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## The President, Congress, and the Courts

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### I. Subpoenaing the President: Jefferson v. Marshall in the Burr Case

We do not think that the President is exalted above legal process . . . and if the President possesses information of any nature which might tend to serve the cause of Aaron Burr, a subpoena should issue to him, notwithstanding his elevated station.

Alexander McRae, of counsel  
for President Jefferson<sup>1</sup>

Chief Justice Marshall's rulings on President Jefferson's claim of right to withhold information in the trial of Aaron Burr have been a source of perennial debate. Eminent writers have drawn demonstrably erroneous deductions from the record. For example, Edward

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1. I T. CARPENTER, *THE TRIAL OF COLONEL AARON BURR* 75 (1807). McRae's co-counsel, William Wirt, who served as Attorney General of the United States for twelve consecutive years, stated that "if the production of this letter would not compromit [*sic*] the safety of the United States, and it can be proved to be material to Mr. Burr, he has a right to demand it. Nay, in such a case, I will admit his right to summon the President . . ." *Id.* at 82. His associate, George Hay, the United States Attorney, stated, I never had the idea of clothing the President . . . with those attributes of divinity. . . . That high officer is but a man; he is but a citizen; and, if he knows anything in any case, civil or criminal, which might affect the life, liberty or property of his fellow-citizens . . . it is his duty to . . . go before a Court, and declare what he knows. And what would be the process, in case he failed to attend? Why, the common means would be, for the Court to issue an attachment to force him . . . .

*Id.* at 90-91.

Later Wirt, arguing in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), stated: Shall we be asked . . . how this Court will enforce its injunction. . . . I answer, it will be time enough to meet that question when it shall arise. . . . In a land of laws, the presumption is that the decision of the Courts will be respected; and, in case they should not, it is a poor government indeed in which there does not exist power to enforce respect.

What is the value of that government in which the decrees of its Courts can be mocked at and defied with impunity? . . . It is no government at all. . . .

[This Court is not] to anticipate that the President will not do his duty.

2 C. WARREN, *HISTORY OF THE SUPREME COURT* 207-08 (1922). Although this was uttered against a background of veiled presidential threats not to enforce a decree against Georgia, the reasoning extends to a subpoena against the President. *Id.* at 205.

Corwin stated that Jefferson "refuse[d] to respond to Chief Justice Marshall's subpoena,"<sup>2</sup> a statement recently repeated by Circuit Judge George MacKinnon.<sup>3</sup> More recently still, Irwin S. Rhodes, on the basis of "newly discovered" evidence,<sup>4</sup> has charged that Chief Judge John J. Sirica, "by asserting the right of the court to order presidential submission and to review and revise the president's judgment in the exercise of executive privilege," laid claim to "a power that Chief Justice Marshall disavowed." In following him, Rhodes states, the Court of Appeals, which "limited or opposed the absolute character of presidential privilege departed from the rulings of Chief Justice Marshall . . ."<sup>5</sup> And he concludes that insofar as the courts "depart from precedent under assertions of perpetuating it, the law as well as history is not well served."<sup>6</sup>

This is a ringing condemnation, and I may be indulged for being equally blunt: The courts were right and Rhodes is wrong. With the "tapes" issue threatening to boil up anew in consequence of President Nixon's refusal to furnish further information to Special Prosecutor Leon Jaworski, and the even more serious limits set by the President on "cooperation" with the impeachment investigation by the House Judiciary Committee,<sup>7</sup> the issue posed by Rhodes is of greatest importance. It is high time that the issue be removed from the realm of opinion, that the Burr record be permitted to speak for itself, and that the several Marshall pronouncements be set out so that one may judge where the truth lies.

As Rhodes remarks, "the proceedings were in four stages: commitment during the grand jury inquiry, trial and acquittal on a charge of treason, trial and acquittal on a charge of misdemeanor, commitment to the United States Circuit Court of Ohio on a misdemeanor charge."<sup>8</sup> The "new" evidence upon which Rhodes relies comes from the fourth stage; and he notices that Marshall

2. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 139 (3d ed. 1948). Compare the statement by Dumas Malone at p. 1119 *infra*.

3. *Nixon v. Sirica*, 487 F.2d 700, 748 (D.C. Cir. 1973) (dissenting opinion) ("the President, through his attorney, refused to disclose certain passages").

4. Rhodes, *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A.J. 52 (1974). He alleges that the courts relied on the "incomplete record." They "failed to uncover the complete contemporaneous reporting of the case taken in shorthand by Thomas Carpenter . . ." and to consult the archives, wherein he located a copy "of the controversial letter of General Wilkinson to President Jefferson . . ." *Id.*

5. *Id.*

6. *Id.* at 54.

7. N.Y. Times, Feb. 15, 1974, at 1, col. 8; Wall St. J., Feb. 20, 1974, at 7, col. 2.

8. Rhodes, *supra* note 4, at 52.

recognized that if Burr could prove the relevancy of the material withheld and if the proceedings were a prosecution in chief [instead of commitment proceedings], he might discontinue the case.<sup>9</sup>

Apparently Rhodes did not realize that this statement demolished his argument.

In the preliminary first stage proceedings, Burr sought to procure a letter of October 21, 180[6], written by General Wilkinson to Jefferson, by means of a subpoena calling both for Jefferson's attendance and production of the letter,<sup>10</sup> though Burr repeatedly stated that he was content merely to obtain the letter.<sup>11</sup> Alexander McRae, of counsel for Jefferson, "admitted that the President might be summoned to attend,"<sup>12</sup> an admission to which Marshall later adverted,<sup>13</sup> but George Hay, the United States Attorney, disputed issuance of a subpoena *duces tecum*.<sup>14</sup> Because Marshall fully appreciated the importance of the personal summons, he was not content to rest on the concession of counsel but rendered a written opinion on June 13, 1807, in which he concluded that "any person charged with a crime in the courts of the United States, has a right before, as well as after indictment, to the process of the Court, to compel the attendance of his witnesses."<sup>15</sup>

Turning to the subpoena *duces tecum* Marshall stated: "In the provisions of the Constitution and of the statute which give to the accused a right to the compulsory process of the Court there is no exception whatever." Likening the President to the Governor of a State, he observed that "it is not known ever to have been doubted, that the Chief Magistrate of a State might be served with a subpoena *ad testificandum*." He added that "it has never been alledged [*sic*]"

9. *Id.* at 54. On the preponderant role of "relevancy," see note 33 *infra*.

10. 1 T. CARPENTER, *supra* note 1, at 65, 124.

11. *Id.* at 62, 64, 70; 2 *id.* at 4.

12. 1 *id.* at 77, 84. While Jefferson wrote that personal attendance might hale him to all parts of the vast hinterland, he stated that if Burr should "suppose there are any facts within the knowledge of the Heads of departments or of myself . . . we shall be ready to give him the benefit of it, by way of deposition . . .," a plea of inconvenience rather than of lack of jurisdiction. 9 JEFFERSON WRITINGS 57 (P. Ford ed. 1898) [hereinafter cited as Ford]. Compare this with Rhodes' statement that Jefferson wrote Hay on June 17 "denying the right to demand his personal attendance." Rhodes, *supra* note 4, at 53. No such representation was ever made to the court. To the contrary, his counsel professed readiness to have him appear. See note 1 *supra*.

13. "We observed that Mr. Hay admitted, that the President might be subpoenaed." 1 T. CARPENTER, *supra* note 1, at 70.

14. *Id.* at 84, 127.

15. *Id.* at 127.

that in England "a subpoena might not be directed" to members of the "cabinet council," who, instead of the King, he correctly noted, were the analogue of the American executive.<sup>16</sup> Marshall could "perceive no legal objection to issuing a subpoena *duces tecum*, to any person whatever, provided the case be such as to justify the process."<sup>17</sup> If the papers "may be important in the evidence—if they may be safely read at the trial—would it not be a blot in the page which records the judicial proceedings of this country, that, in a case of such serious import as this, the accused should be denied the use of them?"<sup>18</sup>

Marshall then addressed the argument that "the letter contains matter which ought not to be disclosed;" he said, "There is certainly nothing before the Court, which shews, that the letter in question contains any matter, the disclosure of which, would endanger the public safety. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will of course, be suppressed."<sup>19</sup> As further developments indicate, Marshall was not to waver from this view. Should Burr be found guilty, he added, all concerned "should certainly regret that a paper which the accused believed to be essential to his defence . . . had been withheld from him;" and "it would justly tarnish the reputation of the Court which had given its sanction to its being withheld." Sounding a personal note, Marshall went on to say that he would feel "self-reproach" were he to "declare on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him."<sup>20</sup>

In sum, Marshall made the touchstone of nondisclosure danger to the public safety, not "confidentiality," as President Nixon urges; and even such matter would be sheltered only if it were not "essentially applicable" to the defense. He regarded a judicial sanction to withhold such "essential" information as a "blot" which would "tarnish the reputation of the Court."

Corwin's statement that Jefferson "refuse[d] to respond to Chief

16. *Id.* at 127-28. Marshall rejected the reservation in the law of evidence for the King—which was based on the ground that it was "incompatible with his dignity to appear under the process of the court"—because the "principle of the English constitution that the king can do no wrong" was inapplicable to our government whereunder "the President . . . may be impeached and may be removed from office." *Id.*

17. *Id.* at 129.

18. *Id.* at 130.

19. *Id.* at 133.

20. *Id.* at 134.

Justice Marshall's subpoena" is also inaccurate. On June 12 Jefferson wrote to Hay that he had delivered the papers to the Attorney General and instructed the War Department to review its files with a view to compliance with the subpoena.<sup>21</sup> In a second letter to Hay on June 17, Jefferson wrote that "the receipt of these papers [by Hay] has, I presume, so far anticipated, and others this day forwarded will have substantially fulfilled the object of a subpoena . . . ."<sup>22</sup> When Jefferson learned that the Attorney General did not have the Wilkinson letter subpoenaed by Burr, he wrote Hay on June 23 that "[N]o researches shall be spared to recover this letter, & if recovered, it shall immediately be sent on to you."<sup>23</sup> Hay advised the court that "[W]hen we receive general Wilkinson's letter, the return will be completed."<sup>24</sup> This is hardly a "refusal" to comply with the subpoena. Apparently the letter "had been put in the hands of the clerk."<sup>25</sup>

○ The treason trial commenced on August 3 and on September 1 Burr was acquitted.<sup>26</sup> On September 2 the misdemeanor proceedings commenced and on September 3 Burr called for a second letter from Wilkinson to Jefferson, dated November 12, 1806.<sup>27</sup> Hay replied that the letter contained "several strictures upon certain characters in the Western country . . . . Would it not be better, to trust the Court with the selection of such parts, as it might deem necessary to the defence of the accused?" Luther Martin objected to a "secret tribunal," whereupon Hay proposed to "submit those letters to the inspection of either Mr. Randolph, or Mr. Botts, or Mr. Wickham [Burr counsel]; the man so selected, to pledge himself upon honour, not to divulge the confidential contents. If there was any difference of opinion as to what were confidential passages, the Court were to decide."<sup>28</sup> Burr's counsel insisted that Burr too should see the letter and demanded production in "public."<sup>29</sup> This is worlds apart from the Nixon claim

21. Ford, *supra* note 12, at 55-56.

22. *Id.* at 56.

23. *Id.* at 61.

24. 1 D. ROBERTSON, TRIAL OF AARON BURR 256 (1808). Like the Carpenter report, the Robertson report is a stenographic record of the trial.

25. 3 T. CARPENTER, *supra* note 1, at 14. Rhodes, *supra* note 4, at 53, states that "a copy of the letter of October 21, which had been lost, [was] submitted."

26. 2 T. CARPENTER, *supra* note 1, at 3; 3 *id.* at 3.

27. 3 *id.* at 9, 20, 21.

28. *Id.* at 20.

29. *Id.* Robertson reports that Martin also claimed the right to hear the Wilkinson letter "publicly," 2 D. ROBERTSON, *supra* note 24, at 502, and that Hay said, "I wish the court to look at the letter and say whether it does not contain what ought not to be submitted to public inspection." *Id.* at 509. It "cannot be right," said Hay, that Burr "shall have . . . access to the letter, merely for the purpose of making it public." 3 T. CARPENTER, *supra* note 1, at 25. In his opinion of September 4, Marshall took account of this dispute; he said,

of blanket "confidentiality," of a right to withhold from court as well as counsel. Instead, Hay left the final determination to the court.

What were the "strictures" Jefferson's counsel were so zealous to shield? Rhodes, who apparently consulted true copies of the letter in the archives, states that Wilkinson referred to the "complicity of Governor Claiborne of Louisiana and his secretary, Cowles Meade, in the [Burr] conspiracy. Claiborne was a trusted appointee of Jefferson, who was adamant that the charges against Claiborne and his aide not be made public."<sup>30</sup> Since Wilkinson was to testify against Burr, this attempted suppression is not the most glorious chapter in Jefferson's history. A subpoena issued on September 4 and Hay promptly made a return with a copy of the letter;

excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue. . . . The accuracy of this opinion, I am willing to refer to the judgment of the Court, by submitting the original letter for its inspection.<sup>31</sup>

Earlier, on June 12, Jefferson had devolved on Hay "the exercise of that discretion, which it would be my right and duty to exercise by withholding . . . any parts of the letter, which are not directly material for the purposes of justice."<sup>32</sup> Neither Jefferson nor Hay invoked an absolute claim of right to withhold information from the court. They restricted themselves to matters irrelevant to the cause and Hay was willing to leave the judgment on relevancy to the Court.<sup>33</sup> Burr's counsel, Botts, then moved that the "prosecution should stand, and be continued until that letter shall be in the possession of your Clerk."<sup>34</sup>

On this state of facts Marshall delivered a second opinion on September 4. Rhodes asserts that rather than review "the withheld data *in camera* or otherwise and weighing relevant interests," Marshall

With respect to the secrecy of these parts which it is stated are improper to give out to the world, the Court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter: but . . . I will order that no copy of it be taken for public exhibition; and that no use shall be made of it but what is necessarily attached to the case . . . . [I]f it is necessary to debate it in public, those who take notes may be instructed not to insert any part of the arguments on that subject.

*Id.* at 38.

30. Rhodes, *supra* note 4, at 52, 53.

31. 3 T. CARPENTER, *supra* note 1, at 27-28.

32. 1 *id.* at 10 (second series of pagination).

33. Throughout, "relevancy" was the touchstone. See pp. 1114, 1118 *supra*, text accompanying notes 32-33, pp. 1120-21 *infra*, and note 37 *infra*.

34. 3 T. CARPENTER, *supra* note 1, at 30.

“repeatedly sidestepped or ignored suggestions by one or the other of the parties to examine the letter and determine the validity of the president’s assertion.”<sup>35</sup> Rhodes bases his argument on Marshall’s statement, “I never ought to have heard it at all, and which I must treat as though I have never heard. I cannot, therefor, speak from any knowledge I have of the letter.”<sup>36</sup> The reason for this statement, which escaped Rhodes, was in Marshall’s own words that “it is impossible that either the Court or the attorney [for the President] can know in what manner it is meant to be used: I must, therefore, consider declaration made upon that subject, as though they had not been made.”<sup>37</sup> In other words Marshall sought to determine a broad issue of law, divorced from his premature and incomplete knowledge of the facts, which he broadly hinted did not really demand nondisclosure.<sup>38</sup> Marshall emphasized that only the defendant knew what was essential to his case and refused to take from him the right of making that decision.

Marshall phrased the issue in broadest terms: “If then the executive possesses a paper which is really believed by the accused to be material to his defence, ought it to be withheld?”<sup>39</sup>

That the President . . . might be subpoenaed and examined as a witness, and called upon to produce any paper which is in his possession, is not controverted, indeed that has once been decided. . . . I can very readily conceive, that the President might receive a letter which it would be very improper to require for public exhibition, because of the manifest inconvenience of the exposure. There ought, in such a case, to be an extremely strong occasion for its demand<sup>40</sup> . . . . I do think that a privilege does exist with respect to a private letter of the President [‘which might relate to public concerns’<sup>41</sup>]

35. Rhodes, *supra* note 4, at 54. There is, however, no evidence that Burr’s counsel at any point suggested that “relevancy” be left to Marshall.

36. *Id.*

37. 3 T. CARPENTER, *supra* note 1, at 37. Marshall subsequently repeated that “it was impossible for him to determine, even if he saw the letter, how much of it was relevant to the present case, because he could not anticipate what ground of defence would be taken by the accused.” *Id.* at 279-80.

38. It is extremely probable that the letter, or the parts of the letter called for . . . is [*sic*] of infinitely less importance, if it should be looked into, than gentlemen suppose; and that the objections . . . would vanish at its production; because it is probable, that, if it was produced and read, very much of the suspicions now entertained, would be wiped away . . . .

*Id.* at 35.

39. *Id.* at 36.

40. Robertson reports this as follows: “The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on.” 2 D. ROBERTSON, *supra* note 24, at 535-36.

41. 3 T. CARPENTER, *supra* note 1, at 37.

. . . . Now, it is a very serious question, when such letters may be supposed to contain something very material to the defence of any individual, that he should not be able to avail himself of the advantage of it. . . . [P]erhaps the Court ought to consider . . . the reasons which induced the President to refuse the paper as a governing principle to induce them to refuse its exhibition, except as it shall be made to appear absolutely necessary in the defence.<sup>42</sup>

Burr had filed an affidavit that the letter "may be material" to his defense and Marshall held that since "no sufficient reason is adduced, except in the affidavit of the accused . . . the Court must suppose that the paper ought to be produced; and if that is refused, the Court must take the proper means of ordering the continuance of the case until it is produced."<sup>43</sup> He concluded that "I do not think that the accused ought to be prohibited from seeing the letter."<sup>44</sup> Thus, although Marshall attached great weight to presidential representations that a document should be withheld, he reaffirmed what he had earlier held: that the needs of the accused were primary.

For the purpose of weighing presidential claims against those needs, Marshall had said in his September 4 opinion that the President himself, not his delegate, must "judge as to his motives for withholding the letter."<sup>45</sup> To meet this requirement, Hay had sent an express letter to Jefferson at Monticello on September 5, and on September 9 he read into the record a certificate from Jefferson (to which was annexed a copy of the Wilkinson November 12 letter) in which Jefferson recited that he had deleted passages "in no wise material to the purposes of justice, on the charges of treason or misdemeanor . . . . [T]hey are on subjects irrelevant to any issue which can arise out of those charges, and could contribute nothing towards his acquittal or conviction."<sup>46</sup> That is all that the reports of the trial contain on the subject.<sup>47</sup> Nothing appears in Carpenter's report to indicate what was

42. *Id.* at 36-37. The challenge to the sufficiency of Burr's allegation that the letter "may be material" was thus met by Marshall:

[I]f a paper be in the possession of the opposite party, what statement of its contents or applicancy can be expected from the person who claims its production, he not knowing its contents? . . . It has always been thought sufficient to describe the paper, and identify its general nature and authenticity . . . .

*Id.* at 35.

43. *Id.* at 36-37.

44. *Id.* at 38.

45. *Id.* at 37; Rhodes, *supra* note 4, at 53. Robertson reports, "The propriety of withholding it must be decided by himself, not by another for him." 2 D. ROBERTSON, *supra* note 24, at 536.

46. 3 T. CARPENTER, *supra* note 1, at 46.

47. *United States v. Burr*, 25 F. Cas. 187, 192-93 (No. 14,694) (C.C. Va. 1807), which purports to draw on the Carpenter and Robertson reports, states that Hay "presented



done with the letter; it was not read into the record. Dumas Malone, biographer of Jefferson, concluded that “[t]he document was accepted without comment. Thus there was an assertion and a recognition of a degree of executive privilege”;<sup>48</sup> and Judge MacKinnon likewise states that Marshall “accepted” the deletions, that they “were not contested.”<sup>49</sup>

Such statements overlook the mechanics of litigation. The letter had been subpoenaed by Burr; thus it would be his counsel who would introduce it in evidence. There is no mention of an offer in evidence of the letter by anyone. Earlier, Luther Martin, answering an objection (“if this evidence [a letter] came, what would be done with it?”), replied, “The answer is obvious; that it must be retained by the court till it is wanted,”<sup>50</sup> at which point it could be called for by counsel for the purpose of introduction in evidence. Throughout, Burr had insisted, and was again to insist, on production of the whole letter, and there is nothing to show that at this stage he had withdrawn his objections to deletions.<sup>51</sup> As Marshall stated at another juncture, “the Court are bound to hear the evidence; if there are any objections made, it will hear them, and decide upon their force.”<sup>52</sup> Of an offer of the letter, or of rulings by Marshall there is not a trace.

Malone and Judge MacKinnon would transform Jefferson’s compliance with Marshall’s requirement of a personal claim of privilege, as a preliminary to Marshall’s balancing of that claim against Burr’s needs, into Marshall’s silent withdrawal of the two careful opinions he had delivered. It is violent presumption that Marshall, without apparent reason, suddenly overruled his opinions *sub silentio*, that he no longer felt that a denial of a needed document to the accused would be a “blot” on American judicial proceedings, “tarnish the reputation of the Court,” and fill Marshall himself with “self-reproach.” Views so deeply felt, so often repeated, are not

a certificate from the President . . .” Neither report contains such language. Robertson does not even record the express letter to Hay from Jefferson. 2 D. ROBERTSON, *supra* note 24, at 537.

48. N.Y. Times, Nov. 26, 1973, at 30, col. 5.

49. *Nixon v. Sirica*, 487 F.2d 700, 748 (D.C. Cir. 1973) (dissenting opinion).

50. 1 D. ROBERTSON, *supra* note 24, at 169. Compare Burr’s statement on September 3: “A letter has been demanded from the President . . . which has been often promised, but never produced. I wish to know if that letter is in Court, and whether it cannot be put into the hands of the clerk.” 3 T. CARPENTER, *supra* note 1, at 14.

51. See, e.g., 3 T. CARPENTER, *supra* note 1, at 30, quoting Botts. Rhodes states that on “September 16, Burr reasserted his demand for the November 12 letter, saying that ‘the court ought to make no question how to proceed on it,’ undoubtedly referring to his prior motion to continue the case.” Rhodes, *supra* note 4, at 54. Marshall had earlier stated that he would follow that course. See p. 1118 *supra*. Burr continued to demand the entire letter. See p. 1120 *infra*.

52. 2 T. CARPENTER, *supra* note 1, at 125.

lightly abandoned. Stronger evidence than Jefferson's mere compliance with Marshall's requirement of a personal presidential claim of privilege is needed to prove that Marshall silently jettisoned his two decisions.<sup>53</sup> There is none.

Instead, the gloss which Malone and Judge MacKinnon put upon Hay's production of the letter is further rebutted by subsequent developments in the case: the Rhodes "discovery." On September 15 Burr was found not guilty on the misdemeanor charges.<sup>54</sup> Proceedings for the commitment of Burr for trial in another district where Burr was present when some overt act occurred then began.<sup>55</sup> On September 29 Wilkinson testified that the November 12 letter had been submitted to the grand jury; the presidential mantle of secrecy had been rent. Wickham called for the letter, but Hay stated that Chief Justice Marshall had remarked that "he could not think of requiring from General Wilkinson the exhibition of those parts of the letter which the president was unwilling to disclose."<sup>56</sup> Rhodes quotes this statement<sup>57</sup> but fails to take into account the implications of further developments. When Wickham, urging that the letter had been laid before the grand jury, renewed the demand, Marshall again emphasized relevancy:

[A]fter such a certificate from the president . . . as has been received, I cannot direct the production of those parts of the letter, without a sufficient evidence of their being relevant to the present prosecution.<sup>58</sup>

The implication that if the deleted portions were shown to be "relevant" their production would be "directed" repels the inference that Marshall had earlier "accepted" the deletions.

After further argument Marshall "determined that the correct course, was to leave the accused all the advantages which he might derive from the parts actually produced; and to allow him all the advantages of supposing that the omitted parts related to any particular point. The accused may avail himself as much of them, as

53. Note Marshall's remark on September 4: "[I]ndeed that has once been decided." See p. 1117 *supra*. Later he stated in another context, "I have already decided this question." 3 T. CARPENTER, *supra* note 1, at 284.

54. 3 T. CARPENTER, *supra* note 1, at 110.

55. Rhodes adverts to Marshall's ruling "that to constitute treason by acts of war the principal must be physically present at the place of committing the acts, in this case at Blannerhasset Island, a requirement the testimony could not meet." Rhodes, *supra* note 4, at 54.

56. 3 T. CARPENTER, *supra* note 1, at 254.

57. Rhodes, *supra* note 4, at 54.

58. 3 T. CARPENTER, *supra* note 1, at 280-81.

if they were actually produced.”<sup>59</sup> When Hay objected to Wickham’s deduction that defendant’s suppositions should be received as evidence in place of Jefferson’s deletions, Marshall responded:

It is certainly fair to supply the omitted parts by suppositions . . . . If this were a trial in chief, I should perhaps think myself bound to continue the cause, on account of the withholding the parts of this paper; and I certainly cannot exclude the inferences which gentlemen may draw from the omissions.<sup>60</sup>

This was the last word spoken by Marshall on the subject; it reaffirmed the earlier opinions that the needs of the accused would override presidential reasons for withholding. In this less formal commitment proceeding, Marshall permitted Burr to fill the place of the deleted parts by suppositions that would be given the force of evidence.

As Rhodes summarized:

The chief justice placed considerable emphasis on the president’s assertion of irrelevancy of the parts withheld, stating that in order to make further demand for the letter Burr must give “sufficient evidence” of relevancy. He recognized that if Burr could prove the relevancy of the material withheld and if the proceedings were a prosecution in chief, he might discontinue the case, but in the absence of that proof and circumstances he refused further steps than allowing Burr to make the most favorable inference of the omitted part.<sup>61</sup>

That allowance made the letter superfluous. Against this background Mr. Rhodes’ deduction, that “[i]t is eminently clear that President Jefferson[’s] . . . claim to an exclusive exercise of executive privilege, unreviewed and unreviewable by the courts, was upheld by Chief Justice Marshall,”<sup>62</sup> boggles the mind.

No more tenable is Rhodes’ view that the misdemeanor trial “concluded without a definitive ruling on the president’s right to withhold the letter.”<sup>63</sup> In his September 4 opinion, a reaffirmation of the principles enunciated in the June 13 opinion, Marshall laid down the rules of law that should guide counsel and firmly indicated that presidential nondisclosure claims must yield to the real

59. *Id.* at 281-82.

60. *Id.* at 284.

61. Rhodes, *supra* note 4, at 54.

62. *Id.*

63. *Id.* at 53.

needs of the accused. Before applying these rules to the facts, he required a personal claim of privilege by Jefferson. This was not the only time that Marshall delineated the applicable legal principles for the future guidance of counsel. In an opinion rendered on September 14 respecting the admissibility of certain testimony, Marshall laid down the governing rules and added, "Gentlemen well know how to apply these principles. Should any difficulty occur in applying them, the particular cases will be brought before the Court and decided."<sup>64</sup> The fact that Marshall had no occasion at the fourth stage commitment hearing to apply the law to the facts, because Burr could be richly content to substitute his "suppositions" for the deleted letter, does not render the opinions of June 13 and September 4 any less the law of the case.<sup>65</sup>

The heart of Marshall's opinions was therefore justly summarized by the Court of Appeals in the "tapes" case: "The court was to show respect for the President's reason . . . but the ultimate decision remained with the Court."<sup>66</sup> If the courts are the "ultimate interpreters" of the Constitution and can therefore constrain Congress to operate within constitutional bounds,<sup>67</sup> they are no less empowered to measure presidential claims of constitutional power. The "mystique" of the President stops at the courthouse doors.

64. 3 T. CARPENTER, *supra* note 1, at 103.

65. See p. 1118 and note 53 *supra*.

66. Nixon v. Sirica, 487 F.2d 700, 710 (D.C. Cir. 1973).

67. See Powell v. McCormack, 395 U.S. 486, 521 (1969).

## The President, Congress, and the Courts

### II. Must Impeachment Precede Indictment?

A great debate has been raging about whether the President or Vice President must be impeached before he can be indicted. It turns on the provisions of Article I, § 3 of the Constitution:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification . . . but the Party convicted shall nevertheless be liable and subject to Indictment, Trial . . .<sup>68</sup>

Let us begin with the words themselves; “nevertheless” is defined as “notwithstanding or in spite of.” Consequently § 3 must be understood to mean that an indictment may be filed “in spite of” a prior removal or impeachment. It does violence to language to twist this into a requirement that an impeachment must precede indictment. The implication of “shall nevertheless be liable” to indictment is that the given party is already liable, that the words are merely designed to preserve existing criminal liability rather than to qualify it.<sup>69</sup> It would be unreasonable to attribute to the Framers an intention to insulate officers from criminal liability by mere appointment to office; like all men they are responsible under the law.<sup>70</sup> Thus Solicitor General Robert H. Bork concluded in a brief designed to demonstrate that Vice President Spiro Agnew could be indicted before he was impeached: “[A] civil officer could be both impeached and criminally punished even absent the Article I, Section 3 proviso.”<sup>71</sup>

68. U.S. CONST. art. I, § 3. It is reported that Special Prosecutor Leon Jaworski advised the grand jury not to indict President Nixon: “It was researched at the time and the conclusion was that legal doubt on the question was so substantial that a move to indict a sitting President would touch off a legal battle of gigantic proportions.” N.Y. Times, Mar. 12, 1974, at 24, col. 1.

When I first studied Article I, § 3, I was engrossed in the *separation* of the removal on impeachment from the indictment and unwittingly wrote that “[r]emoval would enable the government to replace an unfit person with a proper person, leaving ‘punishment’ to a later and separate proceeding . . .” R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 79 (1973). At that time the problem whether impeachment *must* precede indictment had never crossed my mind; since then my incautious words have been read to endorse that view. *Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (MacKinnon, J., dissenting); Brief for Appellant at 20, *Nixon v. Sirica*, *supra*. I hereby repudiate such endorsement, for study of the problem has convinced me that § 3 has no such requirement.

69. See discussion of double jeopardy at pp. 1124-25 *infra*.

70. “[N]o officer of the law may set that law at defiance with impunity. All the officers of government, from the highest to the lowest . . . are bound to obey it.” *United States v. Lee*, 106 U.S. 196, 220 (1882). See note 84 *infra*.

71. Memorandum for the United States at 10n.\*\*, Application of Spiro T. Agnew, Civil No. 73-965 (D. Md.) (memorandum filed Oct. 5, 1973, concerning the Vice President’s claim of constitutional immunity, prepared by Solicitor General Robert H. Bork [hereinafter cited as Bork]).

Since Article II, § 4, provides without discrimination for the impeachment of the "President, Vice President and all civil officers," Mr. Bork's statement should be equally applicable to the President. Furthermore, after impeachment and removal the President is returned to the body of the citizenry.<sup>72</sup> No special dispensation is required to allow prosecution of a citizen; nor is there a scrap of evidence that the Framers were minded to clothe an ex-President in any immunity whatsoever. On the contrary, immunity was denied to him as President. It follows that the President is criminally triable while in office, because no special provision is required for trial of an ex-President. An interpretation of the saving clause that makes the President triable only *after* removal from office would therefore reduce the clause to "mere surplusage,"<sup>73</sup> unless we adopt an alternative—that it was designed solely to foreclose the argument of double jeopardy.

Solicitor General Bork justly concluded, as did Justice Story 140 years ago,<sup>74</sup> that the "sole purpose" of the Article I, § 3 "indictment" proviso "is to preclude the argument that the doctrine of double jeopardy saves the offender from the second trial."<sup>75</sup> That danger arose from the English practice, wherein criminal punishment and removal were wedded in one proceeding; hence it was the part of caution to ward off an inference that a prior impeachment would constitute a bar to indictment. With Solicitor General Bork, I would conclude that the "nevertheless . . . subject to indictment" clause was not designed "to establish the sequence of the two processes, but solely to establish [that a prior conviction upon impeachment] does not raise a double jeopardy defense in a criminal trial."<sup>76</sup> So viewed, the "nevertheless" clause seeks to *preserve* the right

72. As Chief Justice Marshall stated, he "is elected from the mass of the people" and "returns to the mass of the people." 1 D. ROBERTSON, *supra* note 24, at 181.

73. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 394 (1821). Chief Justice Marshall added, "This cannot, therefore, be the true construction of the article."

74. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 782 (5th ed. 1905).

75. Bork, *supra* note 71, at 8.

76. *Id.* at 10. Mr. Bork properly points out that "impeachment and the criminal process serve different ends so that the outcome of one has no legal effect upon the outcome of the other," a conclusion justly rested on James Wilson:

Impeachments . . . come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects; for this reason, the trial and punishment of an offense in the impeachment, is no bar to a trial of the same offense at common [criminal] law.

Bork, *supra* note 71, at 8-9, *citing* 1 J. WILSON, WORKS 324 (R. McCloskey ed. 1967).

Bork, at 11, also cites cases in state courts that reached a similar conclusion under constitutional provisions modeled on Article I, § 3, such as *Commonwealth v. Rowe*,

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to a subsequent criminal prosecution, not to prescribe that it must be preceded by impeachment. Justice Miller's statement in *Langford v. United States* that "the ministers personally, like our President, may be impeached; or if the wrong amounts to a crime, they may be indicted"<sup>77</sup> likewise rebuts insistence that indictment must follow after impeachment.

This conclusion is further buttressed by other factors. "The only explicit immunity in the Constitution," said Solicitor General Bork, "is the limited immunity granted Congressmen"<sup>78</sup> in Article I, § 6, which provides:

The Senators and Representatives . . . shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.

In the words of Mr. Bork:

Since the Framers knew how to, and did, spell out immunity, the natural inference is that no immunity exists where none is mentioned.<sup>79</sup>

The Supreme Court has employed that principle of construction.<sup>80</sup> Not only is this the "natural inference," but we have the testimony of Charles Pinckney, one of the most active participants in the Constitutional Convention, who, in explaining the Constitution to the South Carolina Ratification Convention, stated that no immunity for the President was intended. Speaking in the Senate in 1800, Pinckney said that "it never was intended to give Congress . . . any but spec-

112 Ky. 482, 66 S.W. 29 (1902); *State v. Jefferson*, 90 N.J.L. 507, 101 A. 569 (Ct. Err. & App. 1917). In addition, Bork, at 16n., points to *United States v. Kerner* (involving an indictment and conviction of Circuit Judge Otto Kerner prior to impeachment) then pending in the 7th Circuit and since decided in favor of the Department of Justice position that such a judge is a subject of indictment and conviction prior to impeachment and removal. N.Y. Times, Feb. 21, 1974, at 6, col. 1. To this may be added that Justice William Rehnquist, then Assistant Attorney General, Office of Legal Counsel, advised Attorney General John Mitchell that the United States could prosecute Justice Abe Fortas without waiting on impeachment. Keefe, *Explorations in the Wonderland of Impeachment*, 59 A.B.A.J. 885, 886 (1973).

77. 101 U.S. 341, 343 (1879).

78. Bork, *supra* note 71, at 4.

79. *Id.* at 5.

80. See, e.g., *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471 (1959): "We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carriers Act when the very sections which established that right in Part I [for railroads] were wholly omitted in the Motor Carriers Act."

ified [privileges], and those very limited privileges indeed."<sup>81</sup> And addressing himself to certain privileges under discussion, he stated, "No privilege of this kind was intended for your Executive, nor any except which I have mentioned for your Legislature. The Convention . . . well knew that . . . no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more."<sup>82</sup> James Wilson, considered by Washington "to be one of the strongest men in the Convention,"<sup>83</sup> assured the Pennsylvania Ratification Convention that "not a *single privilege* is annexed to his [the President's] character."<sup>84</sup> Remarks such as these were a response to the pervasive distrust of executive power.<sup>85</sup> Nothing in the prior English practice, with which the Framers were familiar,<sup>86</sup> suggests a requirement that impeachment had to precede indictment. On several occasions the Parliament preferred to refer the case to the courts; and one of the most learned lawyers in Parliament, Sir John Maynard, said of the charges against Sir Adam Blair: "I would not go before the Lords, when the law is clear, and may be tried by juries."<sup>87</sup> Constitutional history therefore confirms the inference properly drawn from the face of the Constitution that no immunity was given to the President.

By a feat of legerdemain Mr. Bork would read the President out of this history. He recognizes that the impeachment debate "related almost exclusively to the Presidency" and that "the impeachment clause was expanded to cover the Vice President and other civil officers only toward the very end of the Convention."<sup>88</sup> Mr.

81. 10 ANNALS OF CONG. 72 (1800).

82. *Id.* at 74. In the course of his remarks, Pinckney addressed himself to the questions "why the Constitution should have been so attentive to each branch of Congress . . . and have shown so little to the President . . . in this respect. Why should the individual members of either branch . . . have more privileges than him [*sic*]." *Id.* Thus the withholding of presidential immunity was no oversight; it was intentional. The explanation lies in history cited by the Supreme Court. See pp. 1129-30 *infra*.

83. M. FARRAND, THE FRAMING OF THE CONSTITUTION 21 (1913).

84. 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480 (1836). In his Lectures of 1791, James Wilson, a Justice of the Supreme Court, rephrased this as follows: "[T]he most powerful magistrates should be amenable to the law . . . . No one should be secure while he violates the constitution and the laws." 1 J. WILSON, *supra* note 76, at 425.

85. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 49-50, 52-53 (1974). Hamilton was constrained to rebut attacks upon grants to the President by those who, "[c]alculating upon the aversion of the people to monarchy," portrayed the President "as the full-grown progeny of that detested parent." THE FEDERALIST No. 68, at 448 (Mod. Lib. ed. 1937) (A. Hamilton).

86. R. BERGER, *supra* note 68, at 328 (See pages cited under heading "Founders."). Compare *id.* at 70, with *id.* at 89; and see *id.* at 171 n.217.

87. *Id.* at 49.

88. Bork, *supra* note 71, at 6-7.



Bork's view presents the anomaly that the history of the impeachment provision, framed entirely in the context of the President, refers only to the "Vice President and all civil officers," who were virtually unmentioned and were added as a last-minute afterthought. Thus a provision the "sole purpose" of which was to forfend the double jeopardy argument, which was not designed "to establish the sequence" of impeachment or indictment, and which is accompanied by an "immunity" provision limited to Congress (without immunity for felonies) so that "the natural inference is that no immunity exists where none is intended," suddenly is found to establish precisely that "sequence" and to confer exactly that un-"natural" immunity on the President. When we emerge from Bork's elaborate argument that the President must be impeached before he is indicted, it adds up to a claim of immunity from criminal prosecution that was denied him. On what grounds is this analytical somersault justified?

Mr. Bork first states that the Framers' "remarks strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process . . . . For example . . . Gouverneur Morris observed that the Supreme Court would 'try the President after the trial of the impeachment.'"<sup>89</sup> That this is ill-considered shorthand emerges from the reference to a trial by the Supreme Court, which can only hear an appeal. Bork also cites Hamilton for the assertion that "the Framers' discussion assumed that impeachment would precede criminal trial."<sup>90</sup> Hamilton's participation in the Convention was sporadic and had little, if any, influence.<sup>91</sup> At the close of the Convention he handed Madison a plan in which he proposed that the President be impeached and removed and "be afterwards tried and punished."<sup>92</sup> So far as the records show, it was not considered by the Convention. The Framers were fastidious draftsmen, keenly alive to the weight of every word.<sup>93</sup>

89. Bork, *supra* note 71, at 6, citing 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (1911) [hereinafter cited as FARRAND].

90. Bork, *supra* note 71, at 17. Another citation by Bork, at 6, is to 2 FARRAND 64-69, 626. Nothing relevant to the impeachment-indictment sequence is contained in those pages.

91. J. MILLER, ALEXANDER HAMILTON: PORTRAIT IN PARADOX 174-76, 178 (1959).

92. 3 FARRAND, *supra* note 89, at 617, 625.

93. Compare their rejection of "high misdemeanor" because it has a "technical meaning too limited" and the substitution of "high crimes and misdemeanors" for "maladministration." R. BERGER, *supra* note 68, at 74. As was said by Chief Justice Taney: "[N]o word was unnecessarily used, or needlessly added . . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840).

They employed neither "after" nor "afterwards";<sup>94</sup> and it is not for us to supply a word thus omitted, to convert "nevertheless" (in spite of) into "afterward," that is, to transform a nonsequential provision into a prescribed sequence. Nor can the mistaken Morris-Hamilton versions of the provision be read to create the very immunity that the Framers intentionally withheld from the President when they squarely faced the issue. The § 3 proviso must be read together with the immunity provision; if possible both should be given effect.<sup>95</sup> Above all, we "cannot rightly prefer" a meaning "which will defeat rather than effectuate the Constitutional purpose."<sup>96</sup>

If, however, the remarks of Morris and Hamilton are to override this withholding of immunity, they no less demand that the "Vice President and all civil officers" likewise first be impeached and then indicted. Mr. Bork's anticipatory answer was that "[i]t is, of course, significant that such remarks referred only to the President, not to the Vice President and other civil officers."<sup>97</sup> How could it be otherwise when the President was the sole object of discussion? There was no allusion to impeachment of the others until the end when the "Vice President and all civil officers" were casually added to the impeachment provision without discussion.<sup>98</sup> As Bork himself has stated, "[N]one of the general debates addressed or considered the particular nature of the powers [or immunities] of the Vice President or other civil officers."<sup>99</sup> How then could the Framers consider the denial to them of an immunity allegedly granted to the President? The fact is that all the history cited by Mr. Bork to establish the prior indictability of the Vice President had reference to the President alone and establishes *his* prior indictability.

After his bow to history, Mr. Bork turns to the structure of the Constitution, wherein he finds "embedded" reasons for drawing the distinction between the President and the others.<sup>100</sup> No such distinction was, of course, drawn by the Founders; it is the product

94. Compare Hamilton's suggestion that on impeachment the President be suspended until judgment, 3 FARRAND, *supra* note 89, at 617, 625, with the rejection of such a motion made by Morris and Rutledge, 2 FARRAND 612. When Hamilton stated in THE FEDERALIST No. 69, *supra* note 85, at 446, that "[t]he President would be liable [in impeachment] and would afterwards be liable to [criminal] prosecution," he was referring to his own plan rather than a faithful rendition of Article I, § 3.

95. For the appropriate rule of construction, see, e.g., *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); cf. *Fisher v. District of Columbia*, 164 F.2d 707, 708-09 (D.C. Cir. 1948).

96. *United States v. Classic*, 313 U.S. 299, 316 (1941).

97. Bork, *supra* note 71, at 6.

98. R. BERGER, *supra* note 68, at 146-47.

99. Bork 7.

100. *Id.*

of presidential counsel 185 years after the event. In a nutshell, Bork rings the changes on “the singular importance of the President.”<sup>101</sup> The crucial nature of the President’s executive responsibilities, on which Mr. Bork lays such great store, played no role in the impeachment debate. Instead, opponents of impeachment urged that it would invade the President’s “independence” and violate the separation of powers,<sup>102</sup> a central principle from which the Framers proceeded. The felt necessity for a curb on presidential transgressions, however, overcame this “independence” argument; despite the “crucial nature” of his powers, the Framers gave Congress power to oust him for various noncriminal offenses.<sup>103</sup> They made no move to interfere with the normal criminal process that applied to every person; on the contrary, they withheld from him an immunity from criminal prosecution that, but for felonies, they expressly conferred upon Congress.

“This limited grant of immunity” to Congress, Bork explains, “demonstrates a recognition that, although the functions of the legislature are not lightly to be interfered with, the public interest in the expeditious and even-handed administration of the criminal law outweighs the cost imposed by the incapacity of a single legislator. Such incapacity does not seriously impair the functioning of Congress.”<sup>104</sup> A very different conclusion needs to be drawn from the fact that “a limited grant of immunity” was conferred upon members of Congress, whereas none whatever was given to the President: The President was not nearly as “important” in the eyes of the Framers as he is in those of Bork. “There is little doubt,” said the Supreme Court, “that the instigation of criminal charges against the critical or disfavored legislators by the executive in a judicial forum [‘the judges were often lackeys of the Stuart monarchs’<sup>105</sup>] was the chief fear prompting the long struggle for parliamentary privi-

101. *Id.* at 18.

102. Rufus King referred “to the primitive axiom that the three great departments of Govts. should be separate & independent,” and asked, “Would this be the case if the Executive should be impeachable?” 2 FARRAND, *supra* note 89, at 66. Charles Pinckney stated that impeachment by the Legislature would give it “a rod over the Executive and by that means effectually destroy his independence.” *Id.*

103. George Mason, expressing the view that prevailed, stated, “No point is of more importance than that the right of impeachment should be continued.” *Id.* at 65. Edmund Randolph stated, “The Executive will have great opportunity for abusing his power.” *Id.* at 67. See also the remarks of James Madison and Elbridge Gerry. *Id.* at 66. The vote was 8 to 2 in favor of retaining the impeachment power. *Id.* at 69. For a discussion of noncriminal offenses, see R. BERGER, *supra* note 68, at 53-93.

104. Bork, *supra* note 71, at 16.

105. *United States v. Johnson*, 383 U.S. 169, 181 (1966).

lege in England."<sup>106</sup> Both the "speech and debate" clause and the "immunity from arrest" clause were "consciously" drawn by the Framers "from this common historical background,"<sup>107</sup> which speaks fear of rather than special solicitude for executive power. Moreover, the Founders had observed that the most powerful ministers could be condemned to death without endangering the continuity of government, indeed, in the case of the Earl of Strafford, conducing to the preservation of liberty.<sup>108</sup> It is no answer to point to the invulnerability of the King because first, as Gouverneur Morris pointed out, "[the first Magistrate] is not the King but the prime-Minister,"<sup>109</sup> and second, as James Iredell emphasized, the President, unlike the King, was made triable.<sup>110</sup>

A kindred speculation is that "[t]he Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power over execution of the laws, which includes, of course, the power to control prosecutions."<sup>111</sup> When President Nixon acted on this premise and discharged Special Prosecutor Archibald Cox, who was engaged, among other things, in investigating whether the President was implicated in the Watergate coverup and other criminal acts, a storm of outrage swept over the White House.<sup>112</sup> It is reasonable to infer that the Framers never intended to permit the President to shield himself from criminal indictment by the control given him over such prosecutions. Next Mr. Bork argues that the presidential pardoning power extends to a pardon for himself, thus rendering criminal conviction ineffectual.<sup>113</sup> Such a pardon after conviction would be an even greater affront to the nation than Nixon's discharge of Cox to impede his own prosecution. The "pardon" provision must be read in harmony with the "immunity" provision; it was not designed to confer an immunity intentionally withheld.<sup>114</sup> Constitutional construction should not depart from com-

106. *Id.* at 182. *See also id.* at 178.

107. K. BRADSHAW & D. PRING, *PARLIAMENT AND CONGRESS* 95 (1972).

108. R. BERGER, *supra* note 68, at 30-33, 39.

109. 2 FARRAND, *supra* note 89, at 69.

110. 4 J. ELLIOT, *supra* note 84, at 109.

111. Bork, *supra* note 71, at 20.

112. The discharge was held illegal by District Judge Gerhard Gesell. *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

113. Bork, *supra* note 71, at 20.

114. In *Ex parte Grossman*, 267 U.S. 87, 121 (1925), the Court said that the pardoning power "is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it." An abuse "would suggest a resort to impeachment . . . ."

mon sense;<sup>115</sup> it should not proceed from horrors that the nation would reject and that would have even more greatly affronted the Founders.

Like Solicitor General Bork, Professor Alexander Bickel declares that the Article I, § 3 provision “does not remotely say that impeachment must precede indictment” and like him he considers that the “case of the President . . . is unique.” He does not base this on the “original intention” but on the premise that “[i]n the presidency is embodied the continuity and indestructibility of the state.”<sup>116</sup> He would thereby import into our system the monarchical notion that the continuity of the state was embodied in the crown: “*L’Etat c’est moi*.”<sup>117</sup> But by the eighteenth century, Parliament had prevailed in its struggle with the King; and the downfalls of Charles I and James II had shown that the indestructibility of a King was not synonymous with the “indestructibility of the state.” For Blackstone the “sovereign power” meant “the making of the laws”; it had come to rest in Parliament, “this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.”<sup>118</sup> Therefore, if we are to look to the history the Founders had before them, the Parliament rather than the King was the repository of sovereignty, the symbol of “continuity.” Among the revolutionary changes made by the Founders was to establish that sovereignty resided in the people and that the officers of government were merely their servants and agents.<sup>119</sup> In the words of Gouverneur Morris, “[T]he people are the King.”<sup>120</sup> Presidents come and go but the people remain. The consensus of the Founders was that the President’s main function was to execute the laws, that as commander in chief he was merely the “first General.”<sup>121</sup> Such functionaries are

115. A respected scholar and judge, Herbert F. Goodrich, stated that “[i]f a legal rule fails to satisfy the untechnical requirements of ordinary common sense the premises behind the rule had better be carefully examined.” *Gavin v. Hudson & Manhattan Co.*, 185 F.2d 104, 105-06 (3d Cir. 1950).

116. Bickel, *The Constitutional Tangle*, THE NEW REPUBLIC, Oct. 6, 1973, at 14, 15.

117. Gibbon says of Rome that “the obsequious civilians unanimously pronounced that the republic is contained in the person of its chief.” 4 E. GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 509 (Nottingham Soc’y ed. undated). A current illustration is furnished by the statement of Emperor Haile Selassie of Ethiopia on March 11, 1974, albeit with recognition of the winds of change: “[W]hile the monarchy was a durable institution needed to hold Ethiopia together, its once overwhelming political power was not ‘eternal’ and could be varied according to the requirements and exigencies of the times.” N.Y. Times, Mar. 12, 1974, at 13, col. 1.

118. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 49, 160-61 (1765).

119. R. BERGER, CONGRESS V. THE SUPREME COURT 174-75 (1969). See also G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 362, 377, 382, 530 (1969).

120. 2 FARRAND, *supra* note 89, at 69.

121. R. BERGER, *supra* note 85, at 51-52, 61-63.

expendable rather than indispensable; thus the view of the President taken by the Framers is incompatible with the proposition that in him the Framers "embodied the continuity and indestructibility of the state." The fact that they made him removable from office alone suggests that a hiatus in his office was not thought to threaten that "indestructibility." This also emerges from Hamilton's statement about the King: There is "no punishment to which he can be subjected without involving the crisis of a national revolution,"<sup>122</sup> implying thereby that removal or indictment of the President could have no calamitous effect.

The nation has also survived a number of presidential deaths and assassinations without impairment of the presidency or the "indestructibility of the state." It is a mistake, I suggest, to identify the "continuity" of the presidency with that of a given President. Whatever befalls a President, the state and the presidency are "indestructible."<sup>123</sup> The fact is that a Vice President is immediately available to assume executive functions without skipping a beat; and if he is unavailable there is a row of statutory successors. William Henry Harrison died and was succeeded by John Tyler, James A. Garfield by Chester A. Arthur, Warren G. Harding by Calvin Coolidge, and Franklin D. Roosevelt by Harry Truman. Upon assassination, Lincoln was succeeded by Andrew Johnson, William McKinley by Theodore Roosevelt, and John F. Kennedy by Lyndon B. Johnson. One may hazard that Tyler was an improvement on Harrison; certainly Theodore Roosevelt was an improvement on McKinley, as was Coolidge on Harding; Truman was at least an adequate substitute for an ailing and sinking Franklin Roosevelt. That is not a bad list to pit against the unfortunate succession of Andrew Johnson to the chair of Abraham Lincoln. A senseless assassination creates a shock for which the nation is utterly unprepared, in contrast to a removal on impeachment or conviction on indictment of a President in whom the nation has lost confidence.

Obviously, Professor Bickel states, "the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial."<sup>124</sup> The second

122. THE FEDERALIST NO. 69, *supra* note 85, at 446.

123. In the words of Arthur Schlesinger, Jr.: "The Presidency, though its wings could be clipped for a time, was an exceedingly tough institution. . . . It had endured many challenges and survived many vicissitudes. It was nonsense to suppose that its fate as an institution was bound up with the fate of the particular man who happened to be President at any given time." A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 405 (1973).

124. See Bickel, *supra* note 116, at 15.

proposition is by no means obvious; Andrew Johnson did not personally participate in his impeachment and he continued to perform the duties of his office.<sup>125</sup> A President equally may entrust his defense in a criminal trial to his counsel. If he feels constrained to be present, that is no more disturbing to the performance of his duties than his parallel presence at an impeachment trial; in either case the effect on his functioning is the same. While it is true that the presidency “cannot be conducted from jail,” it is unrealistic to postulate that a convicted President could not be released on bail pending appeal. Moreover, the attempt of a convicted President to hang on to his office would present a spectacle that the nation would find intolerable. A storm of public outrage such as would make the “firestorm” after the Cox discharge seem like a sputtering candle could sweep him from office. If the President lacked the sensitivity to resign,<sup>126</sup> an impeachment could speedily follow; the most partisan congressman would hardly summon the hardihood to reject the verdict of the people. The test of the availability of criminal process, I suggest, should not turn on hypotheticals that strain credulity. “[O]f what value,” said Macaulay, “is a theory which is true only on a supposition in the highest degree extravagant?”<sup>127</sup>

There is a last practical consideration, which Solicitor General Bork summarized in the context of “civil officers”:

[I]f Article I, Section 3, clause 7, were read to mean that no one not convicted upon impeachment could be tried criminally, the failure of the House to vote an impeachment, or the failure of the impeachment in the Senate, would confer upon the civil officer accused complete and—were the statute of limitations permitted to run—permanent immunity from criminal prosecution however plain his guilt.<sup>128</sup>

That would be no less true of the President. No great stretch of the imagination is required to conceive that partisanship in Congress may defeat an impeachment of the President in the House or conviction by two-thirds of the Senate. Suppose that Special Prosecutor Leon Jaworski were convinced that he had evidence that would establish the President’s guilt. Although a partisan one-third of the

125. The Framers rejected suspension prior to conviction. See note 94 *supra*.

126. Vice President Spiro Agnew resigned after indictment and before trial, explaining in part that the welfare of the nation would thereby be served. N.Y. Times, Oct. 11, 1973, at 35, col. 3.

127. 2 T. MACAULAY, CRITICAL AND HISTORICAL ESSAYS 128 (1890).

128. Bork, *supra* note 71, at 9-10.

Senate might differ, can it be reasonable that he should be barred from prosecution because an impeachment fell prey to partisanship?

A mistake against which we must be ever vigilant is to read our own predilections back into the minds of the Framers.<sup>129</sup> One of the most eminent of the Founders, James Iredell, later a Justice of the Supreme Court, cautioned:

We are too apt, in estimating a law passed at a remote period, to combine, in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing.<sup>130</sup>

These are not merely the yearnings of a legalistic "strict constructionist"; they are a canon of historiography. The task of the historian, Ranke taught, is to establish the facts of history *wie es eigentlich gewesen war*; the search must be for what actually happened and, if we find it, not to substitute for it what should have happened. As in the task of construing any document, the primary function is to ascertain the intention of the draftsmen. When that intention is discovered, what Iredell said becomes of prime importance: "The people have chosen to be governed under such and such principles. They have not chosen to be governed, or promised to submit upon any other."<sup>131</sup>

It is easier, however, to preach such vigilance than to practice it, as I can testify from personal experience in the very context of the distinction here under discussion. Influenced by the difficulty of giving the words "high crimes and misdemeanors" a narrow construction in the case of the President and a broad one for judges, I initially concluded that they must be given a single meaning. But I was led to alter my view upon consideration of the fact that judges were added to the impeachment provision at the last minute with no reference either to judges or to governing standards. From this and other data I reasoned that stricter standards of conduct might be required of a judge, that is, that the range of impeachable offenses might be broader.<sup>132</sup> Whatever the validity of that reasoning,

129. Compare Justice Sutherland on "sovereignty" in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), discussed in Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972).

130. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 267 (1796). See R. BERGER, *supra* note 119, at 22-23.

131. 2 G. MCRÉE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 146 (1857-1858).

132. R. BERGER, *supra* note 68, at 91-93.



it cannot be invoked for the president, who was the subject of the debates and the constitutional restrictions; a broader application of those restrictions to judges does not warrant a total immunity from criminal prosecution for the President. Sensible, however, of the "difficulties involved in adoption of the view that impeachment of judges requires a less restricted reading of those words [high crimes and misdemeanors] than does that of the President," I suggested that "[p]erhaps a better solution is to take a more hospitable approach to removal of judges *by judges* for infractions of good behavior . . .,"<sup>133</sup> indicating thereby that I entertained some doubts about my change of position.

The problem of giving two meanings to the same words in the very same context has continued to trouble me, the more so as I examined the difficulties which Mr. Bork's analysis engendered, his attempt to render utterances exclusively directed at the President applicable solely to "the Vice President and all civil officers," who were not mentioned. My thinking has reverted to my initial view, additionally influenced by the statement of the Supreme Court in *Atlantic Cleaners & Dyers v. United States*: "[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . ."<sup>134</sup> Here the presumption is fortified by the fact that the words are used not in different parts of the Constitution but in one place, in the very same context; and Mr. Bork seeks to give them a different meaning with respect to whom they apply. No trace of an intention to give them that dual meaning is to be found in the history of the provision. This is not to say that the presumption is irrebuttable,<sup>135</sup> but that the rebuttal cannot rest on factors that were not before the Framers, on an image of the presidency which is a product of our times and which they emphatically did not share.

Such distinctions represent but another attempt to revise the Constitution under the guise of euphemisms, derived from an exalted notion of the presidency which is far removed from the egalitarian

133. *Id.* at 93.

134. 286 U.S. 427, 433 (1932).

135. The Court stated,

Where the subject matter [impeachment] to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning may well vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.

*Id.*

sentiments of the Founders.<sup>136</sup> When the subpoena to Jefferson issued, Albert Beveridge, who had scoured the newspapers of the time, comments "For the first time, most Republicans approved of the opinion of John Marshall. In the fanatical politics of the time there was enough honest adherence to the American ideal, that all men are equal in the eyes of the law, to justify the calling of a President, even Thomas Jefferson, before a court of justice."<sup>137</sup> It is we who have surrounded the President with a mystique that has contributed heavily to an "imperial presidency."<sup>138</sup> When we forget that the President is "but a man . . . but a citizen"<sup>139</sup> we are on the road that has unfailingly led to Caesarism. It was because the Founders had learned this lesson from history that presidential powers were enumerated and limited, and that immunity from arrest was altogether withheld.

136. See note 1 *supra*. Herbert Butterfield, who has considered the problems of historiography in his penetrating study, *George III and the Historians* (rev. ed. 1969), remarked that "it is often necessary to know a great deal of history before one is equipped for the interpreting of historical documents." *Id.* at 18. This is more essential with respect to a constitution. See p. 1134 *supra*.

137. 3 A. BEVERIDGE, *LIFE OF JOHN MARSHALL* 450 (1919).

138. See A. SCHLESINGER, JR., *supra* note 123, at ix.

139. 1 T. CARPENTER, *supra* note 1, at 90.

### III. Impeachment: Mr. St. Clair's "Instant History"

If the House "be found incompetent to one of the greatest [causes] . . . it is impossible that this form of trial should not, in the end, vanish out of the constitution. For we must not deceive ourselves: whatever does not stand with credit cannot stand long. And if the constitution should be deprived . . . of this resource, it is virtually deprived of everything else, that is valuable in it. For this process is the cement which binds the whole together . . . here it is that we provide for that, which is the substantial excellence of our constitution . . . by which . . . no man in no circumstance, can escape the account, which he owes to the laws of his country."<sup>140</sup>

When a client proclaims that he will "fight like hell" to balk impeachment it may be expected that his lawyer will follow suit. Not surprisingly, therefore, James St. Clair, chief defense counsel for President Nixon, has favored the House Judiciary Committee with a lengthy memorandum that purports to prove by recourse to history that the President may only be impeached for an indictable crime.<sup>141</sup> That standard would virtually nullify impeachment for the nonindictable offenses which were the chief concern of the Founders and which the evidence plainly shows they considered impeachable. Despite its issuance from the august precincts of the White House, the memorandum is but "lawyer's history," a pastiche of selected snippets and half-truths, exhibiting a resolute disregard of adverse facts, and simply designed to serve the best interests of a client rather than faithfully to represent history as it actually was.

Although defense lawyers are notoriously not the best source of constitutional history,<sup>142</sup> such pseudo-history cannot be ignored because, as J. R. Wiggins said of a similar submission by the then Deputy Attorney General William P. Rogers on the issue of executive privilege, "Unless historians bestir themselves . . . the lawyers'

140. 7 E. BURKE, WORKS 14 (1839) (Burke's opening statement at the trial of Warren Hastings).

141. J. St. Clair, *An Analysis of the Constitutional Standard for Presidential Impeachment*, issued in late February, 1974 [hereinafter cited as *St. Clair*]. The memorandum consists of six pages of summary and a body of 61 pages.

142. The value of such "history" is illuminated by the citation, *St. Clair* at 42-43, of the argument of Luther Martin on behalf of Justice Samuel Chase in 1805. Martin, a heavy drinker, appeared in 1810 before Justice Chase on circuit in Baltimore, somewhat more inebriated than usual. Chase complained, "I am surprised that you can so prostitute your talents." Martin replied, "Sir, I never prostituted my talents except when I defended you and Col. Burr;" and turning to the jury he added confidentially, "[A] couple of the greatest rascals in the world." P. CLARKSON & R. JETT, *LUTHER MARTIN OF MARYLAND* 280 (1970). *In vino veritas*.

summary that has placed 170 years of history squarely behind the assertion of unlimited executive power to withhold information threatens to get incorporated into that collection of fixed beliefs and settled opinions that governs the conduct of affairs. History thereafter may become what lawyers mistakenly said it was therefore."<sup>143</sup> "Legal history," said Justice Frankfurter, "still has its claims."<sup>144</sup>

In the present controversial atmosphere it is all too easy to say "a plague on both your houses" and evenhandedly to attribute partisan readings of history to one and all. My study, however, of the meaning of "high crimes and misdemeanors," the central issue of impeachment, was undertaken in 1968-1970, submitted to the *Southern California Law Review* in mid-summer of 1970, and published in 1971,<sup>145</sup> long before Watergate surfaced and before there was any thought that President Nixon might be impeachable. Composed in the quiet of a university, uninfluenced by fees or hopes of preferment, my study may or may not be mistaken, but it can hardly be dismissed as biased, simply because there then was no occasion whatsoever for partisan bias.

#### A. *Indictable Offenses*

Let us begin in midstream with the Nixon-St. Clair thesis that impeachment is available only for an indictable crime. Former Attorney General Elliot L. Richardson recently stated, "It seems clear to me as a matter of common sense that impeachable offenses cannot be limited to matters defined in the U.S. Penal Code."<sup>146</sup> Common sense is buttressed by the historical record. Mr. St. Clair, quoting the Supreme Court, recognizes that under federal law there are no crimes except as declared by statute: "The legislative authority of the Union must first make an act a crime, affix a punishment to it . . ."<sup>147</sup> That is what the Act of 1790 did for treason and bribery;<sup>148</sup> but

143. Wiggins, *Lawyers as Judges of History*, 75 PROCEEDINGS MASS. HIST. SOC'Y 84, 104 (1963).

144. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 609 (1942) (concurring opinion).

145. Berger, *Impeachment for 'High Crimes and Misdemeanors'*, 44 S. CAL. L. REV. 395 (1971).

146. *Harv. L. Record*, Mar. 15, 1974, at 9.

147. St. Clair, *supra* note 141, at 17, quoting *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

148. Act of Apr. 30, 1790, ch. 9, §§ 1, 21, 1 Stat. 112, 117.

Professor Jefferson Fordham states that "treason is defined as a crime by the Constitution in the judicial article with the element of sanction left to the Congress." Fordham, *Book Review*, 47 S. CAL. L. REV. 673, 676 (1974). The Supreme Court held that, to constitute a crime, it is necessary to "affix a punishment to proscribed con-

with the exception of a handful of statutes, such as those that make “high misdemeanors” of privateering against friendly nations,<sup>149</sup> launching military expeditions against them from American soil,<sup>150</sup> practicing law by a federal judge,<sup>151</sup> conspiring or counseling to insurrection or riot,<sup>152</sup> there are no indictable “high misdemeanors.” Consequently, the offenses the Founders particularly had in mind would be unimpeachable. Consider “subversion of the Constitution”—usurpation of power, the very offense that prompted the addition of the words “high crimes and misdemeanors.” George Mason said in the Federal Convention:

Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined. . . . It is the more necessary to extend the power of impeachments.<sup>153</sup>

Under Mr. St. Clair’s interpretation the manifest intention of the Framers to reach such subversion would be frustrated by the lack of an indictable crime, for no federal statute has made it a crime. So too, other categories of “high crimes and misdemeanors,” under the English practice upon which our impeachment provisions were modeled and which were mentioned by the Founders, such as “abuse of power,” “betrayal of trust,” and “neglect of duty,” would also fall by the wayside. Yet Madison stated that protection against presidential “negligence” was indispensable, that perversion of the office “into a scheme of . . . oppression,” that is, “abuse of power,”

duct.” *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). Had Congress elected not to “affix a punishment,” treason would not have constituted a “crime”; no one could have been prosecuted for treason. By the Act of 1790, treason was made a crime; it will hardly be maintained that prior thereto treasonable acts were indictable. An unpunishable “crime” is like “a grin without a cat.”

Since, as Fordham recognized, “the definition appears to be intended for all purposes, including impeachment,” 47 S. CAL. L. REV. at 676, it cannot be assumed that impeachment for treason was criminal in nature. The fact that George Mason emphasized that “treason” as defined would not reach “subversion of the Constitution” and suggested “maladministration” which, to say the least, comprehended some acts of noncriminal nature, alone argues against such an assumption. See 2 FARRAND, *supra* note 89, at 550, cited in R. BERGER, *supra* note 68, at 86. The substitution of “high crimes and misdemeanors” for Mason’s “maladministration” indicates that the association of “high crimes and misdemeanors” with “treason” was not thought to render “high crimes and misdemeanors” criminal for impeachment purposes.

149. Act of June 14, 1797, ch. 1, § 1, 1 Stat. 520.

150. Act of June 5, 1794, ch. 50, § 5, 1 Stat. 384.

151. 28 U.S.C. § 454 (1970).

152. Act of June 5, 1794, ch. 50, § 1, 1 Stat. 381-82.

153. R. BERGER, *supra* note 68, at 86. Chapter 2 of my book incorporates the article cited in note 145 *supra*.

should be impeachable.<sup>154</sup> Madison, C. C. Pinckney, and Gouverneur Morris referred to "betrayal of trust";<sup>155</sup> Edward Rutledge spoke of "abuse of trust," as did Hamilton in *The Federalist*.<sup>156</sup>

Madison, the leading architect of the Constitution, furnished three illustrations of impeachable offenses that have never been made indictable crimes: (1) In the Virginia Ratification Convention he stated that "if the President be connected, in any suspicious manner with any person, and there be grounds to believe that he will shelter him," he may be impeached.<sup>157</sup> (2) In the First Congress—that "almost adjourned session of the Convention"—he said that the President would be impeachable if he "neglects to superintend [his subordinates'] conduct, so as to check their excesses."<sup>158</sup> (3) There too he stated that "the wanton removal of meritorious officers" would be impeachable.<sup>159</sup> To this day all of these categories of "high crimes and misdemeanors" have not been made indictable crimes, reflecting a continuing judgment by Congress, which has the "sole" jurisdiction of impeachment, that indictable crimes are not a prerequisite to impeachment, as four convictions by the Senate for nonindictable offenses confirm.<sup>160</sup>

One hundred and forty years ago Justice Story pointed out that only treason and bribery were made indictable offenses by statute and that insistence on indictable crimes would enable impeachable offenders to escape scot-free and render the impeachment provisions "a complete nullity."<sup>161</sup> The absurdity of Mr. St. Clair's analysis is pointed up by his incongruous juxtaposition of the 1790 treason and bribery statutes. "Any person" could be indicted under the "treason" Act whereas the "bribery" Act was specifically directed against judges who had accepted bribes.<sup>162</sup> Even today it is open to question whether the bribery statute embraces the President.<sup>163</sup> Ju-

154. R. BERGER, *supra* note 68, at 89.

155. *Id.*

156. THE FEDERALIST No. 65, *supra* note 85, at 423.

157. R. BERGER, *supra* note 68, at 89.

158. 1 ANNALS OF CONG. 372-73 (1789) (page running head "History of Congress").

159. 1 ANNALS OF CONG. 498 (1789) (page running head "History of Congress").

160. R. BERGER, *supra* note 68, at 57 n.15.

161. *Id.* at 77. See 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 796, 798 (5th ed. 1905). An earlier work, W. RAWLE, A VIEW OF THE CONSTITUTION 273 (2d ed. 1829), had come to the same conclusion.

162. See note 148 *supra*.

163. Members of Congress and officers of the United States were added by the Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171. Today, 18 U.S.C. § 201 (1970) covers "public official[s]," defined as "member[s] of Congress . . . or an officer or employee or person acting for or on behalf of the United States, or any department." Under the prior Act, an "officer of the United States" was deemed one "appointed by the President . . . or the head of some executive department." *United States v. Van Wert*,

dicial bribery was not mentioned in the Convention, but Gouverneur Morris emphasized that the President “may be bribed,” and he instanced that “Charles II was bribed by Louis XIV”<sup>164</sup> and that therefore the President ought to be impeachable. Notwithstanding that the President was the only mentioned object of constitutional impeachment for “bribery,” he would be unimpeachable on Mr. St. Clair’s reasoning because the penal “bribery” statute was confined to judges. Nor can we take seriously Mr. St. Clair’s argument that “high crimes and misdemeanors” must involve criminal “offenses of such a serious nature [as] to be akin to treason and bribery.”<sup>165</sup> Treason and bribery are rank unequals. Treason is the arch offense—betrayal of the state to the enemy—whereas acceptance of so much as \$50 as a bribe for favorable official action suffices to constitute bribery. Who would maintain that acceptance of such a petty bribe is more heinous than presidential usurpation or abuse of power?

It remains to add two Founders’ statements that repel the equation of an impeachable offense with an indictable crime. After advertent to impeachment in the North Carolina Ratification Convention, James Iredell stated that “the person convicted is *further liable* to a trial at common law, and may receive such common-law [criminal] punishment as belongs to a description of such offenses, *if it be punishable by that law.*”<sup>166</sup> In other words, an offense may be impeachable although it is not criminally punishable. Similar recognition is evidenced by George Nicholas’ distinction in the Virginia Ratification Convention between disqualification from office and “further punishment if [the President] has committed such high crimes as are punishable at common law.”<sup>167</sup> This clearly implies that some “high crimes” are not thus punishable and nevertheless impeachable. Finally, there is Hamilton’s statement in *The Federalist* No. 65 that an impeachment proceeding “can never be tied down by such strict rules . . . as in common [criminal] cases [which] serve to limit the discretion of the courts in favor of personal security,”<sup>168</sup> an analysis which Department of Justice lawyers concede “cuts against the argument that ‘high crimes and misdemeanors’ should be limited

195 F. 974, 976 (N.D. Iowa 1912); cf. *United States v. Germaine*, 99 U.S. 508, 510 (1878); and under the maxim *noscitur et sociis* the words “employee or person” might similarly exclude the President.

164. R. BERGER, *supra* note 68, at 89.

165. St. Clair, *supra* note 141, at 34.

166. R. BERGER, *supra* note 68, at 75 n.111 (emphasis added).

167. *Id.* at 79. See note 184 *infra* for Hamilton’s similar statement.

168. THE FEDERALIST No. 65, *supra* note 85, at 425-26.

to criminal offenses."<sup>169</sup> We can hardly prefer Mr. St. Clair to Hamilton, Madison, *et al.* as an expounder of the Framers' intention. That Mr. St. Clair can maintain against this background that we should "*uphold the intent of the drafters of the Constitution that impeachable offenses be limited to criminal violations*"<sup>170</sup> only illustrates to what lengths advocacy will go.

### B. *High Crimes and Misdemeanors*

Mr. St. Clair belabors the fact that in England, where removal from office and criminal punishment were united in one and the same proceeding, impeachment was criminal in nature,<sup>171</sup> a fact no one would dispute, albeit the crime, as we shall see, was of a peculiar sort. He totally ignores the impact of a momentous departure from the prior English practice, embodied in Article I, § 3(7), the separation between removal and criminal proceedings:

Judgment in Cases of Impeachment shall not extend further than to removal . . . and disqualification to hold and enjoy any Office . . . but the Party convicted shall nevertheless be liable . . . to Indictment . . . and Punishment, according to Law.<sup>172</sup>

In other words, if criminal law covered the offense, it would be indictable. Thus removal was to be a prophylactic measure, to remove an unfit man from office; criminal punishment was left to a separate proceeding. As Justice Story stated in 1830, impeachment "is not so much designed to punish an offender as to secure the state against gross official misdemeanors. . . . [I]t simply divests him of his political capacity,"<sup>173</sup> it removes and disqualifies him from office. Thus, in place of the combined English removal and criminal proceedings the Framers divorced the two, with consequences that James Wilson immediately perceived:

Impeachments . . . come not . . . within the sphere of ordinary [*i.e.*, criminal] jurisprudence. They are founded on different principles; are governed by different maxims, and are directed

169. Office of Legal Counsel, Dep't of Justice, Legal Aspects of Impeachment: An Overview, February 1974, at 14 [hereinafter cited as Justice Dep't Memorandum].

170. St. Clair, *supra* note 141, at 38-39 (emphasis in original).

171. *Id.* at 7, 10, 12, 13, 20, 26, 38. "To further reinforce the criminal nature of the process," says St. Clair, *id.* at 26-27, "an early draft provided that an impeachment was to be tried before the Supreme Court," as if the Court was to hear no civil cases. By the same reasoning, the subsequent transfer of the trial to the Senate should mark the offense as noncriminal.

172. U.S. CONST. art. I, § 3.

173. R. BERGER, *supra* note 68, at 79. See note 184 *infra*.



## The President, Congress, and the Courts

to different objects; for this reason, the trial and punishment of an offense on impeachment, is no bar to a trial of the same offense at common law.<sup>174</sup>

When Mr. St. Clair emphasizes the criminal nature of impeachment in England, he overlooks that there it was part and parcel of a criminal proceeding. The separation of the two in our Constitution demands a construction of impeachment in noncriminal terms lest it fall afoul of other constitutional provisions.

First there is double jeopardy. Were impeachment criminal in nature, as Mr. St. Clair repeatedly stresses, a conviction or acquittal on impeachment would bar a criminal indictment and a prior conviction or acquittal on indictment would bar an impeachment, for no man can be tried twice for the same offense.<sup>175</sup> Both Wilson and Story were aware of the play of double jeopardy in the constitutional provision.<sup>176</sup> The Framers meant to have both impeachment and indictment available, not to put Congress to a choice between either one or the other. Mr. St. Clair says not a word of the impact on double jeopardy of the separation of removal from indictment, a matter set forth for Mr. St. Clair in my book, *Impeachment: The Constitutional Problems*, which he quotes when it fits his needs.<sup>177</sup> Another example of selective history in this same focus is his citation of the Article III, § 3(3) provision that "trial of all crimes except . . . impeachment shall be by jury" in order to demonstrate that impeachment was limited to "criminal matters."<sup>178</sup> He ignores the fact, which I had also pointed out, that, with this exception before them, the draftsmen of the Sixth Amendment omitted it and extended trial by jury to "all criminal proceedings." Presumably they felt no need to exempt impeachment from the Sixth Amendment because they did not consider it a criminal prosecution. If impeachment be indeed criminal in nature, as Mr. St. Clair maintains, it must be tried by jury, not by the Senate, because "all criminal proceedings" means *all*, particularly after the omission of the prior exception, and second, because the Bill of Rights modifies all prior provisions of the Constitution that are in conflict with it.<sup>179</sup>

Constitutional analysis need not depart from common sense;<sup>180</sup> the

174. *Id.* at 80.

175. *Id.* at 80-81.

176. *Id.*; 1 J. STORY, *supra* note 161, § 782; see J. WILSON, *supra* note 76.

177. St. Clair, *supra* note 141, at 3.

178. *Id.* at 37-38.

179. R. BERGER, *supra* note 68, at 81-82.

180. See note 115 *supra*.

fact that the criteria of what were impeachable crimes in England were employed by the Framers to identify causes for removal from office does not serve to make removal criminal, as a familiar example will make clear. Suppose that Jones runs a red light at 80 miles an hour and crashes into Smith, severely injuring Smith and destroying his car. Such reckless driving constitutes a criminal offense, but that does not convert a civil suit to recover damages on those facts into a criminal proceeding. The difference was appreciated by Solicitor General Bork, who pointed out that "just as an individual may be both criminally prosecuted and deported for the same offense . . . a civil officer could be both impeached and criminally punished . . ." <sup>181</sup> Deportation, the Supreme Court held, "is not punishment for a crime. . . . It is but a method of enforcing the return to his country of an alien who has not complied with the conditions" laid down for his residence, <sup>182</sup> exactly as impeachment is designed solely to remove an unfit officer for the good of the state. That criminal prosecution may also be had on the same grounds does not render either deportation or removal by impeachment criminal. Solicitor General Bork justly concluded that "conviction of impeachment under our Constitution has no criminal consequences," whereas "impeachment in England was designed to accomplish punishment as well as removal." <sup>183</sup> Without criminal penalties such as fine or imprisonment, and limited to removal of an unfit officer, impeachment cannot be criminal in nature. <sup>184</sup>

But, Mr. St. Clair argues, such terms as "convicted" and the like "are all terms limited in context to criminal matters." <sup>185</sup> This terminology was taken into account by me in 1970, and I suggested that the Framers, engaged in an immense task—the drafting of a written Constitution for a new nation in the short space of fourteen weeks—could not at each step undertake "to coin a fresh and different vocabulary." That would have involved an insuperable labor. <sup>186</sup> As the Department of Justice lawyers recognize, quoting Professor John Pomeroy's mid-19th century treatise, "The word is borrowed, the procedure is imitated, and no more; the object and end of the

181. Bork, *supra* note 71, at 10n.\*\*.

182. R. BERGER, *supra* note 68, at 81.

183. Bork, *supra* note 71, at 10n.\*\*.

184. Hamilton distinguished between "their removal from office" and "*their actual punishment* in cases which would admit of it." THE FEDERALIST No. 70, *supra* note 85, at 461 (emphasis added). He thus recognized, as did Iredell and Nicholas, that *some* impeachable offenses could not be punished criminally. See p. 1141 *supra*.

185. St. Clair, *supra* note 141, at 38.

186. R. BERGER, *supra* note 68, at 85.

process are far different.”<sup>187</sup> To give this borrowed terminology conclusive effect on the issue of criminality is to invite the application of double jeopardy and trial by jury rather than by the Senate, as well as to disregard all of the statements by the Founders that clearly demonstrate their intention to make nonindictable offenses impeachable, an intention that courts normally strive to effectuate. Were these conflicting pulls between terminology and “original intention” and the like to be posed to a court, it would attempt to balance them not, like Mr. St. Clair’s selective history, to avoid the inescapable task of weighing heavily countervailing factors.

More than a little confusion has resulted from the fact that the Constitution employs the words “high crimes and misdemeanors.” The starting point is that “high crimes and misdemeanors” and ordinary “crimes and misdemeanors” are altogether different in meaning and origin. “High crimes and misdemeanors,” which the historical evidence shows meant “high crimes and *high* misdemeanors,” referred to offenses against the state, as the companion words “treason, bribery” indicate. Such offenses were triable by Parliament under the *Lex Parliamentaria* or law of Parliament. When the words were first employed in 1386 there was no such ordinary crime as “misdemeanor”; lesser crimes were then punishable as “trespasses.” “Misdemeanors” supplanted “trespasses” early in the 16th century, and, as Fitzjames Stephen pointed out, they were proceedings for wrongs against the individual and were triable in the courts rather than in Parliament.<sup>188</sup> It is safe to say that “high crimes and misdemeanors” were words of art peculiar to parliamentary impeachment<sup>189</sup> and had no relation to ordinary “crimes and misdemeanors” that were triable by the courts. “High misdemeanors,” it may be added, never entered the criminal law administered by the English courts, nor were ordinary “misdemeanors” a criterion for impeachments.<sup>190</sup>

In the main, Mr. St. Clair accepts this analysis: He states that “high crimes and misdemeanors” “was *the standard phrase*” used in “*parliamentary impeachments*,” “a unitary phrase meaning crimes

187. Justice Dep’t Memorandum, *supra* note 169, Appendix 1 at 24. Compare pp. 1143-44 *supra*.

188. J. STEVENS, THE CRIMINAL LAW OF ENGLAND 60 (1863) cited in R. BERGER, *supra* note 68, at 61.

189. Justice Frankfurter stated, “Words of art bring their art with them. They bear the meaning of their habitat . . . whether it be loaded with recondite connotations of feudalism.” Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947). For the meaning of “high crimes and misdemeanors,” see pp. 1139-40 *supra*.

190. R. BERGER, *supra* note 68, at 61-63.

against the state, as opposed to those against individuals."<sup>191</sup> He agrees that the word "high" modifies both "crimes and misdemeanors," and "refers to official conduct, conduct relating to one's function with respect to the State."<sup>192</sup> But he repeatedly skitters from "high misdemeanor" to "misdemeanor"; he cites, for example, Blackstone's distinction between "crimes" and "smaller faults and omissions . . . termed misdemeanors," notwithstanding that Blackstone, as Mr. St. Clair notices, differentiated "high misdemeanors" as "high offenses against the King and government."<sup>193</sup> The Framers well understood that "high misdemeanors" had a "technical meaning too limited";<sup>194</sup> and intellectual honesty demands an end to such verbal play on "misdemeanor," an end to shifts from historical meaning to "its present day context," whereunder "the purpose of inclusion of the word 'misdemeanor' is to include lesser criminal offenses that are not felonies."<sup>195</sup> For the Framers undeniably bor-

191. St. Clair, *supra* note 141, at 19 (emphasis in original).

192. *Id.* at 25, 33. His explanation of "high" is rested on "modern usage," citing to the HOUSE JUDICIARY COMM., 93d CONG., 1st SESS., IMPEACHMENT: SELECTED MATERIALS 622 (Comm. Print 1973). The citation to page 622 is to a reprint of my 1971 article, at which point I was tracing the centuries-long development, culminating in Blackstone!

193. St. Clair, *supra* note 141, at 21-22, 23. He neglected to notice Blackstone's statement in his discussion of "Misprisions . . . generally denominated *contempts* or *high misdemeanors*; of which 1. The first and principal is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment . . ." 4 W. BLACKSTONE, *supra* note 118, at 121 (emphasis in original). Contempts were punished by the respective tribunals against whom contemptuous conduct was proven, the courts or the Parliament. I recall no case in which Parliament turned to a court for punishment of a contempt against itself.

194. R. BERGER, *supra* note 68, at 86.

195. St. Clair, *supra* note 141, at 34 (emphasis in original). It is beside the point to say that "in *common parlance* a misdemeanor is considered a crime by lawyers, judges, defendants, and the general public," *id.* at 33, first, because a "high misdemeanor" is quite different from a "misdemeanor," and second, because the test of such a "technical" common law term is not present "common parlance" but what it meant to the Framers.

The language of the Constitution cannot be interpreted safely except by reference to the common law and British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the Thirteen States, were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary . . . [T]hey expressed [their conclusions] in terms of the common law, confident that they could be shortly and easily understood.

*Ex parte Crossman*, 267 U.S. 87, 108 (1925); *cf.* *United States v. Barnett*, 376 U.S. 681, 688 (1964).

To import "high" by resort to history as a special species of crime and then to argue that the words "high crimes and misdemeanors" . . . are so clear and unequivocal in and of themselves" that it is not "necessary to look beyond the words," St. Clair, *supra* note 141, at 32, 38, indicates that the right hand knew not what the left was doing. This maneuver was designed to invoke the "plain meaning" rule, which once shut off extrinsic evidence, but which has been badly battered in the last fifty years. *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.).

rowed "high misdemeanor" from the law of Parliament; they did not borrow "misdemeanor" from the "criminal" law of the courts. To glide from *their* meaning to the "modern context" and to a view that "misdemeanor" "include[s] lesser *criminal* offenses" is to revise the Constitution, the very thing Mr. St. Clair should most fear, lest it lead to the unbridled discretion not long since attributed to Congress by Vice President Gerald Ford and former Attorney General Kleindienst.<sup>196</sup>

C. *Mr. St. Clair's Theories*

Mr. St. Clair does not attempt to deal with the constitutional separation between impeachment and indictment, the consequent problems of double jeopardy, trial by jury of "all criminal prosecutions," or the long-standing dichotomy between parliamentary trials of political "high misdemeanors" and court trials of criminal "misdemeanors," but he comes up with some far-fetched theories. He begins with the American "commitment to two central and interrelated ideas. The first is the theory of limited government and the second is the mechanism of separation of powers."<sup>197</sup>

Both President Nixon and Mr. St. Clair disregard the fact that the Framers adopted impeachment as *a breach* in the separation of powers. In the Federal Convention Rufus King dwelt on the "primitive axiom that the three great departments of Govts. should be separate & independent. . . . Would this be the case if the Executive should be impeachable? . . . [It] would be destructive of his independence and of the principles of the Constitution."<sup>198</sup> Charles Pinckney likewise urged that it would "effectually destroy his independence."<sup>199</sup> But such views were decisively rejected by a vote of 8 to 2, because, as George Mason stressed, "[N]o point is of more importance than that the right of impeachment should be continued." Madison "thought it indispensable that some provision should be made for defending the Community against the incapacity, negligence

196. See R. BERGER, *supra* note 68, at 53; Wash. Star-News, Apr. 11, 1973, at A2, col. 1.

197. St. Clair, *supra* note 141, at 2.

198. *Id.* 2 FARRAND, *supra* note 89, at 66-67.

199. Particularly disconcerting is St. Clair's non sequitur that that President "was, while President, unindictable by ordinary criminal process. This, of course, is why some members of the Constitutional Convention, Mr. Pinckney, for example, thought impeachment was wholly unnecessary." St. Clair, *supra* note 141, at 10. Pinckney explained to the Senate in 1800 that congressmen were given specific and very limited privileges (immunity from arrest) and none were given to the President. 10 ANNALS OF CONG. 72, 74 (1800). This ill comports with an attribution to him of presidential unindictability.

or perfidy of the chief Magistrate." Impeachment was favored by Edmund Randolph because the "Executive will have great opportunity of abusing his power."<sup>200</sup> It was precisely to effectuate the limits on executive power embodied in the Constitution that impeachment was adopted. As Elias Boudinot, for years President of the Continental Congress, said in the First Congress, impeachment is an "exception to a principle," the separation of powers.<sup>201</sup> Commenting on Hamilton's statement that impeachments were regarded "as a bridle in the hands of the legislative body upon the executive servants . . ."<sup>202</sup> Department of Justice lawyers state that Hamilton was "justifying the exceptions to the separation of powers found in the American provisions relating to impeachment."<sup>203</sup> The extraordinary spectacle now presented by presidential attempts to define the jurisdiction of the House Judiciary Committee and to limit its access to White House documents based on an invocation of the separation of powers stands history on its head. This invasion of the House's "sole" power to impeach, expressed in the Constitution, is more grotesque when it is compared to Mr. Nixon's strenuous claims of inviolable "confidentiality" of which the Constitution contains not a trace.

Mr. St. Clair muddies the waters when he cites James Iredell's 1786 statement that the North Carolina Constitution was not designed to fashion a legislative "despotism" but to "guard against the abuse of unlimited power."<sup>204</sup> First, in 1788 the Framers accomplished that purpose by a careful grant to Congress of enumerated and limited powers. And second, that Iredell himself believed that impeachment for nonindictable offenses was not identifiable with legislative "despotism" is evident in his reference to "impeachment for concealing important intelligence from the Senate" respecting foreign relations.<sup>205</sup> Mr. St. Clair himself quotes Madison's statement that "the executive magistracy is carefully limited," whereas the "legislative department derives a superiority . . . , its constitutional powers being at once more extensive, and less susceptible of precise limits."<sup>206</sup> "In republican government," said Madison, "the legislative authority necessarily predominates."<sup>207</sup> What we are witnessing is a presidential

200. 2 FARRAND, *supra* note 89, at 69, 65, 67; R. BERGER, *supra* note 68, at 89.

201. R. BERGER, *supra* note 68, at 118 n.73.

202. THE FEDERALIST NO. 65, *supra* note 85, at 425.

203. Justice Dep't Memorandum, *supra* note 169, Appendix 1 at 23.

204. St. Clair, *supra* note 141, at 4.

205. R. BERGER, *supra* note 68, at 79.

206. St. Clair 5

207. R. BERGER, *supra* note 68, at 100.

effort to abort the accountability to Congress that the Founders designed in the impeachment process. This process does not endow Congress with unlimited power, for it must act within the confines of "high crimes and misdemeanors."<sup>208</sup> It is Mr. St. Clair who would confer illimitable power on the President by making him unaccountable in an impeachment proceeding except on terms that the President lays down. As well may a banker under suspicion dictate the terms of investigation to a bank examiner.

One of Mr. St. Clair's mistakes is to postulate two unpalatable alternatives: at one pole indictable crimes, at the other unlimited congressional discretion.<sup>209</sup> But there is a median possibility which in fact was the choice of the Framers: Impeachment would be both limited and noncriminal. In noticing that "high crimes and misdemeanors" had a "technical meaning too limited," the Framers exhibited awareness that the words had a "limited" content defined by the English practice at the adoption of the Constitution. As we have seen, they repeatedly referred to the established categories, namely, subversion of the Constitution, abuse of power, neglect of duty—all nonindictable and *limited* offenses.<sup>210</sup> To be sure, these are broad categories, but no more so than many standards employed by the law, such as restraint of trade, the care of an ordinary prudent man, or due process itself.

The English categories expressed the evils at which the Framers squarely aimed; Mr. St. Clair's attempts to explain them away are a grasping at straws. Consider his argument based on the rejection of "maladministration" as an impeachable offense in favor of "high crimes and misdemeanors" in an effort to show that "impeachment was designed to deal exclusively with indictable criminal conduct." "Thus," he states, the Framers "manifested their intention to narrow the scope of impeachable offenses."<sup>211</sup> Without doubt the phrase "high crimes and misdemeanors" is narrower than "maladministration," which might include minor examples of mismanagement. But rejection of "maladministration" does not spell a "narrowing" of "high crimes and misdemeanors"; we need to look to "high crimes

208. *Id.* at 86-90.

209. St. Clair 14.

210. R. BERGER, *supra* note 68, at 70, 89.

211. St. Clair, *supra* note 141, at 30-31, 32. He argues that Gouverneur Morris' argument for retention of Mason's proposed "maladministration" on the ground that "it will not be put in force & can do no harm—an election of every four years will prevent maladministration," 2 FARRAND, *supra* note 89, at 550, "expressed the will of the Convention," St. Clair 31, notwithstanding that the Convention then proceeded to reject Morris' plea for "maladministration" and substituted "high crimes and misdemeanors." Such analysis is sloppy.

and misdemeanors" itself for the content the phrase had in both parliamentary practice and the eyes of the Framers. Each of the categories recognized by the Founders, such as "abuse of power" and "neglect of duty," was a category at English law of "high crimes and misdemeanors" and each represents a form of maladministration, that is, "improper management of public affairs." Thus "maladministration" within the parameters of "high crimes and misdemeanors" undoubtedly was to be impeachable. For this we have Madison's testimony. Referring to displacement "from office [of] a man whose merits require that he should be continued in it" (wanton discharge), Madison stated that the President "will be impeachable by this House, before the Senate, for such an act of maladministration."<sup>212</sup>

Equally without merit is Mr. St. Clair's assertion that "[t]he Convention rejected all noncriminal definitions of impeachable offenses. . . . Terms like 'malpractice,' 'neglect of duty' . . . and 'misconduct' were all considered and discarded."<sup>213</sup> In fact, however, "malpractice" and "neglect of duty" were considered and "agreed to" at an early stage;<sup>214</sup> later, when the issue was whether the President should be impeachable, Franklin urged that impeachment was needed when the President's "misconduct should deserve it."<sup>215</sup> This was not put to a vote and it was not "rejected." Instead, the Framers adopted "high crimes and misdemeanors," which *included* "neglect of duty" and serious "misconduct" in office, as the Framers were well aware. Since the generic "high crimes and misdemeanors" embraced those particulars, there was no need to spell them out; an omission to do so cannot therefore be twisted into a "rejection" of the particulars.

Next Mr. St. Clair scoffs at the Framers' comments on impeachable categories because they antedated the Convention's decision on the "nature of the executive branch." Hence there was "no clear concept of who would be impeached."<sup>216</sup> But by July 20, the date of the early remarks, it had been settled, in Madison's words, that "the Executive Magistracy . . . was to be administered by a single man."<sup>217</sup> The later discussions avouched by Mr. St. Clair merely have reference to the several methods of electing the President; they did not alter impeachability of that "single man."<sup>218</sup> By his own admis-

212. 1 ANNALS OF CONG. 517 (1789) (page running head "History of Congress").

213. St. Clair, *supra* note 141, at 31.

214. 1 FARRAND, *supra* note 89, at 88.

215. 2 *id.* at 65.

216. St. Clair 27-30.

217. 2 FARRAND 66.

218. St. Clair 28-29.



sion, the last discussion of the subject on September 8 was Mason's admonition that provision must be made for "great and dangerous offenses," such as the nonindictable subversion of the Constitution, which led directly to the adoption of the phrase "high crimes and misdemeanors."<sup>219</sup> Moreover, when the Founders referred to the earlier categories in the several Ratification Conventions, they clearly demonstrated their satisfaction with the noncriminal content of "high crimes and misdemeanors"; and, as we have seen, Madison listed still other nonindictable offenses in the First Congress.

To illustrate "the opposition of the Framers to the abuse in the English tradition," Mr. St. Clair points to their proscription of bills of attainder, corruption of blood, and narrow definition of treason.<sup>220</sup> These examples demonstrate, however, that the Framers well knew how to reject undesirable practices. The fact that they defined treason narrowly and left "high crimes and misdemeanors" untouched indicates that they were content to follow English practice in "high crimes and misdemeanors,"<sup>221</sup> as their references to the several categories confirm. Mr. St. Clair further argues that the treason and attainder examples "express the deep commitment to due process which permeates the Constitution. This due process would be emasculated if the impeachment process were not limited to indictable offenses."<sup>222</sup> Since it is the intention of the Framers that Mr. St. Clair purports to seek, we must view due process as they did. For them due process merely demanded conformity with the procedure required by the law of the land. Hamilton gave, as an example, "due process of law, that is by indictment or presentment of good and lawful men, and trial and conviction in consequence."<sup>223</sup> Charges filed

219. *Id.* at 30-31.

220. *Id.* at 14, 16-17, 40.

221. A striking example of the Founders' assumption that English law would be applicable unless barred is exhibited by the First Congress' prohibition of resort to "benefit of clergy" as an exemption from capital punishment, an exemption first afforded by the common law to the clergy and then to such of the laity as could read. R. BERGER, *supra* note 68, at 76.

St. Clair also argues that because the "pardon power is explicitly excluded for impeachment convictions" it "can only be understood as a reaction to and rejection of the English political impeachments." The exclusion proves exactly the contrary: The fact that a pardon *can not* save one convicted on impeachment shows an intention to *preserve* impeachments of whatever nature. The exception for pardons derived from English history and practice, when the pardon of the Earl of Danby by Charles II, after his impeachment, blew up a storm. As a result, the Act of Settlement fashioned a partial bar to such pardons; and a remark by George Nicholas in the Virginia Ratification Convention shows that the Founders were aware of this history: "Few ministers will ever run the risk of being impeached, when they know the King cannot protect them by a pardon." R. BERGER, *supra* note 68, at 45, 55 n.7, 101.

222. St. Clair, *supra* note 141, at 17.

223. 4 A. HAMILTON, WORKS 237 (Lodge ed. 1904). The "due process" of the Fifth Amendment, said Charles Curtis, incontrovertibly "meant a procedural due process, which

by the House and trial by the Senate under the ascertainable law were all that due process required in the eyes of the Framers.

Still another of Mr. St. Clair's contributions to history is his dismissal of the "impeachments between 1621 and 1715 [which] had as their main purpose the achievement of parliamentary supremacy." Indeed, "some individuals were impeached merely because they . . . were favorites of the King and hence rivals of the Parliament in settling State policy."<sup>224</sup> Shades of the dissolute Duke of Buckingham! His "boundless influence over both James I and Charles I," said Professor Chafee, "was one of the greatest calamities which ever hit the English throne," and he, Macaulay stated, illustrates why "favorites have always been highly odious."<sup>225</sup> Such impeachments, according to Mr. St. Clair, "distorted" the process in order to achieve "parliamentary supremacy," which he labels an "abuse."<sup>226</sup> This is a hair raising description of a process that halted the tide of monarchical absolutism which was sweeping over Europe. Mr. St. Clair's conclusion that this aspect of impeachment was opposed by the Framers as "an abuse in the English tradition"<sup>227</sup> reveals unfamiliarity with the fact that for them that parliamentary struggle was the cradle of liberty.<sup>228</sup> In truth, their expressions of distrust of "favorites," their hatred of Stuart absolutism<sup>229</sup> which had engendered the great English impeachments, their abiding faith in the legislature<sup>230</sup> which led the Framers to give it a "bridle" on the executive, their repeated references to impeachable offenses such as subversion of the Constitution, abuse of power, and even to the giving of "bad advice" by Ministers to the Crown<sup>231</sup> that emerged from this struggle for parliamentary supremacy, demonstrate that the Framers, far from regarding these as "abuses" and "distortions" to be repudiated, adopted them

could be easily ascertained from almost any law book." Curtis, *Review and Majority Rule*, in *SUPREME COURT & SUPREME LAW* 177 (E. Cahn ed. 1954). The shift to "substantive" due process began in the late 19th century. R. McCloskey, *THE AMERICAN SUPREME COURT* 128-32 (1960); Hamilton, *The Path of Due Process of Law*, in *THE CONSTITUTION RECONSIDERED* 167 (C. Read ed. 1938).

224. St. Clair 12-13, 15.

225. R. BERGER, *supra* note 68, at 72.

226. St. Clair, *supra* note 141, at 13, 16.

227. *Id.* at 16.

228. "The privileges of the House of Commons, for which the people had fought in the seventeenth century . . . [they] held to be synonymous with their liberty . . . ." J. CLIVE, *MACAULAY* 124-25 (1973).

229. R. BERGER, *supra* note 68, at 5 n.9, 99 n.215, 101 n.228.

230. Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must look to representative assemblies for the protection of their liberties." *Myers v. United States*, 272 U.S. 52, 294-95 (1926) (dissenting opinion). The constitutional provision for impeachment is one piece of evidence for that view.

231. R. BERGER, *supra* note 68, at 71-72, 71n.91, 89.

en bloc in order to save the nascent democracy from executive usurpations and excesses. Mr. St. Clair's reading of history underlines anew the wisdom of Pope's injunction—"Drink deep, or taste not the Pierian spring."

D. *Selectivity: Other Examples*

Let me close with a few additional examples of discriminatory selectivity which a lawyer employs to acquit a client but which hardly comport with the duty of one who professes to give a faithful historical account. After alluding to treason and bribery, Mr. St. Clair states, "Other crimes for which impeachments were brought included the misappropriation of government funds, participation in various plots against the government . . . and voicing religious beliefs prohibited by the laws." By the First Amendment, he continues, the Constitution "specifically rejected the English precedents of impeaching individuals for their religious beliefs."<sup>232</sup> From this one might conclude that he had exhausted the roster of impeachable offenses. Where is mention of subversion of the Constitution, abuse of power, betrayal of trust, and neglect of duty, which were impeachable offenses in England, and to which the Founders adverted?

Again, Mr. St. Clair quotes Erskine May for the proposition that "impeachments are reserved for extraordinary crimes and extraordinary offenders,"<sup>233</sup> but he neglects to add May's statement that "[i]mpeachments by the Commons, for high crimes and misdemeanors beyond the reach of the [criminal] law . . . might still be regarded as an ultimate safeguard of public liberty."<sup>234</sup> Throughout, Mr. St. Clair plays a tattoo on the fact that impeachment was a proceeding "for great men and great causes."<sup>235</sup> Would he read out of the Constitution the express provision for impeachment of "all civil officers" who are not "great men"? Is not the President a "great man" by any standard? Then too, "great offenses" for the Founders were the impeachable offenses that they enumerated, for which we cannot now substitute a new version supplied by defense counsel.

Consider finally Mr. St. Clair's selection from Edmund Burke at the trial of Warren Hastings:

232. St. Clair. *supra* note 141, at 12.

233. *Id.* at 9.

234. T.E. MAY, *PARLIAMENTARY PRACTICE* 39 (17th ed. 1964).

235. *See, e.g.*, St. Clair 9.

We say, then, not only that he governed arbitrarily, but corruptly . . . that is to say, that he was a giver and receiver of bribes. . . . In short, money is the beginning, the middle, and the end of every kind of act done by Mr. Hastings.<sup>236</sup>

The emphasis on "money" is apt to overshadow that Hastings was charged with governing "arbitrarily," the classic impeachable offense, and that Burke's accusations reached far deeper than "bribery." In his opening statement before the Lords he stated,

It is by this tribunal that statesmen who *abuse their power* . . . are tried . . . not upon the niceties of a narrow [criminal] jurisprudence, but upon the enlarged and solid principles of morality.<sup>237</sup>

Observe that Burke, the hero of the Founders for his defense of the American revolt, emphasized that "abuse of power" was not to be tried by the narrow principles of criminal law. And he concluded, "I impeach Warren Hastings of high crimes and misdemeanors. I impeach him in the name of the Commons . . . whose *trust* he has betrayed . . ." <sup>238</sup> To ignore these statements while concentrating attention on "bribery" is to deal in halftruths and to stray from candor.

Enough has been set out to expose Mr. St. Clair's cavalier treatment of history; and though it is tempting to invoke the Latin maxim, so often applied by the courts—false in one thing, false in everything—I prefer rather to forego analysis of the rest of the 61-page St. Clair memorandum in order to spare the reader a needlessly wearisome and tedious journey. Against this background it is sheer effrontery to say, as does Mr. St. Clair,

[a]ny 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.<sup>239</sup>

In conclusion, Mr. St. Clair has resolutely closed his eyes to adverse facts throughout, to the impact of the American separation

236. *Id.* at 14.

237. 7 E. BURKE, *supra* note 140, at 11, 14.

238. *Id.* at 267.

239. St. Clair 60.

## The President, Congress, and the Courts

of removal on impeachment from criminal trial by jury of “all criminal prosecutions” if, as he argues, the removal proceeding must be regarded as criminal in nature. “Historical reconstruction,” said a distinguished English historian, Sir Herbert Butterfield, “must at least account for the evidence that is discrepant, and must explain how the rejected testimony came to exist.”<sup>240</sup> Judges too require lawyers to meet the arguments of opposing counsel. When Mr. St. Clair neglects to do so and wraps himself in the cloak of pseudo-history, he lays himself open to the suspicion that he is not so much engaged in honest reconstruction of history as in propaganda whose sole purpose is to influence public opinion in favor of a client who is under grave suspicion. An “acquittal so obtained,” said Macaulay, “cannot be pleaded in bar of the judgment of history.”<sup>241</sup>

240. H. BUTTERFIELD, *supra* note 136, at 225.

241. T. MACAULAY, *supra* note 127, at 516.