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## Impeachment Grounds: A Collection of Selected Materials

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## **ABSTRACT**

This is a sampling of the available material on the question of what constitutes impeachable conduct for purposes of Article II, section 4 of the United States Constitution.

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## Summary

This is a sampling of the material available on the question of what constitutes impeachable conduct for purposes of Article II, section 4 of the United States Constitution. It is arranged in chronological segments. The first covers those materials available on impeachment at the time the Constitution was drafted, Blackstone's Commentaries, Wooddeson's Lectures, and the impeachment clauses of the state constitutions. The second consists of the debates at the Constitutional Convention and the state ratifying conventions.

The third includes explanations from those who participated in the Convention and their contemporaries, Alexander Hamilton, and Supreme Court Justices James Wilson and Joseph Story.

The fourth is a summary of major American impeachment cases under the Constitution: Presidents Andrew Johnson and Richard Nixon, Senator William Blount, Secretary of War William Belknap, District Court Judges John Pickering, West Humphreys, Halsted Ritter, Harry Claiborne, Alcee Hastings, Walter Nixon, James Peck, Charles Swayne, George English, and Harold Louderback, Appellate Court Judge Robert Archbald, and Supreme Court Justice Samuel Chase.

The fifth is made up of material prepared at the time of the Douglas and Nixon impeachment inquiries including then-Congressman Gerald Ford's remarks. The collection ends with a very limited assembly of scholarly views from treatises and law reviews among them those of Charles Black, Congressman Bob Barr, John Labovitz, Paul Fenton, Laurence Tribe, Theodore Dwight, Alexander Simpson, Michael Gerhardt, and Ronald Rotunda.

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# Impeachment Grounds: A Collection of Selected Materials

*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*

## Introduction

This is a sampling of the material available on the question of what constitutes impeachable conduct for purposes of Article II, section 4 of the United States Constitution. It is arranged in chronological segments. The first covers those materials available on impeachment at the time the Constitution was drafted, Blackstone's Commentaries, Wooddeson's Lectures, and the impeachment clauses of the state constitutions. The second consists of the debates at the Constitutional Convention and the state ratifying conventions. The third includes explanations from those who participated in the Convention and their contemporaries. The fourth is a summary of major American impeachment cases under the Constitution. The fifth is made up of material prepared at the time of the last presidential impeachment inquiry. The collection ends with a very limited assembly of scholarly views.

This selection is of necessity abbreviated and should be augmented at a minimum with the materials, official and otherwise, likely to flow from the present inquiry.

## I.

### Blackstone

“The high court of parliament; which is the supreme court in the kingdom, not only for the making, but also for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*,<sup>1</sup> and by no means an

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<sup>1</sup> *Pro re nata* translates literally to “born of this matter” or “created for the matter at hand” but has come to mean, “a course of judicial action adopted under pressure of the exigencies of the affair in hand, rather than in conformity to established precedents,” BLACK'S LAW DICTIONARY 1220-221 (6th ed. 1990). In this sentence, Blackstone takes pains to avoid

execution of such as are already in being. But an impeachment before the lords of the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a present to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.<sup>[2]</sup> A commoner cannot however be impeached before the lords for any capital offence, but only for high misdemeanors;<sup>[3]</sup> a peer may be impeached for any crime.” IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 256 (1769) (transliteration supplied)(original footnotes in brackets)

Although the phrase had apparently become fairly common in impeachment cases by then, Blackstone makes no reference to the phrase “high crimes and misdemeanors.” He does, nevertheless, provide a detailed outline of the classification of crimes in his day:

“We are now arrived at the fourth and last branch of these commentaries; which treats of *public wrongs*, or *crimes* and *misdemeanors*. For we may remember that, in the beginning of the preceding volume, wrongs were divided into two sorts or species; the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemeanors.” ID. at 1.

\* \* \*

“A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms: though, in common usage, the word, ‘crimes,’ is made to denote such offences as are of a deeper and more atrocious dye; while smaller

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confusion of impeachment and conviction with the passage of a bill of attainder. Impeachment and trial was a judicial process in which the House of Commons voted impeachment which it then presented to the House of Lords for trial; the process was completed upon action by the Lords. The passage of a bill of attainder, on the other hand, was a legislative process that required passage by both Houses *and* the approval of the King. Some would contend that the seventeenth century practices of the House of Commons linked the two and makes them the possible subject to confusion. During that period, the Commons, having impeached an individual on evidence they feared the Lords might find insufficient for criminal conviction on the impeachment, would switch to a bill of attainder to punish, *pro re nata*, the individual whom it had impeached. The Lords, for their part, would punish an individual by an act of legislative discretion for conduct that as judges they could not call a crime, *cf.*, Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 YALE LAW JOURNAL 1419 (1975).

<sup>2</sup> [1 Hal.P.C.\*150.] Blackstone’s footnote here apparently refers to II HALE’S HISTORIA PLACITORUM CORONAE which at \*150 in the 1778 edition observes, “But impeachments by the house of commons of high treason, or other misdemeanors in the lords house have been frequently in practice, notwithstanding the statute of 1 H.4. and are neither within the words nor intent of that statute, for it is a presentment by the most solemn grand inquest of the whole kingdom.”

<sup>3</sup> Blackstone’s rather lengthy footnote here refers to an instance when Parliament objected to initiation of an impeachment against a commoner for a capital offense.

faults, and omissions of less consequence, are comprised under the gentler name of `misdemesnors' only.

“The distinction of public wrongs from private, of crimes and misdemesnors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemesnors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. . . . [T]reason, murder, and robbery are properly ranked among crimes; since besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

“In all cases the crimes include an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community,” ID. at 5.

\* \* \*

“The third general division of crimes [after offenses against God and offenses against the law of nations] consists of such, as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. . . . Every offence therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence: and these may be distinguished into four kinds; 1. Treason. 2. Felonies injurious to the king’s prerogative. 3. *Praemunire*.<sup>4</sup> 4. Other misprisions and contempts.

“Treason . . . imports a betraying, treachery, or breach of faith. It therefore happens only between allies, faith the mirror: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such his superior or lord,” ID. at 74-5.

\* \* \*

“Felony, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted . . . Treason itself . . . was antiently comprised under the name of felony,” ID. at 94.

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<sup>4</sup> *Praemunire* refers to the statutory ban on seeking to invoke papal authority to resolve a dispute touching upon the king, his authority, or his realm. It draws its name from the first line of the writ used to enforce it, *Praemunire facias A.B. quod sit coram nobis*. The writ instructed the sheriff to see to it (*facias*) that a named individual (A.B.) was forewarned (*Praemunire*) of the individual’s obligation to appear before the court to answer charges that the individual had shown contempt for the King’s prerogatives by invoking forbidden papal authority in some matter touching upon the interests of the King, 4 BLACKSTONE’S COMMENTARIES 102-18.

\* \* \*

“The fourth species of offences, more immediately against the king and government, are intitled misprisions and contempts.

“Misprisions (a term derived from the old French, *mespris*. a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever. . . . Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

“Of the first, or negative kind, is what is called *misprision of treason*; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto,” ID. at 119-20.

\* \* \*

“Misprisions, which are merely positive, are generally denominated *contempts* or *high misdemeanors*; of which

“The first and principal is the *mal-administration* of such high offices, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability,” ID. at 121.

\* \* \*

“Lastly, to endeavor to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute; (all of which are impediments to justice) are high misprisions, and contempts of the king’s courts, and punishable by fine and imprisonment. . . .

“The order of our distribution will next lead us to take into consideration such crimes and misdemeanors as more especially affect the *common-wealth*, or public polity of the kingdom. . . .

“The crimes and misdemeanors, that more especially affect the common-wealth, may be divided into five species; *viz.* offences against public *justice*, against the public *peace*, against public *trade*, against public *health*, and against the public *police or oeconomy*: of each of which we will take a cursory view in their order.

“First then, of the offences against public *justice*: some of which are felonious, whose punishment may extend to death; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity,” ID. at 126-28.

\* \* \*

“16. The next offence against public justice is when the suit is past its commencement, and come to trial. And that is the crime of wilful and corrupt *perjury*; which is defined by sir Edward Coke, to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully, absolutely, and falsely*, in a matter *material* to the issue or point in question. . . . *Subornation* of perjury is the offence of procuring another to take such a false oath, as constitutes perjury in the principal. The punishment of perjury and subornation, at common law, has been various. It was antiently death; afterwards banishment, or cutting out the tongue; and then forfeiture of



goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. . . .

“17. Bribery is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavior in his office,” *Id.* at 136-39.

### Wooddeson<sup>5</sup>

“In the last lecture two distinct modes of criminal prosecution were reserved for future inquiry, namely, proceedings on impeachments, and penal acts of parliament occasionally passed against particular offenders: the former is designed to occupy our present consideration.

“It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community, and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents, and the nature of such offences, may not unsuitably engage the authority of the highest court, and the wisdom of the sagest assembly. The commons, therefore, as the grand inquest of the nation, become suitors for penal justice; and they cannot consistently either with their own dignity, or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

“On this policy is founded the origin of impeachments: which began soon after the constitution assumed its present form. In the year 1321. . .

“All the king’s subjects are impeachable in parliament, but with this distinction, that a peer may be so accused before his peers of any crime, a commoner (tho perhaps it was formerly otherwise) can now be charged with misdemeanors only, not with any capital offence. For when Fitzharris, in the year 1681, was impeached of high treason, the lords remitted the prosecution to the inferior court, tho it greatly exasperated the accusers. Such kind of misdeeds however as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper and have been the most usual grounds for this kind of prosecution. Thus, if a lord chancellor be guilty of bribery, or of acting grossly contrary to the duty of his office, if the judges mislead their sovereign by unconstitutional opinions, if any other magistrate attempt to subvert the fundamental laws, or introduce arbitrary power, these have been deemed cases adapted to parliamentary inquiry and decision. So where a lord chancellor has been thought to have put the seal to an ignominious treaty, a lord admiral to neglect the safeguard of the sea, an ambassador to betray his trust, a privy counselor to propound or support pernicious and dishonorable measures, or a confidential advisor of his sovereign to obtain exorbitant grants or incompatible employments, these imputations have properly occasioned impeachments; because it is apparent how little the ordinary tribunals are calculated to take cognizance of such offences, or to investigate and reform the general polity of the state. . . .” 2 WOODDESON’S LECTURES, *Lecture 40*, 596-97, 601 (1792 ed.).

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<sup>5</sup> Wooddeson gave a series of highly regarded, well attended, and widely publicized lectures on the law beginning in 1777. The lecture on English impeachment provides the foundation for much of the impeachment discussion in Jefferson’s manual, see H.Doc. 104-272, Sec. LIII (1995)(Jefferson prepared his manual of parliamentary practice for his own use during the years when he presided over the Senate as Vice President from 1797 to 1801; it has been printed officially virtually ever since).

## **Pre-Convention State Constitutions**

Nine of the states had impeachment provisions in their state constitutions when the Constitutional Convention met in Philadelphia in 1787:

“Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation or removal for mal-administration: All impeachments shall be before the president [governor] or vice-president and council [upper house of the legislature, who shall hear and determine the same,” Pa.Const. §22 (1776).

“That the Governor, and other officers, offending against the State, by violating any part of this Constitution, maladministration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment to the grand jury of any court of supreme jurisdiction in this State,” N.C.Const. Art.23 (1776).

“The president, when he is out of office, and within eighteen months after, and all others offending against the State, either by maladministration, corruption, or other means, by which the safety of the commonwealth may be endangered, within eighteen months after the offence was committed, shall be impeachable by the house of assembly before the legislative council . . .” Del.Const. Art.23 (1776).

“The Governor, when he is out of office, and other, offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates. . . .” Va.Const. (1776).

“That the judges of the supreme court shall continue in office for seven years, the judges of the inferior courts of common pleas in the several counties, justices of the peace, clerks of the supreme court, clerks of the inferior courts of common pleas and quarter sessions, the attorney-general and provincial secretary shall continue in office for five years; and the provincial treasurer shall continue in office for one year; and that they shall be severally appointed by the council and assembly in manner aforesaid, and commissioned by the governor, or, in his absence, by the vice president of the council; provided always, that the said officers severally shall be capable of being re-appointed at the end of the terms severally before limited; and that any of the said officers shall be liable to be dismissed, when adjudged guilty of misbehavior by the council, on an impeachment of the assembly,” N.J.Const. XII (1776).

“That the power of impeaching all officers of the State, for mal and corrupt conduct in their respective offices, be vested in the representatives of the people of the assembly . . .” N.Y.Const. Art. XXXIII (1777).

“ . . . [A] court shall be instituted for the trial of impeachments . . . to consist of the president of the senate, for the time being, and the senators, chancellor, and judges of the supreme court, or the major part of them. . .” N.Y.Const. Art. XXXII (1777).

“Every officer of State, whether judicial or executive, shall be liable to be impeached by the General Assembly, either when in office, or after his resignation, or removal for mal-administration. All impeachments shall be before the Governor or Lieutenant Governor and Council, who shall hear and determine the same,” Vt.Const. Ch.2, §20 (1777).

“The house of representatives shall be the grand inquest of this commonwealth; and all impeachments made by them, shall be heard and tried by the senate,” Mass.Const. Pt.2, Ch.1, §3, Art.VI (1780).

“The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and mal-administration in their offices. . .” Mass.Const. Pt.2, Ch.1, §2. Art.VIII (1780).

“The house of representatives shall be the grand inquest of the state; and all impeachments made by them, shall be heard and tried by the senate,” N.H.Const. Pt.2, Art.17 (1784)

“The senate shall be a court, with full power and authority to hear, try, and determine, all impeachments made by the house of representatives against any officer or officers of the state, for bribery, corruption, malpractice or maladministration in office . . .” N.H.Const. Pt.2, Art. 38 (1784)

## II.

### Constitutional Convention of 1787

The Constitutional Convention in Philadelphia that produced the United States Constitution began its substantive work with the presentation of the Resolutions of Edmund Randolph of Virginia. The Randolph Resolutions supplied a broad general outline of a constitution for a national government and the initial format for discussion. The Ninth Resolution declared:

“Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services. that the jurisdiction [of these tribunals] shall be to hear & determine . . . all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National offices, and questions which may involve the national peace and harmony,” I RECORDS OF THE FEDERAL CONVENTION OF 1787 (FARRAND), 21-2 (Madison) (May 29, 1787) (Farrand, ed. 1888).<sup>6</sup>

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<sup>6</sup> THE RECORDS are a chronologically arranged collection of notes of the various delegates (primarily Madison); the author of the notes and the date are cited in parentheses. No general effort has been made to mark or adjust abbreviations, spelling, or punctuation inconsistencies appearing in the original.

Impeachment was next mentioned when the Convention agreed that the President was “to be removable on impeachment & conviction of mal-practice or neglect of duty,” ID. at 88 (Madison) (June 2, 1787). With a month’s reflection, two delegates, Pinkney and Morris, moved that the removal language be stricken:

“Mr Pinkney & Mr Govr. Morris moved to strike out this part of the Resolution. Mr P. observed. he ought not be impeachable whilst in office

“Mr Davie. If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected. He considered this as an essential security for the good behavior of the Executive.

“Mr Wilson concurred in the necessity of making the Executive impeachable whilst in office.

“Mr Govr. Morris. He can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence. Besides who is to impeach? Is the impeachment to suspend his functions. If it is not the mischief will go on. If it is the impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach.

“Col. Mason. No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors. There had been much debate & difficulty as to the mode of chusing the Executive. He approved of that which had been adopted at first, namely of referring the appointment of the Natl. Legislature. One objection agst. Electors was the danger of their being corrupted by the Candidates: & this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practiced corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?

“Docr. Franklin was for retaining the clause as favorable to the executive. History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. 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.

“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. He might pervert his administration into a scheme of speculation or oppression. He might betray his trust to foreign powers. . . In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

\* \* \*

“Mr. King expressed his apprehensions that an extreme caution in favor of liberty might enervate the Government we were forming. He wished the House to recur to the primitive axiom that the three great departments of Govts. should be separate & independent: that the Executive & Judiciary should be so as well as the Legislative: that the Executive should be so equally with the Judiciary. Would this be the case if the Executive should be impeachable? It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places not for a limited time, but during good behavior. It is necessary therefore that a forum should be

established for trying misbehavior. Was the Executive to hold his place during good behavior? — The Executive was to hold his place for a limited term like the members of the Legislature; Like them particularly the Senate whose members would continue in appointment the same term of 6 years. He would periodically be tried for his behavior by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. Like them therefore, he ought to be subject to no intermediate trial, by impeachment. He ought not to be impeachable unless he hold his office during good behavior, a tenure which would be most agreeable to him; provided an independent and effectual forum could be devised; But under no circumstances ought he to be impeachable by the Legislature. This would be destructive of his independence and of the principles of the Constitution. He relied on the vigor of the Executive as a great security for the public liberties.

“Mr. Randolph. The propriety of impeachments was a favorite principle with him; Guilt wherever found ought to be punished. The Executive will have great opportunities of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections. He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business. He suggested for consideration an idea which had fallen (from Col Hamilton) of composing a forum out of the Judges belonging to the States: and even of requiring some preliminary inquest whether just grounds of impeachment existed.

\* \* \*

“Mr. Govr. Morris’s opinion had been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. 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; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. One would think the King of England well secured agst bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office. This Magistrate is not the King but the prime-Minister. The people are the King. When we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the Legislature.” II FARRAND 64-9 (Madison) (July 20, 1787).

The Convention voted to make the Executive removable on impeachment, but moved on without addressing the particulars. The delegates assigned the Committee on Detail the task of working these and other matters individually agreed upon into a cohesive draft. The draft the Committee presented on August 6 designated as the “President” that officer who had been variously referred to as the “Executive”, the “first Magistrate” up until then. It also declared that, “He shall be removed from his office on impeachment by the House of Representatives, and convicted in the supreme Court, of treason, bribery, or corruption,” ID. at 186-87 (Madison).

After extensive discussion of other issues, the Convention referred a number of propositions to the Committee on Detail for examination, including a proposal for a “Council of State” to assist the President and to consist of the Chief Justice of the supreme Court as well as five designated department heads (secretary of domestic affairs, secretary of commerce and finance, etc.) appointed by the President. “Each of the Officers above mentioned shall be liable to impeachment and removal from

office for neglect of duty, malversation, or corruption,” ID. at 335-38 (Madison) (August 20, 1787).

The Committee reported a proposal on August 22 that, among other things, called for a Council, but made no mention of impeachment of its members. It did suggest that, “The Judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives,” but was silent as to the grounds for impeachment, ID. at 367 (Journal).

The delegates subsequently voted to assign impeachment and a handful of other nettlesome questions to a second committee, the so-called “Committee of Eleven.” The Committee’s partial report packaged together a number of recommendations concerning the President including one that, “He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery . . .” ID. at 499 (Madison) (September 4, 1787).

The Convention debated the recommendation four days later on the eighth of September:

“The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up.

“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.<sup>7</sup> 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 moved. 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.

“Mr Govr Morris, it will not be put in force & can do no harm— An election of every four years will prevent maladministration.

“Col. Mason withdrew `maladministration` & substitutes `other high crimes & misdemeanors` <agst. the State`><sup>8</sup>

“On the question thus altered [the Convention agreed].

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<sup>7</sup> The opening of the Convention coincided with the British impeachment of Warren Hastings, the first governor general of India. The impeachment effort had begun in 1785; featured prominently the oratorical skills of Edmund Burke, a champion of American interests; and was closely followed on this side of the Atlantic. Hastings was charged with condoning and even enabling local government corruption, stimulating wide-spread rioting, highhanded and oppressive administration, and attempting to frustrate official inquiries. His trial in the House of Lords did not start until after the work of the Convention had been completed, and dragged on for another seven years. Hastings was ultimately acquitted of all charges, although the process impoverished him. The distasteful aspects of the Hastings impeachment, further accented a decade later by the impeachment and acquittal of one his prosecutors, Lord Melville, may have cooled both British and American enthusiasm for the English impeachment model.

<sup>8</sup> “Revised from *Journal*” [i.e., added after comparing Madison’s notes and the official Journal entries covering the same discussion].

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“In the amendment of Col: Mason just agreed to, the word ‘State’ after the words [‘]misdemeanors against’ was struck out, and the words ‘United States’ inserted, <unanimously><sup>9</sup> in order to remove ambiguity—

“On the question to agree to clause as amended, [the Convention agreed]

“On motion ‘The vice-President and other Civil officers and the U.S. shall be removed from office on impeachment and conviction as aforesaid’ was added to the clause on the subject of impeachments.”

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“A Committee was then appointed by Ballot to revise the stile of and arrange the articles which had been agreed to by the House.” ID. at 550-53 (Madison). The Committee on Style reported out the language now found in Article II, section 4. ID. at 600.

### **State Ratifying Conventions et al.**

“Mr. Wilson. . . . The last observation respects the judges. It is said that, if they are to decide against the law, one house will impeach them, and the other will convict them. I hope gentlemen will show how this can happen; for bare supposition ought not to be admitted as proof. The judges are to be impeached, because they decide an act null and void, that was made in defiance of the Constitution! What House of Representatives would dare to impeach, or Senate to commit, judges for the performance of their duty?” II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (ELLIOT), 478 (Pennsylvania) (December 4, 1787) (Elliot, ed. 1888).

“Mr. Iredell. Mr. Chairman, I was going to observe that this clause, vesting the power of impeachment in the House of Representatives, is one of the greatest securities for a due execution of all public offices. Every government requires it. Every man ought to be amenable for his conduct, and there are no persons so proper to complain of the public officers as the representatives of the people at large. The representatives of the people know the feelings of the people at large, and will be ready enough to make complaints. If this power were not provided, the consequences might be fatal. It will be not only the means of punishing misconduct, but it will prevent misconduct. A man in public office who knows that there is no tribunal to punish him, may be ready to deviate from his duty; but if he knows there is a tribunal for that purpose, although he may be a man of no principle, the very terror of punishment will perhaps deter him,” IV ELLIOT 32 (North Carolina) (July 24, 1788).

“Mr. Maclaine. . . . I recollect it was mentioned by one gentleman, that petty officers might be impeached. It appears to me, sir, to be the most horrid ignorance to suppose that every officer, however trifling his office, is to be impeached for every petty offence; and that every man, who should be injured by such petty officers, could get no redress but by this mode of impeachment, at the seat of government, at the distance of several hundred miles, whither he would be obliged to summon a great number of witnesses. I hope every gentleman in this committee must see plainly that

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<sup>9</sup> “Taken from *Journal*.”

impeachments cannot extend to inferior officers of the United States. Such a construction cannot be supported without a departure from the usual and well-known practice both in England and America. But this clause empowers the House of Representatives, which is the grand inquest of the Union at large, to bring great offenders to justice. It will be a kind of state trial for high crimes and misdemeanors,” IV ELLIOT 343-44 (North Carolina) (July 25, 1788).

“Mr. Madison. . . . The danger, then, consists merely in this—the President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by this house, before the Senate, for such an act of maladministration; for I contend that the wanton removal of a meritorious officer would subject him to impeachment and removal from his own high trust,” IV ELLIOT 380 (Debate during the First Congress) (June 16, 1789); also in 1 ANNALS OF CONGRESS 498.

### III.

## The Federalist Papers

### *No. 65 (Hamilton)*

“A well constituted court for the trial of impeachments, is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused. In many cases, it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt,” THE FEDERALIST PAPERS, 396-97 (Rossiter ed. 1961).

## James Wilson

“Impeachments were known in Athens. They were prosecuted for great and public offences, by which the commonwealth was brought into danger. They were not referred to any court of justice, but were prosecuted before the popular assembly, or before the senate of five hundred. . . .

“It is evident that, in England, impeachments . . . could not exist before the separation of the two houses of parliament. . . .

“We find the commons appearing as the grand inquest of the nation, about the latter end of the reign of Edward the third. They then began to exhibit accusations for crimes and misdemeanors, against offenders who were thought to be out of the reach of the ordinary power of the law. . . .

“In the United States and Pennsylvania, impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments. . . .” I WORKS OF JAMES WILSON [1790-1791], 425-26 (1967 ed.)



## Joseph Story

“§785. As the offences to which the remedy of impeachment has been, and will continue to be principally applied, are of a political nature, it is natural to suppose, that they will be often exaggerated by party spirit, and the prosecutions be sometimes dictated by party resentments, as well as by a sense of the public good. There is danger, therefore, that in cases of conviction the punishment may be wholly out of proportion to the offence, and pressed as much by popular odium, as by aggravated crime. From the nature of such offences, it is impossible to fix any exact grade, or measure, either in the offences, or the punishments; and a very large discretion must unavoidably be vested in the court of impeachments, as to both.

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“§796. The next inquiry is, what are impeachable offences? They are ‘treason, bribery, or other high crimes and misdemeanors.’ For the definition of treason, resort may be had to the constitution itself; but for the definition of bribery, resort is naturally and necessarily to the common law. . . . Now, neither the constitution, nor any statute of the United States has in any manner defined any crimes, except treason and bribery, to be high crimes and misdemeanors, and as such impeachable. . . . It will not be sufficient to say, that in the cases, where any offence is punished by any statute of the United States, it may, and ought to be deemed an impeachable offence. It is not every offence, that by the constitution is so impeachable. It must not only be an offence, but a *high* crime and misdemeanor. . . .

“§797. Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences 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,” I STORY, COMMENTARIES ON THE CONSTITUTION, §§785, 796, 797 (Cooley ed. 1873).<sup>10</sup>

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<sup>10</sup> Story’s implicit rejection of a perhaps more plausible construction of “high Crimes and Misdemeanors” may reflect the confluence of conflicting realities represented by the dangers of partisanship and the failure of the phrase’s more commonly understood meaning to reach universally accepted grounds for removal such as insanity. Contrary to the weight of authority but consistent with much of the evidence, the term ‘high Crimes and Misdemeanors’ may have been intended to simply mean all crimes. Blackstone seems to indicate that the terms ‘high crimes and low crimes,’ ‘felonies and misdemeanors,’ and ‘high crimes and misdemeanors’ were thought synonymous. By the time Story’s *Commentaries* first appeared in 1833, however, the young Republic had experienced the impeachment and conviction of Judge Pickering, necessitated by his apparent insanity, and an abortive attempt by some in the case of Justice Chase to use impeachment to purge the federal bench of the appointees of their political opponents, Dilliard, *Samuel Chase*, I THE JUSTICES OF THE SUPREME COURT 1789-1969, 196-97 (1969). How better to avoid these distasteful alternatives than to shroud the phrase ‘high Crimes and Misdemeanors’ in an accommodating veil of uncertainty capped by the sage observation that the identification of the circumstances that warrant an official’s removal must be made on an *ad hoc* basis?

## IV.

**American Impeachment Experience<sup>11</sup>****1. President Andrew Johnson***A. Proceedings:*

1. The first resolution for impeachment was defeated in the House (Dec. 12, 1867), III HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES (HIND'S) §2407 (1907).

2. President Johnson was subsequently impeached by the House (Feb. 24, 1868), III HIND'S §2412.

3. The Senate acquitted President Johnson, no article of impeachment having received the constitutionally required vote (May 26, 1868), III HIND'S §2443.

*B. Articles of Impeachment<sup>12</sup>*

“*Article I* charged that Johnson, `unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of [Secretary of War] Edwin M. Stanton.’

“*Article I* concluded that President Johnson had committed `a high misdemeanor in office.’

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

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

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

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

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

“*Article VIII* alleged that Johnson, by appointing a new Secretary of War, had, `with intent unlawfully to control the disbursements of the moneys appropriated for

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<sup>11</sup> Summarized here are the impeachment inquiry concerning President Nixon and each of the impeachments voted by the House and presented to the Senate. The Presidents and officers other than judges are listed first, followed by the judges whom the Senate convicted arranged chronologically, and ending with the judges whom the Senate did not impeach similarly arranged.

<sup>12</sup> From House Comm. on the Judiciary, *Constitutional Grounds for Presidential Impeachment: Report by the Staff of the Impeachment Inquiry (Impeachment Staff Report)*, 93d Cong., 2d Sess. 47-8 (1974).

the military service and for the Department of War,' violated the provisions of the Tenure of Office Act.

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

"*Article X*, which was adopted by amendment after the first nine articles, alleged that Johnson, 'unmindful of the high duties of his office and the dignity and proprieties thereof, . . . designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach, the Congress of the United States, [and] to impair and destroy the regard and respect of all good people . . . for the Congress and legislative power thereof . . .' by making 'certain intemperate, inflammatory, and scandalous harangues.' In addition, the same speeches were alleged to have brought the high office of the President into 'contempt, ridicule, and disgrace, to the great scandal of all good citizens.'

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

## 2. President Richard Nixon

### A. *Proceedings*:

1. The House Committee on the Judiciary voted to report articles of impeachment, H.R.REP.No.93-1305 (July 30, 1974).
2. President Nixon resigned on August 9, 1974, 120 *Cong.Rec.* 29361.
3. The House voted to take notice of these facts and to thank the Committee; it adjourned without voting on articles of impeachment, 120 *Cong.Rec.* 29361.

### B. *Articles of Impeachment*<sup>13</sup>

*Article I* charged that President Nixon "us[ed] the powers of his high office ... to delay, impede, and obstruct" the Watergate investigation by means of false and misleading statements, withholding evidence, condoning and counseling others to give false or misleading testimony, interfering with FBI, Justice Department and Congressional investigations, bribing witnesses, and leaking information about investigations, and "making false or misleading public statements for the purposes of deceiving the people of the United States" and that in doing so he "has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States."

*Article II* alleged that he had misused the FBI, Secret Service, IRS, and CIA for unauthorized, political and oppressive purposes.

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<sup>13</sup> 3 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES §15.13.

*Article III* accused the President of withholding subpoenaed information from the Judiciary Committee.

### 3. Senator William Blount

#### A. *Proceedings*:

1. The Senate expelled Blount for committing a high misdemeanor inconsistent with the duties of his office, 5 *Annals of Congress* 43-4 (1797).

2. The House adopted a resolution impeaching him, 5 *Annals of Congress* 440-41 (1797).

3. The Senate dismissed the impeachment in response to a motion arguing that “(1) a Senator was not a ‘civil officer,’ (2) having already been expelled, Blount was no longer impeachable, and (3) no crime or misdemeanor in the execution of the office had been alleged.” *Impeachment Staff Report* at 42.

#### B. *Articles of Impeachment*<sup>14</sup>

*Article I* alleged that Blount had conspired to help Britain oust Spain from its possession of Louisiana and Florida “contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof.”

*Article II* charged that he had conspired to incite an Indian uprising against the Spanish in violation of those same duties, laws, and interests.

*Articles III and IV* accused him of attempting to corrupt a federal Indian agent and interpreter in furtherance of his conspiratorial plans.

*Article V* condemned him for trying to undermine the confidence of the Indian tribes in the promises of the United States made to encourage the Indians to remain within lands prescribed by treaty and out of the lands occupied by Spanish authorities.

### 4. Secretary of War William Belknap

#### A. *Proceedings*

1. Secretary Belknap resigned immediately prior to the House adoption of an impeachment resolution.

2. The House passed a resolution of impeachment on March 2, 1876, III HINDS §2445.

3. The Senate acquitted Belknap, no article of impeachment having received the constitutionally required vote (August 2, 1876), III HINDS §2468.

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<sup>14</sup> *Impeachment Staff Report* at 41-2.

### B. *Articles of Impeachment*<sup>15</sup>

“*Article I* accused Belknap of high crimes and misdemeanors when as Secretary of War he sold an appointment to run the trading post on an Army base.

“*Article II* charged Belknap with a ‘high misdemeanor in office’ for ‘willfully, corruptly, and unlawfully’ taking and receiving money in return for the continued maintenance of the post trader.

“*Article III* charged that Belknap was ‘criminally disregarding his duty as Secretary of War, and basely prostituting his office to his lust for private gain,’ when he ‘unlawfully and corruptly’ continued his appointee in office, ‘to the great injury and damages of the officers and soldiers of the United States stationed at the military post. . . .’

“*Article IV* alleged seventeen separate specifications relating to Belknap’s appointment and continuance in office of the post trader.

“*Article V* enumerated the instances in which Belknap or his wife had corruptly received ‘divert large sums of money.’”

## 5. District Court Judge John Pickering

### A. *Proceedings*

1. The House impeached Judge Pickering on December 30, 1803, III HINDS §2323.

2. Although not mentioned in the articles, the Judge did not appear and his son submitted sundry petitions indicating that the Judge was “insane” and had been “deranged” for some time, III HINDS §2333.

3. The Senate convicted the Judge on all four articles, III HINDS §2341.

### B. *Articles of Impeachment*<sup>16</sup>

“*Article I* charged that Judge Pickering, ‘not regarding, but with intent to evade’ an act of Congress, had ordered [a] ship and merchandise delivered to its owner without the production of any certificate that the duty on the ship or merchandise had been paid or secured, ‘contrary to [Pickering’s] trust and duty as judge . . . , and to the manifest injury of [the] revenue.’

*Article II* accused the Judge of refusing to hear witnesses whose testimony was offered in evidence by the government in the customs’ claims case.

*Article III* alleged that the judge had refused to allow the government to appeal the same admiralty claims case.

“*Article IV* charged that . . . [Judge] Pickering, being a man of loose morals and intemperate habits, . . . did appear upon the bench of the said court . . . in a state of total intoxication . . . and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States, and was then and there

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<sup>15</sup> *Impeachment Staff Report* at 49-50.

<sup>16</sup> *Impeachment Staff Report* at 42-3.

guilty of other high misdemeanors, disgraceful to his own character as a judge, and degrading to the honor and dignity of the United States.”

## 6. District Court Judge West Humphreys

### A. Proceedings

1. The House impeached Judge Humphreys on May 6, 1862, III HINDS §2385.

2. The Senate convicted on all articles other than the second part of article VI (June 26, 1862), III HINDS §2396.

### B. Articles of Impeachment<sup>17</sup>

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

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

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

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

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

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

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

## 7. Appellate Court Judge Robert Archbald

### A. Proceedings

1. The House impeached Judge Archbald on July 11, 1912, VI CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (CANNON’S) §500.

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<sup>17</sup> *Impeachment Staff Report* at 46-7.

2. The Senate convicted him on articles I, III, IV, V, and XIII on January 13, 1913, and acquitted him on the others, VI CANNON’S §512.<sup>18</sup>

*B. Articles of Impeachment*<sup>19</sup>

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

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

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

“*Article V* charged Archbald with accepting `a gift, reward or present’ from a person for whom Archbald had attempted to gain a favorable leasing agreement with a potential litigant in Archbald’s court.

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

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

*Articles VI through XII* alleged similar acts of bribery, extortion, and misconduct committed while Archbald was a district court judge.

## 8. District Court Judge Halsted Ritter

*A. Proceedings*

1. The House initially impeached Judge Ritter on March 2, 1936, 3 DESCHLER’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (DESCHLER’S) ch.14 §18.4, and subsequently amended its articles of impeachment on March 30, 1936, before they were presented to the Senate, 3 DESCHLER’S ch.14, §18.10.

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<sup>18</sup> Here and elsewhere, articles that failed to receive the constitutionally required vote either on a recorded vote or because the articles were never offered for a vote are treated as articles upon which the individual was acquitted; the articles upon which an individual was convicted are presented first.

<sup>19</sup> *Impeachment Staff Report* at 51-2.

2. The Senate convicted Judge Ritter on article VII, but acquitted him on the first six articles, 3 DESCHLER'S ch.14, §18.17.

*B. Articles of Impeachment*<sup>20</sup>

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

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

“*Article II* charged that Ritter, with others, entered into an ‘arrangement’ whose purpose was to ensure that bankruptcy property would continue in litigation before Ritter’s court. Rulings by Ritter were alleged to have ‘made effective the champertous undertaking’ of others, but Ritter was not himself explicitly charged with the crime of champerty or related criminal offenses....”

*Articles III and IV* accused Ritter of “the practice of law while on the bench, in violation of the Judicial Code;” conduct which was not itself criminal.

*Articles V and VI* “alleged that Ritter had violated the Revenue Act of 1928 by willfully failing to report and pay tax on certain income received by him....” Each failure was described as a “high misdemeanor in office.”

## 9. District Court Judge Harry Claiborne

*A. Proceedings*

1. Judge Claiborne was tried and convicted of tax evasion in violation of 26 U.S.C. 7206, *United States v. Claiborne*, 765 F.2d 784 (9th Cir. 1985).

2. He was impeached by the House, 132 *Cong.Rec.* 17294-306 (1986).

3. The Senate convicted him on articles I, II and IV, 132 *Cong.Rec.* 29870-873 (1986); BROWN, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 538 (1996).

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<sup>20</sup> *Impeachment Staff Report* at 55-6.



## B. *Articles of Impeachment*<sup>21</sup>

*Articles I, II and III* charged Judge Claiborne with misbehavior and high crimes and misdemeanors warranting impeachment, trial and removal from office for three specific alleged violations of 26 U.S.C. 7206(1).

*Article IV*, was a general disrepute charge, and alleged that Judge Claiborne, “by willfully falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.”

## 10. District Court Judge Alcee Hastings

### A. *Proceedings*

1. Judge Hastings was tried and acquitted of violations of 18 U.S.C. 2 (aiding and abetting), 371 (conspiracy), and 1503 (obstruction of justice), see *United States v. Hastings*, 681 F.2d 706, 707 n.2 (11th Cir. 1982); *Hastings v. Judicial Conference*, 829 F.2d 91, 95 (D.C.Cir. 1987).

2. Impeached by the House, 134 *Cong.Rec.* 20211-221 (1988).

3. The Senate convicted him on articles I, II, III, IV, V, VII, VIII, and IX, and acquitted him of the other articles, 135 *Cong.Rec.* 25329-335 (1989).

### B. *Articles of Impeachment*<sup>22</sup>

*Article I* charged that Judge Hastings “engaged in a corrupt conspiracy to obtain \$150,000 from defendants in *United States v. Romano*, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration of the defendants. . . .”

*Articles II through XV* each accused Judge Hastings of perjuring himself in testimony at his criminal trial with respect to a different specific statement.

*Article XVI* alleged that he disclosed the existence of an undercover operation.

*Article XVII* was an omnibus charge that included all the others.

## 11. District Court Judge Walter Nixon

### A. *Proceedings*

1. Judge Nixon was convicted of violating 18 U.S.C. 1623 (false statements before the grand jury), *United States v. Nixon*, 827 F.2d 1019 (5th Cir. 1987).

2. He was impeached by the House, 135 *Cong.Rec.* 8814-823 (1989).

3. The Senate convicted him on Articles I and II, and acquitted him on Article III, 135 *Cong.Rec.* 27101-104 (1989).

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<sup>21</sup> 132 *Cong.Rec.* 29870-873, (1986).

<sup>22</sup> 135 *Cong.Rec.* 25329-335 (1989).

### B. *Articles of Impeachment*<sup>23</sup>

*Articles I and II* charged Judge Nixon with making two specific false statements before the grand jury which it concluded made Judge Nixon “guilty of an impeachable offense” for which he “should be removed from office.”

*Article III* laid out a series of specific allegations growing out of the same situations involved in Articles I and II and charged that they demonstrated that Judge Nixon had “raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and administration of justice by the Federal courts.”

## 12. Supreme Court Justice Samuel Chase

### A. *Proceedings*

1. The House impeached Chase on March 12, 1804, III HINDS §2343.
2. The Senate acquitted him on February 27, 1805, III HINDS §2363.

### B. *Articles of Impeachment*<sup>24</sup>

The articles of impeachment essentially accused Chase of conduct unbecoming a judge including allegations that he used an “intemperate and inflammatory political harangue to charge the federal grand jury,” by referring a sedition case to the grand jury and handling of Sedition Act cases, by refusing to grant a continuance in a pending case, by using incorrect procedural forms, and by conducting trials “marked by manifest injustice, partiality and intemperance.”

## 13. District Court Judge James Peck

### A. *Proceedings*

1. The House impeached Judge Peck on April 24, 1830, III HINDS §2367.
2. The Senate acquitted him on January 31, 1831, III HINDS §2383.

### B. *Articles of Impeachment*<sup>25</sup>

The single article against Judge Peck charged that he had briefly imprisoned, and suspended from practice, an attorney who wrote a newspaper article critical of one of the Judge’s decisions.

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<sup>23</sup> 135 *Cong.Rec.* 27101-104 (1989).

<sup>24</sup> *Impeachment Staff Report* at 44-5.

<sup>25</sup> *Impeachment Staff Report* at 44-5.

## 14. District Court Judge Charles Swayne

### A. Proceedings

1. The House impeached Judge Swayne on December 13, 1904, III HINDS §2472.
2. The Senate acquitted him on February 27, 1905, III HINDS §2485.

### B. Articles of Impeachment<sup>26</sup>

The twelve articles of impeachment presented to the Senate charged Judge Swayne with abuse of official travel allowances, failing to live in a required judicial district, and improperly holding attorneys and a litigant in contempt of court.

## 15. District Court Judge George English

### A. Proceedings

1. The House impeached Judge English on April 1, 1926, VI CANNON'S §545.
2. The Judge resigned shortly before trial in the Senate, VI CANNON'S §574.
3. The Senate dismissed the impeachment after receiving a request to do so from the House in light of Judge English's having resigned, ID.

### B. Articles of Impeachment<sup>27</sup>

“*Article I* charged that Judge English `did on divers and various occasions so abuse the powers of his high office that he is hereby charged with tyranny and oppression, whereby he has brought the administration of justice in [his] court . . . into disrepute, and . . . is guilty of misbehaviour falling under the constitutional provision as ground for impeachment and removal from office.’”

*Articles II, III, & IV* accused Judge English of interfering with bankruptcy proceedings.

*Article V* alleged that his treatment of members of the bar and litigants discouraged the exercise of their rights and conveyed the impression that his cases were decided other than on the merits.

## 16. District Court Judge Harold Louderback

### A. Proceedings

1. A majority of the special inquiry committee recommended censure rather than impeachment, although a minority urged impeachment, VI CANNON'S §514.
2. The House impeached Judge Louderback on February 24, 1933, ID.

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<sup>26</sup> *Impeachment Staff Report* at 50-1.

<sup>27</sup> *Impeachment Staff Report* at 52-4.

3. The Senate acquitted him on all articles on May 24, 1933, VI CANNON'S §524.

*B. Articles of Impeachment*<sup>28</sup>

“*Article I* charged that Louderback `did . . . so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior.”

*Articles II, III & IV* accused the Judge of various instances of favoritism in bankruptcy cases.

*Article V* charged that as consequence of the misconduct alleged in the prior articles he had destroyed confidence in his court “which for a Federal judge . . . is a crime and misdemeanor of the highest order.”

**V.**

**Douglas Inquiry**

**Rep. Gerald Ford**

**“Conduct of Associate Justice Douglas”**

“ . . .What, then, is an impeachable offense?

“The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.

“I think it is fair to come to one conclusion, however, from our history of impeachments: a higher standard is expected of Federal judges than of any other “civil officers” of the United States.

“The President and Vice President, and all persons holding office at the pleasure of the President, can be thrown out of office by the voters at least every 4 years. To remove them in midterm—it has been tried only twice and never done—would indeed require crimes of the magnitude of treason and bribery. Other elective officials, such as Members of the Congress, are so vulnerable to public displeasure that their removal by the complicated impeachment route has not even been tried since 1798. But nine Federal judges, including one Associate Justice of the Supreme Court, have been impeached by this House and tried by the Senate; four were acquitted; four convicted and removed from office; and one resigned during trial and the impeachment was dismissed.

“In the most recent impeachment trial conducted by the other body, that of U.S. Judge Halsted L. Ritter of the southern district of Florida who was removed in 1936, the point of judicial behavior was paramount, since the criminal charges were admittedly thin. . . .

“In a joint statement, Senators Borah, LaFollette, Frazier, and Shipstead said:

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<sup>28</sup> *Impeachment Staff Report* at 54-5.

‘We therefore did not, in passing upon the facts presented to us in the matter of the impeachment proceedings against Judge Halsted L. Ritter, seek to satisfy ourselves as to whether technically a crime or crimes had been committed, or as to whether the acts charged and proved disclosed criminal intent or corrupt motive; we sought only to ascertain from these facts whether he had conducted himself in a way that was calculated to undermine public confidence in the courts and to create a sense of scandal.

There are a great many things which one must readily admit would be wholly unbecoming, wholly intolerable, in the conduct of a judge, and yet these things might not amount to a crime.’

“Senator Elbert Thomas of Utah, citing the Jeffersonian and colonial antecedents of the impeachment process, bluntly declared:

‘Tenure during good behavior . . . is in no sense a guaranty of a life job, and misbehavior in the ordinary, dictionary sense of the term will cause it to be cut short on the vote, under special oath, of two-thirds of the Senate, if charges are first brought by the House of Representatives . . . . To assume that good behavior means anything but good behavior would be to cast a reflection upon the ability of the fathers to express themselves in understandable language,’ 116 *Cong.Rec.* 11912-914 (remarks of Rep. Gerald Ford) (1970).

## **Special Inquiry Subcommittee**

“Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involve criminal conduct in violation of law, or (2) that involved serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench, or unwarranted and unreasonable impartiality [sic] manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature, that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.

“Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve criminal acts in violation of law,” *Final Report of the Special Subcomm. on H.Res. 920 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970)(comm.print), quoted in 3 DESCHLER’S ch. 14, §3.13.

## **Nixon Inquiry**

### **Inquiry Staff Report**

“Two points emerge from the 400 years of English parliamentary experience with the phrase ‘high Crimes and Misdemeanors.’ First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament’s prerogatives, corruption, and betrayal of trust. Second, the phrase ‘high Crimes and Misdemeanors’ was confined to parliamentary impeachments; it had no roots in the

ordinary criminal law, and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions of crime.

\* \* \*

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

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

\* \* \*

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

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

“While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct— undermining the integrity of the office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. Clearly, these effects can be brought about in ways not anticipated by the criminal law. Criminal standards and criminal courts were established to control individual conduct. Impeachment was evolved by parliament to cope with both the inadequacy of criminal standards and the impotence of courts to deal with the conduct of great public figures. It would be anomalous if the framers having barred criminal sanctions from the impeachment remedy and limited it to removal and possible disqualification from office, intended to restrict the grounds for impeachment to conduct that was criminal. . . .

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

“Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only on conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office,” *Impeachment Inquiry Staff Report: Constitutional Grounds for Presidential Impeachment*, House Comm. on the Judiciary, 93d Cong., 2d Sess. 7, 17-8, 26-7 (1974).

### **Attorneys for President Nixon**

“The English impeachment precedents clearly demonstrate the criminal nature and origin of the impeachment process. The Framers adopted the general criminal meaning and language of those impeachments while rejecting the 17th century aberration where impeachment was used as a weapon by Parliament to gain political supremacy at the expense of the rule of law. In light of legislative and judicial usage, American case law, and established rules of constitutional and statutory construction, the term ‘other high Crimes and Misdemeanors’ means great crimes against the state. Finally, a review of American impeachment precedents shows that while judges may be impeached for something less than indictable offenses — even here the standard is less than conclusive — all the evidence points to the fact that the President may not. He may be impeached only for indictable crimes clearly set forth in the Constitution. This is the lesson of history, logic, and experience; this is the meaning of ‘Treason, Bribery, and other high crimes and Misdemeanors.’

“Any analysis that broadly construes the power to impeach and convict can be reached only by reading Constitutional authorities selectively, by lifting specific historical precedents out of their precise historical context, by disregarding the plain meaning and accepted definition of technical, legal terms — in short, by placing a subjective gloss on the history of impeachment that results in permitting the Congress to do whatever it deems most politic. The intent of the Framers, who witnessed episode after episode of outrageous abuse of the impeachment power by the self-righteous English Parliament, was to restrict the **political** reach of the impeachment power.

“Those who seek to broaden the impeachment power invite the use of power ‘as a means of crushing political adversaries or ejecting them from office.’ 1 A. De Tocqueville, *Democracy in America* 11-115 (P. Bradley ed., 1945). The acceptance of such an invitation would be destructive to our system of government, and to the fundamental principle of separation of powers inherent in the very structure of the Constitution. The Framers never intended that the impeachment clause serve to

dominate or destroy the executive branch of government. In their wisdom, they provided adequate and proper methods for change. The misuse of the impeachment clause was not one of them,” *An Analysis of the Constitutional Standard for Presidential Impeachment*, 59-61 (1974).

## VI.

### Charles Black

Impeachment: A Handbook  
39-40 (1974)

“Omitting qualifications, and recognizing that the definition is only an approximation, I think we can say that ‘high Crimes and Misdemeanors,’ in the constitutional sense, ought to be held to be those offenses which are rather obviously wrong, whether or not ‘criminal,’ and which so seriously threaten the order of political society as to make petulant and dangerous the continuance in power of their perpetrator. The fact that such an act is also criminal helps, even if it is not essential, because a general societal view of wrongness, and sometimes of seriousness, is, in such a case, publicly and authoritatively recorded.

“The phrase ‘high Crimes and Misdemeanors’ carries another connotation—that of *distinctness of offense*. It seems that a charge of high crime or high misdemeanor ought to be a charge of a definite act or acts, each of which in itself satisfies the above requirements. General lowness and shabbiness ought not to be enough. The people take some chances when they elect a man to the presidency, and I think this is one of them,” BLACK, IMPEACHMENT: A HANDBOOK, 39-40 (1974).

### Bob Barr

“The ‘President and all civil Officers of the United States shall be removed from Office on Impeachment for and Convictions of, Treason, Bribery, or other high Crimes and Misdemeanors.’ The phrase ‘high crimes and misdemeanors’ was an English term of art that denoted political crimes against the state, and the choice of this phrase was a deliberate and considered action. By including that English phrase, our Founding Fathers intended to expand the scope of impeachable offenses beyond the scope of criminally indictable offenses. This language incorporates political offenses against the state that injure the structure of government and tarnish the integrity of the political office. As Alexander Hamilton observed, these political offenses include breaches of the public trust that a president assumes once he has taken office. Hamilton made this point in the *Federalist*, describing impeachable crimes as ‘those offences which proceed from the misconduct of public men, or, in other words, from the abuses or violations of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself’, BARR, *High Crimes and Misdemeanors*, 2 TEXAS REVIEW OF LAW AND POLICY 1, 9-10 (1997).



## John Labovitz

“The concept of an impeachable offense guts an impeachment case of the very factors — repetition, pattern, coherence — that tend to establish the requisite degree of seriousness warranting the removal of a president from office. . . .

“The most pertinent precedent in this nation’s history for framing a case for the removal of a chief executive may well be the earliest — the Declaration of Independence. In expressing reasons for throwing off the government of George III, the Continental Congress did not claim that there had been a single offense justifying revolution. Instead, it pointed to a course of conduct; it ‘pursu[ed] invariably the same Object’ and evinced a common design; it ‘all [had] in direct object the establishment of absolute Tyranny over these States.’ It was this pattern of wrongdoing taken together, not each specification considered alone, that showed the unfitness of George III to be the ruler of the American people. . . . [T]he unfitness of a president to continue in office is to be judged in much the same way: with reference to totality of his conduct and the common patterns that emerge, not in terms of whether this or that act of wrongdoing, viewed in isolation, is an impeachable offense,” LABOVITZ, *PRESIDENTIAL IMPEACHMENT*, 129-31 (1978).

## Paul Fenton

“It can therefore be concluded that impeachment is not a political tool for arbitrary removal of officials; that the standard for what constitutes an impeachable offense is not based on an inflexible historical precedent or on the judicial tenure clause; that impeachment is not limited to crimes, whether indictable or otherwise; and that the sanction of impeachment does not extend to noncriminal misconduct unless it involves violation of statutory law, the conduct of the respondent’s official duties or an abuse of his official position.

“Within these limitations, it is extremely difficult to define the proper standard for an impeachable offense in affirmative terms. . . .

“The only generalization which can safely be made is that an impeachable offense must be serious in nature. . . .

“While there are no clear rules as to what constitutes a serious offense, there are a number of factors which are relevant. Thus an offense is more serious if it is a criminal violation or if it involves moral turpitude. In the words of one court,

It may be safely asserted 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 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. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the State,” Fenton, *The Scope of the Impeachment Power*, 65 *NORTHWESTERN UNIVERSITY LAW REVIEW* 719, 745-7 (1970).

## Laurence Tribe

“Despite then-Congressman Gerald Ford’s well-known assertion that ‘an impeachable offence is whatever a majority of the House of Representatives considers [it] to be’, there is now wide agreement that the phrase ‘high Crimes and Misdemeanor’ was intended by the Framers to connote a relatively limited category closely analogous to the ‘great offences’ impeachable in common law England. In addition to treason and bribery, the ‘great offences’ included misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption.

“There have been only two serious attempts to impeach American Presidents. In both instances, the offenses charged reflected the impact of the common law tradition discussed here: offenses have been regarded as impeachable if and only if they involve serious abuse of official power,” TRIBE, *AMERICAN CONSTITUTIONAL LAW* 217 (1978).

## Theodore Dwight

“I have dwelt the longer on this point because many seem to think that a public officer can be impeached for a mere act of indecorum. On the contrary, he must have committed a true crime, not against the law of England but against the law of the United States. As impeachment is nothing but a mode of trial, the Constitution only adopts it as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law.

“. . . [A]s there are under the laws of the United States no common law crimes, but only those which are contrary to some positive statutory rule, there can be no impeachment except for a violation of a law of Congress or for the commission of a crime named in the constitution. English precedents concerning impeachable crimes are consequently not applicable,” Dwight, *Trial by Impeachment*, 15 *AMERICAN LAW REGISTER* (6 N.S.) 257, 268-69 (1867).

## Alexander Simpson

“Many attempts have been made to define this power, quite commonly by those who were trying to make the definition fit the facts to a particular case, rather than to have it accord with the constitutional provisions only. A notable exception to this, however . . . is what was said by Manager (afterwards President) Buchanan in the Peck Impeachment:

‘What is misbehavior in office? In answer to this question and without pretending to furnish a definition, I freely admit that we are bound to prove that the respondent has violated the Constitution, or some known law of the land. This, I think, is the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate on the Articles of Impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offence impeachable it must be indictable. But this violation of law may consist

in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be criminal as the usurpation of a power that has not been granted.’

“Perhaps that statement should be broadened to include offences of so weighty a character, and so injurious to the office, that every official is bound to know that they are of the same general character as crimes, and might well be made criminal by statute; but the *terra incognita* beyond, no one can properly be asked to explore under the existing constitutional provisions, if for no other reason than because it is a fixed and salutary principle that penal provisions shall be so construed that the persons to be affected by them may certainly know what things they are forbidden to do,” Simpson, *Federal Impeachments*, 64 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 651, 881 (1916).

### **Michael Gerhardt**

“[A]ttempts to limit the scope of impeachable offenses have rarely proposed limiting impeachable offenses only to indictable offenses. Rather, the major disagreement among commentators has been over the range of nonindictable offenses for which someone may be impeached.

\* \* \*

“The . . . problem is how to identify those nonindictable offenses for which certain high-level government officials may be impeached. Given that certain federal officials may be impeached and removed for committing serious abuses against the state and that these abuses are not confined to indictable offenses, the challenge is to find contemporary analogues to the abuses against the state that authorities such as Hamilton and Justices Wilson and Story viewed as suitable grounds for impeachment. On the one hand, these abuses may be reflected in certain statutory crimes. Violations of federal criminal statutes, such as the bribery statute, represent abuses against the state sufficient to subject the perpetrator to impeachment and removal, because bribery demonstrates serious lack of judgment and respect for the law and because bribery lowers respect for the office. In other words, there are certain statutory crimes that, if committed by public officials, reflect such lapses of judgment, such disregard for the welfare of the state, and such lack of respect for the law and the office held that the occupant may be impeached and removed for lacking the minimum level of integrity and judgment sufficient to discharge the responsibilities of the office. On the other hand, Congress needs to be prepared, as then-Congressman Ford pointed out, to explain what nonindictable offenses may be impeachable offenses by defining contemporary political crimes. The boundaries of congressional power to define such political crimes defy specification because they rest both on the circumstances underlying a particular offense (including the actor, the forum, and the political crime) and on the collective *political* judgment of Congress,” Gerhardt, *The Constitutional Limits of Impeachment*, 68 TEXAS LAW REVIEW 1, 83, (1989).

### **Ronald Rotunda**

“Moreover, leaving aside historical precedent, to limit impeachment to the commission of crimes is bad policy, such a limitation is both too broad and too narrow. It is too broad because some crimes have no functional relation to the problem of malfeasance or abuse of office. For example, if an official in the executive branch, a judge, or a legislator, had been arrested once for driving while intoxicated, that crime should not merit the drastic remedy of removal from office.

“The proposed limitation is also too narrow, for the ‘civil Officer’ might engage in many activities which amount to abuse of office and yet not commit any crimes. For example, if the President abused his pardon power by unconstitutionally pardoning a judge who had been impeached or summoned the Senators from only a few states to ratify a treaty, the President may have violated no criminal law, but he or she has abused the office. . . .” Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KENTUCKY LAW JOURNAL 707, 725-26 (1988).

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