article II, section 4, is no such thing. Rather, Article II, section 4, lists a category of crimes for which no lesser judgment than removal is possible.

There is further confirmation of this reading of Article II, section 4, in the provision of Article III for the tenure of judges, which is discussed below.<sup>38</sup>

Once Article II, section 4, is understood, not as defining the impeachment power or impeachable offenses, but as requiring removal in certain cases, two further questions arise. First, why does the Constitution specifically require removal from office upon conviction of “treason, bribery, or other high crimes and misdemeanors”? Second, if not limited to this enumerated type, what are impeachable offenses? Here too, the answer to both questions is surprisingly clear in light of the relevant history.

### “High Crimes and Misdemeanors”

The core of the conventional view of impeachment—derived from an erroneous reading of Article II, section 4, in my view—is that “treason,

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<sup>37</sup>The Jeffersonian Cyclopaedia 416 (J. Foley ed. 1967) (emphasis added).

bribery, or other high crimes and misdemeanors” make up the constitutional standard of impeachable offenses. The conventional understanding, however, offers no clear notion of what “high crimes and misdemeanors” are. Commentators on impeachment differ widely among themselves over what constitutes a “high crime or misdemeanor.” Having little focus on the historical meaning of these words, writers tend to choose a meaning consistent with their preferences concerning proceedings in view at the time of their writing.<sup>39</sup> Much writing on impeachment consistently overlooks straightforward historical indications of the scope of “high crimes and misdemeanors” and impeachable offenses generally.<sup>40</sup>

A little digging into legal authorities well-known in 1787 reveals what “high crimes and misdemeanors” are and why they are specifically stated grounds of mandatory removal in Article II, section 4. The reason lies in the meaning of the word “high.” Without the word “high” attached to it, the expression “crimes and misdemeanors” is nothing more than a description of public wrongs, offenses that are cognizable in some court of criminal jurisdiction. Blackstone, speaking of the criminal law, begins: “We are now

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<sup>38</sup>See p.30 below.

<sup>39</sup>Berger concludes that “high crimes and misdemeanors,” and therefore impeachable offenses, amount to serious misconduct, but are not limited to crimes. See Berger at 53-102 (esp. 91-93). Brant concludes that “high crimes and misdemeanors” consist only of crimes indictable under federal law and violations of oaths of office. See Brant at 23. During the Watergate affair the staff of the House Judiciary Committee took a position close to that of Berger. See Impeachment Inquiry Staff of House Comm. On the Judiciary, 93d Cong., 2d Sess., *Constitutional Grounds for Presidential Impeachment* 1, 4 (Comm. Print 1974). President Nixon’s lawyers took a position very near that of Brant. See St. Clair, *An Analysis of the Constitutional Standard for Impeachment*, in *Presidential Impeachment: A Documentary Overview* 40-73 (M. Schnapper ed. 1974).

<sup>40</sup>But see Arthur Bestor, *Impeachment: The Constitutional Problems*, 49 Wash. L. Rev. 255 (1973) (review of Berger).

arrived at the fourth and last branch of these commentaries, which treats of *public wrongs or crimes and misdemeanors . . .*” and later continues: “A crime or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it.”<sup>41</sup>

In the 18th Century the word “high,” when attached to the word “crime” or “misdemeanor,” describes a crime aiming at the state or the sovereign rather than a private person. A “high crime or misdemeanor” is not simply a serious crime, but one aimed at the highest powers of the state. “High” has denoted crimes against the state since the Middle Ages.<sup>42</sup>

This meaning of “high” was known to the lawyers of 1787. Part III of Coke's Institutes—standard fare for lawyers of the 18th century<sup>43</sup>—begins with a chapter on *high* treason, followed by a chapter on *petit* treason, the first sentence of which demonstrates that for Coke “high” meant “against the sovereign”: “It was called high or grand treason in respect of the royall majesty against whom it is committed, and comparatively it is called petit treason ... in respect it is committed against subjects and inferior

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<sup>41</sup>4 Blackstone at \*1, \*5.

<sup>42</sup>The first appearance of the word “high” with this meaning in impeachments may have been in the proceedings against Robert de Vere and Michael de la Pole in 1386: “[I]t was declared that *in so high a crime* as is alleged in this appeal, which *touches the person of the king, our Lord, and the state of his entire realm . . .*” 3 Rotuli Parliamentorum [Rolls of Parliament] 236 (undated) (emphasis added) (passage from the rolls of Parliament for the years 1387-88, translated by the author from the original French: “[estoit declare], Que en si haute crime come est pretendu en cest Appell, q [qui] touche la persone du Roi nre [nostre] dit Sr [Seigneur], & l'estat de tout son Roialme . . . .”)

<sup>43</sup>See, e.g., 10 The Writings of Thomas Jefferson 376 (P. Ford ed. 1899); William Koch, Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution, 27 Mem. St. U.L. Rev. 333, 348, 361, 363 (1997); Robert Riggs, Substantive Due Process in 1991 1990 Wis L. Rev. 941, 958, 992-995 (1990); Christopher Vizas, Law and Political Expression in the American

persons ... .”<sup>44</sup> Blackstone reasserts this meaning of “high,”<sup>45</sup> describing various “misprisions” and “contempts ... immediately *against the king and government*” as “all such *high* offences as are under the degree of capital.”<sup>46</sup> This establishes both the nature of “high” offenses and the difference between them and serious (i.e. “capital”) crimes generally.<sup>47</sup> The form of the phrase “treason, bribery, *or other high* crimes and misdemeanors” in Article II, section 4, indicates that “treason” and “bribery” are also “high” crimes. The definition of treason in the Constitution<sup>48</sup> is taken verbatim from Blackstone's definition of “high” treason.<sup>49</sup> Thus the first enumerated crime in Article II,

Revolution, Feb. 1975 (unpublished paper on file with *Yale Law* journal) (thorough survey of Coke's stature in colonial America).

<sup>44</sup>3 Edward Coke, *Institutes of the Laws of England; Concerning High Treason and Other Pleas of the Crown* 19 (1817).

<sup>45</sup>Blackstone continues Coke's classification of treason as “high” and “petit.” 4 Blackstone at \*75. Like Coke, Blackstone was widely known in colonial America. See, e.g., 3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 501 (1836) (remark by James Madison regarding Blackstone) [hereafter cited as Elliot]; Robert Riggs, *Substantive Due Process in 1991* 990 *Wis L. Rev.* 941, 992-995 (1990).

<sup>46</sup>*Id.* at \*119. (Emphasis added.) Blackstone's enumeration of “high misdemeanors” under this heading includes “maladministration,” embezzlement of public money, various misprisions “against the king and government,” and violence or threats of violence against a judge. *Id.* at \*121-26. Blackstone also lists endeavoring “to dissuade a witness against giving evidence.” *Id.* at \*126. In case you were wondering, this appears to consist of trying to keep a witness from appearing at all rather than suggesting false testimony.

Please note, further, that I do not mean to suggest that “high crimes and misdemeanors” should be taken as congruent with offenses identified as “high” by Blackstone, but simply that the import of the term “high” attached to crimes is clear in Blackstone's *Commentaries*.

<sup>47</sup>There is also a difference between “high” crimes and crimes “against the King's peace,” the latter words being a necessary incantation to bring any offense within the jurisdiction of the King's courts. 1 Blackstone at \*118, \*268, \*350; 4 Blackstone at \*444 (appendix).

<sup>48</sup>Article III, section 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”).

<sup>49</sup>4 Blackstone at \*81-82.

section 4, is unequivocally a “high” crime. Bribery of a public official was also a crime against the state at common law, being limited to the making or taking of payments to influence the course of justice.<sup>50</sup>

“High crimes and misdemeanors” thus refer to crimes that harm the state in an immediate way and impair its functioning. Examples of high crimes include treason, bribery, espionage, obstruction of justice in federal criminal proceedings, sabotage of government property, and embezzling or stealing from the public treasury.

The proceedings of the 1787 Constitutional Convention strongly imply this understanding of “high crimes and misdemeanors” among the framers. The Convention originally adopted the expression “high crimes and misdemeanors *against the State*.”<sup>51</sup> The words “against the State” were subsequently deleted from this clause, being first replaced by “against the United States” in order “to remove ambiguity.”<sup>52</sup> The words “against the United States” were then removed without explanation by the Committee of Style.<sup>53</sup> The Committee of Style, unlike other committees of the Convention, was not authorized to make any changes in meaning.<sup>54</sup> This allows the strong inference that the drafters considered the words “against the United States” redundant in this clause. Further underscoring this understanding, Representative Lawrence of New York, speaking in the First Congress, referred to Article II, section 4, of the

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<sup>50</sup>Id. At \*139.

<sup>51</sup>2 Farrand at 550 (emphasis added).

<sup>52</sup>Id. at 551. The “state” in question in federal impeachments is of course the United States.

<sup>53</sup>Id. at 575, 600.

<sup>54</sup>Id. at 553; cf. 3 id. at 499.

Constitution as preventing the retention in office of persons “guilty of crimes or misdemeanors against the Government.”<sup>55</sup>

There is also evidence from the Constitutional Convention that the framers did not consider “high misdemeanors” to be a grab-bag of unspecified offenses, but crimes directed at the state. When a draft provision for extradition by the states of “any person charged with treason, felony or high misdemeanor” was considered, the words “high misdemeanor” were replaced with “other crime,” (as Article IV, section 2, now reads) because it was “doubtful whether ‘high misdemeanor’ had not a technical meaning too limited.”<sup>56</sup> In the debate of August 20 on treason, which is held out as “an offence against the Sovereignty”<sup>57</sup> there is a particularly telling observation of Rufus King, who points out that the definition of treason “excludes any treason against particular States,”<sup>58</sup> adding that “[t]hese may however punish offences” against them “as high misdemesnors.”<sup>59</sup>

This meaning of “high” explains why Article II, section 4, requires removal for “high crimes and misdemeanors.” It bars the retention in office of civil officers convicted of wrongdoing that harms the state itself. Because it does not concern itself with wrongdoing that strikes elsewhere, however, Article II, section 4, is not plausible as a comprehensive definition of

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<sup>55</sup>1 Annals of Congress 392-93 (1789) (running head: “Gales & Seaton's History of Debates in Congress”).

<sup>56</sup>2 Farrand at 443.

<sup>57</sup>2 Farrand at 346 (remark of Johnson).

<sup>58</sup>This is so because the definition of treason in the Constitution is limited to treason against the United States.

<sup>59</sup>Id. At 348.

impeachable offenses.<sup>60</sup> Any number of the most serious crimes—murder, bank robbery, rape—are not “high” crimes.<sup>61</sup> Article II, section 4, does not prevent impeachment and removal for such crimes. It simply does not *require* removal upon conviction. The conventional reading of Article II, section 4, by contrast, leaves the Congress without recourse against a President in office who has committed these crimes and, until the passage of the 25th Amendment in 1967, would have left the nation without recourse against a President’s incapacity or madness.<sup>62</sup>

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<sup>60</sup>Even if it were conceivable to leave a President who had committed other crimes (such as murder) beyond the reach of impeachment—on the ground, for example, that only harm to the state warrants removal—it is unimaginable to do the same for federal judges. See p. 21 below.

<sup>61</sup>One commentator gives murder and rape as “manifest grounds of removal for high crimes.” Brant, note 24 above, at 43. In this Brant appears to equate “high” with “serious.” But neither murder nor rape were “high” crimes at common law (unless directed at the sovereign). Given this, Brant’s observation (albeit unwittingly) demolishes the conventional reading of the impeachment provisions in the Constitution.

<sup>62</sup>See also p.32 below.

## The Range of Impeachable Offenses

Given the meaning of “high” crimes, Article II, section 4—which by its terms does not prevent impeachment for other misconduct—cannot reasonably describe the full range of impeachable offenses. This raises the inevitable next question: what *is* impeachment for? Here also there is an answer in the text of the Constitution and the relevant history.

Impeachment is for crimes. It is, simply, a form of criminal process conducted in Congress. There is an immediate indication of the character of impeachment in Article III, section 2: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury ... .” This clause, by the qualifying words “except in Cases of Impeachment” places impeachment squarely in the family of criminal proceedings. Similarly, the President’s power in Article II, section 2, to grant reprieves and pardons does not apply “in Cases of Impeachment.” Further underscoring the nature of impeachment as a criminal process is the provision in Article I, section 3, that the “party convicted” in an impeachment trial remains liable to indictment and trial at law. No exception to the principles of double jeopardy would be necessary if impeachment were not a criminal process.

These textual indications gain considerable force from the history of impeachment in England and America. The framers adopted the impeachment power against a well-known common law background of English and American practice. Indeed, there was an impeachment actually under way in

England at the time of the Federal Convention.<sup>63</sup> From the history of impeachment before 1787 it is possible to reconstruct the general understanding of impeachment that an American lawyer would have had in 1787. Impeachment emerges from this exercise as a common law criminal process, an area of jurisdiction with some power to shape itself, but also governed by precedent.

Throughout its history in England and America, impeachment was concerned with crimes. Blackstone described impeachment as “a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.”<sup>64</sup> To say that impeachment lies for crimes, however, is only a starting point of analysis and does not mean that an impeachable crime was a statutory crime or an indictable crime triable in the King's courts. Impeachment was a criminal process with its own body of precedent. Because the jurisdiction of Parliament as a court of impeachment was separate, it was not bound by the precedents of the King's courts. Impeachable offenses within the jurisdiction of Parliament were governed only by the law of Parliament.<sup>65</sup> Blackstone allowed that impeachable crimes were something of a class apart:

For, though in general the union of the legislative and judicial powers ought to be more carefully avoided, yet it may happen that a subject entrusted with the

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<sup>63</sup>The impeachment of Warren Hastings. See the remarks of George Mason at the Constitutional Convention, p.36 below.

<sup>64</sup>Blackstone at \*259.

<sup>65</sup>See, e.g., *Grantham v. Gordon*, decided in 1719 by the Lords: “[I]mpeachments in Parliament differed from indictments, and might be justified by the law and course of Parliament.” 24 Eng. Rep. 539, 541 (H.L. 1719).

administration of public affairs may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either dares not or cannot punish.<sup>66</sup>

This does not, however, change the fundamental character of impeachment as a criminal process. Indeed, Blackstone had also previously asserted that an impeachment was the “prosecution of the already known and established law ...”<sup>67</sup>

While undoubtedly a criminal process, impeachment was not limited specifically to “high crimes and misdemeanors.” Throughout its history in England and America impeachment had extended to other offenses.

In England there were, as one would expect, impeachments for treason and corruption. But there were also impeachments for other misconduct both in and out of office.<sup>68</sup> In 1681, the House of Commons resolved:

That it is the undoubted right of the Commons, in parliament assembled, to impeach before the Lords in Parliament, any peer or Commoner for treason or any other crime or misdemeanor.<sup>69</sup>

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<sup>66</sup>Blackstone at \*260-61. This idea is repeated almost exactly by Wooddeson. 2 R. Wooddeson, *A Systematical View of the Laws of England* 596 (1972) [hereafter cited as Wooddeson].

<sup>67</sup>Blackstone at \*259. This distinguishes impeachments from attainders. See *id.*

<sup>68</sup>Case of Lord Mordaunt, 6 State Trials 785, 790 (Howell 1660) (preventing another from standing for Parliament, and making uncivil addresses to a young lady); Case of Chief Justice Scroggs, 8 State Trials 163, 200 (Howell 1680) (“frequent and notorious excesses and debaucheries”); 4 J. Hatsell, *Precedents of the Proceedings in the House of Commons* 126 (1818) (“advising and assisting in the drawing and passing of ‘A Proclamation Against Tumultuous Petitions’”); Case of Peter Pett, 6 State Trials 865, 866-88 (Howell 1668) (negligent preparation before an enemy invasion, losing a ship through carelessness, and sending the wrong type of planks to serve as platforms for cannon); Case of Edward Seymour, 8 State Trials 127, 128-36 (Howell 1680) (applying funds to public purposes other than those for which they had been appropriated).

<sup>69</sup>Case of Edward Fitzharris, 8 State Trials 223, 236-37 (Howell 1681). See also J. Selden, *Of the Judicature in Parliaments* 6 (1690) (House of Lords may proceed upon impeachment against any person for any offense).

The 1681 resolution was part of a dispute, never entirely settled, between the Commons and the Lords, over which classes of persons were subject to trial by the Lords

Thomas Jefferson had precisely this understanding of the English precedent. In his *Manual of Parliamentary Practice* Jefferson wrote that the Lords “may proceed against the delinquent, of whatsoever degree, and whatsoever be the nature of the offence.”<sup>70</sup>

In the entire body of impeachment cases and commentary in England impeachable offenses are not once held out as congruent with “high crimes and misdemeanors.”<sup>71</sup> The view of some commentators<sup>72</sup> that “high crimes and misdemeanors” described the entire range of impeachable offenses in England is therefore unsustainable.<sup>73</sup> What may have misled commentators on

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upon impeachment. See 2 Wooddeson at 601. Blackstone thought that a commoner could not be impeached for a capital offense, but only for a “high misdemeanor” (a crime against the state, not carrying the death penalty), while a peer could be impeached for any crime. See 4 Blackstone at \*259. Other commentators took a different view of the restrictions on the scope of impeachment of commoners. See case of Edward Fitzharris at 231-32 & n.t, 236 n.\* (note by Howell); cf. 2 Wooddeson at 601&n.m.

<sup>70</sup>Thomas Jefferson, *Manual of Parliamentary Practice* v, vi, 113 (1857). Jefferson also gave the entire body of English rules as controlling in cases of impeachment conducted in the U.S. Congress. *Id.* at 112-17.

<sup>71</sup>Wooddeson, whose *Laws of England* were widely quoted at American impeachment trials (see, e.g., 8 *Annals of Congress* 2266, 2287, 2299 (1799)), also indicates clearly that impeachment lies for offenses other than “high crimes and misdemeanors.” 2 Wooddeson at 601, 606. James Fitzjames Stephen concludes that “peers may be tried for any offence, and commoners for any offence not being treason or felony upon an accusation or impeachment by the House of Commons, which is the grand jury of the whole nation.” James Stephen, *A History of the Criminal Law in England* 146 (1883). None of these writers anywhere proposes “high crimes and misdemeanors” as the standard for impeachment. Moreover, English law dictionaries from the 18th and early 19th Centuries give “crimes and misdemeanors” rather than “*high* crimes and misdemeanors” as the standard for impeachment. See, e.g., *Jacob’s Law Dictionary* (O. Ruffhead & J. Morgan eds. 1773). *Tomlins Law Dictionary* (T. Granger ed. 1836).

<sup>72</sup>See, e.g., Berger, note 10 above, at 67.

<sup>73</sup>Berger has difficulty reconciling the narrow scope of “high” misdemeanors in Blackstone with the range of impeachable offenses in English history. See Berger, note 10 above, at 61-62, 86, 89, 92. In other writings Berger concludes 1) that “high crimes and misdemeanors” are words of art specifically describing impeachable offenses, and meaning

this point is that the words “high crimes and misdemeanors” were routinely used in the official language of impeachment proceedings—articles and pleadings—in the 17th and 18th centuries.<sup>74</sup> But by then these words had become jurisdictional formalities, incantations like “by force and arms” in complaints for trespass before the King’s courts.<sup>75</sup>

In America, where the history of impeachment reaches back to the 17th century,<sup>76</sup> “high crimes and misdemeanors” were no more than in England the

something other than “crimes and misdemeanors” modified by “high,” and 2) that “nor were ordinary ‘misdemeanors’ a criterion for impeachments.” Raoul Berger, *The President, Congress, and the Courts*, 83 *Yale L.J.* 1111, 1145 (1974). Both conclusions are dubious. On the former, see Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 *Yale L.J.* 1419 (1975). As to the latter, ordinary “misdemeanors” definitely were a standard of impeachment, as demonstrated below.

<sup>74</sup>See Alexander Simpson, *A Treatise on Federal Impeachments* 143-90 (1916).

<sup>75</sup>See, e.g., 4 William Blackstone, *Commentaries on the Laws of England* 5 n.c. (R. Kerr ed. 1962) (note by Edward Christian, a late 18th century commentator): “When the words *high crimes and misdemeanors* are used in prosecutions for impeachment, the words *high crimes* have no definite signification, but are used merely to give greater solemnity to the charge.” See Berger, note 10 above, at 59 & n.20.

When a writ of *assumpsit* referred to a breach of contract “by force and arms” no actual force or arms were involved. Similarly the incantatory “high” in articles of impeachment did not mean that an actual “high” crime was at issue.

Before 1660 impeachments had in fact been brought in England without without even the allegation of “high crimes and misdemeanors” in the articles of impeachment, on charges of being a “monopolist” and a “patentee.” See *Case of Giles Mompesson*, 2 *State Trials* 1119 (Howell 1620); *Case of Francis Michell*, *id.* at 1131 (Howell 1621). There were also charges of “misdemeanors.” See *case of Samuel Harsnet*, *id.* at 1253 (Howell 1624) (ecclesiastical malfeasances). And there were charges of “Misdemeanors, Misprisions, Offences, Crimes.” *Case of the Duke of Buckingham*, *id.* at 1267, 1308, 1310 (Howell 1626) (procuring offices for himself “to the great discouragement of others” and letting the navy deteriorate under his command); *Case of the Earl of Bristol*, *id.* at 1267, 1281 (Howell 1626) (“Crimes, Offences, and Contempts”). Some impeachments were brought on charges that were not defined. See Simpson, note 71 above, at 115.

After 1660, when the words “high crimes and misdemeanors” commonly were added to articles of impeachment, the underlying charges were frequently not “high.” See note 68 above.

<sup>76</sup>Article XVII of the Pennsylvania Charter of 1683 granted the Assembly the power to impeach criminals. 2 Benjamin Poore, *The Federal and State Constitutions, Colonial*

standard for impeachment.<sup>77</sup> There are definitions of impeachable offenses in the pre-1787 constitutions of nine of the 13 original states and Vermont. None makes any mention of “high crimes and misdemeanors,” and all contain one of the following formulations: “misbehaviour,”<sup>78</sup> “maladministration,”<sup>79</sup> “maladministration or other means by which the safety of the State shall be endangered,”<sup>80</sup> “mal and corrupt conduct in ... office,”<sup>81</sup> or “misconduct and maladministration in ... office.”<sup>82</sup>

Despite the breadth of these provisions, impeachment retained the character of a criminal proceeding.<sup>83</sup> The terms describing impeachable

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Charters, and Organic Laws of the United States 1529 (2d ed. 1878) [hereafter cited as Poore]. In 1684 Nicholas Moore, the first Chief Justice of the Provincial Court, was impeached under this provision. See W. Loyd, *The Early Courts of Pennsylvania* 61 (1910).

<sup>77</sup>As in England, no tribunal or commentator in America before 1787 ever used the words “high crimes and misdemeanors” as a comprehensive statement of impeachable offenses.

<sup>78</sup>New Jersey Constitution article. XII (1776), *reprinted in* 2 Poore at 1312.

<sup>79</sup>Pennsylvania Constitution section 22 (1776), *reprinted in* 2 Poore at 1545; Vermont Constitution chapter II, section 20 (1777), 2 Poore 1863.

<sup>80</sup>Virginia Constitution (1776), *reprinted in* 2 Poore at 1912. See Delaware Constitution, article XXIII (1776), 1 Poore at 276-77; North Carolina Constitution, article XXIII (1776), 2 Poore at 1413.

<sup>81</sup>New York Constitution article XXXIII (1777), *reprinted in* 2 Poore at 1337; South Carolina Constitution article XXIII (1778), 2 Poore 1624.

<sup>82</sup>Massachusetts Constitution. Chapter 1, section 2, article VIII (1780), *reprinted in* 1 Poore at 963, New Hampshire Constitution (1784), 2 Poore 1286.

<sup>83</sup>The character of impeachment as a strictly criminal proceeding may have been weakened in some early American practice, but not decisively. Article XVII of the Pennsylvania Charter of 1683 granted the Assembly the power to impeach “criminals.” 2 Poore 1529. That power may have come to seem insufficient because the Charter of 1696 included the power to “impeach criminals or such persons as they shall think fit to be there impeached.” *Id.* at 1535. In the interim, in 1684, the Assembly had impeached Nicholas Moore, the first Chief Justice of the Provincial Court. The articles of impeachment, although formidable in appearance, contained allegations hardly more serious than arbitrariness and arrogance. See W. Loyd, *The Early Courts of Pennsylvania* 61 &n.1 (1910).

offenses in 18th century state constitutions (“misconduct in office,” “misbehaviour,” “maladministration”) may not all sound like crimes to modern ears, but they are in fact terms for various types of misdemeanors treated as criminal offenses. Indeed, in the impeachment of Judge Hopkinson of Pennsylvania in 1780 the President of the Council viewed the conclusion that “crimes only are causes of removal” as following directly from the premise that judges hold office “during good behaviour.”<sup>84</sup>

### Relation of Impeachable Offenses and Judges’ “Good Behaviour”

There is further confirmation, both textual and prudential, of the true meaning of Article II, section 4, in the provision of Article III, section 1, concerning the tenure of judges.

Judges hold office “during good behaviour.” These three words serve both to give judges life tenure and to indicate a standard for their removal. Article II, section 4, for its part, applies to all civil officers. There is no indication anywhere in the Constitution that judges can be removed in any way other than impeachment.<sup>85</sup> If “treason, bribery, or other high crimes and misdemeanors” in Article II, section 4, describe the entire range of impeachable offenses, then judges’ “good behaviour” includes all conduct short of “high crimes and misdemeanors.” There is, however, no such

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<sup>84</sup>Pennsylvania State Trials 3, 56 (1780). The standard for impeachment in the Pennsylvania constitution of the time was “maladministration.” See p.29 above.

<sup>85</sup>Deliberations at the Federal Convention indicate that judges are removable only by impeachment. On August 27, 1787, the Convention rejected a motion to make the judges removable “by the Executive on the application <by> the Senate and House of Representatives.” 2 Farrand at 428-29.

connection between judges' lapses from "good behaviour" and the commission of "high crimes and misdemeanors." "Good behaviour" is a term of art that means, simply, to commit no crime. "Misbehaviour" (and its close relative "misdemeanor") was a generic term at common law for criminal misconduct.<sup>86</sup> A federal judge can be removed, therefore, for committing a crime and only for committing a crime. At the Convention of 1787, however, "high crimes and misdemeanors" were not once held out as the test of impeachment and removal of judges. This silence is echoed in the *Federalist*, where Hamilton wrote that impeachment is the only way to remove judges for "malconduct":

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be removed from office and disqualified from holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character . . . .<sup>87</sup>

Given this, if "high crimes and misdemeanors"<sup>88</sup> are also the sole standard of impeachment, the tenure of judges takes on a very peculiar tilt. Among other problems, a judge who had committed murder could not be removed from the bench.<sup>89</sup>

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<sup>86</sup>In the impeachment of Judge Hopkinson of Pennsylvania in 1780 the President and Council, before whom the case was tried, asserted as though self-evident: "[Judges] hold office during good behaviour. . . . Crimes only are causes of removal." Pennsylvania State Trials 3, 56 (1780).

<sup>87</sup>The *Federalist* No. 79, at 474 (C. Rossiter ed. 1961).

<sup>88</sup>These are crimes against the state, remember.

<sup>89</sup>A federal judge can be indicted, to be sure, but indictment and conviction in a court of law do not remove a judge from office. A judge convicted of murder, imprisoned, and later released could therefore return to the bench.

The difficulty of reconciling judges' tenure during "good behaviour" with the offenses enumerated in Article II, section 4, disappears once the latter provision is understood as requiring the removal of officers who have committed "high crimes and misdemeanors" but not excluding their impeachment and removal for "misbehaviour."<sup>90</sup>

Congressional practice in impeachments over the years has been fully consistent with this understanding. Impeachment of judges has not been predicated on their having committed "high crimes and misdemeanors."<sup>91</sup>

Similarly, Article II, section 1, of the Constitution (concerning a President's incapacity) makes dubious sense coupled with the conventional understanding of Article II, section 4. Article II, section 1, provides that in the case of the President's "inability" the office shall devolve upon the Vice President. But nothing there indicates that there is any mode of removal other than impeachment proceedings. The apparent possibility of removal of a

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<sup>90</sup>The conventional understanding of Article II, section 4, by contrast, implies that there are two separate tracks of impeachment, one for the "President, Vice President, and all civil officers of the United States" who commit "high crimes and misdemeanors" and another for federal judges who depart from "good behaviour." The proponents of the conventional view do not always appreciate this implication fully, but it inheres in their view.

<sup>91</sup>See the discussion of the Pickering impeachment on p.41 below. Also, the articles of impeachment against Judge George W. English in 1926 contained no allegation of "high crimes and misdemeanors." 67 Cong. Rec. 6283 (1926). The House went on to vote overwhelmingly for articles of impeachment against English containing no allegations of "high crimes and misdemeanors." *Id.* at 6283-87. Four of five articles of impeachment against Judge Harold Louderback did not mention "high crimes and misdemeanors." *Proceedings of the United States Senate in the Trial of Impeachment of Harold Louderback* 825-31 (Gov't Printing Off. 1933). In 1936 Judge Halsted Ritter was impeached by the House "for misbehavior and for high crimes and misdemeanors," and convicted by the Senate on a general charge of misbehavior. *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter* 5, 637 (Gov't Printing Off. 1936).

President in the event of “inability” cuts against the view of Article II, section 4, as a comprehensive statement of grounds for impeachment.<sup>92</sup>

### The Understanding of Impeachment in the Period 1787-1803

There was considerable debate on impeachment at the Constitutional Convention of 1787. A number of the delegates also had much to say on the question in the period immediately following the Convention and in the First Congress of 1789. Made in the forensic heat of various moments, their utterances do not invariably cohere perfectly.<sup>93</sup> In all, however, they add considerable weight to the exegesis of the impeachment provisions that I have expounded here.

Among the delegates to the Convention were proponents of broad and narrow impeachment powers. At an early session (June 2, 1787) the Convention adopted the resolution of Hugh Williamson that the executive be “removable on impeachment & conviction of malpractice or neglect of duty.”<sup>94</sup> This clause, which evolved into Article II, section 4, contains a

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<sup>92</sup>In the First Congress Representative. Smith of South Carolina pointed out that the Constitution “contemplates infirmity in the Chief Magistrate; makes him removable by impeachment; and provides the Vice President to exercise the office, upon such a contingency taking place.” 1 Annals of Congress 528 (1789) (running head: “Gales & Seaton's History of Debates in Congress”). Smith was doubtless referring to Article II, section 1; his understanding of the clause is impossible unless he believed that the scope of impeachment went beyond the terms of Article II, section 4.

<sup>93</sup>Utterances made in the First Congress, though, may be entitled to particular weight because 1) the framing of the Constitution was still freshly in mind and 2) unlike the records of the Constitutional and Ratifying Conventions (which are for the most part shorthand notes transcribed years later) the Annals of Congress are verbatim transcripts of statements knowingly made in a public forum.

<sup>94</sup>1 Farrand at 78-79, 88.

standard of impeachable offenses. That may be why some commentators see the same in Article II, section 4, today. But in the course of the Convention Williamson's clause became something different.

At a later session (July 20, 1787) the Convention, after protracted debate, adopted Williamson's clause for the draft which was sent to the Committee of Detail. In the course of the debate on July 20, James Madison opposed Gouverneur Morris, who found Williamson's terms too broad:

Mr. Govr. Morris admits corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined:  
Mr. <Madison>—thought it indispensable that some provision should be made for defending the Community agst 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.<sup>95</sup>

Neither incapacity nor negligence are “high crimes and misdemeanors.” Later in the debate, Morris changed his mind, and moved closer to Madison's view:

Mr. Govr. Morris's opinion had been changed by the arguments used in the discussion . . . . Corrupting his electors, and incapacity were other causes of impeachment.<sup>96</sup>

The clause actually adopted on July 20 (by a vote of 8 to 2) provided that the executive was “removeable on impeachment and conviction for malpractice and neglect of duty.”<sup>97</sup> If we are to view the current form of Article II, section 4, as containing the whole of the impeachment power, then the apparent consensus of July 20 simply melted away without a trace.

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<sup>95</sup>2 Farrand at 65.

<sup>96</sup>Id. at 68-69.

<sup>97</sup>2 Farrand 64, 69. Madison's notes summarize the question put to a vote as “Shall the Executive be removeable on impeachments?” Id. at 69.

In the hands of the Committee of Detail, Williamson's clause changed from one in which the President is “removable” for “malpractice and neglect of duty” to one in which he “shall be removed” for “Treason (or) Bribery or Corruption.”<sup>98</sup> This clause was further modified by the Committee of Eleven. The Senate was made the trier of impeachments, and the only named offenses were treason and bribery:

He shall be removed from his Office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery . . . .<sup>99</sup>

It takes considerable massaging of this clause as it emerged from the two committees to read it as describing the full range of impeachable offenses. To that end the members of the two committees need only have replaced “malpractice and neglect of duty” by “treason or bribery” in the original Williamson clause. To have also replaced “to be removable” by “shall be removed” suggests an additional purpose. And, although an inadvertent change is conceivable,<sup>100</sup> it would have been an extraordinary coincidence for the members of the two committees to have adopted unwittingly the language of mandatory removal and listed far graver offenses than before without perceiving the changed meaning of the clause before them. To have limited

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<sup>98</sup>The changes are reflected in the notes of a member of the Committee:

He shall be (dismissed) *removed* from his Office on Impeachment by the House of Representatives, and Conviction in the Supreme (National) Court, of Treason (or) Bribery or Corruption.

Id. at 172. Farrand indicates that the parts in parentheses are crossed out in the original. Id. at 163 n.17. The writing appears to be largely in the hand of James Wilson. Id.

<sup>99</sup>Id. At 481, 497, 499.

<sup>100</sup>This change was not made in the heat of the moment. Six weeks had elapsed between the referral to the Committee of Detail and the return of the draft to the whole Convention.

impeachment to treason and bribery would be contrary to the earlier understanding of Madison and Morris on July 20, and would leave an incompetent or insane President beyond the reach of Congress, as well as one who had committed murder, highway robbery, or embezzlement. Rather than put this near-nonsensical construction on the clause that emerged from the Committee of Eleven, it seems obvious to take it to mean what it says: if, on impeachment, the chief executive is found guilty of treason or bribery, he must be removed from office.

The clause from the Committee of Eleven was debated in the Convention on September 8. Before coming to a vote, it elicited the following exchange between George Mason and James Madison:

Col. Mason. 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—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after “bribery” “or maladministration.” Mr. Gerry seconded him—

Mr. Madison So vague a term will be equivalent to a tenure during pleasure of the Senate ...

Col. Mason withdrew “maladministration” & substitutes “other high crimes & misdemeanors” <agst. the State.>

On the question thus altered [passed 8 to 3].<sup>101</sup>

Mason perhaps understood the provision before the Convention as describing the full range of impeachable offenses,<sup>102</sup> although his remark by no means

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<sup>101</sup>Id. At 550. The conventional understanding of Article II, section 4, is derived in large part from Mason’s remark.

<sup>102</sup>If so, he was mistaken. Mason—who was militant on the question of impeachment, but had been a member neither of the Committee of Detail nor the Committee of Eleven—may have been expecting the former Williamson clause concerning the offenses for which a President was “removable.”

forces that conclusion.<sup>103</sup> Nothing in Madison's answer to Mason, however, suggests an understanding that departs from the precise terms of Article II, section 4.<sup>104</sup> The point that so "vague" a term as "maladministration" would be "equivalent to tenure at the pleasure of the Senate" applies with perfectly good sense to a clause governing mandatory removal. If an impeachment were brought by the House on any offense, the Senate could rationalize a capricious removal by characterizing the offense as maladministration and asserting a duty to remove the President. The words subsequently proposed by Mason, "high crimes and misdemeanors against the State," leave the Senate less room for such maneuvers. A term can be too vague for inclusion in a list of offenses for which removal by Senate is required, while remaining a valid basis for Congress as a whole to exercise discretion. It was Madison, remember, who held out "incapacity" and "negligence" as "indispensable" grounds of impeachment in the debate of July 20.<sup>105</sup> Unless Madison had a complete change of view in the interim, he was objecting to "maladministration" as a cause of mandatory removal, not impeachment in general.<sup>106</sup>

There is a further clue in Madison's choice of words on September that his concern was excessive action by the Senate under a mandate to remove the President rather than the scope of impeachment in general. Madison remarked that "maladministration" in this clause would be equivalent to tenure at the

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<sup>103</sup>Mason's remark make good sense applied to a provision for mandatory removal.

<sup>104</sup>Madison, unlike Mason, had been on the Committee of Eleven, and was more than likely to have known the meaning of the clause before the Convention.

<sup>105</sup>See p. \_\_ above.

<sup>106</sup>Note Madison's embrace of "maladministration" as a standard of impeachment in the First Congress. See p. \_\_ below.

pleasure of the *Senate*. The Senate by itself has the removal power only. The impeachment power belongs to the House of Representatives. In subsequent remarks on September 8, Madison asserted that the House could impeach for “any act which might be called a misdemeanor,” a standard far from congruent with “high crimes and misdemeanors against the State.”<sup>107</sup> The Mason-Madison exchange of September 8 does not imply, therefore, that the Convention rejected “maladministration” as a standard for impeachment. Rather, the Convention accepted “high crimes and misdemeanors against the State” as a standard for mandatory removal, after Madison questioned “maladministration” for such a purpose.

A number of later assertions by Madison himself confirm that he neither saw in “high crimes and misdemeanors” the full range of impeachable offenses nor rejected “maladministration” as a ground for impeachment. Speaking before the Virginia ratifying convention Madison suggested that “if the President be connected in any suspicious manner, with any person, and there be grounds to believe he will shelter them, the House of Representatives can impeach him; they can remove him if found guilty.”<sup>108</sup> He later indicated that the President was impeachable for “abuse of power.”<sup>109</sup> On May 19,

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<sup>107</sup>Id. At 551. A similar point was made two months later by James Wilson at the ratifying convention of Pennsylvania: “[T]he Senate stands controlled. . . . With regard to impeachments, the senate can try none but such as will be brought before them by the house representatives.” McMaster and Stone, *Pennsylvania and the Federal Constitution* 313-338, quoted in 3 Farrand 161-162.

<sup>108</sup>3 Elliot at 498.

<sup>109</sup>Id. at 516. Among impeachable offenses held out by others at state ratifying conventions were conduct exciting suspicion, see 2 Elliott at 45; “malconduct” and abuse of power, see id. at 168-69; making bad treaties (James Wilson), see id. at 477, 4 id. at 125; an attempt by the President to push a treaty through the Senate without a quorum being present (John Rutledge), see id. at 268; behaving amiss, or betraying a public trust (Charles Pinckney), id. at 281; “any misdemeanor in office” by the President and giving

1789, in the debates of the First Congress on the Executive Departments (in which were intermingled numerous comments on the scope of impeachment), Madison distinguished “high crimes and misdemeanors against the United States” from impeachable offenses in general:

I think it absolutely necessary that the President should have the power of removing from office; it will make him in a peculiar manner, responsible for their conduct, and 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.<sup>110</sup>

Later in the same debate, on June 16, Madison asserted that the President “is impeachable for any crime or misdemeanor before the Senate, at all times.”<sup>111</sup> Madison's most revealing remarks came on June 17 when he suggested that the House could “at any time” impeach and the Senate convict an “unworthy man.”<sup>112</sup> Madison further contended that “the wanton removal of meritorious officers” was an act of “maladministration” which would subject a President “to impeachment and removal.”<sup>113</sup>

Other standards proposed for impeachment in the First Congress included “misdemeanors,”<sup>114</sup> “malconduct,”<sup>115</sup> misbehavior,<sup>116</sup> “displacing a worthy

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false information to the Senate (James Iredell), see at 109,127; abuse of trust “in any manner” by the President (Richard Spaight), see *id.* at 114, 276; “any maladministration in his office” by the President, see *id.* at 47, 3 *id.* at 17; and misbehavior (Governor Randolph of Virginia), see *id.* at 201. Opinions closer to the conventional view of impeachment were expressed as well in the state ratifying conventions. See 4 Elliot at 48-49; *id.* at 113.

<sup>110</sup>1 Annals of Congress 387.

<sup>111</sup>*Id.* at 480.

<sup>112</sup>*Id.* at 517.

<sup>113</sup>*Id.*

<sup>114</sup>1 Annals of Congress at 484, 493.

<sup>115</sup>*Id.* at 495.

<sup>116</sup>*Id.* at 493.

and able man,”<sup>117</sup> indolence,<sup>118</sup> “neglect,”<sup>119</sup> and infirmity.<sup>120</sup> None of this misconduct was specifically identified as “high crimes and misdemeanors.”

Several key questions on the scope of impeachment arose in the case of Judge John Pickering in 1803, the first impeachment under the Federal Constitution to result in a conviction.<sup>121</sup> The most important element in the Pickering case is the Senate’s rejection of “high crimes and misdemeanors” as the standard for impeachment and removal. The case also bears on the range of possible judgments in impeachment trials.

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<sup>117</sup>Id. at 504.

<sup>118</sup>Id. at 489.

<sup>119</sup>Id. at 594.

<sup>120</sup>Id. at 528.

<sup>121</sup>The Pickering case was in fact the only impeachment trial before 1936 in which there was an actual finding of guilt from which can be drawn inferences about the range of impeachable offenses.

The early federal impeachments also reveal that the conventional view of the impeachment provisions has no greater seniority than the interpretation I have proposed here. There is no systematic explanation or gloss of the impeachment provisions exactly contemporaneous with the Constitutional Convention. In 1799, Representatives Bayard and Harper, the managers of the impeachment trial of Senator Blount (the first under the Federal Constitution) argued that the power to impeach is granted to Congress in its established sense and that Article II, section 4, merely compels the removal of officers found guilty of the offenses specified there. 8 Annals of Congress 2251-53, 2298-99, 2301-04 (1799). Harper also insisted on the possibility of lesser penalties than removal. Id. at 2302. Blount’s defense (Dallas) answered with what has become the conventional view of impeachment. Id. at 2263-67. The Blount case went off on the ground that a Senator is not subject to impeachment for crimes committed in office, see id. at 2318, leaving the other questions unresolved.

Both interpretations of the impeachment provisions were advanced in the impeachment trial of Justice Samuel Chase in 1805. The defense held out Article II, section 4, as an exhaustive definition of impeachable offenses. 14 Annals of Congress 432 (1805). The leading counsel for the defense, Luther Martin, set the stage for a long tradition of constitutional scholarship by quoting Article II, section 4, erroneously in making his argument. Id. One of the managers of the impeachment (Representative Rodney of Delaware) held out Article II, section 4, as requiring removal for the specified offenses, stressing both the common law background of impeachment and the relation between the possibility of lesser judgments and the command of Article II, section 4. Id. at 591-607.

Pickering was impeached and convicted for drunkenness. When the trial came down to a vote on Pickering's guilt, Senator White, one of Pickering's supporters in the Senate, attempted to put the following question for judgment:

Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the \_\_\_\_\_ article of impeachment, or not guilty?<sup>122</sup>

Senator Anderson proposed the following question:

Is John Pickering, etc., ... guilty as charged in the article of impeachment exhibited against him by the House of Representatives?<sup>123</sup>

Anderson's formulation was adopted by the Senate,<sup>124</sup> whereupon Senator White argued that to find guilt on such a question, without declaring “whether those acts amounted to high crimes and misdemeanors,” was to find that “high crimes and misdemeanors” were not necessary for removal.<sup>125</sup> The Senate proceeded to find Pickering guilty in the exact terms of Senator Anderson's question, by a vote of 19 to 7.<sup>126</sup>

Having found Pickering guilty, the Senate passed a judgment of removal by a separate vote of 20 to 6.<sup>127</sup> If no lesser sanction than removal were possible this second vote would have been unnecessary. Therefore the second vote both confirms the possibility of lesser judgments implied by Article I,

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<sup>122</sup>13 Annals of Congress 364 (1803).

<sup>123</sup>Id.

<sup>124</sup>Id.

<sup>125</sup>Id. at 364-65.

<sup>126</sup>Id. at 367.

<sup>127</sup>Id.

section 3, and, more importantly, underscores the true meaning of Article II, section 4. Because Pickering had not been convicted of “high crimes and misdemeanors,” removal was not mandatory and the Senate had to take separate action on the question.<sup>128</sup>

### Censure in Impeachments

The implications of the separate vote on removal in the Pickering impeachment are particularly germane to the current impeachment involving President Clinton. Because President Clinton's misconduct—on any theory of impeachment—is on the milder end of the scale of gravity, various forms of censure have been proposed from different quarters as a more apposite resolution than removal from office. The idea of censure, while gaining strength almost spontaneously, runs into the entrenched view that removal from office or acquittal are the only possible outcomes of impeachment

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<sup>128</sup>Readers of an earlier draft of this paper have suggested that the Senate's vote on removal in the Pickering case can be viewed merely as entry of judgment and does not imply separate discretionary action on the penalty to be imposed. Such an understanding of the proceedings in the Pickering case is, however, hard to sustain. When a verdict is rendered by a jury, judgment is entered by the court. When sentence is mandatory, there are no separate deliberations by the body rendering the verdict. In an impeachment trial, the Senators are both jurors and judges. If in the Pickering case removal had been a necessary consequence of conviction, the presiding officer should have entered the conviction and declared that Pickering would be removed from office. The only possible further vote would be on future disqualification. A separate vote on removal in such a case would be a serious mistake. Suppose there were a conviction in an impeachment trial by an exact two-thirds vote of the Senate and then, in a separate vote on removal called by the presiding officer, removal failed by one vote. Has the Senate then retroactively rescinded the conviction and acquitted, or what? To suppose that the Senate viewed removal from office as a necessary consequence of conviction in the Pickering case but went ahead with a separate vote anyway is to impute to the Senate a gross procedural

proceedings. Censure is therefore generally proposed as a separate, alternative, congressional action.

There can of course be congressional “censure” wholly apart from impeachment. A resolution of both Houses “censuring” President Clinton would be at bottom an expression of Congress’s opinion of his conduct.<sup>129</sup> Such a rebuke is clearly within Congress’s power, and would satisfy a large segment of the public, but does not have much bite. Those who want to inflict pain on the President would be left unrequited.

I have demonstrated here, I hope, that censure is also a possible outcome of impeachment proceedings.<sup>130</sup> The relevant clause of the Constitution, Article I, section 3, prevents judgments in cases of impeachment from extending further than removal from office and disqualification, but not *less* far in cases where the impeachable misconduct falls short of “high” crimes.<sup>131</sup>

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blunder that could have caused real mischief. That is not impossible, of course, but nor is it the way to lay your bet.

<sup>129</sup>Think of it as a kind of Gulf of Tonkin Resolution in reverse. Instead of “The President did well,” it would mean “He acted badly.”

<sup>130</sup>See p. \_\_ above.

<sup>131</sup>The offenses charged against President Clinton probably do fall short of “high” crimes and misdemeanors, if these are understood in their technical sense at common law. The President is alleged to have lied before a grand jury where the truthfulness of his prior deposition in a civil suit was at issue, and to have sought to influence the testimony of others in related proceedings. Although some perjury—in a major federal criminal prosecution, for example—might rise to the level of obstruction of justice (and therefore a “high” crime within the jurisprudence of impeachment), the harm to the state here was indirect and, comparatively, attenuated. Similarly, a suggestion of false testimony is generally less damaging to the machinery of justice (and harder to apprehend with certainty) than dissuading or preventing the appearance of a witness altogether.

For what it is worth, Blackstone does not specifically include perjury among “high misdemeanors,” but does include dissuading a witness from giving evidence. 4 Blackstone at \*126. This does not, however, appear to include suggesting false testimony. See note \_\_ above. I should also caution against taking Blackstone’s catalog of “high misdemeanors” as talismanic. Blackstone classifies high misdemeanors with a fairly broad

Blackstone expressly acknowledged among the penalties in impeachments “discretionary censure, regulated by the nature and aggravations of the offense committed.”<sup>132</sup>

The possibility of censure has implications beyond allowing an alternative, milder penalty in this case. If censure can be imposed as a penalty upon conviction in the Senate, then the President also can accept censure as a form of settlement of impeachment proceedings short of trial.<sup>133</sup> Arising in this way (as a plea bargain, in effect, with a two-thirds vote of the Senate to back it up), censure would stand as a conviction in impeachment proceedings and would be far more than a simple unilateral rebuke from Congress.<sup>134</sup>

There is one more point about censure in impeachments. Even assuming that in some abstract sense censure were unconstitutional because outside the range of contemplated penalties (and, again, I hope that I have demonstrated thus far that this is not in fact the case) who would be in a position effectively to complain about the imposition of censure in lieu of removal from office? Suppose that the Senate and the President agreed to dispose of the proceedings without trial upon condition of the President’s accepting a decree of censure. If all sides agree, where is the harm? The Senate wouldn’t appeal to any other body. Nor would, or could, the President. Might some private

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brush, and the distinction between them and other crimes had a different (and lesser) significance in English impeachments.

<sup>132</sup>4 Blackstone \*141.

<sup>133</sup>My purpose is not to recommend this strategy. The President, indeed, might do well simply to defend himself in the expectation of acquittal. I mean only to point out the possible role of censure in short-circuiting a full-dress trial in the Senate.

<sup>134</sup>“Censure” in this case would be different from a simple congressional resolution. Because in impeachment proceedings Congress is exercising a *judicial* function, among other differences, the Senate’s censure could not be rescinded or cancelled by any subsequent legislative act of Congress.

citizen complain in the court of public opinion? Certainly. But many more would be happily relieved.

### THE SENSE OF IT

The overall scheme of impeachment in the Constitution, based on its language and history, is surprisingly clear considering the variety and confusion of scholarly opinion on the subject. Impeachment lies for a broad range of crimes and, when the crime aims at the state, removal from office is mandatory upon conviction. When the crime aims elsewhere, removal is also possible, but not mandatory, and other penalties, such as censure or suspension from office, are available. The requirement of removal upon conviction of “high” crimes against the state reflects the paramount concern of the sovereignty to protect itself. The sovereignty in question—the United States—was brand new in 1787, and still fragile. It is easy to see why the framers took no chances with crimes harming the nation.

Because the range of impeachable crimes is broad, impeachment is entirely sufficient to protect the public against wrongdoing by the President. Direct action by the courts against the President is overkill. There is no need for it, ever.<sup>135</sup> Indeed the impeachment provisions make considerably less sense if the President is susceptible to compulsory judicial process in addition to impeachment.

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<sup>135</sup>In the conventional view, by contrast, impeachment does not easily reach such crimes as murder and arson. Since the conventional wisdom also has the President immune from indictment—albeit not from other types of judicial action—it leaves the public

It is, therefore, a fair conclusion that subjecting a sitting President to compulsory judicial process is wrong as a matter of constitutional principle. What the present imbroglio demonstrates as well is that it is a terrible idea in practice wholly apart from that. The public has no vital interest in having the President subject to compulsory judicial process, and nothing to fear from presidential immunity. In order to carry out an illegal or criminal scheme, a President must inevitably act through others whom the courts can reach.<sup>136</sup> Should the President decide to rob a Seven-Eleven all by himself, impeachment would be more than sufficient pending removal and further prosecution, psychiatric treatment, or both. As for a private lawsuit brought by a plaintiff with an axe to grind,<sup>137</sup> there is no hazard to the Republic if the suit is deferred until the President is out of office.

To appreciate fully the incoherence of the prevailing doctrines on these matters, consider that under current law as widely understood the President can be sued in tort, but not indicted, or even impeached in some variants,<sup>138</sup> for murder.

Immunity from judicial process does not place the President above the law. The existence and breadth of impeachment, as the participants in the Constitutional Convention understood perfectly, assure that the President is not above the law. What is at issue is who delivers the law to which the President is subject. In the original score, if we follow the tempo markings

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defenseless, literally, against a President who kills a private person with malice aforethought.

<sup>136</sup>This is the point made by Gouverneur Morris at the Constitutional Convention, who thought originally that even the impeachment power was unnecessary. See p.9 above.

<sup>137</sup>Or an ex to grind if it's that kind of lawsuit.

<sup>138</sup>Assuming that murder is understood as not being a "high" crime.

and phrasing faithfully, it is the Congress, through impeachment, and not the courts, that imposes the law on the President's person.

In fact, through all the public pieties about the President's not being above the law, President Clinton has been rather more *below* the law in this affair. No one other than the President of the United States would suffer these consequences for having told a lie in a deposition, on a matter barely relevant to the subject matter of a case that was in any event dismissed. A lawsuit against the President, however, brings out the ghouls. A self-appointed operative made surreptitious recordings of a purported friend and fed them to the plaintiff's camp in the suit. Imagine any other tort suit with so much machinery mobilized to nail a defendant, and going so far outside the subject matter of the suit. By itself this demonstrates beyond peradventure why the President ought not to be subject to routine judicial process in a civil suit.

Another consequence of the President's exposure to the judicial machinery in the Paula Jones case—and here the absurdity of the present situation is fully revealed—is that it ended up supporting a minimally sufficient impeachment. Perjury is a crime, and hence potentially impeachable, even though the perjury alleged here would be a close call in a prosecution in a regular criminal court.<sup>139</sup> Because impeachable crimes, however, are not congruent with crimes prosecutable in regular courts—they reflect the largely self-contained jurisprudence of impeachment itself—impeachment could not be ruled out here at the threshold.

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<sup>139</sup>In his grand jury testimony, President Clinton did not explicitly reassert his earlier deposition testimony from the Paula Jones lawsuit, but purportedly proffered a “false and misleading” characterization of the earlier testimony. That cuts it pretty fine.

And since we now have an impeachment under way, albeit with a bare minimum legal basis, the reader may indeed wonder what difference it makes whether the President is subject to impeachment only or to judicial proceedings as well as impeachment. What difference does it make, in other words, whether the investigatory stage in cases of presidential misconduct unfolds in the courts or through the arm of Congress? But this case in fact underscores the enormous difference between the two regimes. The impeachment leg of these proceedings is itself wholly contingent on prior judicial proceedings against the President. Without the initial action against the President in the Paula Jones lawsuit, there would be nothing to which an impeachment could possibly have attached.

The wrongdoing here, and the ensuing impeachment, was simply an outgrowth of exposing a President to compulsory judicial process, which the very existence and scope of impeachment render unnecessary in the first place.

What is perverse about the impeachment of President Clinton is the idiotic premise on which it rests. The President wasn't forced to respond to judicial process in the Paula Jones sexual harassment suit because he committed a crime of paramount public concern. That case, remember, was dismissed as meritless. Rather, the President is charged with wrongdoing now because he had to face compulsory legal process in that case. The misconduct at issue here—following up a false deposition in the Paula Jones case with falsehood before the grand jury—has no independent significance. It is itself merely a byproduct of judicial process directed at the President, essentially of a sting

set up in the courts. What we have here, in short, is an iatrogenic impeachment.<sup>140</sup>

Compare this with the Watergate affair, where President Nixon was found to have obstructed justice in the investigation of serious crimes committed while he was in office, those crimes being independent of the proceedings that Nixon had sought to subvert.

It is illuminating, in fact, to replay Watergate and the current misadventure in an imaginary world where the President is not subject to judicial process.

The Watergate affair comes out much the same. In that event, impeachment would have been—indeed was—entirely sufficient to the end of public protection. With or without court orders directed against President Nixon, there was ample subject matter for impeachment, ample evidence, and ample opportunity for Congress to develop that evidence by compulsory process of its own.<sup>141</sup>

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<sup>140</sup>The reader doubtless knows what that is, but just in case, an “iatrogenic” disease is a disease itself caused by medical treatment, as when you enter a hospital for tests and contract a staphylococcus infection that you would not otherwise have suffered.

Readers of an earlier draft of this paper suggested that I was trying to defend President Clinton on the ground that he was entrapped. Not at all. President Clinton was *not* entrapped. He was, however, set up—enTripped, if you will. My point here is not to exonerate President Clinton, but to stress how perversely mistaken it was to let private litigants loose against a sitting President.

<sup>141</sup>Congress can assert its own demands for information in connection with impeachment proceedings, and act accordingly if the President does not cooperate. Given that impeachment is inherently a criminal proceeding, the tribunal (the Senate) can certainly take into account a President’s evasion or refusal to supply evidence. Indeed, refusal to provide relevant evidence likely constitutes in itself a valid separate count of impeachment.

The Independent Counsel statute expressly reserves to Congress the full range of investigatory powers in impeachments: “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. Nothing in this chapter or

By contrast, in the current affair, where as far as I can tell nothing of public consequence occurred,<sup>142</sup> impeachment would never have gotten off the ground. Indeed, there would be no public event at all, because Paula Jones' lawsuit, if held off until Clinton were out of office, would have attracted no attention in Congress.<sup>143</sup>

I can therefore say with some confidence that a regime of presidential immunity, coupled with the impeachment power viewed in its true light, would have brought a harmonious resolution to both of these notorious episodes.<sup>144</sup>

One often hears that impeachments are particularly vulnerable to the vagaries of political passion. An implied or express corollary is that judicial proceedings are not. Don't believe it. A lawsuit starts at the caprice—or rapacity—of a plaintiff. Once under way it is an infernal machine that for much of its course is nearly impossible to stop. Compulsory legal process can be mobilized without any degree of consensus. That makes it, when directed at the President, a ready-made apparatus for political actors and ideologues of

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section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.” 28 USC §595(c).

<sup>142</sup>The Whitewater side of the special counsel's investigation has apparently turned up nothing solid against the President.

<sup>143</sup>And since the *raison d'être* of the Jones lawsuit was to hurt the President politically, it might well not even have been pursued after Clinton left office.

<sup>144</sup>In either of these two imaginary worlds, it goes without saying, a special prosecutor could mobilize judicial process against all persons involved in wrongdoing other than the President. In Watergate, that would have been more than sufficient as a predicate of impeachment. Many have forgotten that by the time the Supreme Court's order in *United States v. Nixon* was issued, articles of impeachment had *already* been voted by the House Judiciary Committee.

all stripes.<sup>145</sup> Recall how easily political opponents of President Clinton were able to hijack the judicial proceedings in which he was involved.

Impeachment, for its part, cannot get started without a substantial degree of consensus. In this instance, the momentum for impeachment was supplied by earlier proceedings in court. Because the congressional actors in an impeachment are answerable to the public—which in this event has little stomach for impeachment—it is hard to see how there could have been an impeachment here, had it not been delivered to Congress ready-made from another place.

When the dust settled, the House of Representatives found—or, more accurately, had received as a windfall—enough to impeach. And although the President's supporters run the gamut from apoplectic to apocalyptic on the matter, the House's action is far from self-evidently wrong. Once the decision on impeachment was squarely before the House, there was no fully satisfactory outcome. The Republicans in the House doubtless acted opportunistically. Opportunity was served up to them, however, by the Supreme Court, the Independent Counsel statute, and President Clinton himself. Short of being saintly, the congressional Republicans were bound to snap at a bone so tempting as perjury by the President in a federal judicial proceeding. Imagine a prosecutor or a District Attorney who gets evidence that the mayor of the city—who is from the opposing political party—has committed a crime. This D.A. will seek to indict—it is Pavlovian—even if the

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<sup>145</sup>In *Clinton v. Jones*, the Supreme Court suggested that “the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment.” 520 U.S. \_\_\_\_\_. Really? How much will sanctions deter a judgment-proof ideologue?

public overwhelmingly favors the mayor.<sup>146</sup> Nor will, or should, the D.A. hold back simply because the crime results from a forced encounter of the mayor with the least dangerous branch.

President Clinton's supporters apparently still cannot bring themselves to take the Supreme Court to task for setting the stage of this tragicomedy. The Court, though, did exactly what critics impute to the House of Representatives in this matter: resolve a question of power in favor of having more. One might expect the Supreme Court to have a clearer notion of the reasonable (and legitimate) bounds of its power than the House of Representatives. There should have been no Paula Jones lawsuit.<sup>147</sup> But there was, and we now have—legitimately—an impeachment based on a foot fault.<sup>148</sup> For a conscientious Senator there is no self-evident course at this juncture. The nature of impeachment neither invites nor bars further action. One tolerable outcome, I think, is for proceedings in the Senate to be resolved short of trial with some kind of censure of the President, as discussed above.<sup>149</sup>

What can be drawn from this fiasco is a lesson for the future: Don't set up the President to get entangled in proceedings in court. Consider the odds. The cost to those players who may have to wait until the President is out of office

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<sup>146</sup>A current refrain is that today's proceedings are more intensely "partisan" than the Watergate proceedings of hallowed memory. This is largely myth. In the House Judiciary Committee vote on articles of impeachment in 1974, not a single Democrat voted against impeachment. There were, to be sure, Republican votes *for* impeachment in the Committee, but all the Republicans who voted for impeachment in the Committee were from the moderate/centrist wing of the party. The division along ideological lines was as sharp then as now.

<sup>147</sup>Not while the President was in office, that is.

<sup>148</sup>The President, thanks to the courts, was in a minefield at the time of making it.

<sup>149</sup>See p. \_\_\_\_.

to make their move is likely to be far smaller, on balance, than the cost to the entire country in the obverse situation where the President gets stupidly enmeshed in legal proceedings. Particularly weighty in framing these odds is the scope and flexibility of impeachment as an arm against presidential misconduct. Various suggestions that have surfaced in the accommodationist vein—acknowledging, for example, that the President is beyond direct judicial command in civil but not criminal actions—have no evident constitutional footing. The Supreme Court could come up with no grounded line of demarcation, natural or otherwise, between *United States v. Nixon* and *Clinton v. Jones*.<sup>150</sup> A change in this regime, I suspect, must come from Congress or not at all.

It is hard to miss the palpable irony running through the current situation. President Clinton's supporters today include many from the cheering section for *United States v. Nixon* in 1974. That the instrument for delivering the coup de grâce against President Nixon has molted into a land mine on which their champion Tripped left a number of them shell-shocked. Still, the American legal academy is so judiciocentric that this nightmarish turn of events has not yet elicited, in print at least, second thoughts about *United States v. Nixon* from its early fans.

Pending an epiphany that brings the courts to reconsider the entire question of presidential immunity, or a regime of statutory immunity for the President as outlined below, practical advice for future Presidents is to master

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<sup>150</sup>Note in this regard the Court's pronouncement in *Clinton v. Jones* that "if the federal judiciary may ... direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct." 520 U.S. at \_\_\_\_.

the finer points of Rule 37(b) of the Federal Rules of Civil Procedure.<sup>151</sup> Better to pay off litigants with money, if the courts are bent on letting them loose against Presidents, than to let them stake out a mortgage on the nation.

And although one might hope that the recent events would lead the Supreme Court to reconsider the President's exposure to judicial process, that would be an unexpected turn. The Court's flat assertion in *Clinton v. Jones* that the President is "subject to the laws for his purely private acts"<sup>152</sup> leaves scant room for artful distinction. A President faced with the problem would not want to take a chance, in any event, given the unfolding of the current affair.

Therefore, when the immediate passions have cooled, it would be a capital idea for Congress to confer on the President, by statute, a substantial measure of personal immunity from judicial process while in office. At a minimum, the President's exposure to any and all civil actions should be eliminated. Immunity from orders to testify or appear in *any* proceeding would also be desirable, to my mind, although the trade-off between public protection and the President's exercise of power is admittedly different in that situation.

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<sup>151</sup>What President Clinton could have done, which would have been both honorable and legally skillful, is to refuse to answer questions about his recent sex life and accept the consequences under Rule 37(b) of the Federal Rules of Civil Procedure, which provides sanctions for failure to answer questions in a deposition. In a lawsuit ultimately dismissed as meritless on summary judgment, any sanction under Rule 37(b)(2) could hardly have been substantial. Better yet, President Clinton could have refused to be deposed at all, again accepting the consequences under Rule 37(b), thereby refusing to acquiesce in the extension of judicial power implied by *Clinton v. Jones*. In an ensuing showdown with the courts and Congress—not a likelihood in any event—President Clinton, who could more than plausibly have assumed the mantle of Defender of the Presidency, would, I think, have had broad public support.

<sup>152</sup>520 U.S. \_\_.

Having exhausted technical arguments, let me add in further support of the essential soundness of the understanding of impeachment that I have expounded here what might be considered the practical wisdom of impeachment. By this I mean that the actions of the players in impeachments have tended to some extent to drift into line with the true regime of impeachment, even though ostensibly they operate under a different view. During the Watergate affair, for example, Article II, section 4, was generally taken as an exhaustive definition of impeachable offenses, but there was little focus on the historical meaning of “high crimes and misdemeanors” as terms of art. Rather, “high crimes and misdemeanors” were viewed as a generic rubric of impeachable offenses, open-ended in content and not necessarily limited to crimes.<sup>153</sup> In effect, the full historical range of impeachable offenses was packed into Article II, section 4. As a result, the imprecise focus of the players on the meaning of Article II, section 4, was cancelled out, more or less, by an expansive view of high crimes and misdemeanors.

In connection with today’s affair, a few academic commentators have rediscovered the precise import of “high” crimes against the state and urged this view in defense of the President. This academic change of heart had little sway in the House of Representatives, however, which went ahead and impeached anyway, operating more or less within the same notion of

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<sup>153</sup>This was the view of Raoul Berger, among others, and informed the deliberations of the House Judiciary Committee in 1974. A staffer of the House Judiciary Committee passed through Yale Law School (where I was a student) at the time. In conversation I referred to impeachment as a “criminal” proceeding. The staffer responded to me that the use of the word “criminal” in close proximity to the word “impeachment” was proscribed among the Committee staff, to avoid the slightest implication that impeachable offenses might be limited to crimes.

impeachable offenses that informed the events of 1974.<sup>154</sup> At the same time, though, the idea of censure as a congressional response to lesser

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<sup>154</sup>The new-found rigorist interpretation of high crimes and misdemeanors, for its part, makes an uneasy fit with the prevailing broad-gauged reading of Article II, section 4, as a comprehensive definition of impeachable offenses. If one must accept that “shall be removed” in Article II, section 4, is just an imprecisely worded way of ushering in a definition of impeachable offenses, then it is unreasonable to adopt a rigorist, narrowly technical reading of “high crimes and misdemeanors.” Within this somewhat looser understanding of Article II, section 4, “high crimes and misdemeanors” are better viewed as a generic rubric for impeachable offenses. If the numerous pronouncements on impeachable offenses from 1787-1789, some of which are discussed above, are taken to reflect the framers’ and others’ understanding of “high crimes and misdemeanors,” then the latter are indeed vastly broader than their meaning in the English Common Law.

misconduct—which barely surfaced in 1974—has begun to pop up all over the place. And this despite the initial academic consensus that censure is entirely alien to the impeachment process. These developments betoken considerable straining against the conventional wisdom on impeachment to arrive at something more sensible.

In closing, I want to bring attention back to the fundamental problem in these events. It seems to many that something has gone seriously wrong here. Not a few are inclined to blame the Republican majority in Congress for having mobilized the machinery of impeachment against wrongdoing in which the public has no paramount concern. The House of Representatives' hair trigger stands in apparent contrast with Congress's more restrained pursuit of impeachment in the past. But this affair jumped the tracks long before it reached Congress, and the House's action *is* within the legitimate, though not sagacious, uses of impeachment. The real vice here was the combination of a civil action and elaborate prosecutorial machinery directed at the President. When these events are viewed from a more detached perspective, it will become apparent to others besides me, I think, that Congress throughout has taken, on balance, a more sensible view of impeachment than the Supreme Court has taken of the President's exposure to judicial process.

## CONCLUSION

The point of this excursion into the original meaning of impeachment in the Constitution is twofold. First, the impeachment provisions correctly understood in their textual and historical setting are more sensible than the view of impeachment embodied in today's academic consensus. Second, in light of the scope of impeachment, the case for the President's entire immunity from judicial process is compelling, if not overwhelming.

As the sole lever of public action against a sitting President, impeachment discriminates perfectly well between misconduct of paramount public concern and matters less urgent. The command of Article II, section 4, to remove civil officers guilty of treason, bribery, or other high crimes and misdemeanors, protects the sovereignty from vital harm while leaving the Congress discretion to deal with other wrongs. Exposure of the President to compulsory judicial process as well is thoroughly redundant for all but civil litigants who might have to wait (at most 8 years) for their shot at suing the President.<sup>155</sup> That is a small sacrifice to ward off misadventures of the sort we suffer through today.

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<sup>155</sup>To preserve claims against the President, statutes of limitations could be tolled during a President's tenure of office. To offset the cost of deferral of claims, successful litigants could be awarded up to 8 years of pre-judgment interest.