

Notes

The Scope of the Power to Impeach

In the intense controversies of last year concerning the impeachment of former President Nixon, the prevailing view was that the Constitution limits impeachable offenses to treason, bribery, or other "high crimes and misdemeanors."¹ This Note contends that the prevailing view comports neither with the text of the Constitution nor with much of the history relevant to an understanding of impeachment, and fails to protect the public against much serious misconduct by government officials, including the President. The Note will argue (1) that impeachable offenses are not defined in the Constitution, (2) that "high

1. That proposition is the starting point of Raoul Berger's thorough exegesis of impeachment, which appeared in late 1973. Berger concludes that "high crimes and misdemeanors," and therefore impeachable offenses, amount to serious misconduct, but are not limited to statutory crimes. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 53-102 (1973) (esp. 91-93) [hereinafter cited as BERGER]. Views of impeachment akin to that of Berger can be traced at least as far back as Joseph Story. See 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 789-98, at 575-83 (5th ed. 1891). Another recent commentator focusses more specifically than Berger on American federal impeachments, and concludes that "high crimes and misdemeanors" consist only of crimes indictable under federal law and violations of oaths of office. I. BRANT, *IMPEACHMENT* 23 (1972) [hereinafter cited as BRANT]. Another commentator concludes that "high crimes and misdemeanors" should be limited to misconduct, not necessarily criminal, which threatens the structure of government itself. C. BLACK, *IMPEACHMENT: A HANDBOOK* 36-41 (1974) [hereinafter cited as BLACK]. The common starting point of these commentators was so little challenged that, almost by default, the words "high crimes and misdemeanors" have come to be virtually synonymous with "impeachable offenses." The staff of the House Judiciary Committee took a position very close to that of Berger. See *IMPEACHMENT INQUIRY STAFF OF HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT* 1, 4 (Comm. Print 1974). The President's lawyers took a position very near that of Brant. See St. Clair, *An Analysis of the Constitutional Standard for Impeachment*, in *PRESIDENTIAL IMPEACHMENT: A DOCUMENTARY OVERVIEW* 40-73 (M. Schnapper ed. 1974). Nearly all of the many others who wrote or spoke on the subject of impeachment—while disagreeing among themselves over what constitutes a high crime or misdemeanor—agreed that the Constitution requires a high crime or misdemeanor as the basis of an impeachment. See, e.g., Fenton, *The Scope of the Impeachment Power*, 65 Nw. U.L. REV. 719, 720 (1970); *Panel on Impeachment*, YALE L. REP., Winter 1974, at 25-27 (remarks of Pollak & Summers). An extensive listing of available sources on impeachment—with capsule summaries of their leading contentions—may be found in the House Judiciary Committee print, *supra*, reprinted in BLACK, *supra*, at 71-76. The proceedings against President Nixon did not culminate in a final adjudication, and therefore constitute less than a perfect precedent for any given theory of impeachment. But most of the decisions and recorded statements relating to those proceedings rested on the assumption that "high crimes and misdemeanors" exhaust the list of impeachable offenses. See *Hearings on H. Res. 803 Before the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974)* (esp. at 2) (entitled "Debate on Articles of Impeachment") [hereinafter cited as *Hearings on Nixon Articles*]. But see 120 CONG. REC. H3833 (daily ed. May 14, 1974) (remarks of Rep. Reuss). What follows here is an attempt to challenge that assumption, lest the passage of time confer insuperable authority on the currently prevailing view.

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crimes and misdemeanors” are an historically well-defined category of offenses aimed specifically against the state, for which removal is mandatory upon conviction by the Senate, (3) that Congress has the power to impeach and remove civil officers for a wide range of serious offenses other than high crimes and misdemeanors, and (4) that the Senate can impose sanctions less severe than removal from office on civil officers convicted of such other offenses.

I. The Text of the Constitution

A. *The Meaning of Article II, § 4*

The prevailing view of impeachment rests on Article II, § 4, of the Constitution:

The President, Vice President, and all civil officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.

Recent commentators have generally found in this clause the entire scope of the impeachment power.² But a careful reading of the language indicates that it is neither a definition of the impeachment power nor an exhaustive listing of impeachable offenses.

First, on their face, the words of Article II, § 4, do not purport to be a definition. They *require* the removal of civil officers convicted in impeachment proceedings of “treason, bribery, or other high crimes and misdemeanors.” “Shall be removed” has the form of a command, not of a definition.³

Second, the language of Article II, § 4, does not indicate that it is

2. See sources cited in note 1 *supra*.

3. “Shall” has imperative force everywhere in the Constitution when it occurs in an *independent* clause. Every command in the Constitution is couched in terms of “shall.” See, e.g., *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328-33 (1816). There were exchanges at the Federal Convention confirming that the Framers attached imperative force to “shall.” See 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 377, 412-13 (rev. ed. 1937) [hereinafter cited as FARRAND].

In a chancery case of 1744 the question of the imperative force of “shall” arose in a context closely analogous to the one considered here. In the constitution of a trust, the trustees and survivors were given a general power to remove “the chaplain, treasurer, and other officers and merchants” from a College. There was an additional clause asserting that “if they find any merchant immoral, guilty of drunkenness, they *shall* and may remove them” (emphasis added). The Chancellor concluded that “the latter clause is not a restraining clause, or gives them less power, but only lays an injunction or obligation upon them to remove for such general offenses, and leaves them in every instance besides to act at their discretion The words *shall and may* in general acts of parliament, or in private constitutions, are to be construed imperatively, they *must* remove them.” *Attorney General v. Lock*, 26 Eng. Rep. 897, 898 (Ch. 1744).

an *exhaustive* listing of impeachable offenses. That civil officers *must* be removed for "treason, bribery, or other high crimes and misdemeanors," does not preclude the existence of other misconduct for which they *may* be impeached and removed. For Article II, § 4, to be an exhaustive listing, "shall be removed for" must be taken as somehow equivalent to "shall be removed *only* for." But when the drafters of the Constitution wished to give a restrictive definition, they knew how to do so unambiguously, as in their definition of treason.⁴ Thus, objectively read, Article II, § 4, does not define all impeachable offenses, but specifies those offenses for which removal is mandatory.

B. *Other Constitutional Provisions on Impeachment*

The other provisions in the Constitution relating to impeachment support the "imperative" rather than the "exhaustive" interpretation of Article II, § 4. The impeachment power is granted to Congress in Article I:

The House of Representatives . . . shall have the sole Power of Impeachment.⁵

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The Senate shall have the sole Power to try all Impeachments.⁶

Here the word "impeachment" is used in a familiar context without explanation or qualification. It is a time-honored canon of constitutional construction that words so used are to be taken in their established sense in 1787.⁷ Impeachable offenses both in England and America had included misconduct other than "high crimes and misdemeanors."⁸ Thus if Article II, § 4, is to be taken, against the express

4. U.S. Const. art. III, § 3. Note the words "only" and "unless." Chief Justice Taney commented upon the careful drafting of the Constitution: "[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).

5. Art. I, § 2.

6. Art. I, § 3. The powers are distributed in Congress as they had been in Parliament, with the accusatory power (which had belonged to the House of Commons) given to the House of Representatives, and the judging power (which had belonged to the House of Lords) vested in the Senate.

7. In 1807, Chief Justice John Marshall wrote of another such phrase, "levying war": It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.

United States v. Burr, 25 F. Cas. 55, 159 (No. 14,693) (C.C.D. Va. 1807). See *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925). Justice Frankfurter wrote: "Words of art bring their art with them. They bear the meaning of their habitat . . ." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

8. See pp. 1325-27 *infra*.

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force of its words, as an exhaustive listing of impeachable offenses, it also represents a sharp break with earlier practice. Had the Framers intended such a break, they could have accomplished it more clearly than by commanding removal for high crimes and misdemeanors in Article II after providing a general grant of the power to impeach in Article I.

The proposed reading of Article II, § 4, is confirmed in yet another clause on impeachment from Article I, § 3:

Judgment in Cases of Impeachment *shall not extend further than* to removal from Office and disqualification to hold or enjoy an Office of honor, Trust, or Profit under the United States.⁹

This limitation on the severity of judgments bears on the scope of the impeachment power in several ways.

First, it confirms the drafters' ability to be explicit when departing from English precedents. This provision of Article I prohibits the more severe penalties allowed in England.¹⁰ Had the Framers also wished to provide for a narrower range of impeachable offenses, they could have put a similar limitation in the Article in which they granted to Congress the powers of impeachment.

Second, the words "judgment . . . shall not extend *further* than to . . ." plainly do allow judgments to extend *less* far than removal and disqualification.¹¹ This possibility of lesser judgments than removal is reinforced both by history¹² and by the terms of Article II, § 4. Most recent commentators ignore the possibility of lesser penalties than removal and read Article I, § 3, as though it read in effect: "The *only* judgments in cases of impeachment shall be removal and disqualification."¹³ Not only is this reading a strain on the language,

9. (Emphasis added.)

10. As the Framers were well aware, see BERGER, *supra* note 1, at 4 n.21, 30 n.107, 87 n.160, 122 n.4, 143 n.97, the English House of Lords had handed down a wide variety of judgments in impeachment cases. Compare case of Henry Sacheverell, 15 STATE TRIALS 1, 39, 474 (Howell 1710) (temporary suspension from preaching) and case of Theophilus Field, 2 STATE TRIALS 1087, 1118 (Howell 1620) (censure), with case of Lord Lovat, 18 STATE TRIALS 529, 838 (Howell 1746) (hanging, drawing and quartering).

11. It may be difficult in the case of fines and damages to determine whether or not they are "lesser" judgments than removal and disqualification. 4 W. BLACKSTONE, COMMENTARIES *140-41 [hereinafter cited as BLACKSTONE] suggests that fines are lesser penalties than forfeiture of office. In any event, there do exist judgments of the same nature as removal and disqualification which clearly extend "less far," such as censure, enjoining misconduct, or temporary suspension.

12. See note 10 *supra*; note 16 *infra*.

13. See, e.g., *Hearings on Nixon Articles*, *supra* note 1, at 5. But the following provision from Thomas Jefferson's 1783 draft of a proposed constitution for Virginia demonstrates the capacity of at least one 18th century lawyer to express this idea unambiguously: "[A]nd the *only* sentence they shall have authority to pass shall be that of deprivation and future incapacity of office." THE JEFFERSONIAN CYCLOPEDIA 416 (J. Foley ed. 1967) (emphasis added).

but it makes Article II, § 4, strangely redundant: were no lesser judgment possible, the command to remove would be gratuitous. Conversely, if it is argued that the command of Article II, § 4, bars judgments less severe than removal in all cases, then Article I, § 3, which appears to countenance lesser judgments, is at best badly drafted and at worst inconsistent. Given that removal and disqualification are the outer limits of a range of judgments, it is extremely unlikely that the Framers would have made Article II, § 4—which commands removal¹⁴—the vehicle for defining the entire range of impeachable offenses. The elimination of the more severe judgments is in fact more consistent with a broadening than with a narrowing of the range of impeachable offenses:¹⁵ those impeached by the House of Representatives have ultimately less to fear from the possible partisanship or irrationality of their judges (in the Senate) than did those Englishmen who faced loss of life or liberty at the hands of the Lords.¹⁶

14. The fact that Article II, § 4, mandates only one of the extreme judgments expressly permitted in Article I, § 3, is an additional reason to see it as not containing the entire scope of impeachment.

15. A similar point was made by Mason at the Constitutional Convention. See p. 1331 *infra*.

16. The theory presented in this Note—that the expression “high crimes and misdemeanors” describes offenses requiring removal, but does not describe the full range of impeachable offenses—is not new. The first impeachment under the Federal Constitution to result in a conviction was that of Judge Pickering in 1803. In the Pickering case—which was the only impeachment trial before 1936 to contain an actual holding of guilt bearing on the range of impeachable offenses—the Senate not only rejected “high crimes and misdemeanors” as a prerequisite to conviction, but appeared to acknowledge the possibility of judgments less than removal. For an analysis of Pickering’s conviction for offenses other than “high crimes and misdemeanors,” see note 92 *infra*. Having found Pickering guilty by a vote of 19 to 7, the Senate passed a judgment of removal by a separate vote of 20 to 6. 13 ANNALS OF CONG. 367 (1803). If no lesser sanction than removal were possible this second vote would have been unnecessary. But since Pickering had not been convicted of “high crimes and misdemeanors,” removal was not mandatory.

The “imperative” interpretation of Article II, § 4, is also substantiated by early comment on impeachment. In the First Congress Rep. Boudinot of New Jersey indicated a connection between the imperative character of Article II, § 4, “declaring absolutely that he shall be removed,” and the provision in Article I, § 3, allowing judgments less severe than removal:

notwithstanding the clearest proof of guilt, the Senate might only impose some trifling punishment, and retain him in office, if it were not for this declaration in the constitution.

1 ANNALS OF CONG. 486-87 (1789) (running head: “Gales & Seaton’s History of Debates in Congress”).

Early impeachment proceedings provide further support for the “imperative” interpretation. Reps. Bayard and Harper, managers of the impeachment trial of Sen. William Blount in 1799 (the first under the Federal Constitution), argued that the power to impeach is granted to Congress in its established sense and that Article II, § 4, merely compels the removal of officers found guilty of the specified offenses. 8 ANNALS OF CONG. 2251-53, 2298-99, 2301-04 (1799). Harper also insisted on the possibility of lesser penalties than removal. *Id.* at 2302. These issues were not resolved because the Senate disposed of the Blount case on the ground that a Senator is not subject to impeachment for crimes committed while in office. See *id.* at 2318; BRANT, *supra* note 1, at 28, 45. The constitutional boundaries were explored in another early impeachment trial, that of

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The prevailing interpretation of the Constitution also strains the meaning of the provision for the tenure of judges, who hold office "during good behaviour."¹⁷ That provision serves to give judges life tenure, and to indicate a standard for their removal. Article II, § 4, applies by its terms to all civil officers, and there is no indication anywhere in the Constitution that judges can be removed in any way other than impeachment.¹⁸ If the listing of impeachable offenses in Article II, § 4, is indeed exhaustive, then judges' "good behaviour" includes all conduct short of "high crimes and misdemeanors." But there had never been any historical connection between judges' "misbehaviour" and "high crimes and misdemeanors."¹⁹ The problem of reconciling judges' "good behaviour" with the offenses enumerated in Article II, § 4, disappears once the latter provision is perceived as requiring the removal of officers who have committed "high crimes

Justice Samuel Chase in 1805. Luther Martin, the leading counsel for the defense, naturally adopted the "exhaustive" theory of Article II, § 4. 14 ANNALS OF CONG. 432 (1805) (Martin quotes the clause erroneously in making his argument). One of the managers of the Chase trial, Rep. Rodney of Delaware, asserted the "imperative" theory, stressing the common law background of impeachment, as well as the relation between the possibility of lesser judgments and the mandate of Article II, § 4. *Id.* at 591-607. The possibility of lesser sanctions than removal was again coupled with an "imperative" reading of Article II, § 4, by Rep. Wickliffe, a manager in the impeachment trial of Judge James Peck in 1831. *See* A. STANSBURY, TRIAL OF JAMES H. PECK 308-10 (1833). The managers of the impeachment of Andrew Johnson also acknowledged the validity of the reading of Article II, § 4, proposed in this Note, but chose, doubtless to make a stronger case, to characterize Johnson's violation of the Tenure of Office Act as a "high" crime. CONG. GLOBE (SUPP.), 40th Cong., 2d Sess. 3, 42 (1868).

A related aspect of the scope of impeachment came before the Senate in 1876, in the trial of William Belknap, a Secretary of War, who had resigned before trial. Belknap, who was necessarily being put in jeopardy of a sanction other than removal, protested that the Senate had no jurisdiction over him since he was not at the time of trial a civil officer. TRIAL OF WILLIAM BELKNAP 30 (Gov't Printing Off. 1876). Sen. Key of Tennessee, among others, made an eloquent defense of the "imperative" reading of Article II, § 4. *Id.* at 456-57. The Senate decided to take jurisdiction by a vote of 37 to 29. *Id.* at 239-40. This outcome would have been impossible if the scope of impeachment were strictly bounded by Article II, § 4, which is couched solely in terms of removal of civil officers.

17. Art. III, § 1. A similar point may be made with respect to Article II, § 1. *See* note 33 *infra*.

18. Deliberations at the Federal Convention suggest that judges are removable only by impeachment. On August 27, 1787, the Convention rejected a motion to make the judges removable "by the Executive on the application <by> the Senate and House of Representatives." 2 FARRAND, *supra* note 3, at 428-29.

There is a remark by Gouverneur Morris which suggests, although not conclusively, that impeachment trials were seen as the only alternative to the mode of removal which had been rejected. *Id.* at 428. In addition to the debates at the Convention, Hamilton, writing of federal judges, also insisted that impeachment is the only means available for their removal. *See* THE FEDERALIST No. 79, at 474 (C. Rossiter ed. 1961):

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

19. *See* BERGER, *supra* note 1, at 122, 123-25, 131.

and misdemeanors" but not excluding their impeachment and removal for misbehavior.²⁰

In sum, a close reading of the Constitution reveals that the scope of the impeachment power is not defined in that charter. And if Article I grants the power to impeach as that power was understood in 1787, then the range of impeachable offenses is illuminated, not by those offenses for which removal is made mandatory in Article II, but by the understanding of the impeachment power in England and America during the period of the drafting of the Constitution in 1787.

II. High Crimes and Misdemeanors

Why does the Constitution require removal for the offenses specified in Article II, while leaving other wrongs to the discretion of Congress and its historical perception of the impeachment power? The answer lies in the significance of the word "high." Without the word "high" attached to it, the expression "crimes and misdemeanors" is nothing more than a description of public wrongs, offenses which are cognizable in some court of criminal jurisdiction.²¹ A "high crime or

20. Misbehavior was among the many early standards proposed for the impeachment of all civil officers. See p. 1334 *infra*.

In dealing with the problem of misconduct by judges, Congress has in essence accepted the theory of impeachment presented in this Note. In 1926, the House of Representatives received the following report from the Judiciary Committee in connection with impeachment proceedings against Judge George W. English:

[T]he provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also for abuses or betrayal of trusts, for inexcusable neglect of duty, for the tyrannical abuse of power

67 CONG. REC. 6283 (1926). The House went on to vote overwhelmingly for articles of impeachment against English containing no allegations of "high crimes and misdemeanors." *Id.* at 6283-87. Cf. PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HAROLD LOUDERBACK 825-31 (Gov't Printing Off. 1933) (four of five articles of impeachment did not mention "high crimes and misdemeanors"). The most recent impeachment in which the accused was actually convicted by the Senate—in some sense therefore the one with the greatest value as precedent—was the trial of Judge Halsted Ritter in 1936. Ritter was impeached by the House "for misbehavior, and for high crimes and misdemeanors." PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER 5 (Gov't Printing Off. 1936). He was convicted on a general charge of misbehavior. *Id.* at 637.

English, Louderback, and Ritter were judges, and the Constitution makes judges' tenure dependent on their "good behaviour." It could be argued that this sets apart judges—and judges only—from the standards of Article II, § 4. But Article II, § 4, applies by its very terms to all civil officers; if it limits the scope of impeachable offenses for one officer, it does so for all.

21. Blackstone, speaking of the criminal law, begins: "We are now arrived at the fourth and last branch of these commentaries, which treats of *public wrongs* or *crimes* and *misdemeanors*." 4 BLACKSTONE, *supra* note 11, at *1. He later continues: "I. A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it." *Id.* at *5.

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“misdemeanor” is not merely a serious crime, but rather one aimed at the sovereign or his government, the highest powers of the state.²² “High” has denoted crimes against the state since the Middle Ages.²³

This meaning of “high” has become obscured for us by the passage of time, but was clear to the lawyers of 1787. Part III of Coke’s *Institutes*—standard fare for lawyers of the 18th century²⁴—begins with a chapter on *high* treason, followed by a chapter on *petit* treason, the first sentence of which demonstrates that for Coke “high” meant “against the sovereign”: “It was called high or grand treason in respect of the royall majesty against whom it is committed, and comparatively it is called petit treason . . . in respect it is committed against subjects and inferior persons. . . .”²⁵ Blackstone, who by 1787 was a towering authority on both sides of the Atlantic,²⁶ reasserts this meaning of “high.”²⁷ Even more revealing is that the 1787 Convention originally adopted the expression “high crimes and misdemeanors *against the State*.”²⁸ The words “against the State” were subsequently

22. The form of the expression “treason, bribery, or other high crimes and misdemeanors” in Article II, § 4, indicates that “treason” and “bribery” are “high” offenses.

23. This definition of “high” first appeared in impeachments in the proceedings against Robert de Vere and Michael de la Pole in 1386: “[I]t was declared that *in so high a crime* as is alleged in this appeal, which *touches the person of the king, our Lord, and the state of his entire realm . . .*” 3 ROTULI PARLIAMENTORUM [Rolls of Parliament] 236 (undated) (emphasis added) (passage from the rolls of Parliament for the years 1387-88, transl. by the author from the original French: “[estoit declare], Que en si haute crime come est pretendu en cest Appell, q [qui] touche la persone du Roi ñre [nostre] dit Sr [Seigneur], & l’estat de tout son Roialme . . .”

24. See 10 THE WRITINGS OF THOMAS JEFFERSON 376 (P. Ford ed. 1899); C. Vizas, Law and Political Expression in the American Revolution, Feb. 1975 (unpublished paper on file with *Yale Law Journal*) (thorough survey of Coke’s stature in colonial America).

25. 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN 19 (1817).

26. See, e.g., 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 501 (1836) (remark by Madison regarding Blackstone) [hereinafter cited as ELLIOT].

27. Blackstone continues Coke’s classification of treason as “high” and “petit.” 4 BLACKSTONE, *supra* note 11, at *75. The definition of treason in U.S. CONST. art. III, § 3, is taken verbatim from Blackstone’s definition of “high” treason, 4 BLACKSTONE, *supra* note 11, at *81-82.

Bribery of a public official was also a crime against the state at common law, being limited to the making or taking of payments to influence the course of justice. *Id.* at *139. Blackstone describes various misprisions and contempts “immediately against the king and government” as “all such high offences as are under the degree of capital.” *Id.* at *119. This confirms that an offense could be serious, *i.e.*, “capital,” without being “high.” A distinction should also be made between “high” crimes and crimes “against the King’s peace,” the latter words being a necessary incantation to bring any offense within the jurisdiction of the King’s courts. 1 *id.* at *118, *268, *350; 4 *id.* at *444 (appendix). Blackstone gives a long listing of “high misdemeanors,” which includes some maladministration, as well as other offenses against the government. 4 *id.* at *121-26. For a view of “high” crimes by a historian in accord with the one given here, see Bestor, Book Review, 49 WASH. L. REV. 255, 263-64 (1973). See generally BERGER, *supra* note 1, at 61-62.

28. 2 FARRAND, *supra* note 3, at 550 (emphasis added).

deleted from this clause, apparently because they were redundant.²⁹

"High crimes and misdemeanors" thus refer to crimes which harm the state in an immediate way and impair its functioning.³⁰ Given this meaning of "high," it is eminently reasonable for the Constitution, through Article II, § 4, to single out those offenders in office whose conduct harms the state itself for mandatory removal, while permitting Congress to impeach and remove those whose misconduct strikes elsewhere.³¹ Indeed, it is difficult to treat the "high crimes and misdemeanors" of Article II, § 4, as a comprehensive definition of impeachable offenses. Unless the common law meaning of the phrase "high crimes and misdemeanors" were abandoned, the currently prevailing view that Article II defines the full scope of the impeachment power would leave in office a President who had committed murder, robbery, rape, blackmail—or for that matter who had conspired to break into someone's office and deprive him of his civil rights.³² And until the passage of the 25th Amendment in 1967, the "exhaustive" view of Article II, § 4, would have left the nation without recourse

29. The words "against the State" were first replaced by "against the United States" in order "to remove ambiguity." *Id.* at 551. The words "against the United States" were removed without explanation by the Committee of Style. *Id.* at 575, 600. The Committee of Style was not authorized to make any changes in meaning. *Id.* at 553; *cf.* 3 *id.* at 499. This allows the inference that the Framers considered the words "against the United States" redundant in this clause. Rep. Lawrence of New York, speaking in the First Congress, referred to Article II, § 4, of the Constitution as preventing the retention in office of persons "guilty of crimes or misdemeanors against the Government." 1 ANNALS OF CONG. 392-93 (1789) (running head: "Gales & Seaton's History of Debates in Congress").

30. Examples of such offenses are: treason, bribery, obstruction of justice, sabotage, and embezzling or stealing from the public treasury.

31. It is, of course, conceivable first to accept the idea that "high crimes and misdemeanors" define impeachable offenses, and then proceed to give broad content to those words, in order that the impeachment power be a reasonable remedy against wrong-doing. But the Framers did not see this constitutional provision as a grab-bag; rather they perceived "high misdemeanors" as having a limited, technical meaning. *See* 2 FARRAND *supra* note 3, at 443. This meaning of "high misdemeanor" is very probably the one found in Blackstone. *See* note 27 *supra*. Berger has difficulty reconciling the narrow scope of "high" misdemeanors in Blackstone with the range of impeachable offenses in English history. *See* BERGER, *supra* note 1, at 61-62, 86, 89, 92. Berger concludes that "high crimes and misdemeanors" are words of art specifically describing impeachable offenses, and meaning something other than "crimes and misdemeanors" modified by "high." Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1145 (1974). Berger adds that "nor were ordinary 'misdemeanors' a criterion for impeachments." *Id.* These assertions are open to question. First, Berger's argument depends on his assumption that the phrase "high crimes and misdemeanors," and the term "misdemeanor" had different origins. *Id.* But this assumption may be inaccurate. *See* Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger* (to be published in a forthcoming issue of the *Yale Law Journal*). Second, ordinary "misdemeanors" historically were a criterion for impeachments. *See* notes 36, 39 *infra*.

32. Brant gives murder and rape as "manifest grounds of removal for high crimes." BRANT, *supra* note 1, at 43. But murder and rape are directed at individuals, and were not "high" at common law.

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against a President who proved dangerously incompetent, utterly lazy, or even mad.³³

III. The Range of Impeachable Offenses

To say that impeachable offenses are not limited to “high crimes and misdemeanors” is not to say what they are. The Framers adopted the impeachment power against a well-known common law background of English and American practice. The contours of impeachment were more familiar to the Framers than to us; indeed, there was an impeachment actually under way in England at the time of the Federal Convention.³⁴ The delegates to the Convention undoubtedly expected Congress to pay close heed to this historical background in determining the scope of impeachable offenses.

A. *History Before 1787*

The history of impeachment before 1787 may not demonstrate the wisdom of any particular impeachment or the fitness of any particular impeachable offense, but it does help to reconstruct the general understanding of impeachment that an American lawyer might have had in 1787. And the existing doctrine established that impeachment was a developing common law process, an area of jurisdiction with some power to shape itself, but also governed by precedent.

Although the numerous English impeachments hardly form a unified picture,³⁵ both the cases and the writings of important commentators reveal an impeachment power extending beyond “high crimes and misdemeanors.”³⁶ There were, as one would expect, impeachments

33. To be sure, Article II, § 1, of the Constitution provides that in the case of the President's “inability” his office shall devolve upon the Vice President. But nothing there indicates that there is any mode of removal other than impeachment. The very fact that the Constitution appears to countenance removal for “inability” strengthens the “imperative” theory of Article II, § 4, presented in this Note. In the First Congress Rep. Smith of South Carolina pointed out that the Constitution “contemplates infirmity in the Chief Magistrate; makes him removable by impeachment; and provides the Vice President to exercise the office, upon such a contingency taking place.” 1 ANNALS OF CONG. 528 (1789) (running head: “Gales & Seaton's History of Debates in Congress”). Smith was surely referring to Article II, § 1, and his construction of this clause is impossible unless he believed that the scope of impeachment went beyond the terms of Article II, § 4.

34. The impeachment of Warren Hastings. See p. 1331 *infra*.

35. See A. SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS 81-190 (1916); BERGER, *supra* note 1, at 67-73, 201-02.

36. Some commentators believe that “high crimes and misdemeanors” described the whole range of impeachable offenses in England. See, e.g., BERGER, *supra* note 1, at 67. One possible explanation for this view is that the phrase was routinely used in the official language of impeachment proceedings—articles and pleadings—in the 17th and 18th centuries. See A. SIMPSON, *supra* note 35, at 143-90. But by then they had

for treason and corruption. But there were others for misconduct unrelated to the performance of official duties and for various acts of maladministration.³⁷ In 1681, the House of Commons stated:

That it is the undoubted right of the Commons, in parliament assembled, to impeach before the Lords in Parliament, any peer or Commoner for treason or any other crime or misdemeanor.³⁸

Blackstone, Wooddeson and Stephen confirm this view of the scope of impeachment.³⁹

become jurisdictional formalities, incantations like "by force and arms" in complaints for trespass before the King's courts. See, e.g., 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 n.c. (R. Kerr ed. 1962) (note by Edward Christian, a late 18th century commentator): "When the words *high crimes and misdemeanors* are used in prosecutions for impeachment, the words *high crimes* have no definite signification, but are used merely to give greater solemnity to the charge." See BERGER, *supra* note 1, at 59 & n.20.

Before 1660 impeachments had in fact been brought in England without alleging "high crimes and misdemeanors," on charges of being a "monopolist" and a "patentee." See Case of Giles Mompesson, 2 STATE TRIALS 1119 (Howell 1620); Case of Francis Michell, *id.* at 1131 (Howell 1621). There were also charges of "misdemeanors." See case of Samuel Harsnet, *id.* at 1253 (Howell 1624) (ecclesiastical malfeasances). And there were charges of "Misdemeanors, Misprisions, Offences, Crimes." Case of the Duke of Buckingham, *id.* at 1267, 1308, 1310 (Howell 1626) (procuring offices for himself "to the great discouragement of others" and letting the navy deteriorate under his command); Case of the Earl of Bristol, *id.* at 1267, 1281 (Howell 1626) ("Crimes, Offences, and Contempts"). Some impeachments were brought on charges which were not defined. A. SIMPSON, *supra*, at 115. Even after 1660, when the words "high crimes and misdemeanors" were commonly added to articles of impeachment, the underlying charges were frequently not "high." See note 37 *infra*.

37. Case of Lord Mordaunt, 6 STATE TRIALS 785, 790 (Howell 1660) (preventing another from standing for Parliament, and making uncivil addresses to a young lady); Case of Chief Justice Scroggs, 8 STATE TRIALS 163, 200 (Howell 1680) ("frequent and notorious excesses and debaucheries"); 4 J. HATSELL, PRECEDENTS OF THE PROCEEDINGS IN THE HOUSE OF COMMONS 126 (1818) ("advising and assisting in the drawing and passing of 'A Proclamation Against Tumultuous Petitions'"); Case of Peter Pett, 6 STATE TRIALS 865, 866-88 (Howell 1668) (negligent preparation before an enemy invasion, losing a ship through carelessness, and sending the wrong type of planks to serve as platforms for cannon); Case of Edward Seymour, 8 STATE TRIALS 127, 128-36 (Howell 1680) (applying funds to public purposes other than those for which they had been appropriated).

38. Case of Edward Fitzharris, 8 STATE TRIALS 223, 236-37 (Howell 1681). The resolution was part of a dispute, never entirely settled, between the Commons and the Lords, over which classes of people were subject to trial by the Lords upon impeachment. See 2 R. WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 601 (1972) [hereinafter cited as WOODDESON].

39. More precisely, Blackstone wrote that "a commoner cannot be impeached before the lords for any capital offence, but only for high misdemeanors; a peer may be impeached for any crime." 4 BLACKSTONE, *supra* note 11, at *259. Blackstone means (1) that peers can be impeached for any crime, and (2) that commoners can be impeached only for offenses which do not carry the death penalty ("misdemeanors"), and which are "high." In other words, a commoner cannot be placed in jeopardy of his life in an impeachment trial. This cleavage in English impeachments reflects the tradition of not depriving individuals of their lives without a judgment of their "peers," and has little bearing on the present discussion of the range of impeachable offenses. See case of Edward Fitzharris, *supra*, at 231-32 & n.†. It should be noted that there is also authority contrary to Blackstone's view as to the restrictions on the scope of impeachment of commoners. *Id.* at 236 n.* (note by Howell); cf. 2 WOODDESON, *supra* note 38, at 601 & n.m.

Wooddeson, who was Blackstone's successor to the Vinerian chair, and whose *Laws*

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In America, where the history of impeachment reaches back to the 17th century, "high crimes and misdemeanors" appear even less than in England to have been the standard for impeachment.⁴⁰ There are definitions of impeachable offenses in the pre-1787 constitutions of nine of the 13 original states and Vermont. None of them makes any mention of "high crimes and misdemeanors," and all contain one of the following formulations: "misbehaviour,"⁴¹ "maladministration,"⁴² "maladministration or other means by which the safety of the State shall be endangered,"⁴³ "mal and corrupt conduct in . . . office,"⁴⁴ or "misconduct and maladministration in . . . office."⁴⁵

The most difficult question with respect to the English precedents is whether a crime in the modern sense was necessary to support an impeachment. Impeachment was unquestionably a "criminal" process.⁴⁶ But that fact is only a starting point of analysis and does not mean that an "impeachable" crime was a statutory crime, or an "indictable" crime triable in the King's courts. The category of "crimes" in the 18th century was broader than modern statutory offenses. It included not only common law crimes which today would no longer support a prosecution, but also offenses which were less clearly sep-

of England were widely quoted at American impeachment trials (*see, e.g.*, 8 ANNALS OF CONG. 2266, 2287, 2299 (1799)), clearly indicates that impeachment will lie for offenses other than "high crimes and misdemeanors." 2 WOODDESON, *supra* note 38, at 601, 606, 612. James Fitzjames Stephen concludes that "peers may be tried for any offence, and commoners for any offence not being treason or felony upon an accusation or impeachment by the House of Commons, which is the grand jury of the whole nation." J. STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 146 (1883) [hereinafter cited as STEPHEN]. None of these writers anywhere proposes "high crimes and misdemeanors" as the criterion for impeachment. Moreover, English law dictionaries from the 18th and early 19th Centuries give "crimes and misdemeanors" rather than "high crimes and misdemeanors" as the standard for impeachment. *See, e.g.*, JACOB'S LAW DICTIONARY (O. Ruffhead & J. Morgan eds. 1773). TOMLINS LAW DICTIONARY (T. Granger ed. 1836).

40. Article XVII of the Pennsylvania Charter of 1683 granted the Assembly the power to impeach "criminals." 2 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1529 (2d ed. 1878) [hereinafter cited as POORE]. That power may have come to seem insufficient because the Charter of 1696 included the power to "impeach criminals or such persons as they shall think fit to be there impeached." *Id.* at 1535. In the interim, in 1684, the Assembly had impeached Nicholas Moore, the first Chief Justice of the Provincial Court. The articles of impeachment, although formidable in appearance, contained allegations no more serious than arbitrariness and arrogance. *See* W. LOYD, THE EARLY COURTS OF PENNSYLVANIA 61 & n.1 (1910).

41. N.J. CONST. art. XII (1776), *reprinted in* 2 POORE, *supra* note 40, at 1312.

42. PA. CONST. § 22 (1776), *reprinted in* 2 POORE, *supra* note 40, at 1545; VT. CONST. ch. II, § 20 (1777), 2 POORE 1863.

43. VA. CONST. (1776), *reprinted in* 2 POORE, *supra* note 40, at 1912. *See* DEL. CONST. art. XXIII (1776), 1 POORE 276-77; N.C. CONST. art. XXIII (1776), 2 POORE 1413.

44. N.Y. CONST. art. XXXIII (1777), *reprinted in* 2 POORE, *supra* note 40, at 1337; S.C. CONST. art. XXIII (1778), 2 POORE 1624.

45. MASS. CONST. ch. I, § 2, art. VIII (1780), *reprinted in* 1 POORE, *supra* note 40, at 963; N.H. CONST. (1784), 2 POORE 1286.

46. Blackstone described impeachment as "a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom." 4 BLACKSTONE, *supra* note 11, at *259.

arated from "civil" wrongs than they now are.⁴⁷ Moreover, the jurisdiction of Parliament as a court of impeachment was separate, and was not bound by the precedents of the King's courts. Impeachable offenses within the jurisdiction of Parliament were governed only by the law of Parliament.⁴⁸ Blackstone allowed that impeachable "crimes" were something of a class apart:

For, though in general the union of the legislative and judicial powers ought to be more carefully avoided, yet it may happen that a subject entrusted with the administration of public affairs may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either dares not or cannot punish.⁴⁹

The English practice was the starting point of impeachment in the New World.⁵⁰ American practice before 1787 seems on the whole to have further separated impeachments from ordinary criminal jurisprudence.⁵¹ Standards such as "misconduct in office," "malpractice,"

47. See *id.* at *216.

48. There is confirmation of this principle in *Grantham v. Gordon*, decided in 1719 by the Lords: "[I]mpeachments in Parliament differed from indictments, and might be justified by the law and course of Parliament." 24 ENG. REP. 539, 541 (H.L. 1719). This principle is echoed in 2 WOODDESON, *supra* note 38, at 605-06 and in THE FEDERALIST NO. 65, at 398 (C. Rossiter ed. 1961) (A. Hamilton) [hereinafter cited as THE FEDERALIST NO. 65]. In the *Trial of Dr. Henry Sacheverell*, tried in 1710, Parliament may have decided (the record is somewhat unclear) that there need be no violation of established criminal laws. 15 STATE TRIALS 1, 15 (Howell 1710).

49. 4 BLACKSTONE, *supra* note 11, at *260-61. This idea is repeated almost exactly by Wooddeson. 2 WOODDESON, *supra* note 38, at 596. To be sure, Blackstone had previously asserted that an impeachment was the "prosecution of the already known and established law . . ." 4 BLACKSTONE, *supra* note 11, at *259. But Blackstone made this point in order to distinguish impeachments from attainders. See *id.* And the "law" in question is the "law and course of Parliament." See note 48 *supra*.

50. In his MANUAL OF PARLIAMENTARY PRACTICE v, vi, 112-17 (1857), Thomas Jefferson gave the entire body of English rules as controlling in cases of impeachment. With respect to the very question at issue in this Note, Jefferson read English practice broadly to mean that the Lords "may proceed against the delinquent, of whatsoever degree, and whatsoever be the nature of the offence." *Id.* at 113. Jefferson was repeating almost verbatim J. SELDEN, OF THE JUDICATURE IN PARLIAMENTS 6 [1690] (published posthumously).

In 1774 some citizens of Massachusetts sought to defeat a new British policy of paying the colony's justices from the Royal Treasury rather than, as before, by appropriations of the Massachusetts Assembly. When they consulted John Adams on how to overcome the justices' refusal to renounce their new salaries, he answered that the Assembly could impeach them, asserting that impeachment was a common law power inherent to all parliamentary bodies: "Our House of Representatives have the same right to impeach as the House of Commons has in England." 10 THE WORKS OF JOHN ADAMS 238 (C. Adams ed. 1856). There was no "impeachment" clause in the Massachusetts Charter of 1691. Adams was relying solely on a clause, 1 POORE, *supra* note 40, at 950, granting to Americans the same rights as British subjects: "I repeated to them the clause of the Charter, which I relied on, the constant practice in England, and the necessity of such a power and practice in every free government." 10 WORKS OF JOHN ADAMS, *supra*, at 238 (emphasis added). Adams was also relying on Selden. *Id.* The Assembly followed Adams' advice. *Id.* at 238-41.

51. See 1 THE WORKS OF JAMES WILSON 324 (R. McCloskey ed. 1967). Hamilton confirms that impeachment was perceived as a separate area of jurisdiction, not governed by precedents external to it:

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and “misbehaviour” were adopted,⁵² and in some states the range of penalties was limited to those of a more political nature.⁵³ Therefore, both English and American practice before 1787 indicate that although impeachment was a criminal process, misconduct which would meet this requirement of criminality was not limited to modern statutory crimes.

B. *The Drafting and Implementation of the Constitution*

The impeachment power was widely discussed at the Federal Convention.⁵⁴ Within a week of its convening, on June 2, 1787, the Convention adopted the resolution of Hugh Williamson that the executive be “removable on impeachment & conviction of mal-practice or neglect of duty.”⁵⁵ On July 20, the Convention, after protracted debate, adopted Williamson’s clause for the draft which was sent to the Committee of Detail.⁵⁶ In the course of the debate, James Madison opposed Gouverneur Morris, who found Williamson’s terms too broad:

Mr. Govr. Morris admits corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined:

Mr. <Madison>—thought it indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service was not a sufficient security. He might lose his capacity after his appointment.⁵⁷

Of the three grounds for impeachment mentioned by Madison, two—incapacity and negligence—are not “high crimes and misdemeanors.”

The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security.”

THE FEDERALIST No. 65, *supra* note 48, at 398.

It is true that in one of the early American impeachments, that of Judge Hopkinson of Pennsylvania in 1780 (who was acquitted of exacting illegal fees in a prize case), the President and Council, before whom the case was tried, asserted that “crimes only are causes of removal.” PENNSYLVANIA STATE TRIALS 3, 56 (1780). However, this principle was modified in early federal impeachments, such as that of Judge Pickering in 1804. See p. 1334 *infra*.

52. See p. 1327 *supra*.

53. MASS. CONST. ch. I, § 2, art. VIII (1780), reprinted in 1 POORE, *supra* note 40, at 963; N.H. CONST. (1784); 2 POORE 1286; N.Y. CONST. art. XXXIII (1777), 2 POORE 1337.

54. Every plan of government put before the Convention contained an impeachment provision. See 3 FARRAND, *supra* note 3, at 608; 1 *id.* at 22, 244, 292.

55. 1 *id.* at 78-79, 88.

56. 2 *id.* at 64-69, 97, 106.

57. *Id.* at 65.

Later in the debate, Gouverneur Morris changed his mind, and came around to Madison's view:

Mr. Govr. Morris's opinion had been changed by the arguments used in the discussion. . . . Corrupting his electors, and incapacity were other causes of impeachment.⁵⁸

In the hands of the Committee of Detail, Williamson's clause changed from one in which the President is "removable"⁵⁹ for broadly defined offenses to one in which he "shall be removed" for "Treason (or) Bribery or Corruption."⁶⁰ This clause was further modified by the Committee of Eleven. The Senate was made the trier of impeachments, and the only named offenses were treason and bribery:

(9) He shall be removed from his Office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery.⁶¹

If this clause as it emerged from the two committees was intended to describe the full range of the impeachment power, it was remarkably badly drafted. First, it addressed only the chief executive. Second, if the new clause were to exhaust removable offenses, the members of the two committees need only have replaced "malpractice and neglect of duty" by "treason or bribery" in the original Williamson clause. To have also replaced "to be removable" by "shall be removed" suggests an additional intention. Were this additional intention both to exhaust removable offenses and to make removal mandatory, the clause would be inconsistent with other provisions in the Constitution.⁶² And, although an inadvertent change is conceivable, it would have been an extraordinary coincidence for the members of the two committees to have unwittingly adopted the language of mandatory removal and to have listed far graver offenses than before, without perceiving the changed meaning of the clause before them. Third, we would have to conclude that the two Committees wanted no impeachment provi-

58. *Id.* at 68-69. In the entire debate of July 20—which is the longest discussion of impeachment which has come down to us from the Convention—"high crimes and misdemeanors" were not mentioned. *Id.* at 64-69.

59. *Id.* at 132, 137 n.145.

60. The changes are reflected in the notes of a member of the Committee:

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

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

61. *Id.* at 481, 497, 499.

62. For an analysis of this point, see pp. 1318, 1319-21 *supra*.

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sion for offenses other than treason and bribery. Such a result would be contrary to the earlier understanding of Madison and Morris, and would leave an incompetent or insane President beyond the reach of Congress, as well as one who had committed murder, highway robbery, embezzlement, or drunken manslaughter. Rather than put this strained construction on the clause that emerged from the Committee of Eleven, it seems more plausible to take it to mean what it says: if, on impeachment, the chief executive is found guilty of treason or bribery, he must be removed.

The Committee of Eleven reported back to the Convention on September 4, and the “removal” clause⁶³ was put before the delegates on September 8. Before coming to a vote, the clause elicited the following exchange between George Mason and James Madison:

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

Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after “bribery” “or maladministration.” Mr. Gerry seconded him—

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

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

On the question thus altered [passed 8 to 3].⁶⁴

Madison’s remark about “the pleasure of the Senate” is consistent with the assumption that he was talking about a clause governing mandatory removal. If the “vague” term “maladministration” were retained, and an impeachment were brought on any offense, the

63. *Id.* at 499, 550.

64. *Id.* at 550. Berger, Brant, and Black rely on this exchange for their conclusion that the scope of impeachment is limited to “high crimes and misdemeanors.” See BERGER, *supra* note 1, at 74, 86; BRANT, *supra* note 1, at 18-19; BLACK, *supra* note 1, at 27-31. But this conclusion does not necessarily follow. It is possible that Mason—who was highly pro-impeachment and who had not been a member of either the Committee of Detail or the Committee of Eleven—had been expecting the former Williamson clause addressing the offenses for which a President was “removable,” was somewhat surprised by a clause limited to treason and bribery, and had not perceived that it addressed only mandatory removal. See 2 FARRAND, *supra* note 3, at 65, 106, 481; p. 1329 *supra*; p. 1330 *supra*. Madison, however, had been on the Committee of Eleven, and can be presumed to have known the meaning of the clause before the Convention. 2 FARRAND, *supra* note 3, at 473.

Senate could rationalize a "capricious" removal by characterizing the offense as maladministration and alleging a "duty" to remove the President. The words subsequently proposed by Mason, "high crimes and misdemeanors against the State," which have a more precise technical meaning, leave the Senate less room for such disingenuous maneuvers. There is no need to distort the meaning of Article II, § 4, to give sense to Madison's words of September 8. It is certainly possible for a term to be too vague for inclusion in a list of offenses for which removal is required, while remaining a valid basis for the Congress to exercise discretion.

Madison's very choice of words on September 8 confirms that what he feared was the Senate's abusing a mandate to remove: he remarked that "maladministration" in this clause would be equivalent to tenure at the pleasure of the *Senate*. This is evidence that Madison perceived the clause as concerned with a particular use of the removal power, which is vested in the Senate alone, rather than with the full scope of impeachment, in which the entire Congress has a part. Indeed, in subsequent remarks on September 8, Madison indicated specifically that the power of the House to impeach extended to "any act which might be called a misdemesnor," a criterion much different from "high crimes and misdemeanors against the State."⁶⁵ Thus, although several recent commentators⁶⁶ have concluded from the exchange of September 8 that the Convention rejected "maladministration" as a standard for impeachment, it is more accurate to say that the Convention accepted "high crimes and misdemeanors against the State" as a standard for mandatory removal, after one delegate—Madison—had questioned "maladministration" for such a purpose.

One need only consider later assertions by Madison himself to confirm that the effect of Article II, § 4, is neither to confine impeachable offenses to "high crimes and misdemeanors" nor to reject "maladministration" as a ground for impeachment. Speaking before the Virginia ratifying convention Madison suggested that "if the President be connected in any suspicious manner, with any person, and there be grounds to believe he will shelter them, the House of Representatives can impeach him; they can remove him if found guilty."⁶⁷ He later indicated that the President was impeachable for "abuse of power."⁶⁸ On May 19, 1789, in the debates of the First Congress on

65. *Id.* at 551.

66. See BERGER, *supra* note 1, at 163; BRANT, *supra* note 1, at 21; BLACK, *supra* note 1, at 29.

67. 3 ELLIOT, *supra* note 26, at 498.

68. *Id.* at 516.

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

I think it absolutely necessary that the President should have the power of removing from office; it will make him in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.⁶⁹

Later in the same debate, on June 16, Madison asserted that the President “is impeachable for *any* crime or misdemeanor before the Senate, at all times.”⁷⁰ Madison’s most revealing remarks came on June 17 when he suggested that the House could “at any time” impeach and the Senate convict an “unworthy man.”⁷¹ Madison further contended that “the wanton removal of meritorious officers” was an act of “maladministration” which would subject a President “to impeachment and removal.”⁷² There is no inconsistency between the Madison-Mason exchange at the Federal Convention and Madison’s remarks on these later occasions. In the former, he was addressing a clause governing mandatory removal; in the latter, the scope of the power to impeach.

Other public comment and actual practice in the period immediately following the drafting of the Constitution indicate that impeachment was understood in the light of earlier English and American practice,⁷³ and that impeachable offenses were not generally seen as limited to “high crimes and misdemeanors against the State.” A theme which runs through the state ratification debates is that impeachment serves to make public officials “answerable” to the people.⁷⁴ Impeachable

69. 1 ANNALS OF CONG. 387 (1789) (running head: “Gales & Seaton’s History of Debates in Congress”).

70. *Id.* at 480 (emphasis added).

71. *Id.* at 517.

72. *Id.*

73. See, e.g., 4 ELLIOT, *supra* note 26, at 44; 3 *id.* at 17.

74. See, e.g., 2 *id.* at 45. There were also remarks bearing on the scope of impeachment made outside the ratifying conventions. Hamilton proposed a broad standard for impeachment: “The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust.” THE FEDERALIST NO. 65, *supra* note 48, at 396. Hamilton does not even mention “high crimes and misdemeanors” in the essays he devotes to the impeachment power. *Id.* at 396-407. Luther Martin asserted before the Maryland Legislature that the President is impeachable if “he is guilty of misconduct.” 3 FARRAND, *supra* note 3, at 158.

It must be conceded, however, that not all indications from the state ratifying con-

conduct included: conduct exciting suspicion;⁷⁵ "malconduct" and abuse of power;⁷⁶ making bad treaties (James Wilson);⁷⁷ an attempt by the President to push a treaty through the Senate without a quorum being present (John Rutledge);⁷⁸ behaving amiss, or betraying public trust (Charles Pinckney);⁷⁹ "any misdemeanor in office" by the President, and giving false information to the Senate (James Iredell);⁸⁰ abuse of trust "in any manner" by the President (Richard Spaight);⁸¹ "any maladministration in his office" by the President;⁸² and misbehavior (Governor Randolph of Virginia).⁸³ Moreover, in the debates of the First Congress on the Executive Departments, the standards proposed for impeachment of the President included "maladministration,"⁸⁴ "misdemeanors,"⁸⁵ "malconduct,"⁸⁶ misbehavior,⁸⁷ "displacing a worthy and able man,"⁸⁸ indolence,⁸⁹ and infirmity.⁹⁰ John Vin- ing of Delaware concluded that the people have the means of "calling [the President] to account for neglect."⁹¹ Finally, in the trial of Judge John Pickering in 1803, the Congress impeached and convicted a federal judge for drunkenness. The crucial feature of the Pickering case is that the Senate appears to have consciously rejected "high crimes and misdemeanors" as the necessary standard for impeachment and removal.⁹²

ventions support the theory of this Note. See 4 ELLIOT, *supra* note 26, at 48-49 (remarks by Maclaine and Gov. Johnston suggest "exhaustive" theory in the context of a debate over whether Congress's impeachment power extended over state officials); *id.* at 113 (remarks by Iredell suggest "exhaustive" theory in the context of discussing limitations on the President's power to pardon). See generally BLACK, *supra* note 1, at 30, 49.

75. 2 ELLIOT, *supra* note 26, at 45.

76. *Id.* at 168-69.

77. *Id.* at 477; 4 *id.* at 125. See generally *id.* at 117-18.

78. 4 *id.* at 268.

79. *Id.* at 281.

80. *Id.* at 109, 127.

81. *Id.* at 114, 276.

82. *Id.* at 47; 3 *id.* at 17.

83. 3 *id.* at 201.

84. 1 ANNALS OF CONG. 517 (1789) (running head: "Gales & Seaton's History of Debates in Congress").

85. *Id.* at 484, 493.

86. *Id.* at 495.

87. *Id.* at 493.

88. *Id.* at 504.

89. *Id.* at 489.

90. *Id.* at 528.

91. *Id.* at 594. Rep. Sedgwick of Massachusetts enumerated offenses which he considered impeachable for executive officers other than the President: insanity, loss of capacity, incurable indolence, total neglect of duty. *Id.* at 478.

92. When the trial came down to a vote on Pickering's guilt, Sen. White, one of Pickering's supporters, attempted to put the following question for judgment:

Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the article of impeachment, or not guilty?

13 ANNALS OF CONG. 364 (1803). Sen. Anderson proposed the following question:

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Conclusion

History reveals that impeachment is a judicial process. An impeachment is an accusation followed by a trial, on which the Constitution itself imposes safeguards of a judicial character.⁹³ In impeachment proceedings the representatives and senators do not have the unfettered discretion of legislators; they are participants in a process largely governed by its own common law and history.⁹⁴

Impeachment is also a criminal process. Impeachable offenses are

Is John Pickering, etc., . . . , guilty as charged in the _____ article of impeachment exhibited against him by the House of Representatives?
Anderson's formulation was adopted by the Senate, *id.*, whereupon White made an impassioned plea that to find guilt on such a question, without declaring "whether those acts amounted to high crimes and misdemeanors," was to find that "high crimes and misdemeanors" were not necessary for removal. *Id.* at 364-65. The Senate proceeded, however, to find Pickering guilty in the exact terms of Anderson's question, by a vote of 19 to 7. *Id.* at 367.

93. See Art. I, § 3 (senators on "oath or affirmation"); Chief Justice presides over trial of President; two-thirds vote required for conviction).

94. The trial of Andrew Johnson in 1868 was governed more by political passion than by the law of impeachment. See M. BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON I* (1973). The promoters of the Johnson impeachment particularly departed from that law in denying the judicial aspect of impeachments. In his opening address to the Senate, Rep. Butler, a manager of the trial, asserted that the Senate was bound by no law, did not sit "as a court," and had "none of the attributes of a judicial court." CONG. GLOBE (SUPP.), 40th Cong., 2d Sess. 30 (1868). The entire history of impeachment as well as every previous authority on the subject—from Selden to Hamilton—belies this assertion. See J. SELDEN, *supra* note 50; *THE FEDERALIST* No. 65, *supra* note 51.

Another aspect of the Johnson impeachment was the repeated argument by the defense that to convict Johnson on charges not sanctioned by Article II, § 4 (*i.e.*, not amounting to "indictable" high crimes or misdemeanors), was to make him the victim of a bill of attainder in violation of the Constitution. Some recent commentators, particularly Brant and Black, have taken up this argument and urge that the prohibitions of bills of attainder and ex post facto laws imply a limitation of impeachable offenses to well-defined "high crimes and misdemeanors." See BRANT, *supra* note 1, at 133, 181-200; BLACK, *supra* note 1, at 31-32. But the constitutional prohibition against bills of attainder has little bearing on the range of impeachable offenses. A bill of attainder was a legislative pronouncement imposing death or serious penalty without trial. 2 WOODDESON, *supra* note 38, at 621. See *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 323 (1867); *United States v. Brown*, 381 U.S. 437, 441, 447 (1965); *United States v. Lovett*, 328 U.S. 303, 315 (1946). In the 18th century impeachment and attainder had been perceived as entirely different. See 4 BLACKSTONE, *supra* note 11, at *259; 2 WOODDESON, *supra* note 38, at 621, 693-98; p. 1331 *supra* (remarks by Mason). Impeachment is, and has always been, the exercise of a judicial power. See, *e.g.*, 1 ANNALS OF CONG. 482 (1789) (running head: "Gales & Seaton's History of Debates in Congress") (remarks of Rep. Madison). Moreover, the abolition of attainders (along with the limitation on judgments in Article I, § 3) argues if anything in favor of an expanded impeachment power, in that it leaves the state fewer protections against the misconduct of individuals. See p. 1331 *supra* (remarks of George Mason).

There is also no reason to see in the prohibition against ex post facto laws a limitation on the range of impeachable offenses. A person tried under a common law jurisdiction is not the victim of a law arising "after the fact," despite the absence of a statutory provision. There is, to be sure, an early Supreme Court decision, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), asserting that trial courts of the United States cannot exercise common law jurisdiction in criminal cases. *Id.* at 33, 34. But *Hudson* specifically relies on the fact that the jurisdiction of federal trial courts depends on the pronouncements of Congress, rather than being conferred directly by the Constitution. *Id.* The impeachment power is not affected by *Hudson*, since it is vested by the Constitution itself.

common law offenses, not limited to statutory crimes. It is in the nature of common law offenses to be somewhat fuzzy around the edges. But all courts of criminal jurisdiction ultimately have the same purpose—protection of the public. Impeachment lies for serious misconduct against which the representatives and senators, acting responsibly as grand jurors and judges, feel a duty to protect the nation.⁹⁵

The fact that the Congress has used the impeachment weapon sparingly—and usually for serious offenses—bears heavily on our standards for impeachment. The fact that our structure of government is presidential rather than parliamentary also speaks against promiscuous use of the impeachment power. The only trial of a President in our history, that of Andrew Johnson in 1868, came to be perceived as an aberrant use of the impeachment power, and has had an important effect on our law of impeachment. But it has had that effect because Congress recognizes the Johnson trial as a precedent and chooses to proceed cautiously against Presidents—not because impeachable offenses are limited to those enumerated in Article II, § 4, of the Constitution.

It is not easy to gauge the effect of the theory of impeachment presented in this Note. If one takes the boundaries of “high crimes and misdemeanors” to be freely expandable to meet the necessities of the moment, then the practical differences between the “imperative” and “exhaustive” interpretations of Article II, § 4, are not overwhelming. But if “high crimes and misdemeanors” are perceived as describing crimes aimed directly at the state, the different consequences of the two interpretations become apparent. A President who committed murder would be guilty of a crime against an individual, as specifically distinguished from a “high” crime at common law.⁹⁶ The President’s fate, and that of the nation, would depend on which theory of impeachment were followed. Coming closer to home, let us assume that in the case of President Nixon there had been a failure of proof on all accusations against him except conspiring to break into the office of Daniel Ellsberg’s psychiatrist. This crime—breaking and entering, and possibly depriving another of civil rights—is directed at an individual and is therefore not “high.” If the “exhaustive” theory had been strictly applied, there could have been no conviction. Under the “imperative” theory the Senate could properly have convicted. But, given that no “high” offense had been proven, the Senate would not

95. See THE FEDERALIST No. 65, *supra* note 48, at 397; THE FEDERALIST No. 66, at 407 (C. Rossiter ed. 1961) (A. Hamilton). See generally 4 BLACKSTONE, *supra* note 11, at *259; STEPHEN, *supra* note 39, at 146.

96. See p. 1323 *supra*.

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have had to remove the President, but instead, at its option, could have censured him, enjoined further misconduct, or both.

Some may prefer that Congress have no such discretion, and that impeachment be strictly limited to "high crimes and misdemeanors." But individual preferences do not determine the meaning of the Constitution. No theory of impeachment is without its hazards. The "imperative" theory works well only if the representatives and senators perform responsibly as accusers and judges; the currently prevailing "exhaustive" theory allows greater abuses by civil officers. But these hazards are not equal, because no theory, including the "exhaustive," works unless the Congress acts responsibly. And the "exhaustive" theory is less likely to deter a Congress bent on abuse than to restrict a high-minded or timid Congress faced with official misconduct. The reading of the Constitution presented in this Note recognizes in the Congress a more flexible power to protect the public.