

"HIGH CRIMES AND MISDEMEANORS":

THE DEFINITIONS OF AN IMPEACHABLE OFFENSE*

Dennis J. Owens*

If Richard Nixon were to be removed from office through the process of impeachment, Gerald Ford would become President of the United States.¹ On the 15th of April, 1970, Mr. Ford, then a Congressman, proposed the impeachment of Supreme Court Associate Justice William O. Douglas. He made a speech on the floor of the House of Representatives concerning its power to impeach. In this now-famous speech, he defined an impeachable offense as

whatever a majority of the House of Representatives considers it to be at a given moment in history; . . . whatever . . . [the Senate] considers to be sufficiently serious to require removal of the accused from office. . . .²

Few, if any, scholars would concur with this broadest of "broad" definitions. Fewer yet would adopt that narrowest of "narrow" views which requires an indictable offense for impeachment. What is an impeachable offense?

To address ourselves to this question, we must first understand what an impeachment is and is not.

Impeachment Itself

The Oxford English Dictionary tells us that impeachment originally meant "to impede, to impair, to fetter" or chain. The Second Edition Merriam-Webster New International Dictionary states that it now means an

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"accusation, a calling to account for some high crime or offense before a competent tribunal, an arraignment, especially of a public officer for misconduct while in office."

The most common misunderstanding of the word is that it means "to remove from office." Clearly, it does not properly mean this. If one is asked "Do you think Nixon should be impeached?" one is actually being asked if he should stand trial. (Since our system of justice gives a presumption of innocence to the accused, no pollster has any business asking if a party should be convicted. Courts, including courts of impeachment, decide if charges are borne out by the evidence. The public and its oft uninformed opinion do not.)

An impeachment and impeachment trial are not judicial activities. That is, they are devices designed to resolve an essentially political question: shall this person continue to hold this office to which he was elected or appointed? It uses a political forum: the Congress. And, upon conviction, its sanction is political: removal from office and disqualification from further office. The judicial coloring of the proceedings is genuine enough. The House of Representatives hands down the articles of impeachment while styling itself "the grand inquest of the nation." This is often described as being the "equivalent of an indictment" from a grand jury. The Senate then becomes "the high court of impeachment," conducts a "trial" and renders a "verdict."³ Furthermore, the Chief Justice of the United States presides.

But, regardless of the trappings, the process' forum, question and sanctions remain essentially political. "The critical focus should be, therefore, not on political animus, for that is the nature of the beast, but on whether Congress is proceeding within the limits of 'high crimes and misdemeanors.'"⁴ Justice Story noted that impeachment was "a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors."⁵

The English Background

American law, of course, is the child of English law. We take the concept and procedures of impeachment from the English, too. But, here, the debt is owed to Parliament, not the common law and equity courts.

The British recorded impeachment trials as early as the fourteenth century.⁶ The King, often the adversary of the Parliament, was unimpeachable. But, his ministers were not. Commons could show its displeasure of the King's policies by impeaching those who carried them out. Parliament also used this weapon against the corrupt. (Francis Bacon, the giant of the philosophy of science, was removed from the office of Lord Chancellor of England in one such proceeding.⁷)

But in no sense was a criminal offense required. The phrase "high crimes and misdemeanor" is not derived from the criminal law. It is parliamentary in origin. Thus, Commons impeached government officials for procuring offices for persons unfit and unworthy for them,⁸ neglecting to safeguard the seas as a Great Admiral was required,⁹ putting a seal on an ignominious treaty,¹⁰ misleading the sovereign.¹¹ These charges bear out Story's commentary.

There have been no impeachments in the United Kingdom since 1806.¹² Why? The House of Commons controls the very tenure of the chief executive of modern British governments, the Prime Minister. They can obtain his resignation and those of his entire Cabinet by denying him a majority on a Vote of Confidence.

The American Constitution

The word "impeachment" is found in our Constitution seven times.

Article I, Section 2, Clause 5:

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

Article I; Section 3, Clauses 6 and 7:

"The Senate shall have the sole power to try all Impeachments. When sitting for that Purpose, they shall be in Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: An no person shall be

convicted without the concurrence of two thirds of the Members present.

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

Article II; Section 2, Clause 1:

"The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

Article II; Section 4:

"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Article III, Section 2, Clause 3:

"The Trial of all Crimes, except in cases of Impeachment, shall be by jury"

(The removal of the President and the resultant situation are mentioned several other times.¹³)

Treason is defined in the Constitution in Article III, Section 3.¹⁴

Bribery has a common law definition which generally coincides with the popular understanding.¹⁵ The question centers on "or other high Crimes and Misdemeanors." We shall approach this three ways: analysis of the language itself; investigation of legislative intent which, here, is the understanding of the Constitutional Convention of 1787; and a review of the precedents. In this situation, of course, precedents are those of Congressional impeachments and trials, rather than those of court decisions.

"Or other high crimes and Misdemeanors" is a confusing phrase. Misdemeanors is a class of crimes, the other class being felonies. This suggests that "high crimes and high misdemeanors" was not the thought intended, for a misdemeanor is a minor crime by definition.¹⁶ A felony is a high crime,¹⁷ of course, and contrasts with a simple misdemeanor.

In spite of the seeming logic of these observations, the history of our legal language turns them all on their collective head. Raoul Berger, the Harvard Law Professor, provides us with his scholarship on the matter in Impeachment: The Constitutional Problems (Harvard University Press, 1973).

At the time when the phrase "high crimes and misdemeanors" is first met in the proceedings against the Earl of Suffolk in 1388, there was in fact no such crime as a "misdemeanor." Lesser crimes were prosecuted as "trespasses" well into the sixteenth century, and only then were "trespasses" supplanted by "misdemeanors" as a category of ordinary crimes. As "trespasses" itself suggests, "misdemeanors" derived from torts or private wrongs; and Fitzjames Stephen stated in 1863 that "prosecutions for misdemeanor are to the Crown what actions for wrongs are to private persons." In addition, therefore, to the gap of 150 years that separates "misdemeanors" from "high misdemeanors," there is a sharp functional division between the two. "High crimes and misdemeanors" were a category of political crimes against the state, whereas "misdemeanors" described criminal sanctions for private wrongs. An intuitive sense of the difference is exhibited in the development of English law, for though "misdemeanor" entered into the ordinary criminal law, it did not become the criterion of "high misdemeanor" in the parliamentary law of impeachment. Nor did either "high crimes" or "high misdemeanors" find their way into the general criminal law of England. As late as 1757 Blackstone could say that "the first and principal high misdemeanor is the mal-administration of such high officers, as are in the public trust and employment. This is usually punished by the method of parliamentary impeachment." Other high misdemeanors, he stated, are contempts against the King's prerogative, against his person and government, against his title, "not amounting to treason," in a word, "political crimes." Treason is plainly a "political" crime, an offense against the State; so too bribery of an officer attempts to corrupt administration of the State. Indeed, early in the common law bribery "was sometimes viewed as high treason." Later Hawkins referred to "great Bribes . . . and . . . other such like misdemeanors;" and Parliament itself regarded bribery as a "high crime and misdemeanor." In addition to this identification of bribery, first with "high treason" and then with "misdemeanor," the association, as a matter of construction, of "other high crimes and misdemeanors" with "treason, bribery," which are unmistakably "political" crimes, lends them a similar connotation under the maxim noscitur a sociis.

In sum, "high crimes and misdemeanors" appear to be words of art confined to impeachments, without roots in the ordinary criminal law and which, so far as I could discover, had no relation to whether an indictment would lie in the particular circumstance.¹⁸

Noscitur a sociis, the principle that "the meaning of a word is or may be known from the accompanying words,"¹⁹ limits the phrase to political crimes.

Another maxim of statutory construction also applies: ejusdem generis.

The principle is "that where specific things are enumerated, followed by a general phrase, such as 'and other things,' the general words should be constructed as limited to things of the same kind as those enumerated."²⁰ Thus, Ejusdem generis means that the phrase "or other high crimes or Misdemeanors" should be limited to offenses of the same genus as "Bribery, Treason" Clearly, these are the offenses of a person

who entrusted with governmental office, violates this trust. These are what we meant by "political offenses." "They are Constitutional wrongs that subvert the structure of government or undermine the integrity of office and even the Constitution itself."²¹

Legislative Intent: Framers of the Constitution

The provisions for impeachment made in the Constitution of the United States all find their purposes in our Anglo-American history. The respective powers of the House and Senate are the legacy of the prerogatives of Commons and the House of Lords. "Although English impeachments did not require an indictable crime they were nonetheless criminal proceedings because conviction was punishable by death, imprisonment, or heavy fine."²² The American approach was to "de-criminalize" the proceedings by sharply limiting the sanction to political consequences.²³ Having done so, they could in good conscience, allow for possible criminal indictment for the same actions without double jeopardy applying.²⁴ The British monarch had once pardoned a peer whom the House of Commons had impeached, but the Lords had not yet tried.²⁵ To forestall any such "mischief," the framers of the Constitution explicitly forbade it in Article II. If they had not, civil officers would be little concerned with the prospect of impeachment, and the power of Congress would be thusly blunted. The separation of the function of accusers and the functions of jury makes obvious procedural sense. The two thirds Senate vote requirement²⁶ lessens the prospects of capricious removal and of a faction's denial of the executive's mandate.

Currently, there is much concern that impeachment will somehow "destroy" the Presidency. But, clearly, the impeachment process was planned by the Constitutional Fathers concurrently with their planning of the Presidency and the Executive Branch. Furthermore, impeachment was, just as clearly, aimed specifically at the President.

The original draft was worded "the Executive is to be removable on impeachment and conviction (for) malpractice or neglect of duty."²⁷

In the debate of the Federal Convention on the 20th of July, 1787, Col.

George Mason of Virginia, known as the Father of the Bill of Rights argued:

No point is of more importance than that the right of impeachment should be continued. Shall any man be above justice? Above all, shall that man be above it who can commit the extensive injustice? When great crimes are committed, I am for punishing the principal as well as the coadjutors . . . Shall the man who has practiced corruption and by that means procured his appointment in the first instance, be suffered to escape punishment by repeating his guilt?²⁸

Impeachment was provided for by a vote of 8-2, but the impeachable offenses were redefined. Treason and bribery were grounds agreed to by all parties. Edmund Randolph suggested adding "abusing his power."²⁹ Col. Mason again spoke:

Treason as defined in the Constitution, will not reach many great dangerous offenses. . . Attempts to subvert the Constitution may not be treason as above defined.³⁰

He moved to insert "or maladministration" after the word "bribery."³¹ Madison countered that "so vague a term will be equivalent to tenure during the pleasure of the Senate."³² Mason withdrew the motion and substituted "high crimes and misdemeanors,"³³ borrowing from the English Parliamentary history that he knew so well. Use of this language implied a carryover of the English concepts of the non-criminal nature of the offenses required, the requirement of graveness and seriousness of the offense, and the political nature of the process. The phrase was adopted without further debate.³⁴

The Precedents

In American history, there have been twelve federal impeachments.³⁵ Only four persons have been convicted and removed from office. They were all federal judges. Of the other eight, some resigned before trial, the others acquitted. The most famous impeachment is, of course, that of President Andrew Johnson. But his trial was such a shabby political action that it provides few legal guidelines.

The first convicted judge was John Pickering. He was found

to have been drunk on the bench and to have used profanity in the courtroom.³⁶ The next convicted judge was W. H. Humphreys. He was charged with acting as judge in a Confederate state--and was tried by the Senate during the Civil War.³⁷ These two cases provide little guidance to us due to their uniqueness.

The last two cases do give us some insight. In 1912, Judge Robert W. Archbald was impeached and convicted. He was charged with accepting money from wealthy parties (who did not have cases before him), speculating in the coal business, and accepting money solicited by his clerk from attorneys who practiced in his court. His conduct, though, was not seen as criminal, but rather "exceedingly reprehensible and in marked contrast with the high sense of judicial ethics and probity."³⁸ It is clear that the Senate removed him for his unethical behavior.

In 1936, Judge Halstead L. Ritter was impeached, convicted and removed from the bench of the federal district court for Southern Florida. Six of the seven articles of impeachment adopted cited such offenses as splitting fees with a former law partner from a case in which Ritter gave judgment to his partner's client, collecting other forbidden fees, and not reporting this on his tax return. The Senate had a majority vote, but not the required two thirds, on these six articles. On the last article, a conviction was had, 56 to 28, and Ritter was removed from office. What did the seventh article charge? First, a restatement of the first six article's charges. Second, the charge that:

The reasonable and probable consequence of the actions or conduct of Halsted L. Ritter, hereunder specified or indicated in this article since he became judge of said court, as an individual or as such judge is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge.³⁹

Judge Leon R. Yankwich wrote in a Georgetown Law Journal article in 1938 that

This ruling definitely lays down the principle that even though upon specific charges amounting to legal violations, the Senate finds the accused not guilty, it may

nevertheless, find that his conduct in these very matters was such as to bring his office into disrepute and order his removal upon that ground.⁴⁰

Conclusion

From an analysis of the language of the Constitution in its legal and historical context, from a study of the drafters' stated intentions, and from a review of the Congressional precedents, we can see that "or other high crimes and Misdemeanors" does not mean an indictable crime, does not give the Congress unlimited power to remove, Mr. Ford notwithstanding, but rather, has a definitely delimiting meaning, and does require a "political offense" which must be serious. This could include abuse of office, neglect of duty, unethical conduct bringing one's office into disrespect, and violating the public trust.

John Doar, Majority Counsel of the Judiciary Committee's

Impeachment Inquiry Staff, concluded that

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

The duty to take care is affirmative. So is the duty faithfully to execute the office. A President must carry out the obligations of his office diligently and in good faith. The elective character and political role of a President make it difficult to define faithful exercise of his powers in the abstract. A President must make policy and exercise discretion. This discretion necessarily is broad, especially in emergency situations, but the constitutional duties of a President impose limitations on its exercise.

The "take care" duty emphasizes the responsibility of a President for the overall conduct of the executive branch, which the Constitution vests in him alone. He must take care that the executive is so organized and operated that this duty is performed.

The duty of a President to "preserve, protect, and defend the Constitution" to the best of his ability includes the duty not to abuse his powers or transgress their limits--not to violate the rights of citizens, such as those guaranteed by the Bill of Rights, and not to act in derogation of

powers vested elsewhere by the Constitution.

Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement--substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.⁴¹

FOOTNOTES

1. Mr. Ford is Vice President of the United States. See Article II, Section 1, Clause 6 of the Constitution of the United States.
2. 116 Cong. Rec., H 3113-4 (daily ed. April 15, 1970).
3. T. Jefferson, Manual of Parliamentary Practice and Rules of Procedure for the House of Representatives, Section LIII - Impeachment, §§ 602, 609, 618, 619. The British Parliament used these terms.
4. Berger, Impeachment: The Constitutional Problems 97 (1973).
5. 1 J. Story, Commentaries on the Constitution of the United States, § 803 (5th ed. 1905). Story used the language of Congressman Bayard in the Blount impeachment proceedings.
6. 11 Howell, State Trials 751, 755 (1809). The Earl of Suffolk was impeached in 1388. This was the first use of the term "high crimes and misdemeanors." See text accompanying Note 18.
7. See Yankwich, Impeachment of Civil Officers Under the Federal Constitution, 26 Georgetown L.J. 883. This took place in 1620. He was pardoned in 1621.
8. 4 Hatsell, Precedents of the Proceedings of the House of Commons 60. The Duke of Suffolk was impeached in 1450.
9. 2 Howell, supra note 6, at 1307. The Duke of Buckingham was impeached in 1626.
10. 1 Story, supra note 5, at § 800. Lord Chancellor Somers sealed the Partition Treaties. Berger (note 4) stated that Story is paraphrasing 2 R. Woodeson, Laws of England 619 (1792).
11. 1 Id. at § 800.
12. 29 Howell, State Trials 549 (1821). Viscount Melville was impeached for misappropriation of funds. He had been Treasurer of His Majesty's Navy.
13. See Article II, Section 1, Clause 6, Amendment XX, Sections 3 and 4, and Amendment XXV. Mr. Ford was "nominated" and "confirmed" as Vice President under the latter article.
14. "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt Act, or on confession in open court. . . ."
15. Bribery is "the . . . receiving, or soliciting of any thing of value to influence action as an official or in discharge of legal or public duty. . . ." Black's Law Dictionary (4th ed., 1968).
16. A misdemeanor is "offense lower than a felony and generally punishable by fine. . . ." Black's Law Dictionary (4th ed., 1968). This is the definition of a criminal misdemeanor.

17. A felony is "generally an offense punishable by death or imprisonment in penitentiary." Black's Law Dictionary (4th ed., 1968).
18. Berger, supra note 4 at 61 and 62.
19. Black's Law Dictionary (4th ed., 1968).
20. C. Nutting, S. Elliott, & R. Dickerson, Legislation 477 (4th ed., 1969).
21. Staff of the Impeachment Inquiry, House Comm. on the Judiciary, 93rd Cong., 2d Sess., Report on Constitutional Grounds for Presidential Impeachment 26 (Comm. Print 1974).
22. Berger, supra note 4, at 67.
23. See Article I, Section 3, Clause 7, cited in the text supra.
24. See Amendment V, Constitution of the United States.
25. Charles II pardoned the impeached Earl of Danby.
26. See Article I, Section 3, Clause 6, cited in the text supra.
27. House Comm. on the Judiciary, Impeachment, Selected Materials, H.R. Doc. No. 93-7, 93rd Congress, 1st Sess. 3 (1973) (citing 2 Farrand, The Records of the Federal Convention of 1787).
28. Id. at 3.
29. Id. at 5.
30. Id. at 40 (citing 3 Hinds' Precedents of the House of Representatives, Chapter LXIII).
31. Id. at 40.
32. Id. at 40.
33. Id. at 40.
34. House Comm. on the Judiciary, supra note 27 at 6 (citing 2 Farrand).
35. These were the impeachments of William Blount, U.S. Senator, for conspiracy and treason, expelled from the Senate, held thereby by the Senate to be unimpeachable; John Pickering, U.S. District Court Judge, convicted and removed (see text); Samuel Chase, Associate Justice of the U.S. Supreme Court, a politically motivated impeachment, acquitted by a vote following party lines; James H. Peck, U.S. District Court Judge, for abuse of his judicial power in a contempt proceeding, acquitted on the merits; West H. Humphrey, U.S. District Court Judge, convicted and removed (see text); Andrew Johnson, President of the U.S., for violation of the Tenure of Office Act, a highly politicized impeachment, acquitted by one vote; William W. Belknap, U.S. Secretary of War, for accepting bribes from appointees, resigned before trial; Charles Swayne, U.S. District Court Judge, for false expense account claims and other like charges, acquitted; Robert W. Archbald, U.S. District Court Judge, convicted and removed (see text);

George W. English, U.S. District Court Judge, for manipulation of bankruptcy funds for the benefit of the defendant and his son, resigned before trial; Harold Louderback, U.S. District Court Judge, for manipulation of litigation, granting exorbitant fees to his friends and other like charges, acquitted; Halstead L. Ritter, U.S. District Court Judge, convicted and removed (see text).

36. 3 Hinds' Precedents of the House of Representatives of the United States 681--710 (1907).
37. Id. at 805-20.
38. 6 Cannon's Precedents of the House of Representatives of the United States 684-708; 48 Cong. Rec. 8705-08 (1912).
39. Proceedings of the United States Senate: In the Trial of Impeachment of Halstead L. Ritter. S. Doc. No. 200, 74th Cong., 2d Sess. 644-47 (1936); 80 Cong. Rec. 5602-06 (1936).
40. Yankwich supra note 7 at 858.
41. Staff of the Impeachment Inquiry, supra note 21, at 27.

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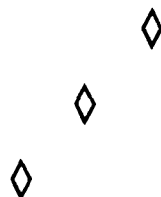
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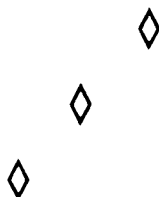
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