IMPEACHMENT: AN HISTORICAL OVERVIEW

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INTRODUCTION

The impeachment of a President of the United States is currently under serious discussion[1] and is being recommended for the first time since the impeachment and trial of Andrew Johnson over a century ago.[2] Despite the current interest in the procedure, impeachment is misunderstood because of the infrequence with which it has been employed. This rare use, however, belies the importance placed on impeachment in both the American and English constitutional systems. Under our Constitution,[3] and in the British system from

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1 As of December 5, 1973, thirty-nine resolutions with respect to President Nixon had been introduced in the House of Representatives, three calling for his resignation, sixteen calling for impeachment, and twenty calling for inquiry into his activities by the House Judiciary Committee had been sent to the House Rules Committee. House Judiciary Committee Compilation, December 5, 1973.

2 On February 24, 1868, the House of Representatives passed the resolution to impeach President Andrew Johnson. CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868).

3 The Constitution refers to impeachment in five separate sections:

> 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.

U.S. CONST. art. II, § 4.

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

Id. art. I, § 2.

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
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> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Id. art. I, § 3.

which it is derived,[4] impeachment was designed to control the excesses of the Executive.[5] In England it was the primary tool in the democratic struggle, Parliament's struggle, to bring ministers of the King within the sanction of the law.[6] In the United States, impeachment is the primary means provided to protect the people, through their Congress, from the Presidency, an office which the Framers of the Constitution distrusted even as they were creating it.[7]

This article will examine the principal English and American cases in which impeachment has been employed as a remedy for extraordinary abuse of official power. Its analysis of these precedents and the various interpretations of the substantive and procedural aspects of impeachment is undertaken in order to clarify and define the term "impeachable offense." Finally, in an effort to purge the impeachment process of its enigmatic and perplexing qualities, this article will review and summarize the existing procedures of the Senate during an impeachment trial.

History: The English Experience

Impeachment is a legitimate child of history, born out of the English Parliament's long struggle to strip the King and his ministers of their absolute power and to expand the rights of the people. Beginning in the late 14th century during the reign of Edward III, the House of Commons and House of Lords, newly separated from each other,[8] used their growing political strength to remove from office several ministers who were of high rank and in favor with the King.[9]

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

Id. art. II, § 2.

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

Id. art. III, § 2.

4 For discussion of the British system of impeachment, see R. Berger, Impeachment: The Constitutional Problems 1-6 (1973); 1 W. Holdsworth, A History of English Law 379-85 (6th ed. rev. 1938); F. Maitland, The Constitutional History of England 215, 246, 317-19 (1908).

5 *See* 2 The Records of the Federal Convention of 1787, at 64-69 (M. Farrand ed. 1911) [hereinafter cited as 2 Records].

6 The impeachments of the Earls of Strafford and Danby during the seventeenth century are representative of Parliament's use of its impeachment power. For discussion of these two cases, see R. Berger, *supra* note 4, at 30-40, 43-46.

7 *See id.* at 4-5.

8 *See* Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 Fordham L. Rev. 1, 5 (1970).

9 R. Berger, *supra* note 4, at 1; 4 J. Hatsell, Precedents of Proceedings in the House of Commons 63 (1796).

It was during this period that the impeachment procedure, whereby the Commons impeached and the Lords convicted,[10] gradually developed, the general pattern which was to be incorporated into the Constitution of the United States 400 years later.[11] The purpose of impeachment was to reach

> persons of the highest rank and favour with the Crown . . . whose elevated situation placed them above the reach of complaint from private individuals, who, if they failed in obtaining redress, might afterwards become the objects of resentment of those, whose tyrannical oppressions they had presumed to call in question.[12]

With the advent of the powerful Tudors some 75 years later, Parliament's strength temporarily diminished.[13] The impeachment of Royal offenders too high and mighty to be brought before the bar of common justice fell into disuse.[14] But, in the 17th century, respond-

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The first known English impeachments took place in the year 1376 when Lords Latimer, Neville and Lyons were impeached. *See* F. MAITLAND, *supra* note 4, at 215; Feerick, *supra* note 8, at 5 & n.8. The years 1376 through 1397 brought a flurry of activity during which at least eighteen officers and judges were impeached and subsequently convicted. C. ROBERTS, THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND 8 & n.1 (1966).

Officers and judges are not the only persons who are subject to impeachment, though. "[A]ny individual, either peer or commoner," may be impeached "for any crime whatever." 9 EARL OF HALSBURY, THE LAWS OF ENGLAND 360 (3d ed. Lord Simonds 1954).

10 *See* 1 W. HOLDSWORTH, *supra* note 4, at 380-81. The judgment is made by a majority vote of the House of Lords. *Id.* at 379. This pattern, excepting the number of votes needed to convict, is the same one that would later be incorporated into the United States Constitution, where it is provided that the House of Representatives impeaches, and the Senate convicts by a two-thirds vote.

11 *See* note 3 *supra*.

12 4 J. HATSELL, *supra* note 9, at 63.

Many political ideas and conditions of that age contributed to the origination of the practice of impeachment. Among them were (1) a broad and vague jurisdiction exercised by the House of Lords, resulting in its taking on cases where the ordinary law might be inadequate; (2) the desire to bring royal ministers within the scope of the law, so as to limit their activities and punish their wrongful acts; and (3) a prevailing political philosophy which espoused that governmental activity be within the limits of the law. 1 W. HOLDSWORTH, *supra* note 4, at 380. For an extensive discussion of the development of the impeachment power in England, see M. CLARKE, FOURTEENTH CENTURY STUDIES 242-71 (1934). According to Clarke, however, impeachment was at this time "essentially a political weapon." *Id.* at 266.

13 *See* R. BERGER, *supra* note 4, at 1-2; *cf.* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 47 (5th ed. 1956).

14 M. CLARKE, *supra* note 12, at 266. It is generally agreed that between 1459 and 1621 no impeachments took place. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 158 (1883). Parliament, however, did not entirely abandon its scrutiny during this period. The bill of attainder, which required consent of both houses of Parliament and of the King, was utilized during this period as a means of purging distrusted or politically dangerous officials. *See* 1 W. HOLDSWORTH, *supra* note 4, at 381; T. PLUCKNETT, *supra* note 13, at

ing to the excesses of the Stuarts, Parliament struck out against the usurpation of power by the King's favorites.[15] Between 1621 and 1787, the year that the Framers of the American Constitution accomplished their work, more than fifty impeachments were brought to trial in England.[16] The history of that period told the Framers that impeachment was indeed a powerful and important tool for controlling executive power.[17]

This idea was well expressed by Edmund Burke, opening the trial of Warren Hastings before the House of Lords in 1788.

> It is by this process that magistracy, which tries and controls all other things, is itself tried and controlled. Other constitutions are satisfied with making good subjects; this is a security for good governors. . . . It ought, therefore, my lords, to become our common care to guard this your precious deposit, rare in its use, but powerful in its effect, with a religious vigilance, and never to suffer it to be either discredited or antiquated.[18]

In words of the House of Commons in 1679, impeachment was envisioned as "the chief institution for the preservation of the gov-

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205. It was not until the reign of Henry VIII that the accused was sometimes allowed to present a semblance of a defense. *See id.* at 146.

15 *See* R. BERGER, *supra* note 4, at 28. One authority has catalogued a list of additional factors which helped bring about the revival of impeachment in the early years of the 17th century.

> The House of Commons was filled with confident, aggressive, and ambitious men, and the House of Lords with peers jealous of their privileges. James's prodigality drove the tight-fisted gentry to oppose importunate courtiers. Government by patentees angered every justice of the peace in the land. The grant of monopolies persuaded the merchants to join in the hunt for monopolists. The collection of impositions aroused the lawyers and merchants. The failure to enforce the laws against recusants exasperated the Puritans. The prevalence of extortion in the administration angered all who had to pay its price. Indecision at Court impelled courtiers to seek support in Parliament against their enemies.

C. ROBERTS, *supra* note 9, at 41.

16 Most of these occurred before 1715. 1 W. HOLDSWORTH, *supra* note 4, at 382. However, one of the longest and most spectacular English impeachments, that of Warren Hastings, began in 1787, the year the Federal Convention met in Philadelphia. R. BERGER, *supra* note 4, at 2-3 & n.15. This particular adjudication was even mentioned in the debates on impeachment. *See* 2 RECORDS 550. The trial, which finally ended with Hastings' acquittal in 1795, is indicative of the cumbersome nature of English impeachment procedures at that time. *See* E. BURKE, POLITICS 275 (R. Hoffman & P. Levack eds. 1949).

17 Professor Arthur Bestor points out that the three checks built into the Constitution to maintain separation of powers are all English in origin. Of these three, impeachment was the only one still in use in England; judicial review had never been effectively implemented and the last use of the veto was in 1707 by Queen Anne. Bestor, Book Review, 49 WASH. L. REV. 255, 283-84 (1973).

18 1 THE SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE ON THE IMPEACHMENT OF WARREN HASTINGS 11 (7 BURKE'S WORKS, 1889).

ernment."[19] Through the use of the impeachment procedure, Parliament had laid the foundations for a representative government in which the highest officials would be accountable to the people and, like them, subject to the rule of law. The theory that the ministers of the King were above the law was effectively negated in the impeachment of the Duke of Buckingham in 1626.[20] Later, in the Earl of Danby's impeachment, it was established that a royal pardon could not terminate an impeachment since the accusation was a parliamentary and not a royally initiated proceeding.[21] Even a dissolution of Parliament would not terminate an impeachment.[22] Parliament thus had a procedurally effective tool that it could use to promote satisfactory cooperation with the ministers of the King.

Parliament did not limit itself in the use of the procedure. Over the years, the House of Commons impeached for a wide variety of misconduct, official and unofficial, violations of the criminal law and conduct which violated no law.[23] For instance, impeachments were initiated for such offenses as subversion of the constitution, betrayal of trust, neglect of duty, corruption, and encroachment on the prerogative of Parliament.[24] The Earl of Strafford, as an example, was impeached for "subvert[ing] the fundamental laws . . . and introduc[ing] an arbitrary and tyrannical government against law."[25] Treason, declared John Pym, a leader of the Commons during the trial, embraced those acts which altered "the settled frame and constitution of government," as well as acts against the King himself.[26] "[I]f it be treason to kill the governor," said another member of Commons, "then

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19 11 How. St. Tr. 828 (1679). This language is also quoted in 1 W. HOLDSWORTH, *supra* note 4, at 383.

20 1 W. HOLDSWORTH, *supra* note 4, at 382. The case is found in 2 Cob. St. Tr. 1267 (1626).

21 1 W. HOLDSWORTH, *supra* note 4, at 382-83. *See* 11 How. St. Tr. 599, 790 (1685). Berger notes that this conclusion is reflected in our Constitution's exemption of impeachment from the pardoning power of the President. R. BERGER, *supra* note 4, at 45 & n.213. Maitland asserts that although this question was raised in Danby's impeachment, it was never resolved. F. MAITLAND, *supra* note 4, at 318.

22 F. MAITLAND, *supra* note 4, at 318.

23 *See* R. BERGER, *supra* note 4, at 195-96.

24 For a summary and characterization of the charges, see *id.* at 67-71; Feerick, *supra* note 8, at 8 n.38.

25 3 Cob. St. Tr. 1382, 1385 (1640). The impeachment of Strafford was never put to a vote but he was later executed under a bill of attainder. *See* C. ROBERTS, *supra* note 9, at 98-100 (1966).

26 R. BERGER, *supra* note 4, at 33; THE TRYAL OF THOMAS EARL OF STRAFFORD 666, 669 (8 J. RUSHWORTH, HISTORICAL COLLECTIONS, 1721).

sure 'tis treason to kill the government."[27] Impeachable offenses thus covered a broad and ill-defined area.

History: The American Experience

Lord Melville's impeachment in 1805, ten years after the acquittal of Warren Hastings, was the last impeachment ever brought in England.[28] The growth of Parliament's power and the development of the cabinet system of government had eliminated the need for its use.[29] The procedure, though, had made its mark in America, even before the adoption of the Constitution. Parliament's struggle in the seventeenth century "to curb ministers who were the tools of royal oppression"[30] was reflected in nearly all of the early state constitutions or charters. These documents provided for the impeachment of wayward officials, on grounds which included endangering the safety of the state through "maladministration, corruption, or other means,"[31] or "Misdemeanor or Default."[32] On July 20, 1787, the delegates to the Constitutional Convention, drawing on the English and colonial experience, debated the question, "Shall the Executive be removeable on impeachments?" The answer was clearly yes.[33]

Although impeachment was ultimately applied to all "civil officers" of the United States, the Founders were preoccupied with control of the Executive. George Mason of Virginia, who later authored much of the Bill of Rights, declared that "[w]hen great crimes [are] committed [I am] for punishing the principal as well as the Coadjutors."[34] He asked: "Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?"[35] William R. Davie of North Carolina considered impeachment "an essential secu-

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27 Russell, *The Theory of Treason in the Trial of Strafford*, 80 Eng. Hist. Rev. 30, 38 (1965) (quoting Nathaniel Fiennes during debate of Strafford's bill of attainder).

28 1 J. Stephen, *supra* note 14, at 159.

29 1 W. Holdsworth, *supra* note 4, at 384; Berger, *Impeachment: An Instrument of Regeneration*, Harper's, January, 1974, at 14.

30 R. Berger, *supra* note 4, at 4.

31 *E.g.*, Del. Const. art. 23 (1776), in 1 The Federal and State Constitutions Colonial Charters, and other Organic Laws of the United States 566 (F. Thorpe ed. 1909) [hereinafter cited as Constitutions]; Va. Const. (1776), in 7 Constitutions 3818. *See* Mass. Const. pt. 2, ch. I, § II, art. VIII (1780), in 3 Constitutions 1897; N.H. Const. (1784), in 4 Constitutions 2461.

32 *E.g.*, Conn. Charter (1662), in 1 Constitutions 531.

33 2 Records 69.

34 *Id.* at 65.

35 *Id.*

rity for the good behaviour of the Executive,"[36] for if not impeachable while in office, "he will spare no efforts or means whatever to get himself re-elected."[37] "Guilt wherever found ought to be punished," said Virginia Governor Edmund Randolph. It was his opinion that impeachment was necessary because the executive would have great opportunities for abuses of power, especially with respect to the power of waging war.[38]

Charles Pinckney of South Carolina was unable to see the need for impeachments, for he thought the legislature would hold them "as a rod over the Executive and by that means effectually destroy his independence."[39] Rufus King of Massachusetts joined in this view.[40] Pennsylvania's Gouverneur Morris initially believed that impeachment might "render the Executive dependent on those who are to impeach."[41] The debate, however, changed his mind and he came to support the impeachment as necessary if the executive was to continue for any length of time in office. His reasoning was as follows:

> Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust . . . .[42]

It is important to note that the Framers of our Constitution limited the sanctions which were to follow impeachment and conviction to removal and disqualification from office.[43] This was in sharp contrast to English practices in which the entire range of criminal sanctions followed impeachment and conviction.[44] Justice Joseph Story

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36 *Id.* at 64.

37 *Id.*

38 *Id.* at 67. For a discussion of the legislative response to alleged presidential abuse of war powers, see Rodino, *Congressional Review of Executive Action*, 5 SETON HALL L. REV. 489, 513-17 (1974).

39 2 RECORDS 66. One scholar has concluded that it is precisely because the executive is independent of the legislature that impeachment was required.

> Had the existing method of the English Constitution been adopted in the United States, and the executive placed under the control of Congress, it might have been possible to dispense with the power of impeachment.

1 J. HARE, AMERICAN CONSTITUTIONAL LAW 210 (1889).

40 *See* 2 RECORDS 67.

41 *Id.* at 65.

42 *Id.* at 68.

43 The Constitution states in pertinent part:

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

U.S. CONST. art. I, § 3.

44 R. BERGER, *supra* note 4, at 78. De Tocqueville contrasts the American system with

described these limited sanctions as "peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries."[45] This relative mildness prompted Alexis de Tocqueville, in his *Democracy in America*, to observe that:

> The main object of the political jurisdiction that obtains in the United States is therefore to take away the power from him who would make a bad use of it and to prevent him from ever acquiring it again.[46]

The actual use of the impeachment power in our history does not reflect de Tocqueville's suggestion that the mildness of its penalties would make its use frequent.[47] Since our Constitution's adoption, twelve men have been impeached by the House of Representatives. Of those twelve, four were convicted by the Senate, six were acquitted, and two resigned prior to Senate trial. Those impeached were President Andrew Johnson, United States Senator William Blount, Secretary of War William W. Belknap, and nine federal judges.

The first impeachment occurred within ten years of the Constitution's adoption. The resolution calling for impeachment of William Blount, a United States Senator from Tennessee, for high crimes and misdemeanors, was introduced in the House of Representatives on July 6, 1797.[48] He was charged (1) with conspiring to lead a military expedition for England for the purpose of taking land in Florida and Louisiana from Spain, thus violating the neutrality of the United States in the war between Spain and England; (2) with inciting the Creek and Cherokee Indians to commit hostile acts against the Spanish; (3) with alienating the confidence of the Indians in the United States agent living with them; (4) with convincing another United States agent to assist him in the expedition; and (5) with conspiring "to diminish and impair the confidence of the said Cherokee nation in the Government of the United States."[49] He was expelled from the

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that of England and France where the penalties are so severe that political tribunals are reluctant to exercise their powers. *See* 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 110 (1st Borzoi ed., rev. F. Bowen, P. Bradley ed. 1945).

45 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 810, at 278 (1833).

46 1 A. DE TOCQUEVILLE, *supra* note 44, at 108.

47 *See id.* at 109-11.

48 1 ANNALS OF CONG. 448 (1797) [1797-1798]; 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2294, at 645 (1907) [hereinafter cited as HINDS' PRECEDENTS].

49 1 ANNALS OF CONG. 948-51 (1798) [1797-1798]; 3 HINDS' PRECEDENTS § 2302, at 653. On July 7, 1797, the House adopted the impeachment resolution against Blount and ordered him impeached before the bar of the Senate. *Id.* § 2294, at 646. The articles of impeach-

Senate on July 8, 1797, the day following his impeachment in the House.[50]

Blount challenged the jurisdiction of the Senate to try him,[51] asserting that he was not a "civil officer" of the United States within the meaning of the Constitution.[52] He further contended that "civil officers" were only those appointed by the President pursuant to the Executive Article of the Constitution; that the clause providing for their removal upon impeachment for, and conviction of, high crimes and misdemeanors was only applicable to such "civil officers;" and that this device could not therefore be used to remove a Senator.[53] Indeed, on January 10, 1798, a resolution stating that Blount was a "civil officer" of the United States and therefore subject to impeachment was defeated in the Senate.[54] On January 14, 1799, the impeachment resolution was dismissed for lack of jurisdiction.[55] Although the Blount decision is generally said to stand for the proposition that Senators, not being "civil officers," are unimpeachable, that theory has been criticized.[56]

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ment were adopted in the House on January 29, 1798, and read in the Senate on February 7, 1798. 1 ANNALS OF CONG. 948-51 (1798) [1797-1798]. The pattern of first impeaching and then writing articles of impeachment was to be followed in subsequent impeachment proceedings until the impeachment of Robert Archbald in 1912, when the articles were exhibited at the time of adoption of the impeachment resolution.

50 1 ANNALS OF CONG. 43-44 (1797) [1797-1798].

51 2 ANNALS OF CONG. 2247-48 (1798) [1798-1799]. The plea was filed in the Senate by Blount's counsel on December 24, 1798. *Id.*; 3 HINDS' PRECEDENTS § 2310, at 663. A copy was then transmitted from the Senate and received in the House on December 26, 1798. 3 ANNALS OF CONG. 2491 (1798) [1798-1799]; 3 HINDS' PRECEDENTS § 2311, at 664.

52 2 ANNALS OF CONG. 2271-72 (1799) [1798-1799]; 3 HINDS' PRECEDENTS § 2310, at 663.

53 2 ANNALS OF CONG. 2270-72 (1799) [1798-1799]; 3 HINDS' PRECEDENTS § 2316, at 671.

54 2 ANNALS OF CONG. 2318 (1799) [1798-1799]; 3 HINDS' PRECEDENTS § 2318, at 679.

The Constitution does, however, provide for expulsion of its own members by each House:

> Each House may determine the Rules of Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

U.S. CONST. art. I, § 5. This power of expulsion was used extensively during the Civil War to remove legislators loyal to the Confederacy. For materials dealing with punishment and expulsion of members of Congress, see 2 HINDS' PRECEDENTS §§ 1236-89.

55 2 ANNALS OF CONG. 2319 (1799) [1798-1799]; 3 HINDS' PRECEDENTS § 2318, at 679.

56 For support for the proposition that Senators are not impeachable "civil officers," see Feerick, *supra* note 8, at 26; Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 20 (1927). Raoul Berger is one who has sharply questioned the historical and logical basis of the Blount precedent, and has suggested that in a proper case it should be overruled. *See* R. BERGER, *supra* note 4, at 214-23. In England "the vast bulk of impeachments" were against members of the House of Lords. *Id.* at 216. The Framers were almost certainly familiar with the impeachment procedure in England. *See id.* at 217. That the State ratifying conventions regarded Senators as impeachable is evidenced by their concern over Senate trial of its own members. *See id.* at 218-19.

United States District Judge John Pickering of New Hampshire, impeached on March 2, 1803, for high crimes and misdemeanors,[57] was the first subject of an impeachment proceeding in the United States to be convicted and removed from office.[58] The charges included drunkenness and profanity on the bench and the rendering of judicial decisions based neither on fact nor law.[59] Although he did not appear on his own behalf at the Senate trial, his son filed a petition which argued that Pickering was so ill and deranged that he was incapable of exercising any kind of judgment or transacting any business and that he should therefore not be removed from office for conduct attributable to insanity.[60] There is general historical agreement as to this claim of insanity.[61]

There has been controversy over whether Pickering's impeachment meant that the charges which could lead to an impeachment were limited to "high crimes and misdemeanors." Simon H. Rifkind, counsel for Justice William O. Douglas during the abortive impeachment inquiry in 1970, contended that Pickering was charged

> with three counts of wilfully violating a Federal statute relating to the posting of bond in certain attachment situations, and the misdemeanors of public drunkenness and blasphemy.[62]

But in fact no federal statute made violation of the bond-posting act a crime, nor obviously were drunkeness or blasphemy federal crimes.[63] The Pickering impeachment, in short, confirms that the concept of high crimes and misdemeanors is not limited to criminal offenses. And as Raoul Berger has observed, "[a] system which did not provide for

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57 1 ANNALS OF CONG. 642 (1803) [1803-1804]; 3 HINDS' PRECEDENTS § 2327, at 692.

58 2 ANNALS OF CONG. 367 (1804) [1804-1805]. Albert Beveridge, John Marshall's biographer, implies that Pickering was a victim of the first efforts of Thomas Jefferson and the Republicans to remove the Federalist Judges appointed by John Adams shortly before the expiration of his Presidential term. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 163-69 (1919). Their purpose was to prove "that impeachment was unrestricted and might be applied to any officer whom, for any reason, two thirds of the Senate deemed undesirable." *Id.* at 165.

Pickering had been charged with ordering that a seized ship be delivered to one Eliphalet Ladd contrary to the law requiring a claimant to produce a tax certificate; refusing to hear a witness on behalf of the United States also claiming the ship and then refusing to hear an appeal on the same matter; and being inebriated and disorderly while sitting in his capacity as a judge. 2 ANNALS OF CONG. 319-22 (1804) [1804-1805]; 3 HINDS' PRECEDENTS § 2328, at 690-92.

59 2 ANNALS OF CONG. 321-22 (1804) [1804-1805]; 3 HINDS' PRECEDENTS § 2328, at 690-92.

60 2 ANNALS OF CONG. 328-30 (1804) [1804-1805].

61 *See, e.g.*, R. BERGER, *supra* note 4, at 183; 3 A. BEVERIDGE, *supra* note 58, at 164-65.

62 SPECIAL SUBCOMM. ON H.R. 920 OF THE HOUSE COMM. ON THE JUDICIARY, 91ST. CONG., 2D SESS., LEGAL MATERIALS ON IMPEACHMENT 26 (Comm. Print 1970).

63 R. BERGER, *supra* note 4, at 57 n.15.

removal of a demented judge because insanity was not a 'crime' would be sadly wanting."[64]

The House of Representatives made it clear only a few years later that it did not consider itself limited to criminal offenses in handing down an impeachment. On March 12, 1804, Samuel Chase, an Associate Justice of the United States Supreme Court, was impeached for high crimes and misdemeanors,[65] specifically interfering with the due administration of justice and depriving defendants accused of violating the Sedition Act of the right to due process of law.[66] Because of Chase's arbitrary and oppressive conduct of one trial, the articles of impeachment declared,[67] the defendant was subjected to cruel and unusual punishment in violation of the eighth amendment and

> was condemned to death without having been heard, by counsel, in his defence, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately rest the liberty and safety of the American people.[68]

In another instance, charged the House, Chase refused to discharge a grand jury until it succumbed to his will and returned a specific indictment against a "seditious printer," and thus "did descend from the dignity of a judge and stoop to the level of an informer."[69] Moreover, the impeachment said, Chase interfered with the prosecutor, ordering him "to find some passage which might furnish the ground-work of a prosecution" against the printer whom he insisted on having indicted.[70] In Raoul Berger's words, Chase, before he was called on to preside over the trial at issue,

> had selected the victim, announced his determination to punish him for his "atrocious" libel, procured his presentment by the grand jury, refused to exclude admittedly biased jurors, identified himself at every step with the prosecution, and employed every means to discredit and disable defense counsel. By the standards of his own day, this was an oppressive misuse of power; and it furnished grounds for impeachment . . . .[71]

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64 *Id.*

65 1 ANNALS OF CONG. 1171 (1804) [1803-1804].

66 *See* J. BORKIN, THE CORRUPT JUDGE 199 (1926); Feerick, *supra* note 8, at 28-29. For an extensive discussion of Chase's handling of the trial of James Callender, see R. BERGER, *supra* note 4, at 230-48.

67 1 ANNALS OF CONG. 1238-40 (1804) [1803-1804].

68 *Id.* at 1238.

69 *Id.* at 1239.

70 *Id.*

71 R. BERGER, *supra* note 4, at 250 (footnote omitted).

On March 1, 1805, Chase was acquitted,[72] but misconduct on the bench continued to be viable grounds for impeachment of federal judges. Notable among past impeachments directly related to non-criminal violations of the Constitution is the impeachment of United States District Judge James H. Peck of Missouri. This proceeding established the precedent that violations of the first amendment are impeachable offenses. On April 24, 1830, the House impeached Peck for "high misdemeanors in office."[73] The issue at stake was the public's right to criticize decisions of the courts without fear of retribution. The facts indicated that a Missouri lawyer named Luke Lawless wrote a newspaper article attacking Judge Peck's decision in a land claims case which Lawless had argued and lost in Judge Peck's court. Lawless signed the article "A Citizen." Although Lawless' article was a response to Judge Peck's own newspaper article justifying the decision, Peck sent him to jail for contempt, and suspended him from the practice of law for 18 months.[74]

Lawless eventually appealed to the House of Representatives.[75] On March 23, 1830, Representative James Buchanan of Pennsylvania, who later became President, presented a committee report recommending impeachment of Judge Peck for "high misdemeanors in office."[76] Despite Peck's written explanation and defense, the House formally adopted the single article of impeachment on May 1, 1830.[77]

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72 2 ANNALS OF CONG. 669 (1805) [1804-1805].

Beveridge states that even at the time, it was clear that Chase's impeachment was a political move. President Jefferson and his fellow Republicans in Congress were determined to remove Chief Justice Marshall and the other four Federalist justices. 3 A. BEVERIDGE, *supra* note 58, at 160. The new President had expected to have the opportunity of appointing the Chief Justice himself, but Chief Justice Ellsworth resigned in time to allow Adams to appoint Marshall. *Id.* at 113. Marshall's opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), establishing the Supreme Court as the final interpreter of the Constitution had particularly enraged the Republicans. *See* 3 A. BEVERIDGE, *supra* note 58, at 161. Speaking of Marshall, Beveridge states:

> He had done all the things of which . . . the Republicans complained. He had "dared to declare an act of Congress unconstitutional," had "dared" to order Madison to show cause why he should not be compelled to do his legal duty. Everybody was at last awake to the fact that Marshall had become the controlling spirit of the Supreme Court and of the whole National Judiciary.

Id.

The impeachment attempts during this period were not without basis. The conduct of the National judges was arrogant and partisan. *See id.* at 29-30. It was Beveridge's opinion that "the assaults upon [them] were made possible chiefly by" their own conduct. *Id.* at 30.

73 6 CONG. DEB. 818-19 (1830).

74 A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 49-52 (1833).

75 3 HINDS' PRECEDENTS § 2364, at 772-73.

76 *Id.* § 2365, at 774.

77 6 CONG. DEB. 869 (1830).

When the case was tried before the Senate eight months later, the House managers made it clear that the impeachment was not only for judicial misconduct but was also for misconduct which endangered the freedom to publish. "The people of this country love their judiciary well," said Buchanan,

> but they love the freedom of their press still better; and if these two great branches of our civil policy shall be placed in hostile array against each other by the decision of this Senate, God only knows what may be the consequences. It is this consideration which has given such solemn importance to the trial in which we are engaged.[78]

"We have so long enjoyed the blessings of a free press," said Representative George McDuffie of South Carolina, "that we seem to be more disposed to censure its unavoidable excesses than to appreciate its vast and inestimable advantages."[79] Peck was acquitted by a Senate vote of 21 guilty, 22 not guilty.[80] But his case advanced the doctrine that violations of the first amendment are high crimes and misdemeanors which may justify removal from office.

On January 8, 1862, the House of Representatives agreed to a resolution impeaching West H. Humphreys, a federal district judge for the district of Tennessee.[81] The most serious charges against him were that he had publicly advocated that the State of Tennessee secede from the Union, had "organize[d] armed rebellion against the United States," had accepted a judicial commission from the Confederate Government, had begun to hold court pursuant to that commission, and had failed to fulfill his duties as a United States Judge.[82] He was convicted on all of the above charges,[83] removed from office and disqualified from holding future office.[84] He had not appeared either by repre-

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78 A. STANSBURY, *supra* note 74, at 425.

79 *Id.* at 103.

80 7 CONG. DEB. 45 (1831).

81 CONG. GLOBE, 37th Cong., 2d Sess. 1966-67 (1862); 3 HINDS' PRECEDENTS § 2385, at 805.

82 CONG. GLOBE, 37th Cong., 2d Sess. 2277 (1862); 3 HINDS' PRECEDENTS § 2390, at 810-11. Following defeat in the Judiciary Committee of the resolution to impeach Andrew Johnson, the minority issued a report in which it was stated that Humphreys "was a traitor against the Government of the United States." 3 HINDS' PRECEDENTS § 2406, at 839.

83 CONG. GLOBE, 37th Cong., 2d Sess. 2949-50 (1862); 3 HINDS' PRECEDENTS § 2397, at 818. There were seven articles of impeachment against Humphreys. Though he was found guilty on all the articles, a separate vote was taken on the three specifications contained in the sixth article and he was found guilty only of the first and third. CONG. GLOBE, 37th Cong., 2d Sess. 2950 (1862); 3 HINDS' PRECEDENTS § 2397, at 818.

84 CONG. GLOBE, 37th Cong., 2d Sess. 2953 (1862); 3 HINDS' PRECEDENTS § 2397, at 820.

sentation or on his own behalf.[85] A brief debate over punishment resulted in the conclusion that the Constitution's limitation on punishment does not require both removal and disqualification but rather that "these are distinct and separate propositions, and are divisible."[86]

A resolution offered on December 17, 1866, calling for a general investigation of the acts of "any officer of the Government . . . which in contemplation of the Constitution are high crimes or misdemeanors"[87] is commonly considered to have been an indirect attempt to impeach President Andrew Johnson.[88] The resolution never came to a vote[89] but on February 24, 1868, following several unsuccessful attempts, Johnson was impeached for high crimes and misdemeanors.[90] He had angered the Republicans by his persistent vetoing of the Reconstruction legislation[91] and by his interference with its enforcement.[92] To prevent him from removing Republican appointees from office,[93] Congress passed the Tenure of Office Act over the President's veto.[94] Johnson, believing the Act to be unconstitutional,[95] refused to

85 CONG. GLOBE, 37th Cong., 2d Sess. 2943 (1862); 3 HINDS' PRECEDENTS § 2395, at 817.

86 CONG. GLOBE, 37th Cong., 2d Sess. 2952 (1862). *See* 3 HINDS' PRECEDENTS § 2397, at 820. Justice Story had stated this position in his *Commentaries* some three decades earlier:

> [T]he senate, on the conviction, were bound, in all cases, to enter a judgment of removal from office, though it has a discretion, as to inflicting the punishment of disqualification.

2 J. STORY, *supra* note 45, § 801, at 271 (footnote omitted).

87 CONG. GLOBE, 39th Cong., 2d Sess. 154 (1866).

88 *See* 3 HINDS' PRECEDENTS § 2399, at 822-23; E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 491 (1960).

89 *See* CONG. GLOBE, 39th Cong., 2d Sess. 154 (1866).

90 CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868). Although Johnson was the first President of the United States to be impeached, he was not the first against whom an impeachment resolution had been introduced. On January 10, 1843, an attempt to impeach President John Tyler for high crimes and misdemeanors was defeated by a vote of 127 to 83. CONG. GLOBE, 27th Cong., 3d Sess. 144-46 (1843).

91 *See* R. BERGER, *supra* note 4, at 256; E. MCKITRICK, *supra* note 88, at 12. One author goes so far as to state:

> Indeed, every veto was regarded by the majority of the House as a defiant insult flung in their faces; as an act of the rankest usurpation; and many of them actually came to consider a veto an impeachable offence of itself.

D. DEWITT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 152 (1967).

92 R. BERGER, *supra* note 4, at 259; E. MCKITRICK, *supra* note 88, at 11-12, 291-92. "Who does not know," asked one of the House Managers,

> that . . . he used his veto power indiscriminately to prevent the passage of wholesome laws, enacted for the pacification of the country? and, when laws were passed by the constitutional majority over his vetoes, he made the most determined opposition, both open and covert . . . .

1 UNITED STATES SENATE, TRIAL OF ANDREW JOHNSON 122 (1868) [hereinafter cited as 1 TRIAL].

93 D. DEWITT, *supra* note 91, at 18.

94 CONG. GLOBE, 39th Cong., 2d Sess. 1966 (1867).

95 *See* CONG. GLOBE, 40th Cong., 2d Sess. 1350 (1868) (speech of Representative Beck, February 22, 1868, in which he quotes from a letter sent by Johnson to the Senate).

abide by it and on February 21, 1868, fired Secretary of War Edwin Stanton.[96] A resolution to impeach was referred to the Committee on Reconstruction that day[97] and three days later it was adopted on the floor of the House.[98]

Raoul Berger has noted that up until the time that he fired Stanton it was hard to sympathize very much with Johnson.[99] He had interfered with the efforts of federal commanders to enforce the military Reconstruction procedures established to protect the civil rights of blacks in the South.[100] He had strongly opposed the fourteenth amendment,[101] and had even advised the Alabama legislature by telegram against ratification.[102] In short it was not without justification that the House accused Johnson of inciting the white South to resistance.[103]

Berger, nonetheless, concludes that the impeachment was a mistake, for a President should not be removed merely for differing with Congress.[104] While the interference with measures designed to promote racial equality does not seem a mere difference of opinion, it is true that all but one of the specific charges brought against Johnson did involve violations of the Tenure of Office Act, an act of questionable constitutionality.[105] The tenth article of impeachment charged that Johnson, intending to bring the United States Congress into "disgrace, ridicule, hatred, contempt and reproach," did openly and publicly declare "with a loud voice certain intemperate, inflammatory, and scandalous harangues" against Congress and its laws.[106]

Only three of the eleven articles drafted were ultimately voted on by the Senate.[107] Two involved the appointment of a new Secretary of War to replace Stanton. The other charged Johnson with usurping

96 The letter from Johnson to Stanton was set out in the first article of impeachment. CONG. GLOBE, 40th Cong., 2d Sess. 1647 (1868).

97 *Id.* at 1329-30.

98 *Id.* at 1400.

99 R. BERGER, *supra* note 4, at 260.

100 *Id.* at 259.

101 R. BERGER, *supra* note 4, at 257; E. MCKITRICK, *supra* note 88, at 357; 1 TRIAL 121-22.

102 1 TRIAL 122.

103 *Id.*

104 R. BERGER, *supra* note 4, at 262.

105 It was argued by Representative Beck of Kentucky prior to the adoption of the impeachment resolution that President Johnson had not committed an impeachable act because the Tenure of Office Act was an attempt by Congress to divest the President of one of his constitutional powers. CONG. GLOBE, 40th Cong., 2d Sess. 1349-51 (1868).

106 *Id.* at 1648. On March 4, 1868, the articles of impeachment were read in the Senate. *Id.* at 1647-49. As stated during the trial: "he everywhere denounced Congress, the legality and constitutionality of its action, and defied its legitimate powers." 1 TRIAL 122.

107 *See* CONG. GLOBE SUPP., 40th Cong., 2d Sess. 411, 414-15 (1868).

the powers of Congress.[108] The vote on each was 35 guilty to 19 not guilty, one less than the number necessary for conviction.[109]

On March 2, 1876, General William Belknap, Secretary of War, was impeached for high crimes and misdemeanors.[110] The formal articles of impeachment charged him with acceptance of bribes,[111] conduct which might have subjected him to criminal prosecution. His resignation was submitted and accepted by President Grant on the same day and presented to the House prior to the vote on impeachment.[112] A lengthy debate ensued concerning the propriety of impeaching an officer who has resigned his office. The weight of opinion, as evidenced by adoption of the resolution to impeach,[113] was that a civil officer may not escape impeachment by resignation.[114] Representative Robbins of North Carolina stated:

> The results of an impeachment . . . are twofold: One is to remove from office and the other is to disqualify from holding office hereafter. The removal from office is accomplished by the resignation but the other portion of the penalty remains uninflicted. Certainly it is within the power of the Senate sitting as a court of impeachment to impose that penalty, and the officer cannot escape it by hasty resignation, which is virtually a flight from justice.[115]

When the issue of jurisdiction was raised again at the Senate trial it met with a similar response. The vote to sustain jurisdiction was 37 to 29.[116] The Senate rejected the argument of Belknap's counsel that

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108 *Id.*

109 *Id.*

110 4 CONG. REC. 1433 (1876); 3 HINDS' PRECEDENTS § 2444, at 905.

111 4 CONG. REC. 2081-82 (1876). Article II alleged:

> William W. Belknap, while he was in office as Secretary of War . . . receive[d] from one Caleb P. Marsh the sum of $1,500, in consideration that he would continue to permit one John S. Evans to maintain a trading establishment at . . . a military post of the United States . . . . And so the said Belknap was thereby guilty . . . of a high misdemeanor in his said office.

Id. at 2081.

112 *Id.* at 1429; 3 HINDS' PRECEDENTS § 2444, at 903-04.

113 4 CONG. REC. 1433 (1876).

114 *See id.* at 1429-32. Representative Hoar of Massachusetts supported his contention that impeachment jurisdiction ceases once the officer in question has resigned by drawing a distinction between English and American impeachment proceedings. He pointed out that

> [i]n England any citizen can be impeached, and therefore the English case of Warren Hastings does not apply. In America no man can be impeached but a civil officer, and when he ceases to be a civil officer he ceases to be within the literal construction of the Constitution.

Id. at 1431.

115 *Id.* at 1430.

116 4 CONG. REC., TRIAL OF WILLIAM BELKNAP 158 (1876); 3 HINDS' PRECEDENTS § 2459,

such a decision required a concurrence of two-thirds of the Senators sitting in the court and the trial proceeded.[117]

Although a majority of the Senate voted him guilty on all the articles of impeachment, the two-thirds required for conviction was not met, and on August 1, 1876, Belknap was acquitted.[118] In the report to the House it is stated that of those voting "not guilty" 23 professed to have done so because they believed the Senate had no jurisdiction.[119]

On December 10, 1903, William B. Lamar, a member of Congress from the State of Florida, rose on a question of privilege to impeach Charles Swayne, federal district judge for the northern district of Florida.[120] His resolution included a joint resolution of the Florida legislature requesting an investigation into Judge Swayne's conduct "to the end that he may be impeached and removed from such office."[121] Following an investigation by the House Judiciary Committee, Judge Swayne was impeached on December 13, 1904.[122] He was charged with collecting travel expenses in excess of the amount actually incurred for trips to hold court in his district; with appropriating, without compensation to the owner and for his own personal use, a railroad car which was in the hands of a receiver appointed by him; with failing to comply with the requirement that he live in his district; and with "maliciously and unlawfully" fining and imprisoning several attorneys for alleged contempt of court.[123] On January 24, 1905, the articles of im-

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at 934-35. Belknap's resignation occurred at the time of the impeachment in the House and before the Senate trial. Therefore, one author thinks that no clear precedent was set. Furthermore, jurisdiction was upheld in the Senate by only a majority rather than by two-thirds. Simpson, *Federal Impeachments* (pt. 2), 64 AM. L. REG. 803, 816 (1916).

117 3 HINDS' PRECEDENTS § 2459, at 934.

118 4 CONG. REC., TRIAL OF WILLIAM BELKNAP 357 (1876); 3 HINDS' PRECEDENTS § 2467, at 946.

119 4 CONG. REC. 5082 (1876); 3 HINDS' PRECEDENTS § 2468, at 946.

120 38 CONG. REC. 95 (1903).

121 *Id.* The resolution said in part:

> Charles Swayne . . . has so conducted himself and his court as to cause the people of the State to doubt his integrity and to believe that his official actions as judge are susceptible to corrupt influences and have been so corruptly influenced . . . .

Id.

A good case has been made that Swayne's impeachment was the result of partisan politics. He was a Republican judge appointed to a Democratic district: the resolution from the Florida legislature passed by a strictly partisan vote and; the votes on his impeachment in the House and trial in the Senate were almost totally partisan. *See* ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 185-89 (1938).

122 39 CONG. REC. 248 (1904); 3 HINDS' PRECEDENTS § 2472, at 954.

123 39 CONG. REC. 665-67 (1905).

peachment were read in the Senate,[124] and on February 27, 1905, he was acquitted, a majority finding him not guilty on all the charges read.[125]

In 1912, Robert W. Archbald, a United States circuit judge from Pennsylvania assigned to the Commerce Court, was impeached for using his office to obtain profitable contracts for himself from persons appearing before his court and others, and for adjudicating cases in which he had a financial interest or had received payment.[126]

The debate surrounding the Archbald impeachment is of considerable interest since this was the first proceeding in which the nature of the impeachment power was extensively considered. The chairman of the House Impeachment Committee flatly conceded that none of the articles would sustain a criminal charge.[127] In the Senate trial, rebutting the defense argument that conduct to be impeachable must be indictable, the House Managers of the impeachment proceeding pointed to the object of the impeachment power. Impeachment, they said, is not intended to punish the individual, but rather to protect the public "from injury at the hands of their own servants and to purify the public service."[128] The Senate found Archbald guilty on five of the thirteen articles, and removed him from office.[129] In addition, he was disqualified from holding future office.[130]

Nearly 100 years after the impeachment of James Peck the House once again impeached a federal official[131] for "willful" and "tyrannical" disregard of the first amendment rights of citizens.[132] The articles of impeachment against United States District Judge George W. English of Illinois declared that he had commited a "misdemeanor in office" by "willfully, unlawfully, tyrannically, and oppressively" sum-

124 *Id.* at 1281-83; 3 HINDS' PRECEDENTS § 2476, at 960-63.

125 39 CONG. REC. 3468-72 (1905); 3 HINDS' PRECEDENTS § 2485, at 979.

126 48 CONG. REC. 8904-34 (1912). This was the first time the articles of impeachment and the resolution calling for impeachment were reported at the same time.

127 *Id.* at 8910. The chairman stated:

> [I]f we are limited to indictable offenses under the Federal statutes there would be very few cases for which a judge or other officer could be impeached. There are no common-law offenses against the Federal Government, and all the offenses against the Federal Government that can be punished must come under some Federal statute. Our criminal code covers but few offenses.

Id.

128 49 CONG. REC. 1259 (1913); 6 C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 460, at 643 [hereinafter cited as 6 CANNON'S PRECEDENTS].

129 49 CONG. REC. 1439-41, 1446-47 (1913); 6 CANNON'S PRECEDENTS § 512, at 707.

130 49 CONG. REC. 1448 (1913); 6 CANNON'S PRECEDENTS § 512, at 708.

131 Judge George W. English was impeached in the House on April 1, 1926. 67 CONG. REC. 6735-36 (1926).

132 *Id.* at 6284.

moning before him a reporter, an editor, and an editor-publisher from three different newspapers and threatening them with imprisonment for newspaper articles giving the facts about, and editorials critical of, his summary disbarment of an Illinois attorney.[133] Concerning two of the newsmen, the article of impeachment charged that Judge English did

> with angry and abusive language attempt to coerce and did threaten them as members of the press from truthfully publishing the facts in relation to the disbarment of Charles A. Karch by said George W. English, judge . . . and then and there used the power of his office tyrannically, in violation of the freedom of the press guaranteed by the Constitution, to suppress the publication of the facts about [his own] official conduct . . . .[134]

As for the third, the editor-publisher, the impeachment charged that Judge English had vehemently threatened him in open court with imprisonment not only for an editorial, but for having printed "some lawful handbills" which made no mention of the judge or his conduct of court.[135] Other charges were disbarring lawyers without notice or hearing,[136] and hindering lawyers in their attempts to represent their clients, thereby depriving the clients of their right to counsel; refusing parties before his court the right to trial by jury; usurping the powers of the state government over its officials; and interfering with "the rights of the people to have and receive due process of law."[137]

Shortly before the scheduled commencement of his trial, Judge English resigned from office.[138] The Senate then voted to discontinue proceedings against him.[139] But his impeachment by the House reaf-

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.* at 6287.

138 68 CONG. REC. 3 (1926). Judge English tendered his resignation to President Coolidge on November 4, 1926, six days before the Senate was scheduled to begin sitting as a court of impeachment. It was accepted that day and on November 10, 1926, when the Senate assembled to begin the trial, the House managers appeared to recommend dismissal of the pending proceeding. *Id.*

139 *Id.* at 348. Clarence Cannon noted in his *Precedents* that the resignation of Judge English did not affect the right of the Senate as a court of impeachment to continue the trial. 6 CANNON'S PRECEDENTS § 547, at 783. There was extensive discussion concerning the effect of such a dismissal culminating in the following statement by Senator William Borah of Idaho:

> I should not want to sit here for a number of weeks and at the public expense to arrive at a judgment . . . . It is hardly possible that Judge English will ever hold another office under this Government, resigning under the circumstances under which he did resign, and considering his age.

68 CONG. REC. 348 (1926).

firmed the principal that violations of the first amendment are grounds for impeachment. In addition, it established that impeachment could be brought against a public official who ignores other sections of the Bill of Rights, such as the right to counsel.

A number of the American impeachments have been partly based on interference with the due administration of justice. Both Judge Peck and Judge English were accused of misconduct which distorted the judicial process, brought their offices into disrepute, and destroyed public confidence in the impartiality of government. In addition to his disregard for the first amendment, Judge English was impeached for corruption, favoritism, and misusing his judicial office "for his personal gain and profit . . . to the great scandal of the said office of judge . . . and all tending to bring the administration of justice in said court into distrust and contempt."[140] He was also accused of permitting a subordinate—the referee in bankruptcy—to engage in "neglect of duty without criticism or rebuke" and, knowing of the referee's neglect, nevertheless appointing him to serve another term.[141]

In 1933 Harold Louderback, a United States District Judge in California, was impeached for abuses of his judicial power[142] which "brought the administration of justice . . . into disrepute."[143] Not only was Louderback guilty of corruption, charged the House, but also of appointing incompetent receivers and ignoring the just claims of parties before his court.[144] The impeachment stated that he conducted himself so "as to excite fear and distrust and to inspire a widespread belief . . . that causes were not decided in said court according to their merits."[145] Louderback was eventually acquitted.[146]

In the most recent instance, United States District Judge Halsted L. Ritter of Florida was impeached for "high crimes and misdemeanors" based on the neglect of judicial duties, the acceptance of bribes and other corrupt behavior.[147] He was later charged with tax evasion.[148] At trial before the Senate, Judge Ritter was acquitted on the first six

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140 67 CONG. REC. 6286 (1926).

141 *Id.*

142 The impeachment resolution, consisting of five articles, was adopted on February 24, 1933. 76 CONG. REC. 4925 (1933).

143 *Id.* at 4914.

144 *Id.* at 4915.

145 *Id.* at 4916.

146 77 CONG. REC. 4088 (1933).

147 80 CONG. REC. 3066-69 (1936).

148 The charge of tax evasion was added by an amendment to the original resolution of impeachment. *Id.* at 4598, 4601.

articles of impeachment[149] which charged specific, possibly criminal, offenses. But he was convicted on the seventh article,[150] which charged him merely with acting in a manner likely

> to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary . . . .[151]

Ritter filed suit against the United States government claiming an unpaid balance of salary from April 1st through April 30th, 1936.[152] His contention was that the Senate had no jurisdiction to consider either the articles of impeachment generally (because they did not set out impeachable offenses)[153] or the seventh article of impeachment specifically, since it was only a reiteration of charges made in the first six articles,[154] charges of which he had been acquitted.[155] The Court of Claims refused to review Ritter's charges stating that the Senate's " '*sole* power to try all impeachments' "[156] immunized those decisions from judicial review.[157]

The past impeachments are an important prologue to the current debate over the grounds for impeachment of a President. Along with the contemporary interpretations by the Framers, they give substance to the brief phrases employed in the Constitution itself. Their import is clear: When a public official abuses the power the people have

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149 *Id.* at 5603-06.

150 *Id.* at 5606.

151 *Id.*

152 Ritter v. United States, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937).

153 84 Ct. Cl. at 294. Ritter alleged that his

> attempted and purported removal . . . from the office of Judge of the United States District Court by the Senate . . . was illegal, unconstitutional, and void . . . for the reason that the charges made in the articles of impeachment do not constitute a high crime or misdemeanor within the meaning of the Constitution . . . .

Id.

154 *Id.* at 294-95.

155 *Id.* at 295.

156 *Id.* at 296 (emphasis by the court). The court quoted from Article 1, section 3 of the United States Constitution and discussed at length the meaning of the word "sole." *See id.* at 296-300.

157 *Id.* at 300. The court stated:

> Our conclusion is that we have no authority to review the impeachment proceedings held in the Senate and decide whether the accusations made against the plaintiff were such that he could properly be impeached thereon . . . . In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final.

Id.

bestowed upon him, he may be impeached and, upon trial and conviction, removed from his office of high trust.

In dealing with the judicial branch of our government, the Constitution states that judges "shall hold their Offices during good Behaviour."[158] It has been suggested that this phrase means that judges can be impeached for simple departures from good behavior, whereas other civil officers can be impeached only for high crimes and misdemeanors.[159] If true, impeachments involving judges would not necessarily illuminate the meaning of high crimes and misdemeanors. But, this view has been rejected by the nearly unanimous view of scholars.[160]

In the first place, the good behavior standard is intended to make judges less—not more—vulnerable to removal from office.[161] Historically it was designed to put English judges beyond the reach of royal

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158 U.S. CONST. art. III, § 1. As might be expected, the significance of this phrase has been the topic of discussion by numerous authors. *See, e.g.*, R. BERGER, *supra* note 4, at 122-80; 3 J. STORY, *supra* note 45, §§ 1594-1601.

It is interesting to note that Story quoted extensively from *The Federalist* in his discussion. It was his opinion that, regarding good behavior, "the Federalist has spoken with so much clearness and force, that little can be added to its reasoning." *Id.* § 1594, at 458. The amount of material written by subsequent authors regarding the good behavior standard indicates that they would take issue with this conclusion. *See, e.g.*, Feerick, *supra* note 8, at 51-52; Simpson, *supra* note 116, at 806-13.

159 The most recent example of this position would appear to be the words of Vice President Gerald Ford in 1970, then serving as Congressman from Michigan. In his discussion of the conduct of Justice William O. Douglas, he referred to what he believed was necessary for impeachment under the provisions of the Constitution:

> [O]ne of the specific or general offenses cited in article II is required for removal of the indirectly elected President and Vice President and all appointed civil officers of the executive branch of the Federal Government, whatever their terms of office. But in the case of members of the judicial branch, Federal judges and Justices, I believe an additional and much stricter requirement is imposed by article II, namely, "good behaviour."

116 CONG. REC. 11913 (1970). It was thus Mr. Ford's opinion that "a higher standard is expected of Federal judges than of any other 'civil officers' of the United States." *Id. See also* Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 KAN. CITY L. REV. 3, 33 (1938).

160 *See, e.g.*, R. BERGER, *supra* note 4, at 159-64; Feerick, *supra* note 8, at 51-52; Simpson, *supra* note 116, at 806-07; Bestor, Book Review, *supra* note 17, at 257.

161 It has been stated by one author that "'Good Behaviour' was an expression of 'tenure,' used to secure the independence of the judiciary." Feerick, *supra* note 8, at 51. That author quoted a passage from *The Federalist* which is most appropriate to this discussion:

> The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

THE FEDERALIST No. 78, at 483 (H. Lodge ed. 1888) (A. Hamilton).

displeasure.[162] In addition, impeachment is an extraordinary remedy and one of the rare exceptions to the separation of powers doctrine.[163] The debate of the Framers and the final language of the Constitution indicate an intention to restrict application of this remedy to treason, bribery, or high crimes and misdemeanors, and not to allow removal of judicial officers by the legislative branch for mere misbehavior.

This does not mean that the good behavior standard is meaningless. As Berger notes, it is a standard that should be implemented within the judicial branch by a statutory procedure for removal of judges,[164] but should not be imposed on the judicial branch by the legislative branch unless the misconduct amounts to high crimes and misdemeanors.[165] And, indeed, as has been seen in this article, all the judges who have been impeached were impeached for high crimes and misdemeanors and not for "misbehavior."

"High Crimes and Misdemeanors"

Under Article II, section 4 of our Constitution, impeachment lies for "Treason, Bribery or other high Crimes and Misdemeanors."

Treason is defined in the Constitution itself.[166] In response to English excesses based on a loose, sometimes retrospective definition of treason, the Framers had closely defined and limited it to certain conduct.[167] "Bribery," although not defined in the Constitution, did have

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162 *See* R. Berger, *supra* note 4, at 151, nn.131-34; 3 J. Story, *supra* note 45, § 1617; Simpson, *supra* note 116, at 807.

163 *See* R. Berger, *supra* note 4, at 5.

164 *Id.* at 179-80. This suggestion is not a new one. As stated by Rufus King in the debate on removability on impeachment during the Constitutional Convention:

> [T]he Judiciary hold their places not for a limited time, but during good behaviour. It is necessary therefore that a forum should be established for trying misbehaviour.

2 Records 66-67 (footnote omitted).

165 It is interesting to note that at the time the impeachment of Andrew Johnson was being discussed, one author, Judge William Lawrence of Ohio, took the position opposite that which this article advocates. Judge Lawrence stated:

> The Constitution contains inherent evidence, therefore, that as to judges they should be impeachable when their *behavior* was not *good*—and the Senate are made the exclusive judges of what is bad behavior.

Lawrence, *The Law of Impeachment*, 15 Am. L. Reg. 641, 653 (1867).

166 The Constitution provides that "[t]reason . . . shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. art. III, § 3.

167 Under English common law, treason had come to include a variety of offenses by the 14th century, many of which deprived the guilty of their lands and goods through forfeiture to the Crown. The Statute of Treasons was adopted by Parliament in 1352 to limit the offenses which this term encompassed so that the nobility would not be deprived

a well-known common-law meaning.[168] On the other hand, "high Crimes and Misdemeanors" is not defined either in the Constitution or in commonlaw.

The American debate about the precise meaning of this term, in the context of past impeachments has largely been one of convenience.[169] At one extreme are those who have contended that the phrase is limited to indictable criminal offenses.[170] This group, as might be

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of escheat where a feudal tenant committed what was previously a treasonable act. *See* T. PLUCKNETT, *supra* note 13, at 443-44. The statute states in part:

> When a Man doth compass or imagine the Death of our Lord the King, or of our Lady his Queen, or of their eldest Son and Heir; or if a Man do violate the King's Companion, or the King's eldest Daughter unmarried, or the Wife of the King's eldest Son and Heir; *or if a Man do levy War against our Lord the King in his Realm*, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort, in the Realm . . . . And if a Man counterfeit the King's Great or Privy Seal, or his Money; and if a Man bring false Money into this Realm, counterfeit to the Money of *England* . . . and if a Man slea the Chancellor, Treasurer, or the King's Justices of the one Bench or the other . . . . [T]hat ought to be judged Treason . . . .

25 Edw. 3, Stat. 5, c.2 (1350). However, Parliament had the authority to extend the scope of the statute and frequently used its power to control political disorders. *See* F. MAITLAND, *supra* note 4, at 227-29.

The Framers were aware of the distortions possible in a constitutional government where the legislature retained the power to interpret the meaning of treason. As a result, the American definition of treason was to be fixed and immutable. *See* R. BERGER, *supra* note 4, at 54-55.

168 Bribery was made the subject of a federal criminal statute in 1790, three years after ratification of the Constitution. Act of April 30, 1790, ch. 9, § 21, 1 Stat. 117. This statute, which was concerned with the bribing of federal judges, was followed by similar statutes concerning members of Congress in 1853, and other civil officers in 1863. The failure to establish a comprehensive definition until many decades after adoption of the Constitution seems indicative of a satisfaction with the common-law definition of bribery as the standard for impeachment. Thus a strong implication is raised that conduct not within the scope of statutory bribery may nevertheless be considered an impeachable offense. *See* STAFF OF HOUSE COMM. ON THE JUDICIARY, 93d CONG., 2d SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 25 & n.17 (Comm. Print 1974).

169 American courts in the past have been guided in their constitutional interpretations by English common-law principles. *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 349-50 (1898); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1818). In a state impeachment proceeding, the Nebraska supreme court, after reviewing the conflicting definitions of high crimes and misdemeanors at the federal level, concluded that

> where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office.

State v. Hastings, 37 Neb. 96, 116, 55 N.W. 774, 780 (1893).

170 *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES *259 (impeachment is "a presentment to the most high and supreme court of criminal jurisdiction"); 1 W. HOLDSWORTH, *supra* note 4, at 379 ("impeachment is a criminal proceeding initiated by the House of Com-

expected, has included defendants in impeachment proceedings, subjects of impeachment inquiries, and their respective counsels.[171] At the other extreme, Vice President, then Congressman, Gerald R. Ford, proposing the impeachment of Supreme Court Justice William O. Douglas, contended that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history."[172]

It is clear that neither extreme is correct. The phrase "high Crimes and Misdemeanors" is not limited to criminal law violations.[173] It is a special standard developed over five hundred years, first by the English Parliament and then by the Framers, to check abuses by public officials.[174] As those who wrote our Constitution knew, normal criminal laws were never designed to cover many of the possible abuses of power by a President.[175]

It is equally clear that Vice President Ford's standard is incorrect, for the words of the Framers were based on history and precedent from which discernible and guiding legal standards appear. It appears that the words high crimes and misdemeanors were first used in 1386 in the impeachment of the Earl of Suffolk, though there is debate over the exact date of the first impeachment.[176] Although criminal allegations including treason were raised against Suffolk, several other charges against him were not criminal. For example, he was impeached

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mons"); Dwight, *Trial by Impeachment*, 6 AM. L. REG. 257, 266 (1867) ("the court of impeachment must administer the same law as the criminal court").

171 Benjamin Curtis, counsel for President Andrew Johnson argued this point before the Senate. 1 TRIAL 409. James St. Clair, attorney for President Nixon has propounded the same view. 10 PRESIDENTIAL DOCUMENTS: RICHARD NIXON 270, 283 (Nov. 9, 1973). Lawyers who defended members of the judiciary have also applied those standards. *See, e.g.*, 3 HINDS' PRECEDENTS § 2360, at 756 (counsel for Justice Chase).

172 116 CONG. REC. 11913 (1970).

173 *See* R. BERGER, *supra* note 4, at 58 n.16; 1 R. FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 582, 585-86 (1895); W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 204 (1825); 2 J. STORY, *supra* note 45, § 762. Professor Bernard Schwartz has taken a middle ground, based upon American impeachment precedents, that a President may only be impeached for indictable offenses while judges are subject to a looser standard including non-criminal activities which indicate them to be unfit to serve on the bench. 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 114-15 (1963).

174 As used by Parliament, an impeachment could be brought against *any* person. *See* note 9 *supra*. However, its real effectiveness appeared to be against influential personages who could not be reached through normal judicial processes. 2 R. WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 611-12 (1792).

175 *See* notes 189-93 *infra* and accompanying text.

176 1 Cob. St. Tr. 89 (1388). According to Berger this proceeding is regarded as the earliest conducted under the charge of high crimes and misdemeanors. R. BERGER, *supra* note 4, at 59.

for neglect of duty for failing to use funds appropriated by Parliament to guard the sea and relieve a beleaguered city.[177] The non-criminal pattern then established has been followed through the centuries.[178]

Because the powers of the upper House of Parliament during the fourteenth century were ill-defined, the impeachment process was unrestricted by common law precedents.[179] Thus, the designation of any action as a high crime or misdemeanor was not founded upon then established criminal jurisprudence.[180] The phrase high misdemeanors was a technical term in English law, used primarily in connection with impeachment proceedings to reach abuses of the public trust.[181] English precedents support the notion that high crimes and misdemeanors were "without roots in the ordinary criminal law" and bore "no relation to whether an indictment would lie in the particular circumstances."[182] A "high" crime or misdemeanor signified a political act against the state as opposed to an act against a private person.[183] Injury to the nation was the gravamen of the offense. The distinction goes back to the ancient law of treason which so differentiated "high" from "petty" treason.[184]

The early constitutional authority, Justice Joseph Story, in 1833 summarized the English impeachments as following this pattern:

> In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have . . . been impeached . . . for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the funda-

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177 1 Cob. St. Tr. at 91-94.

178 For a collection of English cases in which convictions were not founded upon indictable offences, see R. BERGER, *supra* note 4, at 67-69; Simpson, *Federal Impeachments* (pt. 1), 64 AM. L. REG. 651, 681-82 (1916).

179 *See* R. BERGER, *supra* note 4, at 60 & n.25; 1 W. HOLDSWORTH, *supra* note 4, at 380 & n.5.

180 1 R. FOSTER, *supra* note 173, at 586. The term misdemeanor does not appear as a category of criminal offense in England until the sixteenth century; its antecedent, in use during the fourteenth century, was a trespass action where either civil or criminal wrongs might be alleged. T. PLUCKNETT, *supra* note 13, at 456-58. Thus the lack of non-Parliamentary application coupled with the non-criminal aspect of that word's derivation strongly suggests that indictability of an action was not the proper standard for a high misdemeanor.

181 4 W. BLACKSTONE, COMMENTARIES *121; *see* R. BERGER, *supra* note 4, at 61-62.

182 R. BERGER, *supra* note 4, at 62 (footnote omitted). *See* note 14 *supra*.

183 R. BERGER, *supra* note 4, at 61.

184 *See* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 227 n.11 (C. Stephenson & F. Marcham ed. transl. 1937).

> mental laws, and introduce arbitrary power. . . . Thus, persons have been impeached for giving bad counsel to the king; advising a prejudicial peace; enticing the king to act against the advice of parliament; purchasing offices; giving medicine to the king without advice of physicians; preventing other persons from giving counsel to the king, except in their presence; procuring exorbitant personal grants from the king. But others, again, were founded in the most salutary public justice; such as impeachments for malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office and advancing bad.[185]

This history was well known to the Framers of the Constitution. At the time the Constitutional Convention was meeting in Philadelphia, Warren Hastings, the Governor-General of India, was impeached in England for high crimes and misdemeanors.[186] Specific articles of impeachment charged him with both criminal and non-criminal conduct, including mismanagement and misgovernment in India, various acts of extortion, bribery, corruption, confiscation of property, and mistreatment of various provinces.[187] His overly publicized trial was the occasion for the statement of Edmund Burke to the effect that

> statesmen who abuse their power, are accused by statesmen, and tried by statesmen, not upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality. It is here that those who . . . have violated the spirit of law, can never hope for protection from any of its forms . . . that those who have refused to conform themselves to its perfections, can never hope to escape through any of its defects.[188]

In the discussion which determined the final wording of Article II, section 4, George Mason of Virginia objected to limiting the grounds for impeachment to treason and bribery. He argued that the American definition of treason was much narrower than that followed in England and, therefore, that treason alone would "not reach many great and dangerous offences" which ought to be impeachable, including "[a]ttempts to subvert the Constitution."[189]

James Madison rejected the addition of "maladministration," arguing that "[s]o vague a term will be equivalent to a tenure during

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185 2 J. STORY, *supra* note 45, § 798, at 268-69 (footnotes omitted).

186 *See* note 16 *supra*.

187 *See* THE HISTORY OF THE TRIAL OF WARREN HASTINGS, ESQ. ix-x (1796).

188 1 E. BURKE, THE SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE ON THE IMPEACHMENT OF WARREN HASTINGS 11 (7 BURKE'S WORKS, 1889).

189 2 RECORDS 550.

pleasure of the Senate."[190] Thereafter, Mason proposed and the Convention adopted the term "high Crimes and Misdemeanors."[191]

Madison's successful effort to provide a standard of impeachable offenses more certain than that embodied in the vague word "maladministration," was not intended to limit the grounds for removal from office to indictable crimes, for, as he said during the debate on July 20, 1787, it was

> indispensable that some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service [the four year term] was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers.[192]

Two years later Madison told the First Congress:

> I think it absolutely necessary that the President should have the power of removing [his appointees] from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the constitutionality of the declaration I have no manner of doubt.[193]

Even those who disagreed with Madison's expansive view of presidential power agreed with his view of presidential responsibility. The President should be "as responsible as possible," said Elbridge Gerry of Massachusetts.[194] The First Congress, by a wide majority, declared

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190 *Id.*

191 *Id.*

Arthur Bestor rejects Berger's contentions that the Framers intended to make high crimes and misdemeanors a "rigidly limited class of specific acts." Bestor, Book Review, *supra* note 17, at 268-69. Bestor further states that it "is not the instrinsic [*sic*] nature of the action itself, but the context that elevated it to the level designated 'high.'" *Id.* at 271. Among the activities to which Bestor applies this theory are "'misapplication of funds,' 'neglect of duty,' 'conversion of public property,' 'betrayal of trust,' and 'giving pernicious advice to the crown.'" *Id.* at 270 (quoting from R. BERGER, *supra* note 4, at 69-71). Berger differs with Joseph Story's statement that

> "political offenses are of so various and complex a character, so utterly incapable of being defined or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."

R. BERGER, *supra* note 4, at 77 n.126 (quoting from 2 J. STORY, *supra* note 45, § 795, at 264). Bestor, however, agrees with Story, calling "'high crimes and misdemeanors' . . . an obviously flexible category." Bestor, Book Review, *supra* note 17, at 268.

192 2 RECORDS 65-66.

193 1 ANNALS OF CONG. 387 (1789) [1789-1791].

194 *Id.* at 396.

that the power to remove presidential appointees resided in the President alone,[195] for he was responsible for their acts.

Eighty years later, President Andrew Johnson, impeached by the House and on trial before the Senate, agreed with Madison that the President must bear final responsibility for the conduct of his subordinates:

> The legal relation is analogous to that of principal agent. It is the President upon whom the Constitution devolves, as head of the executive department, the duty to see that the laws are faithfully executed; but as he cannot execute them in person he is allowed to select his agents, and is made responsible for their acts within just limits. So complete is this presumed delegation of authority in the relation of a head of department to the President that the Supreme Court of the United States have decided that an order made by a head of department is presumed to be made by the President himself.[196]

That the Founders did not intend to limit high crimes and misdemeanors to commonplace criminal behavior has been reiterated by the statements of others. James Wilson, later a Supreme Court Justice and second only to Madison as a constitutional architect, declared in law lectures shortly after ratification of the Constitution that "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments."[197] James Iredell, another future Supreme Court Justice and chief advocate of ratification in North Carolina, told his state's ratifying convention that impeachment was designed "to bring great offenders to punishment" and that "the occasion for its exercise will arise from acts of great injury to the community."[198]

Additionally, Alexander Hamilton described impeachment as an instrument to reach "the misconduct of public men" and "abuse or violation of some public trust."[199] Impeachable offenses are political, Hamilton further declared, "as they relate chiefly to injuries done immediately to the society itself."[200]

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195 *Id.* at 383.

196 1 TRIAL 64.

197 2 THE WORKS OF JAMES WILSON 46 (J. Andrews ed. 1896).

198 4 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113 (2d ed. J. Andrews 1836).

199 THE FEDERALIST No. 65, at 407 (H. Lodge ed. 1888) (A. Hamilton).

200 *Id.* For a discussion of the political aspects of the impeachment process, see Broderick, *Citizens' Guide to Impeachment of a President: Problem Areas,* 23 CATH. U.L. REV. 205 (1973).

Justice Joseph Story repeated this view of impeachment as a process to protect the public interest:

> The jurisdiction is to be exercised over offences, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political . . . . Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character . . . .[201]

He defined these political injuries as "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust."[202]

The remedy for such evils is impeachment. The Framers of our Constitution so intended it. If the President abuses his power by "the wanton removal of meritorious officers," said James Madison, he should be impeached and removed "from his own high trust."[203] If he permits his subordinates "to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses," he must be held responsible and subject to impeachment.[204]

Subsequent use of the impeachment power supports the Framers' view. Indeed, of the twelve public men impeached by the House of Representatives in our history only one was impeached solely on grounds which constitutes a criminal offense. The eleven others faced charges including misuses of power which have never been made criminal under federal law. Berger concludes that the Senate itself "in a succession of 'guilty' verdicts . . . has tacitly 'settled' that impeachment lies for nonindictable offenses."[205]

Impeachment, said Alexander Hamilton, is designed as "a method of NATIONAL INQUEST into the conduct of public men," and so it has been used in the United States. The purpose to be served is to ensure that "abuse of power . . . [does] not . . . become a precedent for subsequent and perhaps even graver abuses and usurpations."[206]

CONCLUSION

The history of impeachment "shows that it works. It is not a rusty, unused power."[207] It has been successfully used to curb breaches and

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201 2 J. STORY, *supra* note 45, § 744, at 217.

202 *Id.* § 788, at 256.

203 1 ANNALS OF CONG. 517 (1789) [1789-1791].

204 *Id.* at 387.

205 R. BERGER, *supra* note 4, at 56.

206 Bestor, Book Review, *supra* note 17, at 277.

207 Thompson & Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C.L. REV. 87, 118 (1970).

abuses of public trust. Although, as Berger points out, "the lion's share of the debate about impeachment in the last forty years"[208] has focused on removal of judges, it is vital to keep in mind that restraint on the executive was the Framers' primary target. Indeed, Hamilton conceived impeachment to be "a bridle in the hands of the legislative body upon the executive servants of the government."[209]

Impeachment in this context is one of the ultimate sanctions of the American constitutional system, a part of the arrangement of checks and balances. Impeachment and trial is a means to determine the guilt or innocence of the government official accused. It is the means to remove from office those found guilty of treason, bribery, and other high crimes and misdemeanors. But, most importantly, it is the means to declare that certain acts subvert the political principles on which our system of government itself is based.

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208 R. BERGER, *supra* note 4, at 297.

209 THE FEDERALIST No. 65, at 408 (H. Lodge ed. 1888) (A. Hamilton).