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Impeachment and the Constitution

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SUMMARY

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Impeachment and the Constitution

The Constitution grants Congress authority to impeach and remove the President, Vice President, and other federal "civil officers" for "Treason, Bribery, or other high Crimes and Misdemeanors." Impeachment is one of the various checks and balances created by the Constitution, a crucial tool for holding government officers accountable for violations of the law and abuse of power.

Responsibility and authority to determine whether to impeach an individual rests in the hands of the House of Representatives. Should a simple majority of the House approve articles of impeachment, the matter is then presented to the Senate, to which the Constitution provides the sole power to try an impeachment. A conviction on any one of the articles of impeachment requires the support of a two-thirds majority of the Senators present and results in that individual's removal from office. The Senate also has discretion to vote to disqualify that official from holding a federal office in the future.

The Constitution imposes several additional requirements on the impeachment process. When conducting an impeachment trial, Senators must be "on oath or affirmation," and the right to a jury trial does not extend to impeachment proceedings. If the President is impeached and tried in the Senate, the Chief Justice of the United States presides at the trial. The Constitution bars the President from using the pardon power to shield individuals from impeachment or removal from office.

Understanding the historical practices of Congress with regard to impeachment is central to fleshing out the meaning of the Constitution's impeachment clauses. While much of constitutional law is developed through jurisprudence analyzing the text of the Constitution and applying prior judicial precedents, the Constitution's meaning is also shaped by institutional practices and political norms. In fact, the power of impeachment is largely immune from judicial review, meaning that Congress's choices in this arena are unlikely to be overturned by the courts. For that reason, examining the history of actual impeachments is crucial to understanding the meaning of the Constitution's impeachment provisions.

One major recurring question about the impeachment remedy is the definition of "high Crimes and Misdemeanors." At least at the time of ratification of the Constitution, the phrase appears understood to have applied to uniquely "political" offenses, or misdeeds committed by public officials against the state. Such misconduct simply resists a full delineation, however, as the possible range of potential misdeeds in office cannot be determined in advance. Instead, the type of behavior that merits impeachment is worked out over time through the political process.

While this report focuses on the constitutional considerations relevant to impeachment, there are various other important questions that arise in any impeachment proceeding. For a consideration of the legal issues surrounding access to information from the executive branch in an impeachment investigation, see CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey. For discussion of the House procedures used in impeachment investigations, see CRS Report R45769, *The Impeachment Process in the House of Representatives*, by Elizabeth Rybicki and Michael Greene.

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Introduction

The Constitution grants Congress authority to impeach and remove the President, Vice President, and other federal "civil Officers" for treason, bribery, or "other high Crimes and Misdemeanors."[1] Impeachment is one of the various checks and balances created by the Constitution, serving as a crucial tool for holding government officers accountable for abuse of power, corruption, and conduct considered incompatible with the nature of an individual's office.[2]

Although the term *impeachment* is commonly used to refer to the removal of a government official from office, the impeachment process, as described in the Constitution, entails two distinct proceedings carried out by the separate houses of Congress. First, a simple majority of the House *impeaches*—or formally approves allegations of wrongdoing amounting to an impeachable offense.[3] The second proceeding is an impeachment trial in the Senate. If the Senate votes to convict with a two-thirds majority, the official is removed from office.[4] Following a conviction, the Senate also may vote to disqualify that official from holding a federal office in the future.[5] The House has impeached nineteen individuals: fifteen federal judges, one Senator, one Cabinet member, and two Presidents.[6] Of these, eight individuals—all federal judges—were convicted by the Senate.[7]

[1] U.S. CONST. art. II, § 4. While this report focuses on the constitutional considerations relevant to impeachment, there are of course various other important questions that arise in any impeachment proceeding. For a consideration of the legal issues surrounding access to information in an impeachment investigation, see CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey. For discussion of the House procedures used in impeachment investigations, see CRS Report R45769, *The Impeachment Process in the House of Representatives*, by Elizabeth Rybicki and Michael Greene.

[2] *See* discussion *infra* "History of Impeachment in Congress."

[3] *See id.* art. I, § 2, cl. 5.

[4] U.S. CONST. art. I, § 3, cls. 6, 7.

[5] *See* 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2397, pp. 818–20 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf [hereinafter HINDS]; 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 512, pp. 706, 708 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf [hereinafter CANNON]. If this option is pursued, a simple majority vote has been sufficient in the past. *See* 6 CANNON, *supra* note 5, at § 512, pp. 705–06, 708. *See, e.g.*, 49 CONG. REC. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays). *But see* MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 111-12 (2018) (noting that one plausible reading of the constitutional text would require a two-thirds vote for disqualification).

[6] *See infra*. WM. HOLMES BROWN ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE ch. 27 § 1 (2011), https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf [hereinafter HOUSE PRACTICE].

[7] *See infra* Table 1. John Pickering (1804); West H. Humphreys (1862); Robert W. Archbald (1913); Halsted Ritter (1936); Harry E. Claiborne (1986); Alcee Hastings (1989); Walter L. Nixon, Jr. (1989); G. Thomas Porteous Jr. (2010). *See* REPORT OF THE IMPEACHMENT TRIAL COMM. ON THE ARTICLES AGAINST JUDGE G. THOMAS PORTEOUS, JR., 111TH CONG., 2D SESS., S. REP. NO. 111-347, at 1 n.1 (2010) [hereinafter PORTEOUS IMPEACHMENT].

The Constitution imposes several requirements on the impeachment process.[8] When conducting an impeachment trial, Senators must be "on Oath or Affirmation,"[9] and the right to a jury trial does not extend to impeachment proceedings.[10] If the President is impeached and tried in the Senate, the Chief Justice of the United States presides at the trial.[11] Finally, the Constitution bars the President from using the pardon power to shield individuals from impeachment or removal from office.[12]

Understanding the historical practices of Congress on impeachment is central to fleshing out the meaning of the Constitution's impeachment clauses. While much of constitutional law is developed through jurisprudence analyzing the text of the Constitution and applying prior judicial precedents, the Constitution's meaning is also shaped by institutional practices and political norms.[13] James Madison, for instance, argued that the meaning of certain provisions in the Constitution would be "liquidated" over time, or determined through a "regular course of practice."[14] Justice Joseph Story thought this principle applied to impeachment, noting that the Framers understood that the meaning of "high Crimes and Misdemeanors" constituting impeachable offenses would develop over time, much like the common law.[15] Indeed, Justice Story believed it would be impossible to define precisely the full scope of political offenses that may constitute impeachable behavior in the future.[16] Moreover, the power of impeachment is

[8] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[9] Under Senate rules, the Presiding Officer administers the oath to all Senators present before proceeding to consideration of any articles of impeachment. *See* S. COMM. ON RULES AND ADMIN., 113TH CONG., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES § 170, pt. III (2014), https://www.govinfo.gov/content/pkg/SMAN-113/pdf/SMAN-113.pdf.

[10] U.S. CONST. art. I, § 3, cl. 7; *id.* art. III, § 2, cl. 3.

[11] U.S. CONST. art. I, § 3, cl. 7. There is some debate about who would preside if the Vice President were impeached. *Compare* Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849, 850 (2000) *with* Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245 (1997).

[12] U.S. CONST. art. II, § 2, cl. 1.

[13] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3 (1999); JOSEPH STORY, II COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 762 (1833) ("The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character.").

[14] THE FEDERALIST NO. 37 (James Madison) (Clinton Rossiter ed., 1961); *see* Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed. 1908).

[15] STORY, *supra* note 13, at § 797; ("[N]o previous statute is necessary to authorize an impeachment for any official misconduct."); *id.* § 798 ("In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy."); *see also* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 104–05 (2000).

[16] STORY, *supra* note 13, at § 762 ("Not but that crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost

largely immune from judicial review,[17] meaning that Congress's choices in this arena are unlikely to be overturned by the courts. For that reason, examining the history of actual impeachments is crucial to determining the meaning of the Constitution's impeachment provisions.

Consistent with this backdrop, this report begins with an examination of the historical background on impeachment, including the perspective of the Framers as informed by English and colonial practice. It then turns to the unique constitutional roles of the House and Senate in the process, followed by a discussion of impeachment practices throughout the country's history. The report concludes by noting and exploring several recurring questions about impeachment, including legal considerations relevant to a Senate impeachment trial.

Historical Background on Impeachment

English and Colonial Practice

The concept of impeachment and the standard of "high Crimes and Misdemeanors" in the federal Constitution originate from English, colonial, and early state practice.[18] During the struggle in England by Parliament to impose restraints on the Crown's powers, the House of Commons impeached and tried before the House of Lords ministers of the Crown and influential individuals—but not the Crown itself[19]—who were often considered beyond the reach of the criminal courts.[20] The tool was used by Parliament to police political offenses committed against the "system of government."[21]

Parliament used impeachment as a tool to punish political offenses that damaged the state or subverted the government, although impeachment was not limited to government ministers.[22] At

impossible to provide systematically for them by positive law."); *id.* § 795 ("Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.").

[17] *See* discussion *infra* "Are Impeachment Proceedings Subject to Judicial Review?"

[18] *See* THE FEDERALIST NO. 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 54 (1973); H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4 (Comm. Print 1974), https://docs.house.gov/meetings/JU/JU00/20160622/105095/HHRG-114-JU00-20160622-SD004.pdf [hereinafter CONSTITUTIONAL GROUNDS].

[19] PETER C. HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805 96–106 (1984).

[20] CONSTITUTIONAL GROUNDS, *supra* note 18, at 4–7; BERGER, *supra* note 18, at 59–66; *see* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 49–50 (2017). *But see* Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 YALE L.J. 1419 (1975) (arguing that impeachment during the Stuart period applied only to violations of existing law). The availability of impeachment in England appears to have depended on whether the offense endangered the government or society. *See* HOFFER & HULL, *supra* note 19, at 3.

[21] CONSTITUTIONAL GROUNDS, *supra* note 18, at 4–5; STORY, *supra* note 13, at § 798 ("In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and acting grossly contrary to the duties of their office; but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power. … One cannot but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offences; and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding, and reforming, and scrutinizing the polity of the state, and of sufficient dignity to maintain the independence and reputation of worthy public officers.").

[22] BERGER, *supra* note 18, at 59–66; CONSTITUTIONAL GROUNDS, *supra* note 18, at 4–5 (citing J. Rushworth, *The Tryal*

least by the second half of the seventeenth century, impeachment in England represented a remedy for "misconduct in high places."[23] The standard of high crimes and misdemeanors appeared to apply to, among other things, significant abuses of a government office, misapplication of funds, neglect of duty, corruption, abridgement of parliamentary rights, and betrayals of the public trust.[24] Punishment for impeachment was not limited to removal from office, but could include a range of penalties upon conviction by the House of Lords, including imprisonment, fines, or even death.[25] In the English experience, the standard of high crimes and misdemeanors appears to have addressed conduct involving an individual's abuse of power or office that damaged the state.[26]

Inheriting the English practice, the American colonies adopted their own distinctive impeachment practices.[27] These traditions extended into state constitutions established during the early years of the Republic. The colonies largely limited impeachment to officeholders based on misconduct committed in office, and the available punishment for impeachment was limited to removal from office.[28] Likewise, many state constitutions adopted after the Declaration of Independence in 1776, but before the federal Constitution was ratified, incorporated impeachment provisions limiting impeachment to government officials and restricting the punishment for impeachment to removal from office with the possibility of future disqualification from office.[29] At the state level, the body charged with trying an impeachment varied.[30]

Choices of the Framers: An "Americanized" Impeachment System

The English and colonial history thus informed the Framers' consideration and adoption of impeachment procedures at the Constitutional Convention.[31] In some ways, the Framers adopted the general framework of impeachment inherited from English practice. The English Parliamentary structure of a bicameral legislature—dividing the power of impeachment between the "lower" house, which impeached individuals, and an "upper" house, which tried them—was replicated in the federal system with the power to impeach given to the House of Representatives and the power to try impeachments assigned to the Senate.[32]

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of Thomas Earl of Stafford, *in* 8 HISTORICAL COLLECTIONS 8 (1686)); HOFFER & HULL, *supra* note 19, at 96–106; 15 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1061, 1064 (David S. Garland & Lucius P. McGehee eds., 1900).

[23] HOFFER & HULL, *supra* note 19, at 6.

[24] *See* HOFFER & HULL, *supra* note 19, at 3–14; CONSTITUTIONAL GROUNDS, *supra* note 18, at 4–7; BERGER, *supra* note 18, at 67–73. *Compare id.* at 67–68 (claiming that impeachment during the Stuart period was not limited to indictable conduct) *with* Roberts, *supra* note 20 (arguing that impeachment during the Stuart period only applied to violations of existing law).

[25] BERGER, *supra* note 18, at 67.

[26] CONSTITUTIONAL GROUNDS, *supra* note 18, at 4–6; GERHARDT, *supra* note 15, at 103–04.

[27] *See* HOFFER & HULL, *supra* note 19, at 15–26.

[28] *Id.* at 67.

[29] *See generally id.* at 57–95; GERHARDT, *supra* note 15, at 3–11; CHAFETZ, *supra* note 20, at 96–97; *see, e.g.*, MASS. CONST. of 1780, pt. 2, ch. 1, § 2, art. VIII; *id.* § 3, art. VI; NEW YORK CONST. of 1777, art. XXXIII; PENN CONST. of 1776, § 22 (placing the power of impeachment with the commonwealth's unicameral legislature).

[30] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 141–42 (1969); *see, e.g.*, N.Y. CONST. of 1777, arts. XXXII–XXXIII (providing that impeachments be tried before a court composed of Senators, judges of the Supreme Court, and the chancellor).

[31] GERHARDT, *supra* note 15, at 3–11.

[32] *See* THE FEDERALIST NOS. 65, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); BERGER, *supra* note 18, at 59–66; U.S. CONST. art. I, § 2, cl. 5 (conferring the House with the sole power of impeachment); *id.* art. I, § 3, cl. 6

Nonetheless, influenced by the impeachment experiences in the colonies, the Framers ultimately adopted an "Americanized" impeachment practice with a republican character distinct from English practice.[33] The Framers' choices narrowed the scope of impeachable offenses and persons subject to impeachment as compared to English practice.[34] For example, the Constitution established an impeachment mechanism exclusively geared toward holding public officials, including the President, accountable.[35] This contrasted with the English practice of impeachment, which could extend to any individual save the Crown and was not limited to removal from office, but could lead to a variety of punishments.[36] Likewise, the Framers adopted a requirement of a two-thirds majority vote for conviction on impeachment charges, shielding the process somewhat from naked partisan control.[37] This too differed from the English practice, which allowed conviction on a simple majority vote.[38] And in England, the Crown could pardon individuals following an impeachment conviction.[39] In contrast, the Framers restricted the pardon power from being applied to impeachments, rendering the impeachment process essentially unchecked by the executive branch.[40] Ultimately, the Framers' choices in crafting the Constitution's impeachment provisions provide Congress with a crucial check on the other branches of the federal government and inform the Constitution's separation of powers.[41]

Impeachment Trials

The Framers also applied the lessons of English history and colonial practice in determining the structure and location of impeachment trials.[42] As mentioned above, most of the American colonies and early state constitutions adopted their own impeachment procedures before the establishment of the federal Constitution, placing the power to try impeachments in various bodies.[43] At the Constitutional Convention, the proper body to try impeachments posed a difficult question.[44] Several proposals were considered that would have assigned responsibility for trying impeachments to different bodies, including the Supreme Court, a panel of state court judges, or a combination of these bodies.[45] One objection to granting the Supreme Court authority to try

(providing that the Senate has the exclusive power to try impeachments).

[33] *See* HOFFER & HULL, *supra* note 19, at xiii, 96–106; GERHARDT, *supra* note 15, at 3.

[34] *See* Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 908–12 (1999) [hereinafter Gerhardt, *Perspective*].

[35] HOFFER & HULL, *supra* note 19, at 96–106.

[36] *Id.* at 97.

[37] *Id*.

[38] *Id*.

[39] THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 22, at 1071–72.

[40] *See* U.S. CONST. art. II, § 2, cl. 1 (providing that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment").

[41] *See* THE FEDERALIST NO. 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the power of impeachment as a "bridle in the hands of the legislative body upon the executive servants of the government"); *id.* NO. 66 (noting that impeachment is an "essential check in the hands of [Congress] upon the encroachments of the executive"); *id.* NO. 81 (explaining the importance of the impeachment power in checking the judicial branch).

[42] CHARLES L. BLACK, IMPEACHMENT: A HANDBOOK 5–14 (1974).

[43] *See* WOOD, *supra* note 30, at 141–42; *see, e.g.*, N.Y. CONST. of 1777, arts. XXXII–XXXIII (providing that impeachments be tried before a court composed of state senators, judges of the New York Supreme Court, and the state chancellor).

[44] *See* Nixon v. United States, 506 U.S. 224, 233 (1993).

[45] *See id*. at 243–44 (White, J. joined by Blackmun, J. concurring); HOFFER & HULL, *supra* note 19, at 96–100; BLACK, *supra* note 42, at 10.

impeachments was that Justices were to be appointed by the President, casting doubt on their ability to be independent in an impeachment trial of the President or another executive official.[46] Further, a crucial legislative check in the Constitution's structure against the judicial branch is impeachment, as Article III judges cannot be removed by other means.[47] To permit the judiciary to have the ultimate say in one of the most significant checks on its power would subvert the purpose of that important constitutional limitation.[48]

Rather than allowing a coordinate branch to play a role in the impeachment process, the Framers decided that Congress alone would determine who is subject to impeachment. This framework guards against, in the words of Alexander Hamilton, "a series of deliberate usurpations on the authority of the legislature" by the judiciary.[49] Likewise, the Framers' choice to place both the accusatory and adjudicatory aspects of impeachment in the legislature renders impeachment "a bridle in the hands of the legislative body upon the executive" branch.[50] That said, the Framers' choice also imposed institutional constraints on the process.[51] Dividing the power to impeach from the authority to try and convict guards against "the danger of persecution from the prevalency of a fractious spirit in either" body.[52]

Finally, the Framers made one exception to the legislature's exclusive role in the impeachment process that promotes integrity in the proceedings. The Chief Justice of the United States presides at impeachment trials of the President of the United States.[53] This provision ensures that a Vice President, in his usual capacity as Presiding Officer of the Senate,[54] shall not preside over proceedings that could lead to his own elevation to the presidency, a particularly important concern at the time of the founding, when a President and Vice President could belong to rival parties.[55]

High Crimes and Misdemeanors

The Framers narrowed the standard for impeachable conduct as compared to the English experience. While the English Parliament never formally defined the parameters of what counted as impeachable conduct, the Framers restricted impeachment to treason, bribery, and "other high Crimes and Misdemeanors," the latter phrase a standard inherited from English practice.[56] This

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[46] James Madison, *Notes on the Constitutional Convention* (Sept. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 551 (Max Farrand ed., 1911).

[47] While Congress enjoys the power of the purse, U.S. CONST. art I, § 9, cl. 7, this authority is less pronounced relative to the judiciary than the executive branch as the Constitution provides that the salary of federal judges cannot be reduced "during their Continuance in Office." *Id*. art. III, § 1.

[48] *See Nixon*, 506 U.S. at 235; THE FEDERALIST NO. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[49] *See* THE FEDERALIST NO. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[50] *See id*. NO. 65; *id*. NO. 66 (noting that impeachment is an "essential check in the hands of [Congress] upon the encroachments of the executive"); *see Nixon*, 506 U.S. at 242–43 (White, J. joined by Blackmun, J. concurring) ("[T]here can be little doubt that the Framers came to the view at the Convention that . . . the impeachment power must reside in the Legislative Branch to provide a check on the largely unaccountable Judiciary.").

[51] *See* BLACK, *supra* note 42, at 5–14.

[52] THE FEDERALIST NO. 66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[53] U.S. CONST. art. I, § 3, cl. 6.

[54] *Id*., art. I, § 3, cl. 5.

[55] *Compare* U.S. CONST. art. II, § 1, cl. 3 (providing that the electors vote for two persons for President with the runner-up becoming Vice President), *with id*. amend XII (amending the Constitution to require electors to cast one vote for President and one for Vice President). *See* WOOD, *supra* note 30, at 212–13.

[56] HOFFER & HULL, *supra* note 19, at 97; THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 22, at 1066.

standard applied to behavior found damaging to the state, including significant abuses of a government office or power, misapplication of funds, neglect of duty, corruption, abridgement of parliamentary rights, and betrayals of the public trust.[57]

The debates at the Constitutional Convention over what behavior should be subject to impeachment focused mainly on the President.[58] In discussing whether the President should be removable by impeachment, Gouverneur Morris argued that the President should be removable through the impeachment process, noting concern that the President might "be bribed by a greater interest to betray his trust," and pointed to the example of Charles II receiving a bribe from Louis XIV.[59]

The adoption of the high crimes and misdemeanors standard during the Constitutional Convention reveals that the Framers did not envision impeachment as the proper remedy for simple policy disagreements with the President. During the debate, the Framers rejected a proposal to include—in addition to treason and bribery—"maladministration" as an impeachable offense, which would have presumably incorporated a broad range of common-law offenses.[60] Although "maladministration" was a ground for impeachment in many state constitutions at the time of the Constitution's drafting,[61] the Framers instead adopted the term "high Crimes and Misdemeanors" from English practice. James Madison objected to including "maladministration" as grounds for impeachment because such a vague standard would "be equivalent to a tenure during pleasure of the Senate."[62] The Convention voted to include "high crimes and misdemeanors" instead.[63] Arguably, the Framers' rejection of such a broad term supports the view that congressional disagreement with a President's policy goals is not sufficient grounds for impeachment.[64]

Of particular importance to the understanding of high crimes and misdemeanors to the Framers was the roughly contemporaneous British impeachment proceedings of Warren Hastings, the governor general of India, which were transpiring at the time of the Constitution's formulation and ratification.[65] Hastings was charged with high crimes and misdemeanors, which included corruption and abuse of power.[66] At the Constitutional Convention, George Mason positively referenced the impeachment of Hastings. At that point in the Convention, a proposal to define impeachment as appropriate for treason and bribery was under consideration. George Mason objected, noting that treason would not cover the misconduct of Hastings.[67] He also thought

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[57] HOFFER & HULL, *supra* note 19, at 3–14; CONSTITUTIONAL GROUNDS, *supra* note 18, at 4–7; BERGER, *supra* note 18, at 67–73.

[58] GERHARDT, *supra* note 15, at 104.

[59] 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 343 (Jonathan Elliot ed., 1827) [hereinafter ELLIOT'S DEBATES].

[60] RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 547, 550; *see* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 14–15 (1989) [hereinafter Gerhardt, *Constitutional Limits*].

[61] Gerhardt, *Constitutional Limits*, *supra* note 60, at 29; CONSTITUTIONAL GROUNDS, *supra* note 18, at 11; BLACK, *supra* note 42, at 29.

[62] RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 550; *see* BLACK, *supra* note 42, at 29–30.

[63] RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 64–65; *see* BLACK, *supra* note 42, at 28.

[64] *See* BLACK, *supra* note 42, at 30.

[65] CONSTITUTIONAL GROUNDS, *supra* note 18, at 7; HOFFER & HULL, *supra* note 19, at 113–15.

[66] CONSTITUTIONAL GROUNDS, *supra* note 18, at 7; HOFFER & HULL, *supra* note 19, at 113–15.

[67] RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 550.

impeachment should extend to "attempts to subvert the Constitution."[68] Mason thus proposed that maladministration be included as an impeachable offense, although, as noted above, this was eventually rejected in favor of "high Crimes and Misdemeanors."[69]

While evidence of precisely what conduct the Framers and ratifiers of the Constitution considered to constitute high crimes and misdemeanors is relatively sparse, the evidence available indicates that they considered impeachment to be an essential tool to hold government officers accountable for political crimes, or offenses against the state.[70] James Madison considered it "indispensable that some provision be made for defending the community against incapacity, negligence, or perfidy of the chief executive," as the President might "pervert his administration into a scheme of peculation or oppression," or "betray his trust to foreign powers."[71] Alexander Hamilton, in explaining the Constitution's impeachment provisions, described impeachable offenses as arising from "the misconduct of public men, or in other words, from the abuse or violation of some public trust."[72] Such offenses were "*POLITICAL*, as they relate chiefly to injuries done immediately to the society itself."[73] These political offenses could take innumerable forms and simply could not be neatly delineated.[74]

At the North Carolina ratifying convention, James Iredell, later to serve as an Associate Justice of the Supreme Court, noted the difficulty in defining what constitutes an impeachable offense, beyond causing injury to the government.[75] For him, impeachment was "calculated to bring [offenders] to punishment for crime which is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government. . . . [T]he occasion for its exercise will arise from acts of great injury to the community."[76] He thought the President would be impeachable for receiving a bribe or "act[ing] from some corrupt motive or other,"[77] but not merely for "want of judgment."[78] Similarly, Samuel Johnston, then the governor of North Carolina and later the state's first Senator, thought impeachment was reserved for "great misdemeanors against the public."[79]

At the Virginia ratifying convention, a number of individuals claimed that impeachable offenses were not limited to indictable crimes.[80] For example, James Madison argued that were the President to assemble a minority of states in order to ratify a treaty at the expense of the other states, this would constitute an impeachable "misdemeanor."[81] And Virginia Governor Edmund Randolph, who would become the nation's first Attorney General, noted that impeachment was

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[68] *Id*.

[69] *See supra* notes 59–61.

[70] *See* THE FEDERALIST NO. 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961); GERHARDT, *supra* note 15, at 104.

[71] 5 ELLIOT'S DEBATES, *supra* note 59, at 341.

[72] THE FEDERALIST NO. 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[73] *Id*.

[74] *Id. See* GERHARDT, *supra* note 15, at 105.

[75] *See* GERHARDT, *supra* note 15, at 19.

[76] 4 ELLIOT'S DEBATES, *supra* note 59, at 113 (statement of James Iredell at Convention of North Carolina).

[77] *Id*. at 127.

[78] *Id*. at 126.

[79] *Id*. at 48. *See* GERHARDT, *supra* note 15, at 19 (quoting 4 ELLIOT'S DEBATES, *supra* note 59, at 48 (statement of General Johnston)).

[80] *See* GERHARDT, *supra* note 15, at 19.

[81] 3 ELLIOT'S DEBATES, *supra* note 59, at 500.

appropriate for a "willful mistake of the heart," but not for incorrect opinions.[82] Randolph also argued that impeachment was appropriate for a President's violation of the Foreign Emoluments Clause,[83] which, he noted, guards against corruption.[84]

James Wilson, delegate to the Constitutional Convention and later a Supreme Court Justice, delivered talks at the College of Philadelphia on impeachment following the adoption of the federal Constitution. He claimed that impeachment was reserved to "political crimes and misdemeanors, and to political punishments."[85] He argued that, in the eyes of the Framers, impeachments did not come "within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects."[86] Thus, for Wilson, the impeachment and removal of an individual did not preclude a later trial and punishment for a criminal offense based on the same behavior.[87]

Justice Joseph Story's writings on the Constitution echo the understanding that impeachment applied to political offenses. He noted that impeachment applied to those "offences … committed by public men in violation of their public trust and duties," duties that are often "political."[88] And like Hamilton, Story considered the range of impeachable offenses "so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law."[89]

At the time of ratification of the Constitution, the phrase "high crimes and misdemeanors" thus appears understood to have applied to uniquely "political" offenses, or misdeeds committed by public officials against the state.[90] Such offenses simply resist a full delineation, as the possible range of potential misdeeds in office cannot be determined in advance.[91] Instead, the type of misconduct that merits impeachment is worked out over time through the political process. In the years following the Constitution's ratification, precisely what behavior constitutes a high crime or misdemeanor has thus been the subject of much debate.[92]

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[82] *Id.* at 401.

[83] U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").

[84] DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 345 (2d ed. 1805).

[85] James Wilson, *Lectures on Law*, *reprinted in* 1 THE WORKS OF JAMES WILSON 426 (Robert Green McCloskey ed., 1967).

[86] *Id*. at 324.

[87] *Id*.

[88] STORY, *supra* note 13, at § 744.

[89] *Id*. at § 762.

[90] Gary L. McDowell, "*High Crimes and Misdemeanors:" Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 638 (1999); BERGER, *supra* note 18, at 59–61; GERHARDT, *supra* note 15, at 103–06.

[91] *See* GERHARDT, *supra* note 15, at 105.

[92] *Compare* H. COMM. ON THE JUDICIARY, IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, 105TH CONG., 2D SESS., H.R. REP. NO. 105-830, at 110–18 (1998) [hereinafter CLINTON IMPEACHMENT] (majority views), *with id*. at 204 (minority views). *See* McDowell, *supra* note 90, at 627; Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999).

The Role of the House of Representatives

The Constitution grants the sole power of impeachment to the House of Representatives.[93] Generally speaking, the impeachment process has often been initiated in the House by a Member by resolution or declaration of a charge,[94] although anyone—including House Members, a grand jury, or a state legislature—may *request* that the House investigate an individual for impeachment purposes.[95] Indeed, in modern practice, many impeachments have been sparked by referrals from an external investigatory body.[96] Beginning in the 1980s, the Judicial Conference has referred its findings to the House recommending an impeachment investigation into a number of federal judges who were eventually impeached.[97] Similarly, in the impeachment of President Bill Clinton, an independent counsel—a temporary prosecutor given statutory independence and charged with investigating certain misconduct when approved by a judicial body[98]—first conducted an investigation into a variety of alleged activities on the part of the President and his associates, and then delivered a report to the House detailing conduct that the independent counsel considered potentially impeachable.[99]

Regardless of the source requesting an impeachment investigation, the House has sole discretion under the Constitution to begin any impeachment proceedings against an individual.[100] In practice, impeachment investigations are often handled by an already existing or specially created subcommittee of the House Judiciary Committee.[101] The scope of the investigation can vary. In some instances, an entirely independent investigation may be initiated by the House. In other cases, an impeachment investigation might rely on records delivered by outside entities, such as those delivered by the Judicial Conference or an independent counsel.[102] Following this

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[93] U.S. CONST. art. I, § 2, cl. 5.

[94] *See* 3 HINDS, *supra* note 5, at § 2342, pp. 711–15; *id.* § 2400, pp. 823–26; *id.* § 2469, pp. 948–50; 116 CONG. REC. 11,941–42 (1970); 119 CONG. REC. 34,873 (1973); *see also* HOUSE PRACTICE, *supra* note 6, at ch. 27 § 6. For a discussion of the impeachment procedures used in the House, see CRS Report R45769, *The Impeachment Process in the House of Representatives*, by Elizabeth Rybicki and Michael Greene.

[95] *See* GERHARDT, *supra* note 15, at 25; 3 LEWIS DESCHLER, PRECEDENTS OF THE UNITED STATES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, at Ch. 14 § 5, pp. 2020–21; *id.* §§ 5.10–5.11, pp. 2030–31 (1994), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf [hereinafter "DESCHLER"].

[96] The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes the Judicial Conference to forward a certification to the House that impeachment of a federal judge may be warranted. 28 U.S.C. § 355.

[97] *See* GERHARDT, *supra* note 15, at 176.

[98] *See* 28 U.S.C. §§ 591–99. The statute authorizing the appointment of an independent counsel expired in 1999. *Id.* § 599.

[99] *See* GERHARDT, *supra* note 15, at 176.

[100] U.S. CONST. art. I, § 2, cl. 5. For a consideration of legal issues surrounding an impeachment investigation, see CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey. For discussion of the House procedures used in impeachment investigations, see CRS Report R45769, *The Impeachment Process in the House of Representatives*, by Elizabeth Rybicki and Michael Greene.

[101] *See e.g.*, GERHARDT, *supra* note 15, at x–xi; PORTEOUS IMPEACHMENT, *supra* note 7, at 6 (describing the creation by the House Judiciary Committee of an Impeachment Task Force to investigate allegations against Judge Porteous). *Cf.* Press Release, Nancy Pelosi, Speaker of the House, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019) https://www.speaker.gov/newsroom/92419-0 (announcing that various committee investigations of President Trump constitute an "official impeachment inquiry"); H.R. Res. 660 116th Cong. (2019) (directing multiple committees to "continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America").

[102] *See* GERHARDT, *supra* note 15, at 26. The House also did not conduct independent fact finding in the impeachments

investigation, the full House may vote on the relevant impeachment articles. If articles of impeachment are approved, the House chooses managers to present the matter to the Senate.[103] The Chairman of the House Managers then presents the articles of impeachment to the Senate and requests that the body order the appearance of the accused.[104] The House Managers typically act as prosecutors in the Senate trial.[105]

The House has impeached nineteen individuals: fifteen federal judges, one Senator, one Cabinet member, and two Presidents.[106] The consensus reflected in these proceedings is that impeachment may serve as a means to address misconduct that does not necessarily give rise to criminal sanction. According to congressional sources, the types of conduct that constitute grounds for impeachment in the House appear to fall into three general categories: (1) improperly exceeding or abusing the powers of the office; (2) behavior incompatible with the function and purpose of the office; and (3) misusing the office for an improper purpose or for personal gain.[107] Consistent with scholarship on the scope of impeachable offenses,[108] congressional materials have cautioned that the grounds for impeachment "do not all fit neatly and logically into categories" because the remedy of impeachment is intended to "reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office."[109]

While successful impeachments and convictions of federal officials represent some clear guideposts for what constitutes impeachable conduct, impeachment processes that do not result in a final vote for impeachment and removal also may influence the understanding of Congress, executive and judicial branch officials, and the public over what constitutes an impeachable offense.[110] A prominent example involves the first noteworthy attempt at a presidential impeachment, aimed at John Tyler in 1842. At the time, the presidential practice had generally been to reserve vetoes for constitutional, rather than policy, disagreements with Congress.[111] Following President Tyler's veto of a tariff bill on policy grounds, the House endorsed a select committee report condemning President Tyler and suggesting that he might be an appropriate subject for impeachment proceedings.[112] The possibility apparently ended when the Whigs, who

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of President Bill Clinton, President Andrew Johnson, and Judge Harry E. Claiborne. *Id*. at 176–77.

[103] HOUSE PRACTICE, *supra* note 6, at ch. 27 §§ 8–9.

[104] GERHARDT, *supra* note 15, at 33.

[105] 3 HINDS, *supra* note 5, at § 2301, pp. 651–52; *id.* at § 2370, pp. 785–86, 788–89; *id.* at § 2390, pp. 809–10, 812; *id.* at § 2420, pp. 862–63, 869; *id.* at § 2449, pp. 909–10, 915.

[106] *See* PORTEOUS IMPEACHMENT, *supra* note 7, at 1 n.1.

[107] HOUSE PRACTICE, *supra* note 6, at ch. 27 § 4. For examples of impeachments that fit into these categories, see CONG. GLOBE, 40th Cong., 2nd Sess. 1400 (1868) (impeaching President Andrew Johnson for violating the Tenure of Office Act); 132 CONG. REC. H4710–22 (daily ed. July 22, 1986) (impeaching Judge Harry E. Claiborne for providing false information on federal income tax forms); 156 CONG. REC. 3155–57 (2010) (impeaching Judge G. Thomas Porteous for engaging in a corrupt relationship with bail bondmen where he received things of value in return for helping bondsman develop relationships with state judges).

[108] GERHARDT, *supra* note 15, at 48–49.

[109] CONSTITUTIONAL GROUNDS, *supra* note 18, at 17.

[110] In 1970, for instance, a Subcommittee of the House Judiciary Committee was authorized to conduct an impeachment investigation into the conduct of Justice William O. Douglas, but ultimately concluded that impeachment was not warranted. *See generally* ASSOCIATE JUSTICE WILLIAM O. DOUGLAS, FINAL REPORT BY THE SPECIAL SUBCOMM. ON H. RES. 920 OF THE COMMITTEE ON THE JUDICIARY, 91ST CONG. (Comm. Print 1970).

[111] *See generally* MICHAEL J. GERHARDT, FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 41–47 (2013).

[112] OLIVER P. CHITWOOD, JOHN TYLER: CHAMPION OF THE OLD SOUTH 299–300 (1939).

had led the movement to impeach, lost their House majority in the midterm elections.[113] In the years following the aborted effort to impeach President Tyler, Presidents have routinely used their veto power for policy reasons. This practice is generally seen as an important separation of powers limitation on Congress's ability to pass laws rather than a potential ground for impeachment.[114]

Likewise, although President Richard Nixon resigned before impeachment proceedings were completed in the House, the approval of three articles of impeachment by the House Judiciary Committee against him may inform lawmakers' understanding of conduct that constitutes an impeachable offense.[115] The approved impeachment articles included allegations that President Nixon obstructed justice by using the office of the presidency to impede the investigation into the break-in of the Democratic National Committee headquarters at the Watergate Hotel and Office Building and authorized a cover-up of the activities that were being investigated. President Nixon was alleged to have abused the power of his office by using federal agencies to punish political enemies and refusing to cooperate with the Judiciary Committee's investigation.[116] While no impeachment vote was taken by the House, the Nixon experience nevertheless established what some would call the quintessential case for impeachment—a serious abuse of the office of the presidency that undermined the office's integrity.[117]

That said, one must be cautious in extrapolating wide-ranging lessons from the lack of impeachment proceedings in the House. Specific behavior not believed to constitute an impeachable offense in prior contexts might be considered impeachable in a different set of circumstances. Moreover, given the varied contextual permutations, the full scope of impeachable behavior resists specification,[118] and historical precedent may not always serve as a useful guide to whether conduct is grounds for impeachment. For instance, no President has been impeached for abandoning the office and refusing to govern. That this event has not occurred, however, hardly proves that this behavior would not constitute an impeachable offense meriting removal from office.[119]

The Role of the Senate

Historical Practice

The Constitution grants the Senate sole authority "to try all impeachments."[120] The Senate thus enjoys broad discretion in establishing procedures to be undertaken in an impeachment trial. For instance, in a lawsuit challenging the Senate's use of a trial committee to take and report

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[113] GERHARDT, FORGOTTEN PRESIDENTS, *supra* note 111, at 57.

[114] Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 706–07 (1999) ("The Senate acquittal of President Andrew Johnson and the House's failed attempt to impeach President John Tyler implies that even a deeply felt congressional disagreement with a target's policies or political philosophies alone is not enough to justify removal.").

[115] *See* H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93D CONG., 2D SESS., H.R. REP. NO. 93-1305, at 6–11 (1974) [hereinafter NIXON IMPEACHMENT]; United States v. Nixon, 418 U.S. 683, 713–14 (1974).

[116] *See* NIXON IMPEACHMENT, *supra* note 115, at 6–11.

[117] *See* discussion *infra* "Effort to Impeach President Richard Nixon."

[118] *See* GERHARDT, *supra* note 15, at 106.

[119] *See* BLACK, *supra* note 42, at 33–36.

[120] U.S. CONST. art. I, § 3, cl. 6.

evidence, the Supreme Court in *Nixon v. United States* unanimously ruled that the suit posed a nonjusticiable political question and was not subject to judicial resolution.[121] The Court explained that the term "try" in the Constitution's provisions on impeachment was textually committed to the Senate for interpretation and lacked sufficient precision to enable a judicially manageable standard of review.[122] In reaching this conclusion, the Court noted that the Constitution imposes three precise requirements for impeachment trials in the Senate: (1) Members must be under oath during the proceedings; (2) conviction requires a two-thirds vote; and (3) the Chief Justice must preside if the President is tried.[123] Given these three clear requirements, the Court reasoned that the Framers "did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try.'"[124] Thus, subject to these three clear requirements of the Constitution, the Senate enjoys substantial discretion in establishing its own procedures during impeachment trials.

While the Senate determines for itself how to conduct impeachment proceedings, the nature and frequency of Senate impeachment trials largely hinge on the impeachment charges brought by the House. The House has impeached thirteen federal district judges, a judge on the Commerce Court, a Senator, a Supreme Court Justice, the secretary of an executive department, and two Presidents.[125] But the Senate ultimately has only convicted and removed from office seven federal district judges and a Commerce Court judge.[126] While this pattern obviously does not mean that Presidents or other civil officers are immune from removal based on impeachment,[127] the Senate's acquittals may be considered to have precedential value when assessing whether particular conduct constitutes a removable offense. For instance, the first subject of an impeachment by the House involved a sitting U.S. Senator for allegedly conspiring to aid Great Britain's attempt to seize Spanish-controlled territory.[128] The Senate voted to dismiss the charges in 1799,[129] and no Member of Congress has been impeached since. The House also impeached Supreme Court Justice Samuel Chase, who was widely viewed by Jeffersonian Republicans as openly partisan for, among other things, misapplying the law.[130] The Senate acquitted Justice Chase, establishing, at least for many, a general principle that impeachment is not an appropriate remedy for disagreement with a judge's judicial philosophy or decisions.[131]

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[121] 506 U.S. 224, 238 (1993). *But see In re* Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1439–40 (11th Cir. 1987) (upholding an order granting the House Judiciary Committee access to grand jury materials in an impeachment investigation).

[122] *Id*. at 229–30.

[123] *Id*. at 230.

[124] *Id*.

[125] *See infra* Table 1. Impeachments in the United States.

[126] *See id*.

[127] U.S. CONST. art. II, § 4.

[128] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801 275–281 (1997).

[129] 8 ANNALS OF CONG. 2318–20 (1799).

[130] *See* discussion *infra* "Early Historical Practices (1789–1860)."

[131] *See* GERHARDT, *supra* note 15, at 3–11; WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS 134 (1992). For a discussion of the "constitutional constructions" developed by the Chase impeachment, including the standard of impeachable offenses and the role of the judiciary in the Republic, *see* WHITTINGTON, *supra* note 13, at 20–71.

Requirement of Oath or Affirmation

The Constitution requires Senators sitting as an impeachment tribunal to take a special oath distinct from the oath of office that all Members of Congress must take.[132] This requirement underscores the unique nature of the role the Senate plays in impeachment trials, at least in comparison to its normal deliberative functions.[133] The Senate practice has been to require each Senator to swear or affirm that he will "do impartial justice according to the Constitution and laws."[134] The oath was originally adopted by the Senate before proceedings in the impeachment of Senator Blount in 1798 and has remained largely unchanged since.[135]

Judgment in Cases of Impeachment

While the Constitution authorizes the Senate, following an individual's conviction in an impeachment trial, to bar an individual from holding office in the future, the text of the Constitution does not make clear that a vote for disqualification from future office must be taken separately from the initial vote for conviction.[136] Instead, the potential for a separate vote for disqualification has arisen through the historical practice of the Senate.[137] The Senate did not choose to disqualify an impeached individual from holding future office until the Civil War era. Federal district judge West H. Humphreys took a position as a judge in the Confederate government but did not resign his seat in the U.S. government.[138] The House impeached Humphreys in 1862. The Senate then voted unanimously to convict Judge Humphreys and separately voted to disqualify him from holding office in the future.[139] Senate practice since the Humphreys case has been to require a simple majority vote to disqualify an individual from holding future office, rather than the supermajority required by the Constitution's text for removal, but it is unclear what justifies this result beyond historical practice.[140]

The Constitution also distinguishes the impeachment remedy from the criminal process, providing that an individual removed from office following impeachment "shall nevertheless be liable and subject to indictment."[141] The Senate's power to convict and remove individuals from office, as well as to bar them from holding office in the future, thus does not overlap with criminal remedies for misconduct. Indeed, the unique nature of impeachment as a political remedy distinct from criminal proceedings ensures that "the most powerful magistrates should be amenable to the law."[142] Rather than helping police violations of strictly criminal activity,

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[132] U.S. CONST. art. I, § 3, cl. 6.

[133] *See* BLACK, *supra* note 42, at 9–10.

[134] *See* S. DOC. NO. 99-33, at 61 (1986).

[135] *See Senate Adopts First Impeachment Rules*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Adopts_First_Impeachment_Rules.htm (last visited Oct. 25, 2019).

[136] U.S. CONST. art. I, § 3, cl. 7.

[137] *See* 6 CANNON, *supra* note 5, at § 512, pp. 705–08. *See, e.g.*, 49 CONG. REC. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays).

[138] EMILY F.V. TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 114–16 (1999).

[139] ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 123 (1992); *see* U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.").

[140] U.S. CONST. art. I, § 3, cl. 7.

[141] *See id.* art. I, § 3, cl. 7.

[142] James Wilson, *Lectures on Law*, *supra* note 85, at 425–26.

impeachment is a "method of national inquest into the conduct of public men" for "the abuse or violation of some public trust."[143] Impeachable offenses are those that "relate chiefly to injuries done immediately to the society itself."[144] Put another way, the purpose of impeachment is to protect the public interest, rather than impose a punitive measure on an individual.[145] This distinction was highlighted in the impeachment trial of federal district judge Alcee Hastings. Judge Hastings had been indicted for a criminal offense, but was acquitted.[146] In 1988, the House impeached Hastings for much of the same conduct for which he had been indicted. Judge Hastings argued that the impeachment proceedings constituted "double jeopardy" because of his previous acquittal in a criminal proceeding.[147] The Senate rejected his motion to dismiss the articles against him.[148] The Senate voted to convict and remove Judge Hastings on eight articles, but it did not disqualify him from holding office in the future.[149] Judge Hastings was later elected to the House of Representatives.[150]

History of Impeachment in Congress

The Constitution provides that the President, Vice President, and all civil officers are subject to impeachment for "treason, bribery, or other high Crimes and Misdemeanors."[151] The meaning of high crimes and misdemeanors, like the other provisions in the Constitution relevant to impeachment, is not primarily determined through the development of jurisprudence in the courts. Instead, the meaning of the Constitution's impeachment clauses is "liquidated" over time, or determined through historical practice.[152] The Framers did not delineate with specificity the complete range of behavior that would merit impeachment, as the scope of possible "offenses committed by federal officers are myriad and unpredictable."[153] According to one scholar,

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[143] *See* THE FEDERALIST NO. 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[144] *Id.*

[145] 8 ANNALS OF CONG. 2251 (1798).

[146] H.R. Res. 499, 100th Cong., 2d Sess. (1988); H. COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, REPORT OF THE COMM. ON THE JUDICIARY TO ACCOMPANY H. RES. 499, 100TH CONG., 2D SESS., H.R. REP. NO. 100-810, at 1–5, 66 (1988) [hereinafter HASTINGS IMPEACHMENT].

[147] IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, MOTIONS OF JUDGE ALEE L. HASTINGS TO DISMISS ARTICLES I–XV AND XVII OF THE ARTICLES OF IMPEACHMENT AGAINST HIM AND SUPPORTING AND OPPOSING MEMORANDA, 101ST CONG., 1ST SESS., S. DOC. NO. 101-4, at 48–65 (1989).

[148] *The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Oct. 25, 2019).

[149] 135 CONG. REC. S13, 783–88 (daily ed. Oct. 20, 1989).

[150] *See* Waggoner v. Hastings, 816 F. Supp. 716 (S.D. Fla. 1993).

[151] U.S. CONST. art. II, § 4.

[152] THE FEDERALIST NO. 37 (James Madison) (Clinton Rossiter ed., 1961); Letter from James Madison to Spencer Roane, *supra* note 14, at 450.

[153] KEITH E. WHITTINGTON, A FORMIDABLE WEAPON OF FACTION? THE LAW AND POLITICS OF IMPEACHMENT 13 (2019) (Law and Social Inquiry) (Forthcoming); STORY, *supra* note 13, at § 762 ("Not but that crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law."); *id.* § 795 ("Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.").

impeachments are sometimes "aimed at articulating, establishing, preserving, and protecting constitutional norms," or "'constructing' constitutional meaning and practices."[154] At times, impeachment might be used to reinforce an existing norm, indicating that certain behavior continues to constitute grounds for removal; in others, it may be used to establish a new norm, setting a marker that signifies what practices are impeachable for the future.[155] Examining the history of impeachment in Congress can thus illuminate the constitutional meaning of impeachment, including when Congress has established or reaffirmed a particular norm.

Early Historical Practices (1789–1860)

Congressional understanding of the scope of activities subject to impeachment and the potential persons who may be impeached was first put to the test during the Adams Administration. In 1797, letters sent to President Adams revealed a conspiracy by Senator William Blount—in violation of the U.S. government's policy of neutrality on the matter and the Neutrality Act[156]—to organize a military expedition with the British to invade land in the American Southwest under Spanish control.[157] The House voted to impeach Senator Blount on July 7, 1797,[158] while the Senate voted to expel Senator William Blount the next day.[159] Before impeaching Senator Blount, several House Members questioned whether Senators were "civil officers" subject to impeachment.[160] But Samuel W. Dana of Connecticut argued that Members of Congress must be civil officers, because other provisions of the Constitution that mention offices appear to include holding legislative office.[161] Despite already having voted to impeach Senator Blount, it was not until early in the next year that the House actually adopted specific articles of impeachment against him.[162]

At the Senate impeachment trial in 1799, Blount's attorneys argued that impeachment was improper because Blount had already been expelled from his Senate seat and had not been charged with a crime.[163] But the primary issue of debate was whether Members of Congress qualified as civil officers subject to impeachment. The House prosecutors argued that under the American system, as in England, virtually anyone was subject to impeachment.[164] The defense responded that this broad interpretation of the impeachment power would enable Congress to impeach state officials as well as federal, upending the proper division of federal and state authorities in the young Republic.[165] The Senate voted to defeat a resolution that declared Blount was a "civil officer" and therefore subject to impeachment.[166] The Senate ultimately voted to dismiss the impeachment articles brought against Blount because it lacked jurisdiction over the

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[154] WHITTINGTON, FORMIDABLE WEAPON, *supra* note 153, at 17–18 (quoting WHITTINGTON, *supra* note 13).

[155] *Id*.

[156] 1 Stat. 381, 384 § 5 (June 5, 1794) (codified as amended at 18 U.S.C. § 960).

[157] *See generally* BUCKNER F. MELTON, THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 60–103 (1998); GERHARDT, *supra* note 15, at 48; CURRIE, *supra* note 128, at 275–281.

[158] TASSEL & FINKELMAN, *supra* note 138, at 87–88.

[159] GERHARDT, *supra* note 15, at 48; s*ee* U.S. CONST. art. I, § 5.

[160] CURRIE, *supra* note 128, at 276.

[161] *Id.* (citing U.S. CONST. art. I, §§ 3–9).

[162] TASSEL & FINKELMAN, *supra* note 138, at 87–88; *see generally* MELTON, *supra* note 157, at 104–89.

[163] CURRIE, *supra* note 128, at 277.

[164] *Id.* at 279.

[165] *Id.*

[166] 8 ANNALS OF CONG. 2317–18 (1799).

matter, although the impeachment record does not reveal the precise basis for this conclusion.[167] In any event, the House has not impeached a Member of Congress since.

The first federal official to be impeached and removed from office was John Pickering, a federal district judge. The election of President Thomas Jefferson in 1800, along with Jeffersonian Republican majorities in both Houses of Congress, signaled a shift from Federalist party control of government.[168] Much of the federal judiciary at this early stage of the Republic were members of the Federalist party, and the new Jeffersonian Republican majority strongly opposed the Federalist-controlled courts.[169] John Pickering was impeached by the House of Representatives in 1803[170] and convicted by the Senate on March 12, 1804.[171] The circumstances of Judge Pickering's impeachment are somewhat unique as it appears that the judge had been mentally ill for some time, although the articles of impeachment did not address Pickering's mental faculties but instead accused him of drunkenness, blasphemy on the bench, and refusing to follow legal precedent.[172] Judge Pickering did not appear at his trial, and Senator John Quincy Adams apparently served as a defense counsel.[173] Following debate in a closed session, the Senate voted to permit evidence of Judge Pickering's insanity, drunkenness, and behavior on the bench.[174] The Senate also rejected a resolution to disqualify three Senators, who were previously in the House and had voted to impeach Judge Pickering, from participating in the impeachment trial.[175] The Senate voted to convict Judge Pickering guilty as charged, but the articles did not explicitly specify that any of Pickering's behavior constituted a high crime or misdemeanor.[176] Objections to the framing of the question at issue caused several Senators to withdraw from the trial.[177]

On the same day the Senate convicted Judge Pickering, the House of Representatives impeached Supreme Court Justice Samuel Chase.[178] Like the impeachment trial of Judge Pickering, the proceedings occurred following the election of President Thomas Jefferson and amid intense

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[167] HOFFER & HULL, *supra* note 19, at 155, 161. 9 ANNALS OF CONG. 2648–49 (1799). CURRIE, *supra* note 128, at 280–81. While the Senate's vote to dismiss for lack of jurisdiction might also be based on the fact that the Senator had been expelled from Congress, and therefore did not occupy an "office," it is generally accepted that the Senate's decision stands for the proposition that impeachment does not extend to Members of Congress. *See* HOUSE PRACTICE, *supra* note 6, at ch. 27 §§ 2–3.; H. COMM. ON THE JUDICIARY, 93D CONG., IMPEACHMENT, SELECTED MATERIAL 692 (Comm. Print 1973) [hereinafter IMPEACHMENT, SELECTED MATERIALS]; Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1373 (Fed. Cir. 2006) ("This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a civil officer . . . for purposes of the Impeachment Clause.")

[168] HOFFER & HULL, *supra* note 19, at 181.

[169] HOFFER & HULL, *supra* note 19, at 206.

[170] *See* 12 ANNALS OF CONG. 642 (1803); 13 ANNALS OF CONG. 380 (1803).

[171] *See* 13 ANNALS OF CONG. 368 (1804); HOFFER & HULL, *supra* note 19, at 208, 216–17.

[172] BUSHNELL, *supra* note 139, at 45–46.

[173] HOFFER & HULL, *supra* note 19, at 211–13.

[174] BUSHNELL, *supra* note 139, at 48–51. Scholars have noted that the Senate vote in favor of admitting evidence of insanity likely stemmed from two opposing reasons. The minority party Federalists—of which Judge Pickering was a member—considered evidence of insanity a reason to acquit the judge because it was not an impeachable offense. The majority party Republicans, in contrast, considered insanity a reason to remove him from the bench. *Id*. at 48–49.

[175] *Id*. at 46–47.

[176] 13 ANNALS OF CONG. 367 (1804); BUSHNELL, *supra* note 139, at 53–54.

[177] BUSHNELL, *supra* note 139, at 53–54.

[178] TASSEL & FINKELMAN, *supra* note 138, at 101; 13 ANNALS OF CONG. 363–68 (1804) (Senate conviction of Judge Pickering); 13 ANNALS OF CONG. 1180–81 (1804) (House impeachment of Justice Chase).

conflict between the Federalists and Jeffersonian Republicans.[179] Justice Chase was viewed by Jeffersonian Republicans as openly partisan, and in fact the Justice openly campaigned for Federalist John Adams in the presidential election of 1800.[180] Republicans also took issue with Justice Chase's aggressive approach to jury instructions in Sedition Act prosecutions.[181] The eight articles of impeachment accused him of acting in an "arbitrary, oppressive, and unjust" manner at trial, misapplying the law, and expressing partisan political views to a grand jury.[182] The Senate trial began on February 4, 1805. Both the House Managers and defense counsel for Justice Chase presented witnesses detailing the Justice's behavior.[183] While some aspects of the dispute focused on whether Justice Chase took certain actions, the primary conflict centered on whether his behavior was impeachable.[184] Before reaching a verdict, the Senate approved a motion from Senator James Bayard, a Federalist from Delaware, that the underlying question be whether Justice Chase was guilty of high crimes and misdemeanors, rather than guilty as charged.[185] Of the eight articles, a majority of Senators voted to convict on three, while the remaining five did not muster a majority for conviction.[186] But the Senate vote ultimately fell short of the necessary two-thirds majority to secure a conviction on any of the articles.[187]

The trial raised several questions that have recurred throughout the history of impeachments. For example, is impeachment limited to criminal acts, or does it extend to noncriminal behavior?[188] The opposing sides in the Chase case took differing views on this matter, as they would in later impeachments to come.[189] Due in part to the charged political atmosphere of the historical context, the attempted impeachment of Justice Chase has also come to represent an important limit on the scope of the impeachment remedy. Commentators have interpreted the acquittal of Justice Chase as establishing that impeachment does not extend to congressional disagreement with a judge's opinions or judicial philosophy.[190] At least some Senators who voted to acquit did not consider the alleged offenses as rising to the level of impeachable behavior.[191]

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[179] HOFFER & HULL, *supra* note 19, at 228–38.

[180] BUSHNELL, *supra* note 139, at 62–63.

[181] *See* CHAFETZ, *supra* note 20, at 108.

[182] IMPEACHMENT, SELECTED MATERIALS, *supra* note 167, at 133–35.

[183] BUSHNELL, *supra* note 139, at 63–73.

[184] *Id.* at 67–84; *see* GERHARDT, *supra* note 15, at 181.

[185] BUSHNELL, *supra* note 139, at 84.

[186] 14 ANNALS OF CONG. 664–69 (1804); TASSEL & FINKELMAN, *supra* note 138, at 103.

[187] TASSEL & FINKELMAN, *supra* note 138, at 103.

[188] BUSHNELL, *supra* note 139, at 82–87.

[189] *See* NIXON IMPEACHMENT, *supra* note 115, at 362–72 (minority views); 3 DESCHLER, *supra* note 95, at Ch. 14 §§ 3.8–3.11, pp. 1996–2003.

[190] *See* David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801–1805*, 33 WAKE FOREST L. REV. 219, 259 (1998); REHNQUIST, *supra* note 131, at 114; CHAFETZ, *supra* note 20, at 150. This is not to say that impeachment had no effect on Justice Chase, see *id.* at 109 (arguing that Justice Chase returned to the bench "humbled" and that one result of the affair was that the Marshall Court "made its peace with Republican politics); or the judiciary more broadly. *See* REHNQUIST, *supra* note 131, at 125; Gene Healy, *Indispensable Remedy: The Broad Scope of the Constitution's Impeachment Power*, CATO INST. 21–22 (2018), https://www.cato.org/sites/cato.org/files/pubs/pdf/gene-healy-indispensable-remedy-white-paper.pdf (noting that a result of the Chase impeachment was to "foster a new norm against blatant partisanship from the bench"). For a discussion of the implications of the Chase impeachment for the judiciary, see WHITTINGTON, *supra* note 13, at 20–71.

[191] *See* Gerhardt, *Perspective*, *supra* note 34, at 921.

By the time of the next impeachment in 1830, both houses of Congress were controlled by Jacksonian Democrats, and the federal courts were unpopular with Congress and the public.[192] The House of Representatives impeached James Peck, a federal district judge, for abusing his judicial authority. The sole article accused the judge of holding an attorney in contempt for publishing an article critical of Peck and barring the attorney from practicing law for eighteen months. The context surrounding Judge Peck's actions involved disputes over French and Spanish land grant titles following the transfer of land in the Louisiana territory from French to U.S. control.[193] Shortly after Missouri was admitted to the United States as part of the Missouri Compromise in 1821, Judge Peck decided a land rights case against the claimants in favor of the United States.[194] The attorney for the plaintiffs wrote an article critical of the decision in a local paper.[195] Judge Peck held the attorney in contempt, sentenced him to jail for twenty-four hours, and barred him from practicing law for eighteen months.[196]

The House impeached Judge Peck by a wide margin.[197] Of central concern during the Senate trial were the limits of a judge's common law contempt power, a matter that appeared to be in dispute.[198] The Senate ultimately acquitted Judge Peck, with roughly half of the Jacksonian Democrats voting against conviction.[199] Shortly thereafter, Congress passed a law reforming and defining the scope of the judicial contempt power.[200]

Finally, in the midst of the Civil War, federal district judge West H. Humphreys was appointed to a position as a judge in the Confederate government, but he did not resign as a U.S. federal judge.[201] In 1862, the House impeached and the Senate convicted Judge Humphreys for joining the Confederate government and abandoning his position.[202] As in the trial of Judge Pickering previously, Judge Humphreys did not attend the proceedings.[203] Unlike in the case of Judge Pickering, however, no defense was offered in the impeachment trial of Judge Humphreys.[204]

Impeachment of Andrew Johnson

The impeachment and trial of President Andrew Johnson took place in the shadow of the Civil War and the assassination of President Abraham Lincoln.[205] President Johnson was a Democrat and former slave owner who was the only southern Senator to remain in his seat when the South seceded from the Union.[206] President Lincoln, a Republican, appointed Johnson military governor

[192] BUSHNELL, *supra* note 139, at 91.

[193] TASSEL & FINKELMAN, *supra* note 138, at 108–09; BUSHNELL, *supra* note 139, at 92.

[194] TASSEL & FINKELMAN, *supra* note 138, at 108–09.

[195] *Id*.

[196] *Id*.

[197] 6 CONG. DEB. 818–19 (1830).

[198] BUSHNELL, *supra* note 139, at 91–113.

[199] 7 CONG. DEB. 45 (1831).

[200] *See* Act of Mar. 2, 1831, ch. 98, 4 Stat. 487.

[201] TASSEL & FINKELMAN, *supra* note 138, at 114–16.

[202] 3 HINDS, *supra* note 5, at §§ 2385–86, pp. 805–07; *see also id.* § 2390, pp. 810–11; *id.* § 2396–97, pp. 817–20.

[203] BUSHNELL, *supra* note 139, at 115.

[204] *Id.*

[205] *See* REHNQUIST, *supra* note 131, at 185–98.

[206] BUSHNELL, *supra* note 139, at 128.

of Tennessee in 1862,[207] and Johnson was later selected as Lincoln's second-term running mate on a "Union" ticket.[208] Given these unique circumstances, President Johnson lacked both a party and geographic power base when in office, which likely isolated him when he assumed the presidency following the assassination of President Lincoln.[209]

The majority Republican Congress and President Johnson clashed over, among other things, Reconstruction policies implemented in the former slave states and control over officials in the executive branch.[210] President Johnson vetoed twenty-one bills while in office, compared to thirty-six vetoes by all prior Presidents. Congress overrode fifteen of Johnson's vetoes, compared to just six with prior Presidents.[211] On March 2, 1867, Congress reauthorized, over President Johnson's veto, the Tenure of Office Act, extending its protections for all officeholders.[212] In essence, the Act provided that all federal officeholders subject to Senate confirmation could not be removed by the President except with Senate approval,[213] although the reach of this requirement to officials appointed by a prior administration was unclear.[214] Congressional Republicans apparently anticipated the possible impeachment of President Johnson when drafting the legislation; Republicans already knew of President Johnson's plans to fire Secretary of War Edwin Stanton, and the Act provided that a violation of its terms constituted a "high misdemeanor."[215]

President Johnson then fired Secretary Stanton without the approval of the Senate. Importantly, his Cabinet unanimously agreed that the new restrictions on the President's removal power imposed by the Tenure of Office Act were unconstitutional.[216] Shortly thereafter, on February 24, 1868, the House voted to impeach President Johnson.[217] The impeachment articles adopted by the House against President Johnson included defying the Tenure of Office Act by removing Stanton from office[218] and violating (and encouraging others to violate) the Army Appropriations Act.[219] One article of impeachment also accused the President of making "utterances, declarations, threats, and harangues" against Congress.[220]

The Senate appointed a committee to recommend rules of procedure for the impeachment trial which then were adopted by the Senate, including a one-hour time limit for each side to debate questions of law that would arise during the trial.[221] Chief Justice Salmon P. Chase presided over

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[207] *Id*.

[208] TASSEL & FINKELMAN, *supra* note 138, at 222.

[209] BUSHNELL, *supra* note 139, at 128.

[210] *See* WHITTINGTON, *supra* note 13, at 113–57; *see generally* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 1–25 (1973).

[211] TASSEL & FINKELMAN, *supra* note 138, at 222–23.

[212] Tenure of Office Act, 14 Stat. 430 (1867); TASSEL & FINKELMAN, *supra* note 138, at 224.

[213] Tenure of Office Act, 14 Stat. 430 (1867); *see* Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1663 (2016).

[214] REHNQUIST, *supra* note 131, at 228.

[215] LES BENEDICT, *supra* note 210, at 92–125.

[216] REHNQUIST, *supra* note 131, at 230.

[217] CONG. GLOBE, 40th Cong., 2nd Sess. 1400 (1868).

[218] *See* Act of Mar. 2, 1867, ch. 154, § 6, 14 Stat. 430. Incidentally, such tenure protections were later invalidated as unconstitutional by the Supreme Court. *See* Myers v. United States, 272 U.S. 52, 106–07 (1926).

[219] TASSEL & FINKELMAN, *supra* note 138, at 226.

[220] *Id.* at 235.

[221] REHNQUIST, *supra* note 131, at 219–20.

the trial and was sworn in by Associate Justice Samuel Nelson.[222] During the swearing-in of the individual Senators, the body paused to debate whether Senator Benjamin Wade of Indiana, the president pro tempore of the Senate, was eligible to participate in the trial. Because the office of the Vice President was empty, under the laws of succession at that time Senator Wade would assume the presidency upon a conviction of President Johnson. Ultimately, the Senator who raised this point, Thomas Hendricks of Indiana, withdrew the issue and Senator Wade was sworn in.[223]

An important point of contention at the trial was whether the Tenure of Office Act protected Stanton at all because of his appointment by President Lincoln, rather than President Johnson.[224] Counsel for President Johnson argued that impeachment for violating a statute whose meaning was unclear was inappropriate, and the statute barring removal of the Secretary of War was an unconstitutional intrusion into the President's authority under Article II.[225]

The Senate failed to convict President Johnson with a two-thirds majority by one vote on three articles, and it failed to vote on the remaining eight.[226] But reports suggest that several Senators were prepared to acquit if their votes were needed.[227] Seven Republicans voted to acquit; of those Senators, some thought it questionable whether the Tenure of Office Act applied to Stanton and believe it was improper to impeach a President for incorrectly interpreting an arguably ambiguous law.[228]

The implications of the acquittal of President Johnson are difficult to encapsulate neatly.[229] Some commentators have concluded that the failure to convict President Johnson coincides with a general understanding that while impeachment is appropriate for abuses of power or violations of the public trust, it does not pertain to political or policy disagreements with the President, no matter how weighty.[230] Of course, it bears mention that by the time of the Senate trial Johnson was in the last year of his Presidency, was not going to receive a nomination for President by either major political party for the next term, and appears to have promised in private to appoint a replacement for Stanton that could be confirmable.[231] More broadly, the Johnson impeachment also represented a larger struggle between Congress and the President over the scope of executive power, one that arguably reconstituted their respective roles following the Civil War presidency of Abraham Lincoln.[232]

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[222] *Id.* at 221.

[223] *See generally* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION (2012).

[224] REHNQUIST, *supra* note 131, at 221.

[225] *Id*. at 230–31.

[226] 3 HINDS, *supra* note 5, at § 2440 (vote on article 11); *id*. at § 2443, pp. 897–901 (vote on articles 2 and 3); *see* REHNQUIST, *supra* note 131, at 234–35.

[227] TASSEL & FINKELMAN, *supra* note 138, at 221; *see generally* HANS L. TREFOUSSE, IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS, AND RECONSTRUCTION 169 (1975).

[228] REHNQUIST, *supra* note 131, at 240–46.

[229] *See generally* WHITTINGTON, *supra* note 13, at 115; TREFOUSSE, *supra* note 227, at 180–90.

[230] HOFFER & HULL, *supra* note 19, at 101; Gerhardt, *Perspective*, *supra* note 34, at 921–22. This is not to say that the acquittal of President Johnson necessarily was a triumph or vindication of his actions. *See* WHITTINGTON, *supra* note 13, at 152 (arguing that "Johnson had been disciplined and his actions repudiated, even if he had not been removed").

[231] REHNQUIST, *supra* note 131, at 247.

[232] *See* WHITTINGTON, *supra* note 13, at 132–40.

Postbellum Practices (1865–1900)

The postbellum experience in American history saw a variety of government officials impeached on several different grounds. These examples provide important principles that guide the practice of impeachment through the present day. For example, the Senate has not always conducted a trial following an impeachment by the House. In 1873, the House impeached federal district judge Mark. H. Delahay for, among other things, drunkenness on and off the bench.[233] The impeachment followed an investigation by a subcommittee of the House Judiciary Committee into his conduct.[234] Following the House vote on impeachment, Judge Delahay resigned before written impeachment articles were drawn up, and the Senate did not hold a trial.[235] The impeachment of Judge Delahay shows that the scope of impeachable behavior is not limited to strictly criminal behavior; Congress has been willing to impeach individuals for behavior that is not indictable, but still constitutes an abuse of an individual's power and duties.

This period of American history was fraught with partisan conflict over Reconstruction.[236] Besides President Johnson, a number of other individuals were investigated by Congress during this time for purposes of impeachment. For example, in 1873, the House voted to authorize the House Judiciary Committee to investigate the behavior of Edward H. Durrell, federal district judge for Louisiana.[237] A majority of the House Judiciary Committee reported in favor of impeaching Judge Durell for corruption and usurpation of power, including interfering with the state's election.[238] Judge Durrell resigned on December 1, 1874, and the House discontinued impeachment proceedings.[239]

The first and only time a Cabinet-level official was impeached occurred during the presidential administration of Ulysses S. Grant. Grant's Secretary of War, William W. Belknap, was impeached in 1876 for allegedly receiving payments in return for appointing an individual to maintain a trading post in Indian territory.[240] Belknap resigned two hours before the House unanimously impeached him,[241] but the Senate still conducted a trial in which Belknap was acquitted.[242] During the trial, upon objection by Belknap's counsel that the Senate lacked jurisdiction because Belknap was now a private citizen, the Senate voted 37-29 in favor of jurisdiction.[243] A majority of Senators voted to convict Belknap, but no article mustered a two-thirds majority, resulting in acquittal. A number of Senators voting to acquit indicated that they did so because the Senate lacked jurisdiction over an individual no longer in office.[244] Notably, although bribery is explicitly included as an impeachable offense in the Constitution, the impeachment articles brought against Belknap instead charged his behavior as constituting high

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[233] 3 HINDS, *supra* note 5, at §§ 2504–05, pp. 1008–10; HOUSE PRACTICE, *supra* note 6, at ch. 27 § 4.

[234] 3 HINDS, *supra* note 5, at §§ 2504–05, pp. 1008–10.

[235] TASSEL & FINKELMAN, *supra* note 138, at 119.

[236] *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–77 (1988).

[237] 3 HINDS, *supra* note 5, at §§ 2506–08, pp. 1011–14.

[238] *Id.*

[239] *Id.* at § 2509, pp. 1015–16. For a defense of Judge Durell's actions in the matters in question, see Charles Lane, *Edward Henry Durell: A Study in Reputation*, 13 GREEN BAG 2D 153, 153–68 (2010).

[240] 3 HINDS, *supra* note 5, at §§ 2444–46, pp. 902–06; *see* CONSTITUTIONAL GROUNDS *supra* note 18, at 20.

[241] BUSHNELL, *supra* note 139, at 165.

[242] 3 HINDS, *supra* note 5, at §§ 2446–68, pp. 906–47.

[243] *Id.* at §§ 2459–60, pp. 933–36. Two of the thirty-seven voting "guilty" and twenty-two of the twenty-five voting "not guilty" stated that they believed the Senate lacked jurisdiction in the case. *Id.* at § 2467, pp. 945–46.

[244] BUSHNELL, *supra* note 139, at 186.

crimes and misdemeanors.[245] Bribery was mentioned at the Senate trial, but it was not specifically referenced in the impeachment articles themselves.[246]

Early Twentieth Century Practices

The twentieth century saw further development of the scope of conduct considered by Congress to be impeachable, including the extent to which noncriminal conduct can constitute impeachable behavior and the proper role of a federal judge. The question of judicial review of impeachments also received its first treatment in the federal courts.

The question of whether Congress can designate particular behavior as a "high crime or misdemeanor" by statute arose in the impeachment of Charles Swayne, a federal district judge for the Northern District of Florida, during the first decade of the twentieth century. A federal statute provided that federal district judges live in their districts and that anyone violating this requirement was "guilty of a high misdemeanor."[247] Judge Swayne's impeachment originated from a resolution passed by the Florida legislature requesting the state's congressional delegation to recommend an investigation into his behavior.[248] The procedures followed by the House in impeaching Judge Swayne were somewhat unique. First, the House referred the impeachment request to the Judiciary Committee for investigation. Following this investigation, the House voted to impeach Judge Swayne based on the report prepared by the Committee.[249] The Committee was then tasked with preparing articles of impeachment to present to the Senate.[250] The House then voted again on these individual articles, each of which received less support than the single prior impeachment vote had received.[251] The impeachment articles accused Judge Swayne of a variety of offenses, including misusing the office, abusing the contempt power, and living outside his judicial district. At the trial in the Senate, Judge Swayne essentially admitted to certain accused behavior, although his attorneys did dispute the residency charge, and Swayne instead argued that his actions were not impeachable.[252] The Senate vote failed to convict Judge Swayne on any of the charges brought by the House.[253]

The impeachability of certain noncriminal behavior for federal judges was firmly established by the impeachment of Judge Robert W. Archbald in 1912. Judge Archbald served as a federal district judge before being appointed to the short-lived U.S. Commerce Court, which was created to review decisions of the Interstate Commerce Commission.[254] He was impeached by the House for behavior occurring both as a federal district judge and as a judge on the Commerce Court.[255] The impeachment articles accused Judge Archbald of, among other things, using his position as a

[245] *See* U.S. CONST. art. II, § 4.

[246] BUSHNELL, *supra* note 139, at 170.

[247] REVISED STATUTES OF THE UNITED STATES PASSED AT THE FIRST SESS. OF THE FORTY-THIRD CONG., 1873–'74 , Title XIII, Ch. 2 § 551 (2d ed., 1878); TASSEL & FINKELMAN, *supra* note 138, at 123–24.

[248] BUSHNELL, *supra* note 139, at 191.

[249] 39 CONG. REC. 248 (1904).

[250] BUSHNELL, *supra* note 139, at 191–92.

[251] *Id.* at 191–93.

[252] TASSEL & FINKELMAN, *supra* note 138, at 123–25.

[253] 39 CONG. REC. 3467–72 (1905).

[254] TASSEL & FINKELMAN, *supra* note 138, at 132.

[255] 48 CONG. REC. 8904–34 (1912).

judge to generate profitable business deals with potential future litigants in his court.[256] This behavior did not violate any criminal statute and did not appear to violate any laws regulating judges.[257] Judge Archbald argued at trial that noncriminal conduct was not impeachable. The Senate voted to convict him on five articles and also voted to disqualify him from holding office in the future.[258] Four of those articles centered on behavior that occurred while Judge Archbald sat on the Commerce Court, whereas the fifth described his conduct over the course of his career.[259]

In the 1920s, a series of corruption scandals swirled around the administration of President Warren G. Harding. Most prominently, the Teapot Dome Scandal, which involved the noncompetitive lease of government land to oil companies, implicated many government officials and led to resignations and the criminal conviction and incarceration of a Cabinet-level official.[260] The Secretary of the Navy, at the time Edwin Denby, was entrusted with overseeing the development of oil reserves that had recently been located. The Secretary of the Interior, Albert Fall, convinced Denby that the Interior Department should assume responsibility for two of the reserve locations, including in Teapot Dome, Wyoming.[261] Secretary Fall then leased the reserves to two of his friends, Harry F. Sinclair and Edward L. Doheny.[262] Revelations of the lease without competitive bidding launched a lengthy congressional investigation that sparked the eventual criminal conviction of Fall for bribery and conspiracy and Sinclair for jury tampering.[263] President Harding, however, died in 1923, before congressional hearings began. The affair also generated significant judicial decisions examining the scope of Congress's investigatory powers.[264]

One aspect of the controversy included an impeachment investigation into the decisions of then-Attorney General Harry M. Daugherty.[265] In 1922, the House of Representatives referred a resolution to impeach Daugherty for a variety of activities, including his failure to prosecute those involved in the Teapot Dome Scandal, to the House Judiciary Committee.[266] The House Judiciary Committee eventually found there was not sufficient evidence to impeach Daugherty. But in 1924, a Senate special committee was formed to investigate similar matters.[267] That investigation

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[256] TASSEL & FINKELMAN, *supra* note 138, at 133.

[257] *Id.* at 134.

[258] 49 CONG. REC. 1438–48 (1913).

[259] BUSHNELL, *supra* note 139, at 221.

[260] *See* Hasia Diner, *The Teapot Dome Scandal, 1922–24*, *in* 1 CONGRESS INVESTIGATES: A CRITICAL AND DOCUMENTARY HISTORY 460–74 (Roger A. Bruns, David L. Hostetter, Raymond W. Smock eds., 2011).

[261] *Id.* at 461.

[262] *Id.*

[263] *Id.* at 463–74.

[264] *See* McGrain v. Daugherty, 273 U.S. 135, 174–75 (1927) ("We are of opinion that the power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function."); Sinclair v. United States, 279 U.S. 263, 295 (1929) (observing that Congress has authority to require disclosures in aid of its constitutional powers), *overruled on other grounds by* United States v. Gaudin, 515 U.S. 506 (1995).

[265] 6 CANNON, *supra* note 5, at §§ 536–38, pp. 769–73.

[266] *See* 62 CONG. REC. 12,381 (1922); *see generally* H. COMM. ON THE JUDICIARY, 67TH CONG., CHARGES OF HON. OSCAR E. KELLER AGAINST THE ATTORNEY GENERAL AND THE ATTORNEY GENERAL'S ANSWERS THERETO BEFORE THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, SIXTY-SEVENTH CONG., THIRD SESS. ON H. RES. 425 (Comm. Print 1922).

[267] S. Res. 157, 68th Cong., 1st Sess. (1924); *Hearings Before the Select Committee on Investigation of the Attorney General, United States Senate, Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States*, 68th Cong., 1st Sess. (1924).

spawned allegations of many improper activities in the Justice Department. Daugherty resigned on March 28, 1924.[268]

In 1926, federal district judge George W. English was impeached for a variety of alleged offenses, including (1) directing a U.S. marshal to gather a number of state and local officials into court in an imaginary case in which Judge English proceeded to denounce them; (2) threatening two members of the press with imprisonment without sufficient cause; and (3) showing favoritism to certain litigants before his court.[269] Judge English resigned before a trial in the Senate occurred; and the Senate dismissed the charges without conducting a trial in his absence.[270]

Federal district judge Harold Louderback was impeached in 1933 for showing favoritism in the appointment of bankruptcy receivers, which were coveted positions following the stock market crash of 1929 and the ensuing Depression.[271] The House authorized a subcommittee to investigate, which held hearings and recommended to the Judiciary Committee that Judge Louderback be impeached.[272] The Judiciary Committee actually voted against recommending impeachment, urging censure of Judge Louderback instead, but permitted the minority report that favored impeachment to be reported to the House together with the majority report.[273] The full House voted to impeach anyway,[274] but the Senate failed to convict him.[275]

Shortly thereafter, the House impeached federal district judge Halsted L. Ritter for showing favoritism in and profiting from appointing receivers in bankruptcy proceedings; practicing law while a judge; and failing to fully report his income on his tax returns.[276] The Senate acquitted Judge Ritter on each individual count alleging specific behavior, but convicted him on the final count which referenced the previous articles, and charged him with bringing his court into disrepute and undermining the public's confidence in the judiciary.[277]

Congress's impeachment of Judge Ritter was the first to be challenged in court.[278] Judge Ritter sued in the Federal Court of Claims seeking back pay, arguing that the charges brought against him were not impeachable under the Constitution and that the Senate improperly voted to acquit on six specific articles but to convict on a single omnibus article.[279] In rejecting Judge Ritter's suit, the court held that the Senate has exclusive jurisdiction over impeachments and courts lack authority to review the Senate's verdict.[280]

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[268] *See The Teapot Dome Scandal*, *supra* note 260, at 471.

[269] 67 CONG. REC. 6705–55 (1926); 6 CANNON, *supra* note 5, at §§ 544–45, pp. 778–81.

[270] TASSEL & FINKELMAN, *supra* note 138, at 144–46.

[271] 76 CONG. REC. 4913–26 (1933); 6 CANNON, *supra* note 5, at §§ 513–20, pp. 709–30.

[272] BUSHNELL, *supra* note 139, at 245.

[273] *Id*. at 246.

[274] *Id*. at 247.

[275] 77 CONG. REC. 4064–88 (1933).

[276] 80 CONG. REC. 3066–92 (1936); TASSEL & FINKELMAN, *supra* note 138, at 157.

[277] 80 CONG. REC. 5602–08 (1936); *See* PROCEEDINGS OF THE U.S. SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, 74TH CONG., 2D SESS., S. DOC. NO. 74-200, at 637–38 (1936) [hereinafter RITTER IMPEACHMENT]; TASSEL & FINKELMAN, *supra* note 138, at 158–59.

[278] Ritter v. United States, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937).

[279] BUSHNELL, *supra* note 139, at 286–87.

[280] *Ritter*, 84 Ct. Cl. at 298.

Effort to Impeach President Richard Nixon

The impeachment investigation and ensuing resignation of President Richard Nixon stands out as a profoundly important experience informing the standard for the impeachment of Presidents.[281] Although President Nixon was never impeached by the House or subjected to a trial in the Senate, his conduct exemplifies for many authorities, scholars, and members of the public the quintessential case of impeachable behavior in a President.

Less than two years after a landslide reelection as President, Richard Nixon resigned following the House Judiciary Committee's adoption of three articles of impeachment against him.[282] The circumstances surrounding the impeachment of President Nixon were sparked by the arrest of five men for breaking into the Democratic National Committee Headquarters at the Watergate Hotel and Office Building. The arrested men were employed by the Committee to Re-Elect the President (CRP), a campaign organization formed to support President Nixon's reelection.[283]

In the early summer of 1973, Attorney General Elliot Richardson appointed Archibald Cox as a special prosecutor to investigate the connection between the five burglars and CRP. Likewise, the Senate Select Committee on Presidential Campaign Activities began its own investigation.[284] After President Nixon fired various staffers allegedly involved in covering up the incident, he spoke on national television disclaiming knowledge of the cover-up. But the investigations uncovered evidence that President Nixon was involved, that he illegally harassed his enemies through, among other things, the use of tax audits, and that the men arrested for the Watergate break-in—the "plumbers unit," because they were used to "plug leaks" considered damaging to the Nixon Administration—had committed burglaries before.[285] Eventually a White House aide revealed that the President had a tape recording system in his office, raising the possibility that many of Nixon's conversations about the Watergate incident were recorded.[286]

The President refused to hand over such tapes to the special prosecutor or Congress. In his capacity as special prosecutor, Cox then subpoenaed tapes of conversations in the Oval Office on Saturday, October 20, 1973. This sparked the sequence of events commonly known as the Saturday Night Massacre.[287] In response to the subpoena, President Nixon ordered Attorney General Elliot Richardson to fire Special Prosecutor Cox. Richardson refused and resigned. Nixon ordered Deputy Attorney General William D. Ruckelshaus to fire the special prosecutor, but Ruckelshaus also refused to do so and resigned. Solicitor General Robert Bork, in his capacity as Acting Attorney General, then fired the special prosecutor.[288] Nixon eventually agreed to deliver some of the subpoenaed tapes to the judge supervising the grand jury. The Justice Department appointed Leon Jaworski to replace Cox as special prosecutor.

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[281] For a more detailed account of the Watergate Scandal, see STANLEY I. KUTLER, THE WARS OF WATERGATE (1990).

[282] *See* Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm.

[283] KUTLER, *supra* note 281, at 187–211.

[284] *Id.* at 323–49; TASSEL & FINKELMAN, *supra* note 138, at 255–56.

[285] TASSEL & FINKELMAN, *supra* note 138, at 255–56; KUTLER, *supra* note 281, at 111–16, 351–72.

[286] TASSEL & FINKELMAN, *supra* note 138, at 256–57.

[287] JERRY ZEIFMAN, WITHOUT HONOR: CRIMES OF CAMELOT AND THE IMPEACHMENT OF PRESIDENT NIXON 59 (1995).

[288] *See* Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm.

The House Judiciary Committee began an official investigation of the Watergate issue and commenced impeachment hearings in April 1974.[289] On March 1, 1974, a grand jury indicted seven individuals connected to the larger Watergate investigation and named the President as an unindicted coconspirator.[290] On April 18, a subpoena was issued, upon the motion of the special prosecutor, by the United States District Court for the District of Columbia requiring the production of tapes and various items relating to meetings between the President and other individuals. Following a challenge to the subpoena in district court, the Supreme Court reviewed the case. On July 24, 1974, the Supreme Court affirmed the district court's order.[291]

In late July, following its investigation and hearings, the House Judiciary Committee voted to adopt three articles of impeachment against President Nixon.[292] The first impeachment article alleged that the President obstructed justice by attempting to impede the investigation into the Watergate break-in.[293] The second charged the President with abuse of power for using federal agencies to harass his political enemies and authorizing burglaries of private citizens who opposed the President.[294] The third article accused the President of refusing to cooperate with the Judiciary Committee's investigation.[295]

The Committee considered but rejected two proposed articles of impeachment. The first rejected article accused the President of concealing from Congress the bombing operations in Cambodia during the Vietnam conflict.[296] This article was rejected for two primary reasons: some Members thought (1) the President was performing his constitutional duty as Commander-in-Chief and (2) Congress was given sufficient notice of these operations.[297]

The second rejected article concerned receiving compensation in the form of government expenditures at President Nixon's private properties in California and Florida—which allegedly constituted an emolument from the United States in violation of Article II, Section 1, Clause 7 of the Constitution—and tax evasion.[298] Those Members opposed to the portion of the charge alleging receipt of federal funds argued that most of the President's expenditures were made pursuant to a request from the Secret Service; that there was no direct evidence the President knew at the time that the source of these funds was public, rather than private; and that this conduct failed to rise to the level of an impeachable offense.[299] Some Members opposed to the tax evasion charge argued that the evidence was insufficient to impeach; others that tax fraud is not the type of behavior "at which the remedy of impeachment is directed."[300]

President Nixon resigned on August 9, 1974, before the full House voted on the articles.[301] The lessons and standards established by the Nixon impeachment investigation and resignation are

[289] TASSEL & FINKELMAN, *supra* note 138, at 258–59.

[290] United States v. Nixon, 418 U.S. 683, 686–87 (1974).

[291] *Id.* at 713–14.

[292] NIXON IMPEACHMENT, *supra* note 115, at 6–11.

[293] *Id*. at 1–2.

[294] *Id*. at 3–4.

[295] *Id*. at 4.

[296] *Id*. at 217–19.

[297] *Id*. at 219.

[298] *Id*. at 220–23.

[299] *Id*. at 221.

[300] *Id*. at 223.

[301] Kilpatrick, *Nixon Resigns*, *supra* note 282.

disputed. On the one hand, the behavior alleged in the *approved* articles against President Nixon is arguably a "paradigmatic" case of impeachment, constituting actions that are almost certainly impeachable conduct for the President.[302]

On the other hand, the significance of the House Judiciary Committee's rejection of certain impeachment articles is unclear. In particular, whether conduct considered unrelated to the performance of official duties, such as the rejected article alleging tax evasion, can constitute an impeachable offense for the President is disputed. During the later impeachment of President Bill Clinton, for example, the majority and minority reports of the House Judiciary Committee on the Committee's impeachment recommendation took different views on when conduct that might traditionally be viewed as private or unrelated to the functions of the presidency constitutes an impeachable offense.[303] The House Judiciary Committee report that recommended articles of impeachment argued that perjury by the President was an impeachable offense, even if committed with regard to matters outside his official duties.[304] In contrast, the minority views in the report argued that impeachment was reserved for "conduct that constitutes an egregious abuse or subversion of the powers of the executive office."[305] The minority noted that the Judiciary Committee had rejected an article of impeachment against President Nixon alleging that he committed tax fraud, mainly because that "related to the President's private conduct, not to an abuse of his authority as President."[306]

Impeachment of President Bill Clinton

The impeachment of President Bill Clinton stemmed from an investigation that originally centered on financial transactions occurring years before President Clinton took federal office.[307] Attorney General Janet Reno appointed Robert Fiske Jr. as a special prosecutor in January 1994 to investigate the dealings of President Clinton and his wife with the "Whitewater" real estate development during the President's tenure as attorney general and then governor of Arkansas.[308]

Following the reauthorization of the Independent Counsel Act in June, the Special Division of the United States Court of Appeals for the District of Columbia Circuit replaced Fiske in August with Independent Counsel Kenneth W. Starr, a former Solicitor General in the George H.W. Bush Administration and federal appellate judge.[309]

During the Whitewater investigation, Paula Jones, an Arkansas state employee, filed a civil suit against President Clinton in May 1994 alleging that he sexually harassed her in 1991 while governor of Arkansas.[310] Lawyers for Jones deposed President Clinton at the White House and asked questions about the President's relationship with staffers, including an intern named

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[302] Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 604 (1999).

[303] *Compare* CLINTON IMPEACHMENT, *supra* note 92, at 110–18 (majority views), *with id.* at 204–07 (minority views).

[304] *See id.* at 108.

[305] *Id.* at 205.

[306] *Id.* at 207.

[307] *See generally* KEN GORMLEY, THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR 33–114 (2010).

[308] TASSEL & FINKELMAN, *supra* note 138, at 267; *see generally Whitewater: Timeline*, WASH. POST (1998), http://www.washingtonpost.com/wp-srv/politics/special/whitewater/timeline.htm (last visited Oct. 25, 2019).

[309] *See generally* GORMLEY, *supra* note 307, at 143–69. A previous version of the statute under which the independent counsel was appointed was challenged as unconstitutional in *Morrison v. Olson*, 487 U.S. 654 (1998). The Supreme Court upheld the statute. *Id.* at 685–96.

[310] In *Clinton v. Jones*, the Supreme Court held that the President was not immune from suit for unofficial acts. 520 U.S. 681, 684–85 (1997).

Monica Lewinsky.[311] Independent Counsel Starr received information alleging that Lewinsky had tried to influence the testimony of a witness in the Jones litigation,[312] along with tapes of recordings between Monica Lewinsky and former White House employee Linda Tripp.[313] Tripp had recorded conversations between herself and Lewinsky about Lewinsky's relationship with the President and hope of obtaining a job outside the White House. Starr presented this information to Attorney General Reno. Reno petitioned the Special Division of the United States Court of Appeals for the District of Columbia Circuit to expand the independent counsel's jurisdiction, and the Special Division issued an order on January 16, 1998, permitting the expansion of Starr's investigation into President Clinton's response to the Paula Jones case.[314] Over the course of the spring and summer a grand jury investigated whether President Clinton committed perjury in his response to the Jones suit and whether he obstructed justice by encouraging others to lie about his relationship with Lewinsky.[315] President Clinton appeared by video before the grand jury and testified about the Lewinsky relationship.[316]

Independent Counsel Starr referred his report to the House of Representatives on September 9, 1998, noting that under the independent counsel statute, his office was required to do so because President Clinton engaged in behavior that might constitute grounds for impeachment.[317] The House then voted to open an impeachment investigation into President Clinton's behavior, released the Starr report publicly, and the House Judiciary Committee voted to release the tape of the President's grand jury testimony.[318]

Although the House Judiciary Committee had already conducted several hearings on the possibility of impeachment,[319] the Committee did not engage in an independent fact-finding investigation or call any live witnesses to testify about the President's conduct.[320] Instead, the Judiciary Committee largely relied on the Starr report to inform the Committee's own report recommending impeachment, released December 16, 1998.[321] The Committee report recommended impeachment of President Clinton on four counts.[322] The first article alleged that President Clinton perjured himself when testifying to a criminal grand jury about his response to the Jones lawsuit and his relationship with Lewinsky.[323] The second alleged that the President

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[311] TASSEL & FINKELMAN, *supra* note 138, at 268.

[312] *The Starr Report: Introduction*, WASH. POST (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm (last visited Oct. 25, 2019).

[313] *See* GORMLEY, *supra* note 307, at 304–06.

[314] *Id*.

[315] TASSEL & FINKELMAN, *supra* note 138, at 269.

[316] CLINTON IMPEACHMENT, *supra* note 92, at 28; *The Starr Report: Grounds For Impeachment, No. II*, WASH. POST (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/7groundsii.htm (last visited Oct. 25, 2019).

[317] *The Starr Report: Introduction*, WASH. POST (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm (last visited Oct. 25, 2019); *see* 28 U.S.C. § 595(c).

[318] TASSEL & FINKELMAN, *supra* note 138, at 271.

[319] *See Background and History of Impeachment, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998).

[320] GERHARDT, *supra* note 15, at 176–77.

[321] *See* CLINTON IMPEACHMENT, *supra* note 92, at 200–02 (minority views).

[322] *Id.* at 128.

[323] *Id*. at 2.

committed perjury during a deposition in the civil suit brought against him by Paula Jones.[324] The third alleged that President Clinton obstructed justice in the suit brought against him by Jones and in the investigation by Independent Counsel Starr.[325] The fourth alleged that the President abused his office by refusing to respond to certain requests for admission from Congress and making untruthful responses to Congress during the investigation into his behavior.[326]

On December 19, 1998, in a lame-duck session, the House voted to approve the first and third articles.[327] After trial in the Senate, the President was acquitted on February 12, 1999.[328] Statements of the Senators entered into the record on the impeachment reflect disagreement about what constitutes an impeachable offense for the President and whether Clinton's behavior rose to this level.[329] For instance, Republican Senator Richard G. Lugar voted to convict on both articles, noting in his statement the gravity of the "presidential misconduct at issue" and arguing that the case was "not about adultery."[330] Instead, it centered on the obstruction of justice that occurred when the President "lied to a federal grand jury and worked to induce others to give false testimony."[331] For Senator Lugar, the President ultimately "betrayed [the] trust" of the nation through his actions and should be removed from office.[332] In contrast, Republican Senator Olympia Snowe voted to acquit on both articles. In her statement, she admonished the President's "lowly conduct," but concluded there was "insufficient evidence of the requisite untruth and the requisite intent" to establish perjury with regard to the concealment of his relationship with a subordinate; and the perjury charges regarding his relationship with a subordinate concerned statements that were largely "ruled irrelevant and inadmissible in the underlying civil case" which "undermine[d] [their] materiality."[333] She also stated that she thought one of the allegations in the second impeachment article had been proven—the President's attempt to influence the testimony of his personal assistant—but that the proper remedy for this was a criminal prosecution.[334] Indeed, a number of Senators indicated that they did not consider the President's behavior to constitute an impeachable offense because the President's conduct was not of a distinctly public nature.[335] For instance, Democratic Senator Byron L. Dorgan voted to acquit on both articles.[336] He described Clinton's behavior as "reprehensible," but concluded that it did not constitute "a grave danger to the nation."[337]

The significance of the Clinton impeachment experience to informing the understanding of what constitutes an impeachable offense is thus open to debate. One might point to the impeachment

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[324] *Id*. at 2–3.

[325] *Id*. at 3–4.

[326] *Id*. at 4–5.

[327] 144 CONG. REC. 28,035–113 (1998).

[328] 145 CONG. REC. 2375–78 (1999); Alison Mitchell, *Clinton is Acquitted Decisively by Senate on Both Charges*, N.Y. TIMES (Feb. 13, 1999), http://www.nytimes.com/learning/general/featured_articles/990216tuesday.html.

[329] *See* 145 CONG. REC. S1471–1637 (daily ed. Feb. 12, 1999); GERHARDT, *supra* note 15, at 175.

[330] PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON, VOLUME IV: STATEMENTS OF SENATORS REGARDING THE IMPEACHMENT TRIAL, 106TH CONG., 1ST SESS., S. DOC. NO. 106-4, at 2571–72 (1999) [hereinafter CLINTON PROCEEDINGS].

[331] *Id*.

[332] *Id*. at 2573.

[333] *Id*. at 3001–02.

[334] *Id*. at 3004.

[335] *See* 145 CONG. REC. S1471–1637 (daily ed. Feb. 12, 1999); GERHARDT, *supra* note 15, at 175.

[336] CLINTON PROCEEDINGS, *supra* note 330, at 2942.

[337] *Id.*

articles recommended by the House Judiciary Committee, but not adopted by the full House, as concerning conduct insufficient to establish an impeachable offense. Specifically, the House declined to impeach President Clinton for his alleged perjury in a civil suit against him as well as for alleged untruthful statements made in response to congressional requests.[338] Likewise, some scholars have pointed to the acquittal in the Senate of both impeachment articles brought by the House as evidence that the Clinton impeachment articles lacked merit or were adopted on purely partisan grounds.[339] The statements of some Senators mentioned above, reasoning that Clinton's conduct did not qualify as an impeachable offense, may support arguments that impeachment is not an appropriate tool to address at least some sphere of conduct by a President not directly tied to his official duties.[340] Even so, the failure to convict President Clinton might instead simply reflect the failure of the House Managers to prove their case,[341] or simply bare political calculation by some Senators.[342] Ultimately, the lessons of the Clinton impeachment experience will be revealed in the future practice of Congress when assessing whether similar conduct is impeachable if committed by future Presidents.

Contemporary Judicial Impeachments

Congress has impeached federal judges with comparatively greater frequency in recent decades, and some of these impeachments appear to augur important consequences for the practice in the future. In particular, within three years in the 1980s the House voted to impeach three federal judges, each occurring after a criminal prosecution of the judge. One impeached federal judge was not barred from future office and later was elected to serve in the House of Representatives, the body that had earlier impeached him.[343] Another judge challenged the adequacy of his impeachment trial in a case that ultimately reached the Supreme Court, which ruled that the case was nonjusticiable.[344]

The House of Representatives impeached federal district judge Harry E. Claiborne in 1986, following his criminal conviction and imprisonment for providing false statements on his tax returns.[345] Despite his incarceration, Judge Claiborne did not resign his seat and continued to collect his judicial salary.[346] The House unanimously voted in favor of four articles of

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[338] 144 CONG. REC. 28,110–12 (1998).

[339] Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 728 (1999) ("President Clinton's acquittal, a constitutional law decision by the Senate—the final arbiter of the impeachment law—will reaffirm Congress's prior "holdings" that impeachment carries a "substantiality" requirement. Impeachable offenses are offenses seriously incompatible with the institutions of government or those that substantially impair a president's ability to perform his constitutional duties. President Clinton's conduct falls short of this extraordinarily high threshold."). *But see* Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice As High Crimes and Misdemeanors*, 22 HARV. J.L. & PUB. POL'Y 619, 621 (1999) ("[T]he crimes alleged against the President . . . plainly do involve the derelict violation of executive duties. Those crimes are plainly impeachable offenses.").

[340] Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. CHI. L. REV. 293, 299–301 (2000).

[341] *See* 145 CONG. REC. S1577 (daily ed. Feb. 12, 1999).

[342] GERHARDT, *supra* note 15, at 175–76.

[343] *See* H.R. Res. 499, 100th Cong., 2d Sess. (1988); HASTINGS IMPEACHMENT, *supra* note 146, at 8, 66; *see also The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Oct. 25, 2019).

[344] Nixon v. United States, 506 U.S. 224, 237–38 (1993).

[345] United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984).

[346] TASSEL & FINKELMAN, *supra* note 138, at 168.

impeachment against him.[347] The first two articles against Judge Claiborne simply laid out the underlying behavior that had led to his criminal prosecution.[348] The third article "rest[ed] entirely on the conviction itself" and stood for the principle that "by conviction alone he is guilty of . . . 'high crimes' in office."[349] The fourth alleged that Judge Claiborne's actions brought the "judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice" which amounted to a "misdemeanor."[350]

The Senate impeachment trial of Judge Claiborne was the first in which that body used a committee to take evidence. Rather than conducting a full trial with the entire Senate, the committee took testimony, received evidence, and voted on pretrial motions regarding evidence and discovery.[351] The committee then reported a transcript of the proceedings to the full Senate, without recommending whether impeachment was warranted.[352] The Senate voted to convict Judge Claiborne on the first, second, and fourth articles.[353]

In 1988, the House impeached a federal district judge who had been indicted for a criminal offense but was acquitted. Judge Alcee L. Hastings was acquitted in a criminal trial where he was accused of conspiracy and obstruction of justice for soliciting a bribe in return for reducing the sentences of two felons.[354] After his acquittal, a judicial committee investigated the case and concluded that Judge Hastings's behavior might merit impeachment. The Judicial Conference (a national entity composed of federal judges that reviews investigations of judges and may refer recommendations to Congress) eventually referred the matter to the House of Representatives, noting that impeachment might be warranted.[355] The House of Representatives approved seventeen impeachment articles against Judge Hastings, including for perjury, bribery, and conspiracy.[356]

Judge Hastings objected to the impeachment proceedings as "double jeopardy" because he had already been acquitted in a previous criminal proceeding.[357] The Senate, however, rejected his motion to dismiss the articles against him.[358] The Senate again used a trial committee to receive evidence. That body voted to convict and remove Judge Hastings on eight articles, but did not

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[347] 132 CONG. REC. H4710–22 (daily ed. July 22, 1986).

[348] H. COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, REPORT TO ACCOMPANY H. RES. 461, 99TH CONG., 2D SESS., H.R. REP. NO. 99-688, at 1–2 (1986) [hereinafter CLAIBORNE IMPEACHMENT].

[349] *Id*. at 22.

[350] *Id*. at 23.

[351] STAFF FROM THE S. IMPEACHMENT TRIAL COMM., ON THE IMPEACHMENT OF HARRY E. CLAIBORNE, 99TH CONG., 2D SESS., S. REP. NO. 99-511, at 1–4 (1986).

[352] *Id*. at 1.

[353] 132 CONG. REC. 29,870–72 (1986).

[354] HASTINGS IMPEACHMENT, *supra* note 146, at 8.

[355] *Id*. at 8. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes the Judicial Conference to forward a certification to the House that impeachment of a federal judge may be warranted. 28 U.S.C. § 355.

[356] H.R. Res. 499, 100th Cong., 2d Sess. (1988); HASTINGS IMPEACHMENT, *supra* note 146, at 1–5, 8.

[357] IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, MOTIONS TO DISMISS, *supra note* 147, at 48–65.

[358] *The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Oct. 25, 2019).

vote to disqualify him from holding future office.[359] Judge Hastings was later elected to the House of Representatives.[360]

Before the trial of Judge Hastings even began in the Senate, the House impeached Judge Walter L. Nixon. Judge Nixon was convicted in a criminal trial of perjury to a grand jury and imprisoned.[361] Following an investigation by the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, the Judiciary Committee reported a resolution to the full House recommending impeachment on three articles.[362] The full House approved three articles of impeachment, the first two involving lying to a grand jury and the last for undermining the integrity of and bringing disrepute on the federal judicial system.[363] The Senate convicted Judge Nixon on the first two articles but acquitted him on the third.[364]

Judge Nixon challenged the Senate's use of a committee to receive evidence and conduct hearings. He sued in federal court arguing that the use of a committee, rather than the full Senate, to take evidence violated the Constitution's provision that the Senate "try" all impeachments.[365] The Supreme Court ultimately rejected his challenge in *Nixon v. United States*, ruling that the issue was a nonjusticiable political question because the Constitution grants the power to try impeachments "in the Senate and nowhere else"; and the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[366] As a result of this decision, impeachment proceedings appear largely immune from judicial review.[367]

Two judges have been impeached in the twenty-first century. As with the three impeachments of judges in the 1980s, the first followed a criminal indictment. District Judge Samuel B. Kent pleaded guilty to obstruction of justice for lying to a judicial investigation into alleged sexual misconduct and was sentenced to thirty-three months in prison.[368] The House impeached Judge Kent for sexually assaulting two court employees, obstructing the judicial investigation of his behavior, and making false and misleading statements to agents of the Federal Bureau of Investigation about the activity.[369] Judge Kent resigned his office before a Senate trial.[370] The Senate declined to conduct a trial following his resignation.

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[359] 135 CONG. REC. S13,783–87 (daily ed. Oct. 20, 1989).

[360] TASSEL & FINKELMAN, *supra* note 138, at 173.

[361] H. COMM. ON THE JUDICIARY, IMPEACHMENT OF WALTER L. NIXON, JR., REPORT TO ACCOMPANY H. RES. 87, 101ST CONG. 1ST SESS., H.R. REP. NO. 101-36, at 12–13 (1989) [hereinafter NIXON JR. IMPEACHMENT].

[362] *Id.* at 14–16.

[363] *See* 135 CONG. REC. H1802–11 (daily ed. May 10, 1989).

[364] 135 CONG. REC. S14,633–39 (daily ed. Nov. 3, 1989).

[365] Nixon v. United States, 506 U.S. 224, 226 (1993).

[366] *Id.* at 229.

[367] The U.S. District Court for the District of Columbia initially threw out Judge Hastings' Senate impeachment conviction, because the Senate had tried his impeachment before a committee rather than the full Senate. Hastings v. United States, 802 F. Supp. 490, 505 (D.D.C. 1992). The decision was vacated on appeal and remanded for reconsideration in light of *Nixon v. United States*. Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993). The district court then dismissed the suit because it presented a nonjusticiable political question. Hastings v. United States, 837 F. Supp. 3, 5–6 (D.D.C. 1993).

[368] H. COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE SAMUEL B. KENT, REPORT TO ACCOMPANY H. RES. 520, 11TH CONG., 1ST SESS., H.R. REP. No. 111-159, at 6–13 (2009) [hereinafter KENT IMPEACHMENT].

[369] 155 CONG. REC. H7053–67 (daily ed. June 19, 2009); KENT IMPEACHMENT, *supra* note 368, at 2–3.

[370] HOUSE PRACTICE, *supra* note 6, at ch. 27 §§ 3–4.

Although the four previous impeachments of federal judges followed criminal proceedings, the most recent impeachment did not.[371] In 2010, Judge G. Thomas Porteous Jr. was impeached for participating in a corrupt financial relationship with attorneys in a case before him, and engaging in a corrupt relationship with bail bondsmen whereby he received things of value in return for helping the bondsman develop corrupt relationships with state court judges.[372] Judge Porteous was the first individual impeached by the House[373] and convicted by the Senate based in part on conduct occurring before he began his tenure in federal office. The first and second articles of impeachment each alleged misconduct by Judge Porteous during both his state and federal judgeships.[374] The fourth alleged that Judge Porteous made false statements to the Senate and FBI in connection with his nomination and confirmation to the U.S. District Court for the Eastern District of Louisiana.[375]

Judge Porteous's filings in answer to the articles of impeachment argued that conduct occurring before he was appointed to the federal bench cannot constitute impeachable behavior.[376] The House Managers' replication, or reply to this argument, argued that Porteous's contention had no basis in the Constitution.[377] On December 8, 2010, he was convicted on all four articles, removed from office, and disqualified from holding future federal offices.[378] The first article, which included conduct occurring before he was a federal judge, was affirmed 96-0.[379] The second article, approved 90-6, alleged that he lied to the Senate in his confirmation hearing to be a federal judge.[380] A number of Senators explicitly adopted the reasoning supplied by expert witness testimony before the House that the crucial issue over the appropriateness of impeachment was not the timing of the misconduct, but "whether Judge Porteous committed such misconduct and whether such misconduct demonstrates the lack of integrity and judgment that are required in order for him to continue to function" in office.[381]

Senator Claire McCaskill explained in her statement entered in the *Congressional Record* that Judge Porteous's argument for an "absolute, categorical rule that would preclude impeachment

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[371] The FBI investigated judicial corruption in Louisiana's 24th Judicial District, the court on which Judge Porteous served before appointed to the District Court for the Eastern District of Louisiana. The Department of Justice declined to seek criminal charges but did submit a complaint of judicial misconduct to the Fifth Circuit Court of Appeals. PORTEOUS IMPEACHMENT, *supra* note 7, at 5.

[372] *Id.* at 1–2.

[373] *See* 156 CONG. REC. 3155–57 (2010).

[374] PORTEOUS IMPEACHMENT, *supra* note 7, at 1–2.

[375] *Id*. at 2.

[376] 156 CONG. REC. S2183–84 (daily ed. Apr. 12, 2010). *See also* Judge G. Thomas Porteous, Jr.'s Post-Trial Brief (Oct. 29, 2010), *in* PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF G. THOMAS PORTEOUS, JR., A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, 111TH CONG., 2D SESS., S. DOC. NO. 111-20, at 61–76 (2010) [hereinafter PORTEOUS PROCEEDINGS].

[377] 156 CONG. REC. S2358 (daily ed. Apr. 15, 2010). *See also* Post-Trial Memorandum of the House of Representatives (Oct. 29, 2010), *in* PORTEOUS PROCEEDINGS, *supra* note 376, at 304–15.

[378] 156 CONG. REC. 19,134–36 (2010).

[379] *Id.* at 8609.

[380] *Id.* at 8610.

[381] *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr. (Part IV), Hearing Before the Task Force on Judicial Impeachment of the H. Comm. on the Judiciary*, 111th Cong. 1st Sess., H. Hrg. 111-46, at 30 (Dec. 15, 2009) (statement of Michael J. Gerhardt, Professor of Law, University of North Carolina, Chapel Hill School of Law); *see, e.g.*, 156 CONG. REC. S10,285 (daily ed. Dec. 15, 2010) (statement of Senator Tom Udall); *id.* S10,284 (statement of Senator Patrick Leahy).

and removal for any pre-federal conduct" should be rejected.[382] "That should not be the rule," she noted, "any more than allowing impeachment for any pre-federal conduct that is entirely unrelated to the federal office."[383] Senator Patrick Leahy agreed, noting that he "reject[ed] any notion of impeachment immunity [for pre-federal behavior] if misconduct was hidden, or otherwise went undiscovered during the confirmation process, and it is relevant to a judge's ability to serve as an impartial arbiter."[384]

Recurring Questions About Impeachment

Who Counts as an Impeachable Officer?

The Constitution explicitly makes "[t]he President, Vice President and all civil Officers of the United States" subject to impeachment and removal.[385] Which officials are considered "civil Officers of the United States" for purposes of impeachment is a significant constitutional question that remains partly unresolved. Based on both the constitutional text and historical precedent, federal judges[386] and Cabinet-level officials[387] are "civil Officers" subject to impeachment, while military officers,[388] state and local officials,[389] purely private individuals,[390] and Members of Congress[391] likely are not.

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[382] 156 CONG. REC. S10,282 (daily ed. Dec. 15, 2010).

[383] *Id.*

[384] *Id.* S10,284; *see also id.* S10,286 (statement of Senator Jeanne Shaheen) ("I was totally unpersuaded by the defense team's argument that Judge Porteous's 'pre-Federal' conduct should be outside the scope of our deliberation—I do not believe the act of being confirmed to a Federal judgeship by the Senate erases or excuses an individual's conduct up to the point of confirmation."); *id.* S10,405 (statement of Senator Jeff Sessions) ("The Constitution does not require that all conduct be committed post Federal appointment nor does it stipulate at all when the conduct must occur.").

[385] U.S. CONST. art. II, § 4.

[386] Federal judges—appointed by the President, confirmed by the Senate, and enjoying tenure and salary protection—have consistently been considered civil officers; in fact, the vast majority of impeached individuals have been federal judges. *See generally* PORTEOUS IMPEACHMENT, *supra* note 7; United States v. Claiborne, 727 F.2d 842, 845 n.3 (9th Cir. 1984) (observing that "[f]ederal judges are 'civil officers' within the meaning of Art. II sec 4").

[387] 3 HINDS, *supra* note 5, at §§ 2444–68, pp. 902, 946–47.

[388] Joseph Story has also suggested that "civil officers" was not intended to cover military officers. *See* STORY, *supra* note 13, at § 789 (concluding that "[t]he sense, in which [civil] is used in the Constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government.").

[389] *See* discussion *infra* "Postbellum Practices (1865–1900)"; CONSTITUTIONAL GROUNDS, *supra* note 18, at 20; 3 HINDS, *supra* note 5, at §§ 2444–68, pp. 902, 946–47. A House committee concluded that a Commissioner of the District of Columbia was not a civil officer for impeachment purposes because he was not a federal official, but a municipal officer. *See* 6 CANNON, *supra* note 5, at § 548.

[390] 3 HINDS, *supra* note 5, at §§ 2007, 2315. For a discussion of impeachment proceedings following an official's resignation, see "Impeachment After an Individual Leaves Office."

[391] As previously discussed, the House impeached Senator William Blount in 1797. The Senate, however, voted to defeat a resolution that declared Blount a "civil officer" and ultimately voted to dismiss the impeachment articles brought against Blount because it lacked jurisdiction over the matter. Although the record does not indicate precisely the basis for the Senate dismissal, it has generally been viewed as establishing that Members of Congress are not subject to impeachment. *See e.g.*, Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1373 (Fed. Cir. 2006) ("This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a civil officer . . . for purposes of the Impeachment Clause.").

A question that neither the Constitution nor historical practice has answered is whether Congress may impeach and remove lower-level, non-Cabinet executive branch officials. The Constitution does not define "civil Officers of the United States." Nor do the debates at the Constitutional Convention provide significant evidence of which individuals (beyond the President and Vice President) the Framers intended to be impeachable.[392] Impeachment precedents in both the House and Senate are of equally limited utility with respect to subordinate executive officials (i.e., executive branch officials other than the President and Vice President). In all of American history, only one such official has been impeached: Secretary of War William Belknap. Thus, while it seems that executive officials of the highest levels have been viewed as "civil Officers," historical precedent provides no examples of the impeachment power being used against lower-level executive officials.[393] One must therefore look to other sources for aid in determining precisely how far down the federal bureaucracy the impeachment power might reach.

The general purposes of impeachment may assist in interpreting the proper scope of "civil Officers of the United States." The congressional power of impeachment constitutes an important aspect of the various checks and balances built into the Constitution to preserve the separation of powers. It is a tool, entrusted to the House and Senate alone, to remove government officials in the other branches of government, who either abuse their power or engage in conduct that warrants their dismissal from an office of public trust. At least one commentator has suggested that the Framers recognized, particularly for executive branch officials, that there would be times when it may not be in the President's interest to remove a "favorite" from office, even when that individual has violated the public trust.[394] As such, the Framers "dwelt repeatedly on the need of power to oust corrupt or oppressive ministers whom the President might seek to shelter."[395] If the impeachment power were meant to ensure that Congress has the ability to impeach and remove corrupt officials that the President was unwilling to dismiss, it would seem arguable that the power should extend to officers exercising a degree of authority, the abuse of which would harm the separation of powers and good government.

The writings of early constitutional commentators also arguably suggest a broad interpretation of "civil Officers of the United States." Joseph Story addressed the reach of the impeachment power in his influential *Commentaries on the Constitution*, asserting that "*all* officers of the United states [] who hold their appointments under the national government, whether their duties are executive or judicial, *in the highest or in the lowest departments of the government*, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment."[396] Similarly, William Rawle reasoned that "civil Officers" included "[*a*]*ll* executive and judicial officers, *from the President downwards*, from the judges of the Supreme Court to those of the most inferior tribunals. . . ."[397] Consistent with the text of the Constitution, these early interpretations suggest the impeachment power was arguably

[392] *See* Gerhardt, *Constitutional Limits*, *supra* note 60, at 10–19. For discussion of the impeachment clauses at the Constitutional Convention see RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 53–54, 64–66, 550–63.

[393] Some non-Cabinet executive branch officials have been investigated for possible impeachable offenses. *See Impeachment Articles Referred on John Koskinen: Hearing Before the H. Comm. On the Judiciary*, 114th Cong. (2016) (focusing on allegations against the Commissioner of the Internal Revenue Service).

[394] BERGER, *supra* note 18, at 101 (citing statement of James Madison, 1 ANNALS OF CONG. 372 (1789)).

[395] *Id.* at 228–30.

[396] STORY, *supra* note 13, at § 790 (emphasis added).

[397] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 214 (1829) (emphasis added).

intended to extend to "all" executive officers, and not just Cabinet-level officials and other executive officials at the highest levels.

The meaning of "officer of the United States" under the impeachment provisions may be informed by other provisions of the Constitution that use the same phrase. Applying this contextual approach, the most thorough, and perhaps most helpful, judicial elucidation of the definition of "Officers of the United States" comes in the Constitution's Appointments Clause.[398] Indeed, that provision, which establishes the methods by which "Officers of the United States" may be appointed, has generally been viewed as a useful guidepost in establishing the definition of "civil Officers" for purposes of impeachment.[399]

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[400]

In interpreting the Appointments Clause, the Court has distinguished "Officers of the United States," whose appointment is subject to the requirements of the Clause, and non-officers, also known as employees, whose appointment is not.[401] The amount of authority that an individual exercises will generally determine his classification as either an officer or employee. As established in *Buckley v. Valeo*, an officer is "any appointee exercising *significant authority* pursuant to the laws of the United States," while employees are viewed as "lesser functionaries subordinate to the officers of the United States," who do not exercise "significant authority."[402]

The Supreme Court has further subdivided "officers" into two categories: principal officers, who may be appointed only by the President with the advice and consent of the Senate; and inferior officers, whose appointment Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments."[403] The Court has acknowledged that its "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[404] The clearest statement of the proper standard to be applied in differentiating between the two types of officers appears to have been made in *Edmond v. United States*[405] when the Court noted that "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President . . . [and] whose work is directed and

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[398] *See, e.g.*, DOJ, OFFICE OF LEGAL COUNSEL, *Officers of the United States Within the Meaning of the Appointments Clause* (Apr. 16, 2007), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v031-p0083.pdf; Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 303 (1999); Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENT. 479 (1998).

[399] U.S. CONST. art. II, §2, cl. 2.

[400] *Id*.

[401] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 663 (1997) (declaring that the exercise of "'significant authority pursuant to the laws of the United States' marks . . . the line between officer and non-officer."). The Department of Justice, Office of Legal Counsel has argued that an office is subject to the Appointments Clause "if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing.'" *Officers of the United States Within the Meaning of the Appointments Clause*, *supra* note 398.

[402] 424 U.S. 1, 126 & n.162 (1976).

[403] U.S. CONST. art. II, §2, cl. 2.

[404] *Edmond*, 520 U.S. at 661.

[405] *Id*. at 659.

supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[406] Thus, in analyzing whether one may be properly characterized as either an inferior or a principal officer, the Court's decisions appear to focus on the extent of the officer's discretion to make autonomous policy choices and the authority of other officials to supervise and to remove the officer.

Using the principles established in the Court's Appointments Clause jurisprudence to interpret the scope of "civil Officers" for purposes of impeachment, it would appear that employees, as non-officers, would not be subject to impeachment. Thus, lesser functionaries—such as federal employees who belong to the civil service, do not exercise "significant authority," and are not appointed by the President or an agency head—would *not* be subject to impeachment. At the opposite end of the spectrum, it would seem that any official who qualifies as a principal officer, including a head of an agency such as a Secretary, Administrator, or Commissioner, *would be* impeachable.

The remaining question is whether inferior officers, or those officers who exercise significant authority under the supervision of a principal officer, are subject to impeachment and removal. As noted above, an argument can be made from the text and purpose of the impeachment clauses, as well as early constitutional interpretations, that the impeachment power was intended to extend to "*all*" officers of the United States, and not just those in the highest levels of government. Any official exercising "significant authority," including both principal and inferior officers, would therefore qualify as a "civil Officer" subject to impeachment. This view would permit Congress to impeach and remove any executive branch "officer," including many deputy political appointees and certain administrative judges.[407]

There is some historical evidence, however, to suggest that inferior officers were not meant to be subject to impeachment.[408] For example, a delegate at the North Carolina ratifying convention asserted that "[i]t appears to me . . . the most horrid ignorance to suppose that every officer, however trifling his office, is to be impeached for every petty offense . . . I hope every gentleman . . . must see plainly that impeachments cannot extend to inferior officers of the United States."[409] Additionally, Governeur Morris, member of the Pennsylvania delegation to the Constitutional Convention, arguably implied that inferior officers would not be subject to impeachment in stating that "certain *great* officers of State; a minister of finance, of war, of foreign affairs, etc. . . . will be amenable by impeachment to the public justice."[410]

Despite this ongoing debate, the authority to resolve any ambiguity in the scope of "civil Officers" for purposes of impeachment lays initially with the House, in adopting articles of impeachment, and then with the Senate, in trying the officer.[411]

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[406] *Id*. at 662–63.

[407] For additional examples of inferior officers see, Ex parte Hennen, 38 U.S. (13 Pet.) 225, 258 (1839) (a district court clerk); Ex parte Siebold, 100 U.S. 371, 397–98 (1880) (election supervisor); United States v. Eaton, 169 U.S. 331, 343 (1898) (vice consul charged temporarily with the duties of the consul); Go-Bart Importing Co. v. United States, 282 U.S. 344, 252–54 (1931) (United States Commissioner in district court proceedings); Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel).

[408] *See* Raoul Berger, *Impeachment of Judges and Good Behavior Tenure*, 79 YALE L. J. 1475 (1970) (asserting that impeachment was not intended to extend to inferior officers in either the executive or judicial branches.).

[409] *Id*. at 1510 (statement of Archibald Maclaine).

[410] *Id*. at n.176 (citing RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 53–54).

[411] Although many decisions made by the House and Senate in the course of the impeachment process are not subject to judicial review, it is unclear whether a federal court would be willing to review whether an individual is a "civil

Is Impeachment Limited to Criminal Acts?

The Constitution describes the grounds of impeachment as "Treason, Bribery, or other high Crimes and Misdemeanors."[412] As discussed above, the meaning of "high Crimes and Misdemeanors" is not defined in the Constitution or in statute.[413]

Some have argued that only criminal acts are impeachable offenses under the U.S. Constitution; impeachment is therefore inappropriate for noncriminal activity.[414] In support of this assertion, one might note that the debate on impeachable offenses during the Constitutional Convention in 1787 shows that criminal conduct was encompassed in the "high crimes and misdemeanors" standard.[415]

As noted above,[416] the notion that *only* criminal conduct can constitute sufficient grounds for impeachment does not, however, track historical practice.[417] A variety of congressional materials support the notion that impeachment applies to certain noncriminal misconduct. For example, House committee reports on potential grounds for impeachment have described the history of English impeachment as including noncriminal conduct and noted that this tradition was adopted by the Framers.[418] In accordance with the understanding of "high" offenses in the English tradition, impeachable offenses under this view are "constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself."[419] "[O]ther high crimes and misdemeanor[s]" are not limited to indictable offenses, but apply to "serious violations of the public trust."[420] Congressional materials take the view that "'Misdemeanor' . . . does not mean a minor criminal offense as the term is generally employed in the criminal law," but refers instead to the behavior of public officials.[421] "[H]igh Crimes and Misdemeanors" may thus be characterized as "misconduct that damages the state and the operations of governmental institutions."[422]

According to congressional materials, the purposes underlying the impeachment process also reflect that noncriminal activity may constitute sufficient grounds for impeachment.[423] The purpose of impeachment is not to inflict personal punishment for criminal activity. In fact, the Constitution explicitly makes clear that impeached individuals are not immunized from criminal

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Officer" subject to impeachment.

[412] U.S. CONST. art. II § 4.

[413] *See supra* "High Crimes and Misdemeanors."

[414] *See, e.g.*, NIXON IMPEACHMENT, *supra* note 115, at 362–72 (minority views); 3 DESCHLER, *supra* note 95, at Ch. 14 § 3.8, pp. 1992–94. *See also* CONSTITUTIONAL GROUNDS, *supra* note 18, at 22.

[415] *See* NIXON IMPEACHMENT, *supra* note 115, at 362–72 (citing RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 64–70). For a discussion of presidential impeachment grounds, *see* 3 DESCHLER, *supra* note 95, at Ch. 14 § 3.7, pp. 1979–83.

[416] *See supra* "History of Impeachment in Congress."

[417] *See* GERHARDT, *supra* note 15, at 53 (pointing to the impeachments and convictions of Judge Pickering, 2 ANNALS OF CONG. 319–22 (1804), Judge West H. Humphreys, CONG. GLOBE, 37th Cong. 2d Sess. 2949–50 (1862), Judge Robert Archbald, 48 CONG. REC. 8910 (1912), and Judge Halsted Ritter, 80 CONG. REC. 5606 (1936)); BLACK, *supra* note 42, at 33–36; BERGER, *supra* note 18, at 55–59.

[418] *See* CONSTITUTIONAL GROUNDS, *supra* note 18, at 22–24.

[419] *Id*. at 26.

[420] NIXON JR. IMPEACHMENT, *supra* note 361, at 5.

[421] *Id*.

[422] HASTINGS IMPEACHMENT, *supra* note 146, at 6.

[423] *See* CONSTITUTIONAL GROUNDS, *supra* note 18, at 22–25.

liability once they are impeached for particular activity.[424] Instead, impeachment is a "remedial" tool; it serves to effectively "maintain constitutional government" by removing individuals unfit for office.[425] Grounds for impeachment include abuse of the particular powers of government office or a violation of the "public trust"[426]—conduct that is unlikely to be barred by statute.[427]

Congressional practice also supports this position. Many impeachments approved by the House of Representatives have included conduct that did not involve criminal activity.[428] For example, in 1803, Judge John Pickering was impeached and convicted for, among other things, appearing on the bench "in a state of total intoxication."[429] In 1912, Judge Robert W. Archbald was impeached and convicted for abusing his position as a judge by inducing parties before him to enter financial transactions with him.[430] In 1936, Judge Halstead Ritter was impeached and convicted for conduct that "br[ought] his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice . . . and to the prejudice of public respect for and confidence in the Federal judiciary."[431] And a number of judges were impeached for misusing their position for personal profit.[432]

Are the Standards for Impeachable Offenses the Same for Judges and Executive Branch Officials?

Some have suggested that the standard for impeaching a federal judge differs from an executive branch official.[433] While Article II, Section 1, of the Constitution specifies the grounds for the impeachment of civil officers as "Treason, Bribery, or other high Crimes and Misdemeanors," Article III, Section 1, provides that federal judges "hold their Offices during good Behaviour."[434] One argument posits that these clauses should be read in conjunction, meaning that judges can be impeached and removed from office if they fail to exhibit good behavior *or* if they are guilty of "treason, bribery, or other high Crimes and Misdemeanors."[435]

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[424] U.S. CONST. art. I, § 3, cls. 6, 7.

[425] *See* CONSTITUTIONAL GROUNDS, *supra* note 18, at 22–24.

[426] NIXON JR. IMPEACHMENT, *supra* note 361, at 5.

[427] *See* CONSTITUTIONAL GROUNDS, *supra* note 18, at 22–25.

[428] *See* HASTINGS IMPEACHMENT, *supra* note 146, at 6 ("The rich body of precedent incorporated with the adoption of the phrase 'high Crimes and Misdemeanors' makes clear that the phrase refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal misconduct. Indeed, the phrase itself had no roots in the ordinary criminal law, but was limited to parliamentary impeachments. In the United States ten of the impeachments voted by the House of Representatives have involved one or more charges that did not allege a violation of the criminal law.").

[429] *See* CONSTITUTIONAL GROUNDS, *supra* note 18, at 43. Judge Pickering did not appear himself or by counsel. In the Senate trial, a written petition offered by Judge Pickering's son, through Robert G. Harper, indicated that the Judge had been under treatment for mental illness for over two years without success. 3 HINDS, *supra* note 5, at §§ 2333–35, pp. 697–704. *See supra* "Early Historical Practices (1789–1860)."

[430] CONSTITUTIONAL GROUNDS, *supra* note 18, at 51–52. At the time this was not a prosecutable offense. *See* GERHARDT, *supra note* 15, at 53 (citing 48 CONG. REC. 8910 (1912)). *See supra* "Early Twentieth Century Practices."

[431] RITTER IMPEACHMENT, *supra* note 277, at 637–38. *See supra* "Early Twentieth Century Practices."

[432] *See* HOUSE PRACTICE, *supra* note 6, at ch. 27 § 4 ("The use of office for direct or indirect personal monetary gain was also involved in the impeachments of Judges Charles Swayne (1903), Robert Archbald (1912), George English (1926), Harold Louderback (1932), Halsted Ritter (1936), Samuel Kent (2009), and Thomas Porteous (2010)").

[433] *See* 3 DESCHLER, *supra* note 95, at Ch. 14 § 3.9, pp. 1994–98; GERHARDT, *supra* note 15, at 106–07.

[434] U.S. CONST. art. II, § 4; art. III, § 1.

[435] *See* HOUSE PRACTICE, *supra* note 6, at ch. 27 § 3.

But while one might find some support for the notion that the "good behavior" clause constitutes an additional ground for impeachment in early twentieth century practice,[436] the "modern view" of Congress appears to be that the phrase "good behavior" simply designates judicial tenure.[437] Under this reasoning, rather than functioning as a ground for impeachment, the "good behavior" phrase simply makes clear that federal judges retain their office for life unless they are removed through a proper constitutional mechanism. For example, a 1973 discussion of impeachment grounds released by the House Judiciary Committee reviewed the history of the phrase and concluded that the "Constitutional Convention . . . quite clearly rejected" a "dual standard" for judges and civil officers.[438] The next year, the House Judiciary Committee's Impeachment Inquiry asked whether the "good behavior" clause provides another ground for impeachment of judges and concluded that "[i]t does not."[439] It emphasized that the House's impeachment of judges was "consistent" with impeachment of "non-judicial officers."[440] Finally, the House Report on the Impeachment of President Clinton affirmed this reading of the Constitution, stating that impeachable conduct for judges mirrored impeachable conduct for other civil officers in the government.[441] The "treason, bribery, and high Crimes and Misdemeanors" clause thus serves as the sole standard for impeachable conduct for both executive branch officials and federal judges.[442]

Still, even if the "good behavior" clause does not delineate a standard for impeachment and removal for federal judges, as a practical matter, one might argue that the range of impeachable conduct differs between judges and executive branch officials because of the differing nature of each office. For example, one might argue that a federal judge could be impeached for perjury or fraud because of the importance of trustworthiness and impartiality to the judiciary, while the same behavior might not always constitute impeachable conduct for an executive branch official. But given the varied factors at issue—including political calculations, the relative paucity of impeachments of nonjudicial officers compared to judges, and the fact that a nonjudicial officer has never been convicted by the Senate—it is uncertain if conduct meriting impeachment and conviction for a judge would fail to qualify for a nonjudicial officer.

The impeachment and acquittal of President Clinton highlights this difficulty. The House of Representatives impeached President Clinton for (1) providing perjurious and misleading testimony to a federal grand jury and (2) obstruction of justice in regards to a civil rights action against him.[443] The House Judiciary Committee report that recommended articles of impeachment argued that perjury by the President was an impeachable offense, even if committed with regard to matters outside his official duties.[444] The report rejected the notion that conduct such as perjury was "more detrimental when committed by judges and therefore only impeachable when committed by judges."[445] The report pointed to the impeachment of Judge Claiborne, who was impeached and convicted for falsifying his income tax returns—an act which "betrayed the trust

[436] *See* IMPEACHMENT, SELECTED MATERIALS, *supra* note 167, at 666.

[437] HOUSE PRACTICE, *supra* note 6, at ch. 27 § 4.

[438] *See* IMPEACHMENT, SELECTED MATERIALS, *supra* note 167, at 667.

[439] *See* CONSTITUTIONAL GROUNDS, *supra* note 18, at 17.

[440] *Id*.

[441] CLINTON IMPEACHMENT, *supra* note 92, at 110–18.

[442] *See* IMPEACHMENT, SELECTED MATERIALS, *supra* note 167, at 666.

[443] *See id*. at 108, 119.

[444] *See id*. at 108.

[445] *Id*. at 112.

of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary."[446] While it is "devastating" for the judiciary when judges are perceived as dishonest, the report argued, perjury by the President is "just as devastating to our system of government."[447] And, the report continued, both Judge Claiborne and Judge Nixon were impeached and convicted for perjury and false statements in matters distinct from their official duties.[448] Likewise, the report concluded that President Clinton's perjurious conduct, though seemingly falling outside his official duties as President, nonetheless constituted grounds for impeachment.

In contrast, the minority views from the report opposing impeachment reasoned that "not all impeachable offenses are crimes and not all crimes are impeachable offenses."[449] The minority argued that the President is not impeachable for all potential crimes, no matter how minor; impeachment is reserved for "conduct that constitutes an egregious abuse or subversion of the powers of the executive office."[450] Examining the impeachment of President Andrew Johnson and the articles of impeachment drawn up for President Richard Nixon, the minority concluded that both were accused of committing "public misconduct" integral to their "official duties."[451] The minority noted that the Judiciary Committee had rejected an article of impeachment against President Nixon alleging that he committed tax fraud, primarily because that "related to the President's private conduct, not to an abuse of his authority as President."[452]

The minority did not explicitly claim that the grounds for impeachment might be different between federal judges and executive branch officials, but its reasoning at least hints in that direction. Its rejection of nonpublic behavior as sufficient grounds for impeachment of the President—including its example of tax fraud as nonpublic behavior that does not qualify—appears to conflict with the past impeachment and conviction of federal judges on just this basis.[453] One reading of the minority's position is that certain behavior might be impeachable conduct for a federal judge, but not for the President.

While two articles of impeachment were approved by the House, the Senate acquitted President Clinton on both charges.[454] Even so, generating firm conclusions from this result is difficult, as there may have been varying motivations for these votes.[455] One possibility is that the acquittal occurred because some Senators—though agreeing that the conduct merited impeachment—thought the House Managers failed to prove their case. Another is that certain Senators disagreed that the behavior was impeachable at all. Yet another possibility is that neither ideological stance was considered and voting was conducted solely according to political calculations.

[446] *Id*. (quoting 132 CONG. REC. S15, 760–62 (daily ed. Oct. 9, 1986)).

[447] *Id*. at 113.

[448] *Id*. at 118.

[449] *Id*. at 204 (minority views).

[450] *Id*. at 205.

[451] *Id*. at 206–07.

[452] *Id*. at 207.

[453] *Id*. *Cf.* discussion *supra* "Contemporary Judicial Impeachments."

[454] 145 CONG. REC. 2375–78 (1999).

[455] *See generally* GERHARDT, *supra* note 15, at 175–79.

What Is the Constitutional Definition of Bribery?

Civil officers are subject to impeachment for treason, bribery, or "other high Crimes and Misdemeanors."[456] Treason is defined in the constitutional text, but bribery is not.[457] As this report has discussed, Congress has substantial discretion in determining what misconduct constitutes "high Crimes and Misdemeanors" meriting impeachment and removal for government officials. Likewise, Congress could presumably look to several different sources to inform its understanding of what behavior qualifies as bribery under the Constitution.[458]

One source might be the current federal criminal code.[459] Under federal statute, it is a criminal offense for a public official to corruptly seek or receive bribes in return for official acts.[460]

Another might be the understanding of the crime of bribery at the nation's Founding. At the time of the Constitutional Convention, bribery was a common law crime,[461] although its precise scope is somewhat difficult to determine. According to Blackstone, it included situations where a judge, or other person involved in the administration of justice, took "any undue reward to influence his behavior in office."[462] Though the scope of the crime of bribery was initially narrow,[463] it appears to have expanded to include giving as well as receiving bribes, as well as attempted bribery in certain situations.[464] Some commentators assert that, at the time of the Founding, the English and

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[456] U.S. CONST. art. II, § 4.

[457] *Id*. art. III, § 3, cl. 1.

[458] *Compare* S. Doc. No. 1140, at 1695 (1913) ("The offense of bribery had a fixed status in the parliamentary law as well as the criminal law of England when our Constitution was adopted, and there is little difficulty in determining its nature and extent in the application of the law of impeachments in this country."), *with* HASTINGS IMPEACHMENT, *supra* note 146, at 1, 8 (framing an impeachment article alleging a conspiracy to obtain money in return for a lenient sentence as a general impeachable offense, rather than explicitly in terms of the bribery provision in the Constitution).

[459] *See generally Constitutional Limits*, *supra* note 60, at 87 ("Violations of federal criminal statutes, such as the bribery statute represent abuses against the state sufficient to subject the perpetrator to impeachment and removal, because bribery demonstrates serious lack of judgment and respect for the law and because bribery lowers respect for the office.").

[460] 18 U.S.C. § 201. The statute defines a "public official" as a "Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror. . . ." *Id*. § 201(a).

[461] FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 243 (2019).

[462] IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND: IN FOUR BOOKS 129 (1765-69).

[463] *See* EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 147 (1644) (noting that "bribery is only committed by him, that hath a judicial place, and extortion may be committed both by him that hath a judicial place, or by him that hath a ministerial office").

[464] GILES JACOB, BRIBERY, A NEW-LAW DICTIONARY (1744); STANDISH GROVE GRADY & COLLEY HARMAN SCOTLAND, THE LAW AND PRACTICE IN PROCEEDINGS ON THE CROWN SIDE OF THE COURT OF THE QUEEN'S BENCH 11 (1844) ("Wherever it is a crime to take, it is a crime to give. They are reciprocal. And in many cases, especially in bribery at elections to parliament, the attempt is a crime. It is complete on his side who offers it." (quoting R. v. Vaughan (1769) 4 Burr. 2494, 2500)) (italics removed). *See also* WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 239-41 (1819) ("Bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. . . . And it seems that this offence will be committed by any person in an official situation, who shall corruptly use the power or interest of his place for rewards or promises. . . . *attempts to bribe*, though unsuccessful, have in several cases been held to be criminal.") (italics in original).

American common law definition of bribery had developed to apply not just to judges, but also to executive officers.[465]

No matter the precise scope of bribery in the common law courts, in Parliamentary practice[466] it was understood to constitute an impeachable offense in England at the time of the nation's Founding.[467] In 1624, the House of Commons impeached the Lord Treasurer (one of the King's ministers) for bribery.[468]

Actual debate on the meaning of bribery at the Constitutional Convention was limited. As mentioned above, while discussing presidential impeachment, Gouverneur Morris asserted that the President should be subject to the impeachment process because he might "be bribed by a greater interest to betray his trust," noting the example of Charles II receiving a bribe from Louis XIV.[469]

The First Congress enacted a federal bribery statute for customs officers, which provided that those officers convicted of taking or receiving a bribe be fined and barred from holding office in the future, while the payer of a bribe would be fined as well.[470] The same Congress passed another

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[465] *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 527 (3d. ed. 1982) (noting that "English law, however, developed . . . to extend beyond the bribery of a judicial officer" to include, for instance, bribery of a privy counsellor); JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 50 (1882) (claiming that Blackstone's definition of bribery as too narrow because the offense "extends to all officers connected with the administration of the government"). *But see* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1696–97 (1993) ("In England and the United States, the primary public corruption offense over most of the last 700 years has been extortion, though in recent years bribery prosecutions appear to be at least as common. As an offense called bribery, this crime probably appeared relatively late (mid-1500s) and may not have been routinely applied to administrative officials until the 1800s. Obviously, there was always a need to punish bribery-type behavior by public officials. Continuously since the 1200s, extortion has met that need."). It bears mention that the line between "judicial" and "executive" officers in England at this time was not as clear cut as the division is under the U.S. constitutional system. Judges in England "remained in many ways royal servants like any other" and could be removed from their position by the Crown. *See* CHAFETZ, *supra* note 20, at 81.

[466] *See* Note, *The Scope of the Power to Impeach*, 84 YALE L.J. 1316, 1328 (1975)("[T]he 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."); Grantham v. Gordon, 24 Eng. Rep. 539, 541 (H.L. 1719) ("[I]mpeachments in Parliament differed from indictments, and might be justified by the law and course of Parliament."); *see also* 2 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 605-06 (1792) (noting that in English practice, articles of impeachment need not take the strict form of an indictment and "the particular words supposed to be criminal are not necessary to be expressly specified in such impeachments"); S. DOC. NO. 1140, at 1695 (1913) ("The provision in . . . the Constitution . . . defining impeachable offenses . . . was taken from the British parliamentary law established and prevailing at the time of the formation of our Government. It must, therefore, be interpreted by the light of time-honored parliamentary usage, as contradistinguished from the common municipal law of England.").

[467] *See* WOODDESON, *supra* note 466, at 602 (noting that a lord chancellor could be impeached for bribery); CLAYTON ROBERTS, THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND 31 (1966) (describing how the House of Commons "showed no reluctance to punish extortionists and receivers of bribes" via impeachment); STORY, *supra* note 13, at § 798 ("In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and acting grossly contrary to the duties of their office; but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power.").

[468] *See* 3 H.L. JOUR. 380 (1624) (convicting Lionel Cranfield, Earl of Middlesex and Lord Treasurer on various articles including bribery and extortion).

[469] 5 ELLIOT'S DEBATES, *supra* note 59.

[470] *See* Act of July 31, 1789 ch. 5, § 35, 1 Stat. 29 (1789). The Supreme Court has acknowledged that actions taken by the First Congress can reveal the original understanding of the Constitution, as twenty of its members were delegates at the Constitutional Convention. *See* Bowsher v. Synar, 478 U.S. 714, 724 n.3 (1986); McCulloch v. Maryland, 17 U.S.

bribery statute that applied to anyone who "directly or indirectly, give[s] any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States" as well as the judge who accepted the bribe.[471] Other officers of the United States were added to the federal statute's provisions in 1853.[472] And the states passed their own laws about the time of the Constitution's drafting that prohibited bribery and the closely related crime of extortion[473] by state officers and judges.[474]

A number of impeachments in the United States have charged individuals with misconduct that was viewed as bribery. In most of those instances, however, the specific articles of impeachment were framed as "high crimes and misdemeanors" or an "impeachable offense."[475] For instance, the House of Representatives approved articles of impeachment against then-Judge Hastings, including one for the "impeachable offense" of participating in a "corrupt conspiracy to obtain $150,000 from defendants [in a case before him] in return for the imposition of [lighter] sentences."[476] Although the article did not mention bribery, the Judiciary Committee report analyzing the article described Judge Hastings as participating in a "bribery conspiracy" or a "bribery scheme."[477] The Senate convicted Hastings on this article.[478] Likewise, the first article of impeachment against Judge Porteous charged him with "solicit[ing] and accept[ing] things of value" from attorneys without disclosure and ruling in those clients favor.[479] The second charged him with "solicit[ing] and accept[ing] things of value . . . for his personal use and benefit, while at the same time taking official actions that benefitted" a bail bondman and his sister.[480] Neither article explicitly referenced bribery, but much like the Hastings impeachment, the Judiciary Committee report analyzing the articles alleged that Judge Porteous had participated in a "bribery scheme."[481]

(4 Wheat.) 316, 424 (1819).

[471] Crimes Act of 1790, ch. 9, § 21, 1 Stat. 112 (1790).

[472] Act of Feb. 26. 1853, ch. 81, § 6, 10 Stat. 171 (1853).

[473] *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 875 (1988) ("Since bribery law remained undeveloped for so long, another crime was needed to fill the gap-especially against corruption by nonjudicial officers. That crime was extortion. From the 13th century to the present day, much common behavior that we now call bribery has been punished as common law extortion.").

[474] *See, e.g.*, Laws of New York, ch. 19, at 632 (1788); 12 Va. Stat. at Large 796 (1788) (correcting 11 Va. Stat. at Large 335-36 (1786)).

[475] *See, e.g.*, 3 HINDS, *supra* note 5, at §§ 2385–86, pp. 805–07; *see also id.* § 2390, pp. 810–11 (impeachment of Judge Humphreys); 132 CONG. REC. H4710–22 (daily ed. July 22, 1986) (impeachment of Judge Claiborne). For instance, President Grant's Secretary of War, William W. Belknap, was impeached in 1876 for allegedly receiving payments in return for appointing an individual to maintain a trading post in Indian territory. 3 Hinds, *supra* note 5, at §§ 2444–46, pp. 902–06. *See* DOJ, OFFICE OF LEGAL COUNSEL, *Legal Aspects of Impeachment: An Overview*, at 30 (1974) (describing the impeachment of Belknap "on grounds which amounted to bribery").

[476] H.R. Res. 499, 100th Cong., 2d Sess. (1988); HASTINGS IMPEACHMENT, *supra* note 146, at 1–5, 8.

[477] HASTINGS IMPEACHMENT, *supra* note 146, at 41.

[478] 135 Cong. Rec. S13, 783–88 (daily ed. Oct. 20, 1989).

[479] *See, e.g.*, PORTEOUS IMPEACHMENT, *supra* note 7, at 7 ("Judge Porteous . . . solicited and accepted things of value from both Amato and his law partner Creely, including a payment of thousands of dollars in cash. Thereafter, and without disclosing his corrupt relationship with the attorneys of Amato & Creely PLC or his receipt from them of cash and other things of value, Judge Porteous ruled in favor of their client, Liljeberg.").

[480] *Id*. at 16.

[481] *Id*. at 17 ("This type of conduct is specifically set forth in Article II, Section 4 of the Constitution as a grounds for

In sum, the Framers provided that bribery was an impeachable offense for the President, Vice President, and other civil officers. At the time of the Constitution's drafting, bribery was a common law crime whose scope had expanded from its earlier roots. And Parliament had impeached ministers of the Crown for bribery.[482] But the Framers did not adopt a formal definition of bribery in the Constitution, and the debates at the Constitutional Convention and during ratification do not clearly indicate the intended meaning of bribery for impeachment purposes.[483] In any case, the practice of impeachment in the United States has tended to envelop charges of bribery within the broader standard of "other high Crimes and Misdemeanors."[484]

Impeachment for Behavior Prior to Assuming Office

Most impeachments have concerned behavior occurring while an individual is in a federal office. But some have addressed, at least in part, conduct before individuals assumed their positions. For example, in 1912, a resolution[485] impeaching Judge Robert W. Archbald and setting forth thirteen articles of impeachment was reported out of the House Judiciary Committee and agreed to by the House.[486] The Senate convicted Judge Archbald in January the next year. At the time that Judge Archbald was impeached by the House and tried by the Senate in the 62nd Congress, he was U.S. Circuit Judge for the Third Circuit and a designated judge of the U.S. Commerce Court. The articles of impeachment brought against him alleged misconduct in those positions as well as in his previous position as U.S. District Court Judge of the Middle District of Pennsylvania.[487] Judge Archbald was convicted on four articles alleging misconduct in his then-current positions as a circuit judge and Commerce Court judge, and on a fifth article that alleged misuse of his office both in his then-current positions and in his previous position as U.S. District Judge.[488]

While Judge Archbald was impeached and convicted in part for behavior occurring before he assumed his then-current position, that behavior occurred while he held a prior federal office. Judge G. Thomas Porteous, in contrast, is the first individual to be impeached by the House[489] and convicted by the Senate based in part on conduct occurring before he began his tenure in federal office. Article II alleged misconduct beginning while Judge Porteous was a state court judge as well as misconduct while he was a federal judge.[490] Article IV alleged that Judge Porteous made false statements to the Senate and FBI in connection with his nomination and confirmation to the

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impeachment—that is 'Treason, Bribery, or other high Crimes and Misdemeanors.'"). In addressing Judge Porteous's conduct, the report also "note[d] by way of reference" judicial interpretations of "federal bribery laws." *Id*. at 86 n. 397.

[482] *See* discussion *infra* notes 466-67.

[483] *See* discussion *infra* note 468.

[484] *See* discussion *infra* notes 474-80.

[485] In response to H. Res. 511, 62d Cong. (1912), *see* 48 CONG. REC. 5242 (1912), President William Howard Taft transmitted to the House Judiciary Committee information related to an investigation by the U.S. Department of Justice of charges of improper conduct by Judge Robert W. Archbald, which had been brought to the President's attention by the Commissioner of the Interstate Commerce Commission. 6 CANNON, *supra* note 5, at § 498, pp. 684–85.

[486] 6 CANNON, *supra* note 5, at §§ 499–500, pp. 686–87.

[487] H. Res. 622, 62d Cong. (1912).

[488] Thirteen articles of impeachment were brought against Judge Archbald. He was convicted on articles I, III, IV, V, and XIII, acquitted on the remaining articles, removed from office, and disqualified from holding further offices of honor, trust, or profit under the United States. 6 CANNON, *supra* note 5, at § 499–501, pp. 686–89; *id.* § 512, pp. 705–08.

[489] 156 CONG. REC. 3155–157 (2010).

[490] PORTEOUS IMPEACHMENT, *supra* note 7, at 16–17.

U.S. District Court for the Eastern District of Louisiana.[491] He was convicted on all four articles, removed from office, and disqualified from holding future federal offices.[492]

On the other hand, it does not appear that any President, Vice President, or other civil officer of the United States has been impeached by the House *solely* based on conduct occurring before he began his tenure in the office held at the time of the impeachment investigation, although the House has, on occasion, investigated such allegations.[493]

Impeachment After an Individual Leaves Office

It appears that federal officials who have resigned have still been thought to be susceptible to impeachment and a ban on holding future office.[494] Secretary of War William W. Belknap

[491] *Id.* at 52–53.

[492] 156 CONG. REC. 19,134–36 (2010).

[493] For example, in 1826, the House of Representatives responded to a letter from Vice President John C. Calhoun requesting an impeachment investigation into whether his prior conduct as Secretary of War constituted an impeachable offense by referring the matter to a select committee. After an extensive investigation, the select committee reported back, recommending that the House take no action. The House laid the measure on the table. 3 HINDS, *supra* note 5, at § 1736, pp. 97–99.

Several decades later, the House declined to pursue impeachment charges against Vice President Schuyler Colfax for activity occurring while he was Speaker of the House. Pursuant to a resolution agreed to on December 2, 1872, the Speaker *pro tempore* of the House appointed a special committee "to investigate and ascertain whether any member of this House was bribed by Oakes Ames or any other person in any matter touching his legislative duty." 46 CONG. GLOBE, 42d Cong., 3d Sess. 11 (1872). Allegations had been made during the preceding presidential campaign suggesting that Representative Oakes Ames of Massachusetts had bribed several Members of the House to perform certain legislative acts for the benefit of the Union Pacific Railroad Company by giving them presents of stock in a corporation known as the "Credit Mobilier of America" or by presents derived therefrom. *Id.* at 11–12. On February 20, 1873—apparently at Colfax's request after leaving his position as Speaker and becoming Vice President —the House agreed to a resolution directing that the testimony taken by the special committee be referred to the House Judiciary Committee "to inquire whether anything in such testimony warrants articles of impeachment of any officer of the United States not a member of this House, or makes it proper that further investigation be ordered in this case." 46 CONG. GLOBE, 42d Cong., 3d Sess. 1545 (1873); *see* 3 DESCHLER, *supra* note 95, at Ch. 14 § 5.14, pp. 2035–36. After a review of past federal, state, and British impeachment precedents, the House Judiciary Committee stated that, in light of the pertinent U.S. constitutional language and the remedial nature of impeachment, impeachment "should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever may have been their effect upon him as a man, for impeachment touches the office only and qualifications for the office, and not the man himself." 46 CONG. GLOBE, 42d Cong., 3d Sess. 1652 (1873). *See also* 3 HINDS, *supra* note 5, at § 2510, pp. 1016–19. The committee's report was made in the House on February 24, 1873, briefly debated, and then postponed to February 26, 1873. 46 CONG. GLOBE, 42d Cong., 3d Sess. 1655–57 (1873). However, it does not appear to have been taken up again. 3 HINDS, *supra* note 5, at § 2510, pp. 1016–19.

Finally, in the 93rd Congress, then-Vice President Spiro Agnew wrote a letter to the House seeking an impeachment investigation of allegations against him concerning his conduct while Governor of Maryland. The Speaker declined to take up the matter because it was pending before the courts. The House took no substantive action on seven related resolutions, seemingly because of concerns regarding the matter's pendency in the courts and regarding the fact that the conduct involved occurred before Agnew began his tenure as Vice President. 3 DESCHLER, *supra* note 95, at Ch. 14 § 5.14.

[494] *See* HOUSE PRACTICE, *supra* note 6, at ch. 27 § 2. ("The House and Senate have the power to impeach and try an accused official who has resigned."); GERHARDT, *supra* note 15, at 79 (noting "surprising consensus among commentators that resignation does not necessarily preclude impeachment and disqualification"); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 18 (2001); RAWLE, *supra* note 397, at 210. *But see* STORY, *supra* note 13, at § 801; Robert C. Steele, Note, *Defining High Crimes and Misdemeanors: A Call for Stare Decisis*, 15 J.L. & POL. 309, 358 (1999).

resigned hours before the House impeached him,[495] but the Senate still conducted a trial in which Belknap was acquitted.[496] During the trial, upon objection by Belknap's counsel that the Senate lacked jurisdiction because Belknap was now a private citizen, the Senate voted in favor of jurisdiction.[497]

That said, the resignation of an official under investigation for impeachment often ends impeachment proceedings. For example, no impeachment vote was taken following President Richard Nixon's resignation after the House Judiciary Committee decided to report articles of impeachment to the House.[498] And proceedings were ended following the resignation of Judges English,[499] Delahay,[500] and Kent.[501]

What Is the Standard of Proof in House and Senate Impeachment Proceedings?

In the judicial system, the degree of certainty with which parties must prove their allegations through the production of evidence—what is known as the *burden of persuasion* or the *standard of proof*—varies depending on the type of proceeding.[502] In a criminal trial, in which a defendant risks deprivation of life and liberty, the prosecutor's burden of proof is high. Each element of the offense must be proved "beyond a reasonable doubt."[503] In civil litigation between private parties, in which the potential harm to a defendant is less severe, the plaintiff's burden of proof is reduced. The allegations generally need only be proved by a "preponderance of the evidence."[504] An even more generous standard is used by federal grand juries, who may issue an indictment on a finding that there is "probable cause" to believe that a crime has occurred.[505] In yet other settings, an intermediate standard of "clear and convincing evidence" is used.[506] This burden is somewhere below "reasonable doubt" but higher than "preponderance."

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[495] TASSEL & FINKELMAN, *supra* note 138, at 192–93.

[496] 3 HINDS, *supra* note 5, at §§ 2444–68, pp. 902, 946–47.

[497] *Id.* at §§ 2459–60, pp. 933–36. As mentioned above, Belknap was acquitted of the charges against him in the articles of impeachment. This acquittal seems to have reflected, in part, a residual level of concern on the part of some of the Senators as to the wisdom of trying an impeachment of a person no longer in office. Two of the thirty-seven voting "guilty" and twenty-two of the twenty-five voting "not guilty" stated that they believed the Senate lacked jurisdiction in the case. *Id.* at § 2467, pp. 945–46.

[498] *See* HOUSE PRACTICE, *supra* note 6, at ch. 27 § 2.

[499] 6 CANNON, *supra* note 5, at § 547, pp. 783–86.

[500] HOUSE PRACTICE, *supra* note 6, at ch. 27 § 4; 3 HINDS, *supra* note 5, at §§ 2504–05, pp. 1008–10.

[501] HOUSE PRACTICE, *supra* note 6, at ch. 27 § 4.

[502] *See Burden of Persuasion*, BLACK'S LAW DICTIONARY (7th ed. 1999) 190 (defining burden of persuasion as "[a] party's duty to convince the fact finder to view the facts in a way that favors that party."); Addington v. Texas, 441 U.S. 418, 423 (1979) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'") (citations omitted).

[503] *See In re* Winship, 397 U.S. 358, 362 (1970) ("Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.").

[504] Concrete Pipe & Prods. v. Constr. Laborers Pension Tr., 508 U.S. 602, 622 (1993).

[505] United States v. Calandra, 414 U.S. 338, 343 (describing the responsibility of the grand jury as determining "whether there is probable cause believe a crime has been committed").

[506] *See Addington*, 441 U.S. at 425 (stating that the "intermediate standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt").

The Constitution establishes no clear standard of proof to be applied in the impeachment process. Neither has the House in its decision to impeach, nor the Senate in its decision to convict, chosen to establish (either by rule or precedent) a particular governing standard. The question has been repeatedly debated in both chambers, but ultimately individual Members have been free to use any standard they wish in deciding how to cast their respective votes. In short, when deciding questions of impeachment and removal, historical practice seems to indicate that Members need be convinced only to their own satisfaction. Moreover, even if the House or Senate chose to establish a governing standard of proof, it may be hard for such a rule to be enforced.[507]

Standard of Proof in the House

In the House, the debate over the standard of proof that should be applied in determining whether the evidence supports approval of articles of impeachment has generally focused on the lower end of the standards-of-proof spectrum.[508]

Those who have argued for the most easily satisfied probable cause standard have often analogized the House's decision to impeach to that of a grand jury's decision to indict.[509] Like a grand jury, the House's role is to ascertain whether sufficient evidence exists to charge an official with an impeachable offense, not to determine guilt. That role is reserved to the Senate, which may apply a different, potentially higher standard of proof. As such, it is argued that the House should apply a similar standard to what is applied by an investigating grand jury—a standard such as preponderance of the evidence or "probable cause."[510] This position was perhaps most clearly articulated during the Judiciary Committee's consideration of the impeachment of Judge Charles Swayne in 1904 by Representative Powers, who argued the following:

> This House has no constitutional power to pass upon the question of the guilt or the innocent of the respondent. He is not on trial before us. We have no right to take from him the presumption of innocence which he enjoys under the law. All we have the right to do is to say whether there has been made out such probable cause of guilt as to entitle the American people to the right to have the case tried before the Senate of the United States.[511]

Those who have argued for the more demanding clear and convincing standard have often focused on the gravity of the impeachment process and its impact not only on the impeached

[507] This is both because impeachment proceedings are largely shielded from judicial review, *see* discussion *infra* "Are Impeachment Proceedings Subject to Judicial Review?" but also because absent a Member affirmatively identifying the standard they applied, it is difficult to determine the reasoning that led to a Member's vote.

[508] It has also been suggested that Members of the House should ask whether there exists "satisfactory evidence sufficient to support a conviction upon a trial by the Senate…" H. R. REP. NO. 63-1176, at 164; 39 Cong. Rec. 245–46 (Dec. 13, 1904) (statement of Rep. Littlefield) ("I cannot vote for … any charge unless, in my judgment, the Senate of the United States, upon the record as it stands before us, would be required in honor and in conscience to find the charge sustained."). This standard would appear to be dependent on what an individual Member determines the appropriate standard of proof to be in a Senate trial. While some Members have employed this standard, *see id*., the approach has been criticized by some as creating a scenario in which the House was simply "duplicating," or perhaps even usurping, the role of the Senate in determining guilt. *See* JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 192 (1978).

[509] *See In re* Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives, 370 F. Supp. 1219, 1230 (D.D.C. 1974) (concluding that a committee engaged in an impeachment investigation "acts simply as another grand jury"). But as one district court has stated, "[t]he grand jury analogy is not perfect." *In re* Application of the Comm. on the Judiciary, U.S. House of Representatives, 2019 U.S. Dist. LEXIS 184857, at *65 n. 32 (D.D.C. Oct. 25, 2019).

[510] 39 CONG. REC. 244–46 (Dec. 13, 1904).

[511] *Id*. at 244.

official, but in the case of a presidential impeachment, on the entire executive branch. For example, during the House's consideration of articles of impeachment against President Clinton, the President's counsel asserted that the clear and convincing standard was "commensurate with the gravity of impeachment."[512] "Lower standards," it was argued, "are simply not demanding enough to justify the fateful step of an impeachment trial."[513]

The House Judiciary Committee's report issued in connection with its approval of articles of impeachment against President Nixon displays the House's historical reluctance to impose any formalized burden of proof on Members. In describing the articles, the report noted that the Committee had found "clear and convincing evidence" of the individual impeachable offenses, but did not explicitly contend that such a finding was required, or that "clear and convincing" should represent the governing standard of proof in House impeachments.[514] The dissenting Members took a different approach, arguing that they were persuaded that the applicable standard for proof in House impeachments "must be no less rigorous than proof by 'clear and convincing evidence.'"[515] Even so, the minority not only acknowledged that the House has never sought to "fix by rule" an applicable standard of proof, but also explicitly stated that they would not "advocate such a rule."[516] "The question," the minority concluded, "is properly left to the discretion of individual Members."[517]

Standard of Proof in the Senate

Much like Members of the House, Senators are not bound by any specific burden of proof in the trial of an impeached official. Counsel for the impeached official have generally argued that individual Senators should adopt the most demanding standard of "beyond a reasonable doubt," while the House Managers have generally urged a lower standard.[518]

The Constitution's use of words like "try" and "convicted" could be read to suggest an intent that the Senate adopt a criminal-like standard in impeachment trials.[519] Counsel for President Clinton argued this position, at least with respect to presidential impeachments, asserting that the Constitution's phrasing "strongly suggests that an impeachment trial is akin to a criminal proceeding and that the beyond-a-reasonable-doubt standard of criminal proceedings should be used."[520] House Managers, on the other hand, have generally argued that use of the "beyond reasonable doubt" standard is inappropriate. They have noted that "an impeachment trial is not a

[512] H. COMM. ON THE JUDICIARY, 105TH CONG., SUBMISSION BY COUNSEL FOR PRESIDENT CLINTON TO THE COMMITTEE ON THE JUDICIARY 20 (Comm. Print 1998).

[513] *Id.*

[514] H.R. REP. NO. 93-1305, at 133, 183 (1974).

[515] *Id.* at 377 (minority views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti an Latta).

[516] *Id.*

[517] *Id.*

[518] *Compare* Trial Memorandum of President William Jefferson Clinton, *in* 2 CLINTON PROCEEDINGS, *supra* note 330, at 938 (arguing for use of reasonable doubt standard) *with* Reply of the United States House of Representatives to the Trial Memorandum of President William Jefferson Clinton, *in* 2 CLINTON PROCEEDINGS, *supra* note 330, at 1000–01 (arguing that beyond a reasonable doubt is an "inappropriate" standard for impeachment trials).

[519] U.S. CONST. art I, § 2; *id.* at art II, § 4.

[520] 2 CLINTON PROCEEDINGS, *supra* note 330, at 952.

criminal trial," nor are the consequences of a conviction—which are limited to removal from office and possible disqualification from holding future federal office—criminal in nature.[521]

The Senate's approach of ensuring that its Members retain the ability to make individualized decisions on the standard of proof necessary for conviction was perhaps best exhibited during the impeachment trial of Judge Claiborne. There, counsel for Judge Claiborne submitted a motion to establish "beyond a reasonable doubt" as the applicable standard of proof in the trial.[522] The House Managers disagreed, arguing that standard was inappropriate, and that setting any standards would prevent individual members from exercising their own personal judgment.[523] Judge Claiborne's motion was ultimately rejected by the Presiding Officer, who held that the standard of proof to be applied was left to the discretion of each individual Senator.[524]

This approach was affirmed in the Senate's most recent statement on the standard of proof in a Senate trial. During Judge Porteous's trial, the Senate trial committee referenced the resolution of the Claiborne motion, noting that the Senate had "declin[ed] to establish an obligatory standard."[525] Accordingly, the committee report concluded that "Each Senator may, therefore, use the standard of proof that he or she feels is appropriate."[526]

As such, rather than impose a specific standard of proof on its members, both the House and Senate have sought to ensure that individual Members remain free to make their own determinations, guided by their individual conscience and judgment, and their oath to do "impartial justice."[527]

What Are the Applicable Evidentiary Rules and Standards in a Senate Impeachment Trial?

Like most aspects of the Senate impeachment trial, the body's approach to evidentiary questions is unique. The Senate has not bound itself to any specific controlling set of evidentiary rules. Instead, the admissibility of evidence is primarily based on Senate precedent, with objections first ruled on by the Presiding Officer, but ultimately settled by a majority vote of the Senate.[528]

The present Senate Impeachment Rules provide a basic procedural framework for how evidentiary questions are to be handled. Under the Rules, objections to the admissibility of evidence "may be made by the parties or their counsel."[529] Those objections are directed to the Presiding Officer who "may rule on all questions of evidence."[530] That ruling is given effect unless challenged by an individual Senator. At that point, the Rules provide that the question be "submitted to the Senate for decision without debate."[531]

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[521] 1 *id.* at 758.

[522] S. DOC. NO. 99-48, at 105 (1986).

[523] *Id*. at 107.

[524] 132 CONG. REC. S15,506–07 (daily ed. Oct. 7, 1986).

[525] PORTEOUS IMPEACHMENT, *supra* note 7, at 4.

[526] *Id*.

[527] *See* S. DOC. NO. 99-33, at 7 (1986).

[528] SENATE MANUAL, *supra* note 9, at VII.

[529] *Id*. at XVI.

[530] *Id*. at VII.

[531] *Id*.; S. DOC. NO. 99-33, at 64 (1986) ("The intent of this change is to make it clear that a decision by the Senate to overrule or sustain a ruling of the Presiding Officer is not to be deliberated in open session.").

The Rules set the process by which evidentiary questions are to be decided, but provide only the most basic guidance on the substantive standards to be applied by either the Presiding Officer or individual Senators in making such decisions. The Rules state only that the Presiding Officer's authority to rule on questions of evidence includes, but is not limited to, "questions of relevancy, materiality, and redundancy of evidence and incidental questions."[532] Similarly, the Senate reserves the right to "determine competency, relevancy, and materiality."[533] The Rules therefore suggest only that evidence should meet basic relevancy requirements.

To the extent there are additional substantive standards for either the Presiding Officer or individual Senators to apply in making evidentiary determinations, they appear to derive primarily from Senate precedent. Evaluating and understanding those precedents, however, is difficult because evidentiary questions submitted to the Senate are generally made with no debate. As such, the historical record of Senate deliberations on evidentiary questions typically includes the final disposition of the question and perhaps only limited evidence of the particular reasoning that led to the Senate's decision.[534]

Given the quasi-judicial aspects of the Senate trial, the parties have often used judicial evidentiary standards, including the Federal Rules of Evidence, to support their motions to either allow or exclude evidence. The Senate has generally been receptive to this approach and in fact arguably supported some adherence to judicial rules of evidence.[535] But more recent trials have made clear that the Senate is "not bound by the Federal Rules of Evidence, although those rules may provide some guidance. . . ."[536] Indeed, it has been argued that the Federal Rules of Evidence, which were designed to protect jurors from prejudicial evidence and to help them judge evidence, have little if any place in a Senate impeachment trial, where each individual Senator must weigh all relevant evidence as he or she deems fit.[537] This approach is consistent with Chief Justice Rehnquist's ruling during the Clinton impeachment trial that the Senators should not be referred to as "jurors" because in an impeachment trial "the Senate is not simply a jury. It is a court. . . ."[538] Accordingly, while judicial principles may guide the Senate, the body primarily "determine[s] the admissibility of evidence by looking to Senate precedents rather than court decisions. A Senate vote is the ultimate authority for determining the admissibility of evidence."[539]

In the end, viewing House and Senate impeachment proceedings through the lens of established judicial constructs—including rules of procedure, evidence, and standards of proof—should be undertaken with caution. The impeachment process does not fit into existing judicial molds of either a criminal or civil proceeding. Indeed, it is not necessarily a judicial proceeding at all. It is instead an exceptional proceeding defined by its distinctive combination of judicial and

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[532] SENATE MANUAL, *supra* note 9, at VII. The minimal standards of relevancy materiality and redundancy were not added to the Senate rules until 1986. S. DOC. NO. 99-33, at 64.

[533] SENATE MANUAL, *supra* note 9, at XI.

[534] Light can be shed on an evidentiary question through arguments made by the parties or through written motions. *See id.* at XVI (stating that the Presiding Officer, or any Senator, may require that any motion or objection be "committed to writing.").

[535] *See* 3 HINDS, *supra* note 5, at § 2395, at p. 817.

[536] REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, S. HRG. 101-194, Part 1 at 293 (1989).

[537] *Id.* ("Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence."); BLACK, *supra* note 42, at 18 ("Both the House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules.").

[538] 145 CONG. REC. S279 (daily ed. Jan. 15, 1999).

[539] S. REP. NO. 101-1, at 111 (1989).

legislative characteristics that has historically required a unique approach to procedural and evidentiary questions.[540]

Are Impeachment Proceedings Subject to Judicial Review?

Impeachment proceedings have been challenged in federal court on a number of occasions. Perhaps most significantly, the Supreme Court has ruled that a challenge to the Senate's use of a trial committee to take evidence posed a nonjusticiable political question.[541] In *Nixon v. United States*, Judge Walter L. Nixon had been convicted in a criminal trial on two counts of making false statements before a grand jury and was sent to prison.[542] He refused, however, to resign and continued to receive his salary as a judge while in prison. The House of Representatives adopted articles of impeachment against the judge and presented the Senate with the articles.[543] The Senate invoked Impeachment Rule XI, a Senate procedural rule which permits a committee to take evidence and testimony. After the committee completed its proceedings, it presented the full Senate with a transcript and report. Both sides presented briefs to the full Senate and delivered arguments, and the Senate then voted to convict and remove him from office.[544] The judge then brought a suit arguing that the use of a committee to take evidence violated the Constitution's provision that the Senate "try" all impeachments.[545]

The Supreme Court noted that the Constitution grants "the sole Power"[546] to try impeachments "in the Senate and nowhere else";[547] and the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[548] This constitutional grant of sole authority, the Court reasoned, meant that the "Senate alone shall have authority to determine whether an individual should be acquitted or convicted."[549] In addition, because impeachment functions as the "*only* check on the Judicial Branch by the Legislature,"[550] the Court noted the important separation of powers concerns that would be implicated if the "final reviewing authority with respect to impeachments [was placed] in the hands of the same body that the impeachment process is meant to regulate."[551] Further, the Court explained that certain prudential considerations—"the lack of finality and the difficulty of fashioning relief"—weighed against adjudication of the case.[552] Judicial review of impeachments could create considerable political uncertainty, if, for example, an impeached President sued for judicial review.[553]

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[540] For example, one commentator has asserted that "'[o]verwhelming preponderance of the evidence' comes perhaps as close as can to denoting the desired standard." BLACK, *supra* note 42, at 18.

[541] Nixon v. United States, 506 U.S. 224, 237–38 (1993).

[542] 506 U.S. at 226–27.

[543] *Id*.

[544] *Id*. at 227–28.

[545] *Id*. at 228.

[546] U.S. CONST. art. I. § 3, cl. 6.

[547] *Nixon*, 506 U.S. at 229.

[548] *Id*.

[549] *Id*. at 231.

[550] *Id*. at 235.

[551] *Id*.

[552] *Id*. at 236.

[553] *Id*.

The Court in *Nixon* was careful to distinguish the situation from *Powell v. McCormack*, a case also involving congressional procedure where the Court declined to apply the political question doctrine.[554] That case involved a challenge brought by a Member-elect of the House of Representatives, who had been excluded from his seat pursuant to a House Resolution.[555] The precise issue in *Powell* was whether the judiciary could review a congressional decision that the plaintiff was "unqualified" to take his seat.[556] That determination had turned, the Court explained, "on whether the Constitution committed authority to the House to judge its Members' qualifications, and if so, the extent of that commitment."[557] The Court noted that while Article I, Section 5, does provide that Congress shall determine the qualifications of its Members,[558] Article I, Section 2, delineates the three requirements for House membership—Representatives must be at least twenty-five years old, have been U.S. citizens for at least seven years, and inhabit the states they represent.[559] Therefore, the *Powell* Court concluded, the House's claim that it possessed unreviewable authority to determine the qualifications of its Members "was defeated by . . . this separate provision specifying the only qualifications which might be imposed for House membership."[560] In other words, finding that the House had unreviewable authority to decide its Members' qualifications would violate another provision of the Constitution. The Court therefore concluded in *Powell* that whether the three requirements in the Constitution were satisfied was textually committed to the House, "but the decision as to what these qualifications consisted of was not."[561] Applying the logic of *Powell* to the case at hand, the *Nixon* Court noted that here, in contrast, leaving the interpretation of the word "try" with the Senate did not violate any "separate provision" of the Constitution.[562]

In addition, several other aspects of the impeachment process have been challenged. Judge G. Thomas Porteous sued seeking to bar counsel for the Impeachment Task Force of the House Judiciary Committee from using sworn testimony the judge had provided under a grant of immunity.[563] The impeachment proceedings were started after a judicial investigation of Judge Porteous for alleged corruption on the bench. During that investigation, Judge Porteous testified under oath to the Special Investigatory Committee under an order granting him immunity from that information being used against him in a criminal case.[564] Before the U.S. District Court for the District of Columbia, Judge Porteous argued that the use of his immunized testimony during an impeachment proceeding violated his Fifth Amendment right not to be compelled to serve as a

[554] *Id*. at 236–38 (discussing Powell v. McCormack, 395 U.S. 486 (1969)).

[555] *See Powell*, 395 U.S. at 489–95.

[556] *Nixon*, 506 U.S. at 236–237 (discussing *Powell*).

[557] *Id*. at 237.

[558] *Id*. *See* U.S. CONST. art. I. § 5.

[559] *Nixon*, 506 U.S. at 236–37. *See* U.S. CONST. art. I. § 2.

[560] *Nixon*, 506 U.S. at 236–37.

[561] *Id.* (discussing *Powell*).

[562] *Id*. Justice White, joined by Justice Blackmun, concurred in the judgment but argued that while the Senate's use of an impeachment committee was appropriate in this situation, questions concerning the impeachment power did not necessarily pose nonjusticiable political questions. *Id*. at 239–52 (White, J. joined by Blackmun, J. concurring). In addition, Justice Souter concurred in the judgment and claimed that this case presented a nonjusticiable political question, but noted that "different and unusual circumstances . . . might justify a more searching review." *Id.* at 253 (Souter, J. concurring). If the Senate were to convict on the basis of a coin flip, for example, or "a summary determination that an officer of the United States was simply 'a bad guy,'" then judicial review might be appropriate. *Id*. at 253–54 (quoting *id*. at 239 (White, J., concurring)).

[563] Porteous v. Baron, 729 F.Supp.2d 158, 160–61 (D.D.C. 2010).

[564] *Id*. at 160.

witness against himself.[565] The court rejected his challenge, reasoning that because the use of the testimony for an impeachment proceeding fell within the legislative sphere, the Speech or Debate Clause prevented the court from ordering the committee staff members to refrain from using the testimony.[566]

Similarly, Judge Alcee L. Hastings sought to prevent the House Judiciary Committee from obtaining the records of a grand jury inquiry during the Committee's impeachment investigation.[567] Prior to the impeachment proceedings, although ultimately acquitted, Judge Hastings had been indicted by a federal grand jury for a conspiracy to commit bribery.[568] Judge Hastings's argument was grounded in the separation of powers: he claimed that permitting disclosure of grand jury records for an impeachment investigation risked improperly allowing the executive and judicial branches to participate in the impeachment process—a tool reserved for the legislature.[569] The U.S. Court of Appeals for the Eleventh Circuit, however, rejected this "absolutist" concept of the separation of powers and held that "a merely generalized assertion of secrecy in grand jury materials must yield to a demonstrated, specific need for evidence in a pending impeachment investigation."[570]

The U.S. District Court for the District of Columbia initially threw out Judge Hastings's Senate impeachment conviction, because the Senate had tried his impeachment before a committee rather than the full Senate.[571] The decision was vacated on appeal and remanded for reconsideration under *Nixon v. United States*.[572] The district court then dismissed the suit because it presented a nonjusticiable political question.[573]

Conclusion

Influenced by both English and colonial practice, the Framers of the Constitution crafted an Americanized impeachment remedy that ultimately holds government officers accountable for political offenses, or misdeeds committed by public officials against the state. The meaning of the Constitution's impeachment provisions has been worked out over time, informed by the historical practices of the House and Senate in pursuing impeachment for the misconduct of government officers. Impeachment is also generally immune from judicial review, meaning that Congress has substantial discretion in how it structures impeachment proceedings.

The Constitution does not delineate the range of misconduct that qualifies as "high Crimes and Misdemeanors," perhaps because the scope of possible offenses by government officers is impossible to delineate in advance. The history of impeachment in the United States shows that the remedy has generally applied against government officers for abuses of power, corruption, and conduct determined incompatible with an individual's office, but does not extend to strictly political or policy disagreements.

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[565] *Id*. at 161–62.

[566] *Id*. at 165–67.

[567] *In re* Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1439–41 (11th Cir. 1987) (upholding an order granting the House Judiciary Committee access to grand jury materials in an impeachment investigation).

[568] *See id*. at 1439.

[569] *See id*. at 1442.

[570] *Id*. at 1444.

[571] Hastings v. United States, 802 F. Supp. 490, 505 (D.D.C. 1992).

[572] Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993).

[573] Hastings v. United States, 837 F. Supp. 3, 5–6 (D.D.C. 1993).

Table 1. Impeachments in the United States

Name	Office	House Action and Summary of Charge	Date of Final Senate Action	Result
Blount, William	U.S. Senator from Tennessee	Impeached July 7, 1797, on charges of conspiring to assist in the United Kingdom's attempt to seize Spanish-controlled territories in modern-day Florida and Louisiana	January 11, 1799	Charges dismissed for want of jurisdiction; Blount had been expelled from the U.S. Senate before his trial
Pickering, John	Judge, U.S. district court, District of New Hampshire	Impeached March 2, 1803, on charges of intoxication on the bench, refusing to follow legal precedents, and blasphemy	March 12, 1804	Guilty; removed from office
Chase, Samuel	Associate Justice, U.S. Supreme Court	Impeached March 12, 1804, on charges of arbitrary and oppressive conduct of trials	March 1, 1805	Not guilty; acquitted
Peck, James H.	Judge, U.S. district court, Western District of Tennessee	Impeached April 24, 1830, on charges of abuse of the contempt power	January 31, 1831	Not guilty; acquitted
Humphreys, West H.	Judge, U.S. district court, Western District of Tennessee	Impeached May 6, 1862, on charges of joining the Confederate government and abandoning his position	June 26, 1862	Guilty; removed from office and disqualified from future office
Johnson, Andrew	President of the United States	Impeached February 24, 1868, on charges of violating the Tenure of Office Act by removing Secretary of War Edwin Stanton from office	May 16, 1868 (acquittal on art. 11) May 26, 1868 (acquittal on arts. 2 and 3)	Not guilty; acquitted
Delahay, Mark H.	Judge, U.S. district court, District of Kansas	Impeached February 28, 1873, on charges of intoxication on the bench	No Senate action taken due to Delahay's resignation on December 12, 1873	Resigned prior to trial
Belknap, William W.	U.S. Secretary of War	Impeached March 2, 1876, on charges of criminal disregard for his office and accepting payments in exchange for making official appointments	August 1, 1876	Not guilty; acquitted, resigned before trial
Swayne, Charles	Judge, U.S. district court, Northern District of Florida	Impeached December 13, 1904, on charges of abuse of contempt power and other misuses of office	February 27, 1905	Resigned before trial; acquitted
Archbald, Robert W.	Associate judge, U.S. Commerce Court	Impeached July 11, 1912, on charges of improper business relationship with litigants	January 13, 1913	Guilty; removed from office and disqualified from future office

Name	Office	House Action and Summary of Charge	Date of Final Senate Action	Result
English, George W.	Judge, U.S. district court, Eastern District of Illinois	Impeached April 1, 1926, on charges of abuse of judicial power	December 13, 1926	Resigned November 4, 1926; proceedings dismissed December 13, 1926
Louderback, Harold	Judge, U.S. district court, Northern District of California	Impeached February 24, 1933, on charges of favoritism in the appointment of bankruptcy receivers	May 24, 1933	Not guilty; acquitted
Ritter, Halsted L.	Judge, U.S. district court, Southern District of Florida	Impeached March 2, 1936, on charges of favoritism in the appointment of bankruptcy receivers and practicing law as a sitting judge	April 17, 1936	Guilty; removed from office
Claiborne, Harry E.	Judge, U.S. district court, District of Nevada	Impeached July 22, 1986, on charges of income tax evasion	October 9, 1986	Guilty; removed from office
Hastings, Alcee L.	Judge, U.S. district court, Southern District of Florida	Impeached August 3, 1988, on charges of perjury and conspiring to solicit a bribe	October 20, 1989	Guilty; removed from office
Nixon, Walter L.	Judge, U.S. district court, Southern District of Mississippi	Impeached May 10, 1989, on charges of perjury before a federal grand jury	November 3, 1989	Guilty; removed from office
Clinton, William J.	President of the United States	Impeached December 19, 1998, on charges of lying under oath to a federal grand jury and obstruction of justice	February 12, 1999	Not guilty; acquitted
Kent, Samuel B.	Judge, U.S. district court, Southern District of Texas	Impeached June 19, 2009, on charges of sexual assault, obstructing and impeding an official proceeding, and making false and misleading statements	July 22, 2009	Resigned June 30, 2009, before the completion of the trial
Porteous, G. Thomas Jr.	Judge, U.S. district court, Eastern District of Louisiana	Impeached March 11, 2010, on charges of accepting bribes and making false statements under penalty of perjury	December 8, 2010	Guilty; removed from office

Source: Adapted from *List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/Institution/Impeachment/Impeachment-List/ (last visited Oct. 25, 2019); *Impeachment, Senate Impeachment Trials*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm#impeachment_trials (last visited Oct. 25, 2019).

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