Citizens' Guide to Impeachment of a President: Problem Areas

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Much of the discussion in the Judiciary Committee [of the House] runs in a direction which does not take the constitutional provisions literally. [John M.] Doar [special counsel to the House Judiciary Committee] recognizes this in saying that it might not be necessary to show [President] Nixon had committed criminal offenses as a requirement for removing him from office. Some seem to think that a finding that the President had brought his office into notorious disrepute severely damaging the nation is sufficient to justify his removal from office without proof of treason, bribery or other high crimes and misdemeanors . . . .

Once they stray from the literal terms of the constitution they . . . concede the absence of convicting proof of the constitutionally defined offenses . . . .

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The word "misdemeanors", it is now widely accepted, was used by the Framers in a particular historical sense. Raoul Berger, the leading writer in impeachment today, shows that in the ancient English precedents "high misdemeanors" were political crimes such as, in Blackstone's word, "maladministration."1

The provisions of the Constitution dealing with impeachment are short, and with one exception clear from a first reading. But one key provision, the one under discussion in the above passages, has been in controversy from the beginning of the Republic. Article II, Sec. 4: "The President, Vice President and all civil Officers of the United States, shall be removed

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1. These passages are from columnists of sophistication and repute, writing from different standpoints. The first is from Richard Wilson (Impeachment: Some Hard Questions, Wash. Star-News, Dec. 24, 1973, at A7 col. 4), and the second by Anthony Lewis ('Negligence or Perfidy', N.Y. Times, Dec. 10, 1973, at 37 col. 1).
from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors." Unfortunately, a large part of the continuing debate has been conducted by advocates: those seeking to prosecute or defend a public person challenged by the impeachment process—either as lawyers or as oriented journalists. The vital and legitimate role of the citizen in the impeachment design of the Constitution has never been sufficiently stressed. Nor have constitutional lawyers placed before the members of the Republic, in better than opaque form, the historical and analytical data from which citizens may fairly assess the issues for decision, the significance of their role, and how best to exercise it. This study, dealing precisely with the meaning of "other high crimes and misdemeanors" in Article II, Section 4, is designed to contribute to this educative function. It will, therefore, remain aloof from the nature or weight of the evidence in the present impeachment undertaking.

Since we live under constitutional government, any impeachment or conviction not conducted under, and in accordance with, the provisions of the

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2. Constitutional Provisions Concerning Impeachment of the President:

Procedure: Art. I, § 2. "The House of Representatives shall . . . have the sole power of impeachment." Art. I, § 3. "The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present." Art. III, § 2. "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury." (E. A.).

Substance: Art. II, § 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."

Limitation of Penalty: Art. I, § 3. "Judgment in Cases of Impeachment shall not extend further than 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."


3. In the early history of the nation there were extensive considerations of the impeachment provisions given by leading constitutional law scholars. But the chief literature derives from the briefs submitted in actual impeachments. In these were enlisted some of the most distinguished advocates in the history of the Republic. These briefs kept alive the controversy as to the scope of "high crimes and misdemeanors." Consider also the statement of Vice-President Gerald Ford while in Congress when, in support of his 1970 proposal to impeach Supreme Court Justice William O. Douglas, he stated:

What, then, is an impeachable offense?

The only answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the entire body [the Senate] considers to be sufficiently serious to require removal of the accused from office . . . [T]here are few fixed principles among the handful of precedents.


4. Only in recent months, it seems, is there public awareness that "impeachment" is merely the voting of charges—"articles of impeachment"—by the House, and that
Constitution is simply an exercise of raw and illegal power. So the reference above to possible removal from office without proof of treason, bribery or other high crimes and misdemeanors is a posits of sheer lawlessness. The proper question, of course, is what constitutes "high crimes and misdemeanors." The answers range from the assertion that the "literal terms" give their own answer, to the suggestion that there is no limit save the conscience of each Representative and Senator voting in a particular impeachment proceeding.

So overwhelming is the evidence that the "literal terms" do not give a feasible answer that winning counsel for an impeached official in a twentieth century Senate trial conceded that commission of statutory crime was not required for conviction. On the other hand, the suggestion that the scope of "removal from office"—the Constitutional penalty—only follows conviction in the Senate "trial." The question: "What are impeachable offenses" is crucial at both the House and Senate phases of the impeachment proceedings.

5. The question: Who decides what constitutes "high crimes and misdemeanors", has been subject to less disagreement. When read as an answer to this jurisdictional inquiry, the Ford statement, note 3 supra, is less puzzling. It then becomes reminiscent of the famous statement of Chief Justice Charles Evans Hughes: "We are under a Constitution, but the Constitution is what the judges say it is." See M. Pusey, CHARLES EVANS HUGHES 204 (1951). Clearly the House determines what constitutes bases for impeachment, and the Senate is charged with determining the constitutional bases for conviction. For a novel but over exuberant view that there may be room even here for "the judges" to have a final word, see R. Berger, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 103-21 (1973) [hereinafter cited as Berger].

6. Cf. the opening quotations in this article.

7. On January 8, 1913 the House Manager, John A. Sterling, said in his final argument in the impeachment trial of Judge Robert W. Archbald:

And so, Mr. President, I say, that outside of the language of the Constitution which I have quoted [see note 2 supra] there is no law which binds the Senate in this case today except that law which is prescribed by their own conscience, and on that, and on that alone, must depend the result of this trial. Each Senator must fix his own standard, and the result of this trial depends upon whether or not these offenses we have charged against Judge Archbald come within the law laid down by the conscience of each Senator for himself.


The same inference may, perhaps, be drawn from the Ford statement, note 3 supra.

8. The brief filed on February 22, 1905 by counsel for Judge Charles Swayne in his impeachment trial said that this contention had "perished" through inherent weakness.

[A] grotesque attempt has been made to narrow unreasonably the jurisdiction of the Senate sitting as a court of impeachment by the claim that the power of impeachment is limited to offenses positively defined by the statutes of the United States as impeachable crimes and misdemeanors.

Apart from its other infirmities, this contention loses sight of the fact that Congress has no power whatsoever to define a high crime and misdemeanor.

3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ch. LXIII, No. 2019 (1907) [hereinafter cited as HINDS' PRECEDENTS], as quoted in IMPEACHMENT: SELECTED MATERIALS 76-77.
impeachable offenses is as broad as individual conscience would withdraw the process from any recognized constitutional limit. The first and basic inquiry must be: What are the constitutional limits to impeachable offenses? Only when this question has been answered is there need for consideration of the "political" factors which I will urge have a proper place in making any decision whether to impeach and convict (or not) in the context of a specific factual and historical situation.

I. Impeachable Offenses—The Constitutional Parameters

Our legal system has standard methods for determining the meaning of statutes. Where the words in themselves, or in their context, have a "plain meaning," there is no need to go further. But where doubt arises, the court turns to the legislative history and the official statements of the authors or sponsors, either in conference or committee reports or, less reliably, in legislative debates in the course of enactment. If doubt still exists, or perhaps to buttress conclusions already reached, the court may turn to contemporaneous extra-parliamentary interpretation of the authors or sponsors or of the officials whose task has been to administer the statute.

9. "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." Caminetti v. United States, 242 U.S. 470, 485 (1917).

10. Even in the face of superficially "plain meaning", American courts have come to resort to extrinsic materials. Cf. Mr. Justice Reed in United States v. American Trucking Association, 310 U.S. 534, 543-44 (1940):

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the Legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there can certainly be no "rule of law" which forbids its use, however clear the words may be on superficial examination.

11. See, e.g., Schwegmann Bros. v. Calvert Distillers, Corp., 341 U.S. 384 (1951) where Mr. Justice Douglas stressed the significance of statements of sponsors, making a distinction frequently reiterated by the Supreme Court: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." Id. at 394-95.

12. While this is sometimes acceptable, it is less weighty than the other guides, and courts' reactions to it are uneven. See e.g., Skidmore v. Swift & Co., 323 U.S. 134 (1944) where, after noting "[t]here is no statutory provision as to what, if any, deference courts should pay to the Administrator's [of the Fair Labor Standards Act] conclusions." Id. at 139. The Court treated them as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. at 140. The Court then added that "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning,
stitution is, of course, a form of statutory enactment, the prime statute by which all laws and decisions are measured. The legislative history of the original Constitution is found in the reports of the proceedings of the Constitutional Convention in which fifty-five delegates from twelve of the thirteen original states in the summer of 1787 produced the document that has been modified only twenty-six times in its history.

The Convention

While the literature on the Convention is immense and rich and can hardly be improved upon here, a grasp of the import of the impeachment provisions requires more than merely excerpting them from the debates. Understanding requires attention to the dynamics and rhythm of the entire founding process. Because of the interrelation of the impeachment clause with other constitutional provisions, considerations of development and time frame become especially crucial in the problem of impeachment.

Consider the setting. Authorized on February 21, 1787, to meet to revise the Articles of Confederation, the delegates begin to arrive in Philadelphia in mid-May. Not until May 25th are a majority of the states represented there so that the Convention may organize and begin its work. Then for
two months they simply debate basic generalities, reaching only limited and quite general conclusions. By now they seem committed to preparing not mere revisions of the Articles of Confederation, but something new and integral. Some despair that they cannot do the job; perhaps another convention will be required. But on July 24th, they elect five men from their number (Gorham, Ellsworth, Wilson, Randolph and Rutledge) to prepare a concrete draft based on the discussion already had, reserving only matters concerning the chief executive. The Convention commissions this “Committee on Detail”—a deceptively disarming designation—to come up with nothing less than a draft of the Constitution. Then the Convention actually adjourns for ten days to await the concrete product. When the five-man committee presents the delegates with printed copies of the “draft of August 6th”, the Convention reconvenes and debates the draft line-by-line for a month. As delegates present new material for consideration, or as discussion seems to bog down on one or another item in discussing the “draft,” these items are referred by the Convention to separately elected committees composed of one man from each state. Four of these “Committees of Eleven” are sent out in succession and report back in the month following August 6th. By September 8th the Convention has so far progressed that it elects a “Committee on Style” (Johnson, Morris, Hamilton, Madison, and King) “to revise the style of and arrange the articles which had been agreed to by the House.” On September 12th the Committee on Style reports back to the convention “the Constitution as revised and arranged.” On September 17th, after five days of conclusive line-by-line debate, the Convention adjourns sine die. Having now com-

18. From May 29th to June 13th, sitting as a Committee of the Whole, the Convention debated and amended the extensive plan of government prepared by the Virginia delegation. It then discussed the New Jersey plan submitted by Patterson, heard Hamilton's plan, and debated the relative merits of the basic plans until June 20th, when it returned to sitting as a Convention. Thereafter, although many specifics had been agreed to, largely in the context of amending the Virginia plan, there was a tendency to redeliberation and an air of tentativeness about the previously conducted business.


20. 2 Farrand 96-97.

21. The matters concerning the chief executive were added to the Committee on Detail's assignment on July 26th. 2 Farrand 117.

22. The Convention's resolution called for its “proceedings . . . for the establishment of a national government, except what respects the Supreme Executive, be referred to a Committee for the purpose of reporting a Constitution conformably to the Proceedings.” 2 Farrand 85.


24. 2 Farrand 553.

25. Id. at 582.

26. Id. at 649.
completed its work, it commissions the secretary to send the Constitution and letter of transmittal to “the United States in Congress assembled.”

During its summer’s work the delegates had met for two sessions a day, six days a week. Their sense of urgency had yielded a product. Few were satisfied on every point, but the twelve states represented there unanimously approved the final edition.

**Questions Concerning Impeachment**

In the context of this monumental task, the time and space devoted to the question of impeachment was quite small. What talk there was centered on the impeachment of the President. When it was agreed that the President would serve for a term of years, and not for life, question was raised as to the need for a presidential impeachment provision at all. The issue, after all, was different from that of federal judges, who were to serve not for a term but “during good behavior.” But most felt some check of the strong executive was needed. The second question to be resolved was what governmental agency or agencies would conduct the impeachment proceedings. This question was answered in words whose clarity left no room for dispute. There was a third problem: for what offenses was impeachment to be applicable? This problem is still with us, after 187 years and twelve impeachments, but the materials are at hand to furnish a convincing answer.

**Impeachable Offenses**

The preliminary determination of the Convention (sitting as a Committee of the Whole) on June 13th was that the “National Executive”, who would be chosen by the “National Legislature” for a seven-year term, would “be removable on impeachment and conviction of malpractice or neglect of duty.”

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27. The letter had been prepared by the Committee on Style at the direction of the Convention. *Id.* at 583.
28. *Id.* at 664-65. All but three of the delegates—Randolph, Mason, and Gerry—signed. *Id.* at 649.
29. However, the Virginia delegation’s plan, presented by Governor Edmund Randolph to the Convention on May 29th, did provide that “a National Judiciary . . . to hold their offices during good behavior” would have jurisdiction of “impeachments of any National officers.” 1 *Farrand* 21-22; cf. *Id.* at 231, where this provision was agreed to in the Committee of the Whole on June 13th. But on July 18th, the impeachment jurisdiction was unanimously stricken. 2 *Farrand* 39.
30. *Id.* at 68.
31. *Id.* at 69.
32. See U.S. Const. art. I, § 3.
33. 1 *Farrand* 230. Like most of the specific resolutions passed prior to referral to the Committee on Detail on July 26th, this was based on the resolutions contained in the Virginia plan.
presidential term. A resolution that the chief executive hold office during "good behavior" only lost by six votes to four. In debate on this resolution the Convention recognized the interplay of the length of the presidential term, and the problem of impeachment.84 Mason, in opposing tenure for the President during good behavior, urged "it would be impossible to define the misbehavior in such a manner as to subject it to a proper trial."85 The votes that ensued left standing the provision for a seven-year term. On July 20th the Convention approved "malpractice or neglect of duty" as the basis for the chief executive’s impeachment.86 The vote was eight to two.87 The debate of July 20th which approved impeachment of the executive (then still ticketed for a seven year term, and eligible for re-election) for "malpractice or neglect of duty" furnished the fullest discussion of the Convention on impeachment.88 Governeur Morris of Pennsylvania, whose earlier position had been against impeachment of the executive, admitted that "corruption & some few other offenses . . . ought to be impeachable; but thought the cases ought to be enumerated & defined." Still he voted to maintain the "malpractice or neglect of duty position", as did all ten states voting, except for Massachusetts and South Carolina.89

The draft of August 6th of the Committee on Detail changed the grounds for impeachment to "treason, bribery or corruption."40 On August 20th the Convention referred additional propositions to the Committee on Detail, among them the proposal that major governmental officers "shall be liable to impeachment and removal from office for neglect of duty, Malversation,41 or corruption", and directions to devise "a mode for trying the su-

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34. Madison, opposing the resolution, said that "much greater latitude is left to opinion and discretion" in executive administration than in judicial administration. He asked whether this "proves that it will be more difficult to establish a rule sufficiently precise for trying the Executive than the Judges." 2 FARRAND 34. Then, referring directly to the pending resolution, he added: "Whether the plan proposed by the motion was a proper one was another question, as it depended on the practicability of instituting a tribunal for impeachments, as certain & as adequate in the one case as in the other." Id. at 35. To the very end, Madison fought for the Supreme Court as the preferred tribunal for impeachment trials of the President. Id. at 551, 612.

35. Id. at 35.
36. Id. at 61.
37. New Hampshire, New York, and Rhode Island did not vote. As noted earlier, Rhode Island did not participate in the Convention. New York does not appear to have voted on any roll call after July 10th, although Hamilton cast the vote for New York to approve the final Constitution. Id. at 664. New Hampshire voted regularly after July 23rd, when its delegates first took their seats. Id. at 84.
38. Id. at 64-69.
39. Id. at 69.
40. Id. at 186. This draft retained the seven-year term but provided that the President, as the chief executive was called for the first time, could not succeed himself. Impeachment was to be by the House of Representatives and trial in the Supreme Court.
41. James Wilson, a Founder, later referred to "malversation in office or what are called high misdemeanors." 1 J. WILSON, WORKS 426 (R. McCloskey ed. 1967).
preme Judges in cases of impeachment."\(^{42}\)

Consideration of the "treason, bribery or corruption" standard was postponed by the Convention\(^{43}\) when it came up on August 27th. It was among those referred back to the fourth Committee of Eleven on August 31st.\(^{44}\) This committee reported back on September 4th recommending that the President's impeachment be restricted to "Treason or Bribery."\(^{45}\)

At the debate on this proposal, September 8th, Mason asked:

Why is the provision restrained to Treason & Bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason.\(^{46}\) Attempts to subvert the Constitution may not be Treason as above defined\(^{47}\) — As bills of attainder which have saved the British Constitution are forbidden,\(^{48}\) it is the more necessary to extend: the power of impeachments.\(^{49}\)

Madison reports that Mason then "moved to add after 'bribery' [the words] or maladministration". After Gerry seconded Mason, Madison demurred: "So vague a term will be equivalent to a tenure during pleasure of the Senate." But Morris rejoined: "It will not be put in force & can do no harm—An election every four years will prevent maladministration." Still, without further debate or explanation on this point, Mason "withdrew 'maladministration' & substitute[d] 'other high crimes & misdemeanors against the state'." This amendment passed 8 to 3.\(^{50}\) Madison and Pinckney unsuccessfully sought to restore the Supreme Court (in place of the Senate) as the tribunal to try impeachments.\(^{51}\) It failed 9 to 2. At this point it was unanimously agreed to change "against the state", in Mason's success-

\(^{42}\) 2 Farrand 337. This committee reported back to the Convention on August 22nd, recommending that "[t]he Judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives." Id. at 367. This report was approved by the Convention on August 27th. Id. at 423. But the clause appears to have been withdrawn later without debate.

\(^{43}\) Id. at 422.

\(^{44}\) Id. at 473.

\(^{45}\) Id. at 495.

\(^{46}\) The long-awaited impeachment of Warren Hastings of British India fame got under way in May, 1787. It was to last seven years.

\(^{47}\) The treason definition precisely in the form in which it appears in article III, § 3, of the Constitution had been passed on August 20th. Id. at 339.

\(^{48}\) The ban on bills of attainder—adjudications of individual guilt by legislative act—had been adopted by the Convention on August 22nd. Id. at 376. "If the King himself wished to punish a minister a bill of attainder was more convenient than an impeachment, because it superseded the necessity for a trial." 1 J. Stephen, History of Criminal Law, 158 (1883).

\(^{49}\) 2 Farrand 550.

\(^{50}\) Id.

\(^{51}\) Id. at 551.
ful motion, to "against the United States." A further clause was then added, apparently on motion from the floor, which extended the range of impeachments to "The vice-President and other Civil officers of the U.S." When the Committee on Style reported the final draft of the Constitution to the Convention on September 12th, the language on impeachment was precisely as they had received it, except for a single change: the final words "against the United States" had been deleted. No further changes developed in the final touches given before approval of the Constitution on September 17th by the Convention.

Contemporaneous Interpretation

The three chief sources of contemporaneous interpretation of the constitutional provisions (beyond the Convention proceedings themselves) are the ratification conventions, the Federalist papers, and the debates and proceedings of the first sessions of Congress under the new Constitution. The following passages from these sources throw additional light on impeachable offenses under the Constitution.

Madison. Comments by James Madison, the chief chronicler of the Convention, have particular interest on the question of impeachable offenses because, it will be recalled, he had protested Mason's proposal that "mal-

52. Id. at 551-52. This amendment was subsequently rendered nugatory by a deletion by the Committee on Style. See note 134 infra. However, it is an important indicia of the understanding of the Convention in accepting Mason's new language: "high crimes and misdemeanors." It was not just any kind of "crime" or "misdemeanor," it was one that had an impact on the functioning of government—a "high crime [or] high misdemeanor against the state." Then for greater clarity it became "against the United States." The deletion does not lessen this impression, for it was purported to have been stylistic only.

53. Id. at 552. But Randolph's original report had contemplated this and had received earlier approval from the Committee of the Whole. See note 27, supra.

54. Id. at 590-603.

55. Madison and Jefferson put special stress on the state ratifying conventions as guides to the meaning of the Constitution. "I cannot but highly approve the industry with which you have searched for a key to the sense of the Constitution, where alone the true one can be found; in the proceedings of the [Constitutional] Convention, the contemporary expositions, and above all in the ratifying Conventions of the States." (Letter from James Madison to Andrew Stevenson, March 25, 1826), 3 Farrand 474. Jefferson stressed as constitutional meaning that "contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanation of those who advocated . . . it." 4 Elliot's Debates 446. Such "explanation" was given primarily when states were preparing for ratification conventions. Without ratification by nine states, the Constitution would not have taken effect, and the battle in many states was hard fought and close, notably in New York, Massachusetts, Virginia, North Carolina (where it lost the first vote) and New Hampshire.

56. The celebrated political tracts, essays of James Madison, Alexander Hamilton and John Jay, aimed particularly at influencing the ratification convention in New York.

57. The first Congress took office in March, 1789.
administration” be added to “treason and bribery”. It was at that juncture that “high crimes and misdemeanors” was accepted by the Convention. At the Virginia ratification convention, when interrogated on this subject, Madison replied:

[I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe that he will shelter him, [he may be] impeach[ed].

Shortly thereafter, the question was raised whether in connection with Senate ratification of a treaty the President might be selective of Senators he consulted for “advice and consent”. Madison replied: “Were the President to commit any thing so atrocious as to summon only a few states [Senators] he would be impeached for . . . [a] ‘misdemeanor’.”

On June 17, 1789, in the First Congress’ debate on the proposal to give the President power to remove public officers, Madison argued that this removal power was appropriate to the President:

The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.

Hamilton. Although Alexander Hamilton spent little time at the Convention, he signed the Constitution on behalf of the state of New York; his efforts to secure ratification of the Constitution (many of whose provisions he personally opposed before the document was completed) were particularly significant in his home state. His “Federalist” paper of March 7, 1788 contains his defense of the impeachment provisions of the Constitution.

[On the nature of the impeachment institution.]

What, it may be asked, is the true spirit of the institution itself? Is it not designated as a method of NATIONAL IN-

QUEST [sic] into the conduct of public men? If this be the de-

sign of it, who can so properly be the inquisitors for the nation as

58. See text accompanying note 50, supra.
59. 3 ELLIOT’S DEBATES 498.
60. The reference is to the Constitution, art. II, § 2, cl. 2, Presidential power “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”
61. 3 ELLIOT’S DEBATES 500.
62. 1 DEBATES AND PROCEEDINGS OF CONGRESS 497.
the representatives of the nation themselves?63

[On impeachable offenses.]

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.64

[On the origin of the impeachment institution in the Constitution.]

The model, from which the idea of this institution has been borrowed, pointed out that course [impeachment by House; trial by Senate] to the convention. In Great Britain it is the province of the house of commons to prefer the impeachment; and of the house of lords to decide upon it. Several of the state constitutions have followed the example.65

[In defense of the Senate as the court of impeachment.]

The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favour of personal security . . . . The awful discretion, which a court of impeachments must necessarily have, to doom to honour or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.66

[On the need for expeditious settlement of impeachments—against the alternative (rejected by the Convention) that the court of impeachment should be drawn from officers of state governments who would be called upon whenever an impeachment was actually pending].

Hamilton cited:

[the difficulty of collecting men dispersed over the whole union; the injury to the innocent from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty from the opportunities which delay would afford for intrigue and corruption; and in some cases the detriment to the state, from the prolonged inaction of men whose firm and faithful execution of their duty, might have exposed them to the persecution of an intemperate or designing majority]

63. The Federalist, No. 65, at 491 (J. Hamilton ed. 1909).
64. Id. at 490.
65. Id. at 492.
66. Id. at 492-93.
in the house of representatives . . . . [I]t ought not be for-
gotten, that the demon of faction will, at certain seasons, extend
his sceptre over all numerous bodies of men.67

The English Experience

The “institution” of impeachment, as Hamilton calls it,68 was clearly bor-
rowed from England by the Founders. But not before they had subjected
it to significant modification which considerably reduced its potential for
arbitrary action. Among the changes made in the English practice of im-
peachment, the following stand out:

1. In England any citizen could be impeached.
The Constitution limits impeachment to “civil Officers of the
United States.”69

2. In England an impeachment was a criminal proceeding, and
conviction might bring penalties of loss of life or property,
and imprisonment.
The Constitution expressly removes impeachment from the
criminal process. The Senate sitting to try impeachments70
after the House invokes the power of impeachment71 against
“The President, Vice-President [or other] civil Officers
of the United States”72, may convict if “two thirds of the
Members present” concur.73 But such a “Judgment . . .
shall not extend further than to removal from Office and
disqualification” from future service in any federal office.74
Any criminal incidents of impeachable offenses are reserved
for “Indictment, Trial, Judgment and Punishment, according
to Law”—i.e. in the ordinary criminal process, and under
ordinary criminal law.75 This point is reinforced in the pro-
vision for trial of “all crimes” by jury, from which is specifi-
cally excepted the “high crimes” provided for among im-
peachable offenses.76

3. In England the King could pardon any person convicted after
impeachment.
The Constitutional grant of power to the President to “Grant
Reprieves and Pardons” carries the express exclusion: “ex-

67. Id. at 495.
68. See text accompanying note 63 supra.
70. U.S. Const. art. I, § 3, cl. 6.
73. U.S. Const. art. I, § 3.
74. Id.
75. Id.
76. “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”
U.S. Const. art. III, § 2.
cept in Cases of Impeachment."

4. In England the King, as sovereign, could not be impeached. The Constitution expressly provides that the President, as chief executive, may be impeached and, upon conviction, removed from office. In fact, the debate on impeachment in the Convention centered almost exclusively on the impeachment of the President.

5. In England other modes existed for removal from office, even as to officials serving "during good behavior" (i.e. with life tenure). Any official might be removed and punished by a bill of attainder; judges might be removed by the King upon the request of both Houses of Parliament, without trial.

The Constitution provides no method for removal from office of the President, the Vice President, or federal judges save by impeachment. Bills of attainder are expressly banned both on the part of the federal government and on the part of the states.

6. In England the categories of impeachable offenses were open. Parliament was free to add new offenses as cases were brought before it for decision.

The Constitution expressly limits impeachable offenses to "treason, bribery, [or] other high crimes and misdemeanors." I argue in this study that "other high crimes and misdemeanors" is further restricted by implications of the Convention debates out of which this provision emerged.

Turning from impeachment as an institution to a specific focus on impeachable offenses, we have seen that these were expanded during the Convention from "treason and bribery" to "treason, bribery and other high crimes and misdemeanors." Treason, as defined in the Constitution, was considerably narrowed from English practice. Bribery, left undefined, was to be understood in its common sense. What of "high crimes and mis-

77. U.S. Const. art. II, § 2.
79. U.S. Const. art. I, § 9, cl. 3.
81. For the propositions cited above concerning English practice, see Berger ch. 2; Simpson, Federal Impeachments, 64 U. Pa. L. Rev. 651, 651-53, 681-85 (1916) [hereinafter cited as Simpson].
82. Presumably as restrictively defined in U.S. Const. art. 3, § 3, cl. 1.
84. See infra.
85. Berger 54-55.
86. "The Framers employed common law terms because they had recognizable content, because they had posited 'limits'. . . . Who would maintain, for example, that the impeachment for 'bribery' provision authorizes Congress to define bribery to include robbery, departing sharply from its common law meaning . . . ." Berger 176.
demeanors?" This had been the identification given in English practice to the entire category of offenses (except treason) that were subject to impeachment by the Commons and trial by the Lords. The Convention had earlier dealt with the term "high misdemeanor", and excluded it from the items being considered because it had a technical meaning. This technical meaning was derived from parliamentary practice with respect to impeachments—not from the common law, but from the so-called lex parliamentaria. What the common law was to the judicial courts, the lex parliamentaria was to the court of Parliament sitting in impeachment proceedings. By striking out of American impeachment the criminal aspect that was indigenous to the English model, the Founders made inapplicable and irrelevant that aspect of the lex parliamentaria that pertained to criminal penalties. But in identifying the impeachable offenses by the specialized English terms "high crimes" and "high misdemeanors", the Founders force us to inquire as to the status of the technical term in English practice in 1787—whatever use we later decide to make of the data once it is gathered.

In a famous passage Justice Story paraphrased a catalog of impeachable offenses prepared in 1787 by Richard Wooddeson, a successor of Blackstone at Oxford:

[L]ord 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. So where a lord chancellor has been thought to have put the great seal to an ignominious treaty; a lord admiral to have neglected the safeguard of the sea; an ambassador to have betrayed his trust; a privy councillor to have propounded or supported pernicious or dishonorable measures; or a confidential adviser to his sovereign

87. Simpson 681.
88. A recommendation of the Committee on Detail provided, "Any person charged with Treason Felony or high Misdemeanor who shall flee from Justice & be found in any of the U[nited] States shall on dem[an]d of the executive power of the State from which he fled be deliv[er]ed up .... " 2 FARRAND 174. After debating this provision in the Convention on August 28th, according to Madison's notes, "the words 'high misdemeanor' were struck out, and 'other crime' inserted, in order to comprehend all proper cases: it being doubted whether 'high misdemeanor' had not a technical meaning too limited." 2 FARRAND 443.
89. The "common law" should be grasped as the non-statutory, decisional law, emanating from the judicial process.
90. Understood as law developed internal to Parliament, largely emanating from the case-by-case decisional process.
91. Berger quotes Justice Joseph Story to the effect that "what are and what are not high crimes and misdemeanors is to be ascertained by a recurrence" to English law. BERGER 90.
to have obtained exorbitant grants or incompatible employments; these have all been deemed impeachable offenses. 92

After more recent research, Raoul Berger concluded that "high crimes and misdemeanors" in pre-Convention England were "reducible to intelligible categories": misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of Parliament's prerogatives, corruption, betrayal of trust, and giving pernicious advice to the Crown. 93

Story, Simpson, and Berger, and American commentators almost without exception, 94 agree that: (1) "English impeachments did proceed for misconduct that was not 'criminal' in the sense of the general criminal law;" 95 (2) "High crimes and misdemeanors" are "words of art confined to impeachments, without roots in the ordinary criminal law and which . . . had no relation to whether an indictment would lie in the particular circumstances." 96

Precedent

If precedent—prior cases deciding the issues at hand—had been strong or convincing in these questions about impeachment in the lex parliamentaria of the House and Senate, we should have talked about it earlier. For in our law, precedent is first among the guides to interpretation. The assumption is that all the other guides to interpretation (analysis of text in context, legislative history, contemporaneous interpretation, scholarly literature) had been given their due weight in the prior decided cases and, somehow, merged in them. Only when fresh analysis suggests that precedent seems obviously discordant with any of these, or when there is newly discovered material, does the issue once decided get a really new look. That, at least, has been the traditional view of formulating decisions in the Anglo-American common law judicial system. And this tradition has rubbed off on legislators, who are notoriously precedent-prone in the area of their decision-making activities. Precedent is valued in a positive light as a probable guide to truth: the question at hand has already been decided free from the emotional impact of the present case, and at a point in time closer to

92. 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 800 (5th ed. 1905). The limitation to "civil Officers" in art. II, § 4, will exclude, of course, the naval personnel so dear to British impeachments.
93. BERGER 70-71.
94. As Berger points out, that solitary exception is Timothy Dwight. (Cf. Luther Martin on the impeachment of Justice Chase). See BERGER 305-08 where he examines Dwight's and Martin's citations.
95. BERGER 69. But criminal penalties were inflicted upon conviction of "high crimes and misdemeanors." Cf. U.S. CONST. art. I, § 3 and note 2 supra.
96. Id. at 62.
the original enacting event. But precedent also has a significant negative,
or protective, aspect: it frees the present decision-maker from dangers of
arbitrariness that are inherent in precedent-free decision. This discussion
assumes that in a given situation the decision-maker may identify precedents
that are truly in point, for only if they are in fact germane and well-
considered in their original formulation, should they control a present case.
Are there precedents with respect to impeachment under the Constitution
which shed light on our question? To what extent do they identify the
proper grounds for impeachment of a President?

There have only been twelve impeachments, complete with articles and
charges\(^9\) voted by the House of Representatives, and Senate trials. The
one most directly relevant, of course, is the impeachment of President John-
son in 1868, which failed of conviction by only one vote. Of the others,
one involved a United States Senator, one a cabinet member who had al-
ready resigned, and nine involved federal judges, one of them a Supreme
Court Justice. Not only are these impeachments sparse in number, but
their precedential value is also lessened by the fact that we cannot always
be certain of the contested issue which was crucial in the determination of
conviction (four cases) or acquittal (seven cases).\(^9\) I will summarize them
briefly in chronological order, and identify any help they furnish us in our
inquiry.

1. Senator William Blount (1797).

The four articles of impeachment voted by the House accused Blount, a
Senator from Tennessee, of “high crimes and misdemeanors”—conspir-
ing to launch a hostile military expedition against Spain in Spanish territories
in Florida and Louisiana, and inciting Cherokee Indians against Spain and
the United States. After his impeachment by the House, he was expelled
from the Senate, and the Senate acquitted Blount of the impeachment
charges on the jurisdictional ground that he was not a “civil Officer of the
United States.”\(^\text{100}\)

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\(^9\) Recall the view of Vice-President Gerald Ford when he was House minority
leader, cited in note 3 supra: “[T]here are few fixed principles among the handful of
[impeachment] precedents.”

\(^9\) There is a thirteenth impeachment, of Judge Mark Delahay, in 1873. How-
ever, the case was discontinued before articles of impeachment were drawn. 3 HINDS,
PRECEDENTS 1008-1011. This case is not generally listed among impeachments.

\(^9\) A twelfth impeachment (with articles) — that of Judge George English in
1921—never came to trial. The Senate dismissed the proceedings after he had re-
signed from the bench, a favor not accorded to Secretary Belknap; see p. 224, infra.

\(^\text{100}\) The articles of this and succeeding impeachments are contained in IMPEACH-
At the time it was arguable that the basis for determination of lack of jurisdiction was either that (1) "[the] civil Officer of the United States" did not embrace members of the houses of Congress, which had their own internal power of dismissal; or (2) that one is no longer a "civil Officer" within the meaning of the Constitution after his governmental status has terminated. In view of the later disposition of the Belknap impeachment (see below), we may now assume that the Blount case has chief significance as a disclaimer, at least by the Senate, of impeachment jurisdiction over legislative officers,\textsuperscript{101}

2. Judge John Pickering (1804)

Judge Pickering was charged with, and convicted of, four "high crimes and misdemeanors," three of which involved breach of "his trust and duty" as a federal judge with "intent to evade an Act of Congress" and "to defeat the just claims of the United States." The fourth charged him with being drunk and profane on the bench on the days in question.

The case instances an "officer" removed after trial upon impeachment for "high crimes and misdemeanors" where there was no indictable offense under federal law. Furthermore, though this involved the impeachment of a judge, the proceedings were conducted under charges of "high crimes and misdemeanors" and not for failure of "good behavior." The fact that the judge was admitted to be insane at the time of the trial detracts from its value as a precedent. The impeachment, which was initiated by President Jefferson, is generally regarded as having been "a partisan move to oust a Federalist judge."\textsuperscript{102}

3. Justice Samuel Chase (1805)

The charges brought against Supreme Court Justice Samuel Chase in his impeachment all related to judicial misconduct while acting in his capacity as a judge. The first six articles concerned improper rulings in criminal

\textsuperscript{101} The status of the case as a precedent on the jurisdiction question is further obscured by the fact that Blount had also claimed that the proceedings violated his right to trial by jury, that he was not charged with a crime committed while a "civil Officer", and that common law courts were competent to try him on these charges. Berger assumes the case stands for the senatorial exemption, the prevailing view, and argues that such an exemption is against the intention of the Founders (of whom, more's the pity, Blount was one) and urges reconsideration. BERGER 214-223.

trials and im temperate statements to a grand jury to bring about an indictment. As was to become the routine in impeachment defenses, Chase's counsel urged that "in order to sustain an impeachment, an offense must be proved ... which would support an indictment." In presenting its case the prosecution insisted that impeachment required no indictable offense, although, it also insisted, one was present here. But there was general acceptance that "politics rather than legal discrimination moved Congress," and the Chase acquittal has traditionally been regarded as certification that the constitutional process of impeachments was not to be used for raw partisan purposes. Later judicial impeachments were to raise questions as to the precedential value of the Chase acquittal.

4. Judge James H. Peck (1825)

The single article of Judge Peck's impeachment charged him with excessive severity ("gross abuse") in his sentence for contempt of an attorney appearing in his court. He was acquitted, but 21 of 43 senators voted for his conviction.

5. Judge West H. Humphreys (1862)

Humphreys was a federal district judge who accepted an appointment as a Confederate judge. The seven articles of impeachment charged him with advocating and supporting secession, conspiring against the authority of the United States, and with misconduct in, and while, sitting as a Confederate judge. He was tried in absentia, without defense, and convicted unanimously.

6. President Andrew Johnson (1868)

After an unsuccessful attempt to impeach him, the House voted eleven articles of impeachment against President Johnson in February, 1868, the
last year of the term of Lincoln to which he had succeeded. Two of these articles were identified as "high crimes" and nine as "high misdemeanors." The charges, as is well known, centered around Johnson's alleged violation of the Tenure of Office Act by dismissing Secretary of War, Edwin M. Stanton, appointing Stanton's successor without consulting Congress, and vigorously attacking Congress in political speeches. Johnson's defense claimed that the dismissal of Stanton (a holdover from the Lincoln cabinet) did not fall within the scope of the Tenure of Office Act, that in any event the Act was unconstitutional, and that he had attempted to test its constitutionality in the courts. The partisan atmosphere ran throughout the trial, and Johnson's acquittal by a single vote on three selected articles led his opponents in the Senate to vote for adjournment sine die, terminating the proceeding.\textsuperscript{108}

7. William W. Belknap (1876)

The only cabinet officer to be impeached, William Belknap, resigned after his impeachment, but before the articles had been prepared. He challenged the jurisdiction of the Senate to try him, on the ground that he was no longer a "civil Officer of the United States" within the meaning of the impeachment provision. The Senate rejected his jurisdictional plea and tried him. His acquittal makes the case a thin reed as a jurisdictional precedent, since several Senators voting for acquittal announced that their doubt as to jurisdiction, rather than doubt as to proof of the alleged financial corruption, was the basis for their votes.\textsuperscript{109}

8. Judge Charles Swayne (1905)

The twelve articles against Judge Charles Swayne included five reminiscent of the Pickering, Peck and Chase impeachments—overbearing conduct to-

\textsuperscript{108} Id. at 821-901. See M. Lomask, Andrew Johnson: President on Trial (1960), and Berger 252-96 (Ch. IX, "The Impeachment of President Andrew Johnson"). In his classic work, The President: Office and Powers (3d ed. 1948), Edward S. Corwin referred to Johnson's claim that he had independent power, beyond his presidential veto, to decline to enforce an Act of Congress on grounds of his belief in its unconstitutionality, and concluded that "it seems clear that the impeachers had the better of the argument for all but the most urgent situations." Id. at 79. However, to Corwin, "the outcome of Johnson's trial, his acquittal by a single vote—not to mention the political maneuvers which account for this outcome—make the episode of slight value as a precedent." Id. Berger justifies Johnson's position: "[T]he issue whether the President was bound to execute a law which encroached on his presidential prerogatives had never been squarely presented; and there was solid ground for Johnson's view that he was privileged to disobey the law in self-defense." Berger 287. He concludes that Johnson's impeachment and trial "represent a gross abuse of the impeachment process, an attempt to punish the President for differing with and obstructing the policy of Congress . . . to alter the place of a coordinate branch in the constitutional scheme." Id. at 295.

\textsuperscript{109} 3 Hinds' Precedents 902-47.
wards attorneys in contempt proceedings in his court. Three involved alleged padded government expense accounts. Two articles charged violation of a federal statute requiring a federal judge to reside within his court district. The two others charged that he made personal use of a railroad car held by a receiver appointed by him. Judge Swayne was acquitted by a majority vote on all counts, although no factual issue appears to have been raised on the charges of violation of the residency statute.  

9. Judge Robert W. Archbald (1913)  
The thirteen articles of impeachment brought against Judge Archbald, a court of appeals judge serving as Associate Judge of the Commerce Court, included six articles concerning his activities while on the Commerce Court, six articles concerning prior activities while a judge of the United States District Court, and an omnibus article covering his activities on both courts. His conviction was on the articles concerning his present assignment. This trial is generally regarded as highly significant among impeachments, because counsel for the House Managers stressed that impeachable offenses need not be indictable crimes, and because at least some of the improprieties charged did not even arguably violate a statute. "The authorities consistently conclude that none of the five articles of which Archbald was convicted constitutes an indictable offense." A recent study challenges this conclusion, but concedes that this "assessment is probably correct" with respect to at least one article.  

10. Judge George W. English (1926)  
The five articles of impeachment brought against Judge English included one charge of overbearing conduct toward attorneys on the Peck-Chase scale, two charges of profit-making in handling court matters, and an omnibus  

110. Id. at 948-80.  
111. Fenton 736. For an account of impeachment in light of the Archbald trial written by a participant on the side of the House Managers, see Brown, The Impeachment of the Federal Judiciary, 26 HARV. L. REV. 684 (1913). Brown writes: "[N]one of the articles exhibited [by the House] against Judge Archbald charged an indictable offense or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen." Id. at 705. With perhaps overexuberant overkill, Brown concludes: "Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. The case is constructive and it will go down in the annals of the Congress as a great landmark of the law." Id.  
112. Fenton argues that only Article 4 (misconduct in the course of judicial proceedings) was not an indictable offense, that criminal statutes arguably might reach the official misconduct charged in the other articles. Fenton 736-37.
charge. The judge resigned one week before his Senate trial was to commence. Unlike the Belknap case, the Senate dismissed the proceedings at the request of the House Managers.\textsuperscript{118}

11. Judge Harold Louderback (1933)

Four of the five articles brought against Judge Louderback charged irregularities and favoritism in the conduct of receiverships in his court, and conduct on the bench towards litigants which created "a general condition of widespread fear and distrust and disbelief in the fairness and disinterestedness [of his official actions] to the scandal and disrepute of [his] court and the administration of justice therein and prejudicial generally to the public respect for and public confidence in the Federal judiciary."\textsuperscript{114} The fifth article involved maintaining a fictitious residence. The case is noteworthy for the scope of the articles of impeachment, and the fact that the majority of the Judiciary Committee of the House had recommended against impeachment. The House, however, accepted the minority report for impeachment and the articles attached. But the Senate acquitted Judge Louderback on all counts.\textsuperscript{115}

12. Judge Halsted L. Ritter (1936)

The conviction of Judge Halsted L. Ritter at the most recent impeachment trial, in 1936, is greatly disputed as to its precedential value.\textsuperscript{116} It is, perhaps, the greatest oddity among the eleven Senate trials. Two articles charged outright kickback-type corruption; two charged violations of a federal statute (practicing law while on the federal bench); and two charged violation of income tax statutes in failing to pay income taxes on fees earned by the conduct recited in the other charges. The seventh article was an omnibus article alleging that "[t]he reasonable and probable consequence" of the conduct alleged in the first six articles "as an individual, or as a 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."

Judge Ritter was acquitted of each of the first six charges, and convicted
of the omnibus article based upon precisely the same conduct alleged in the "not-guilty" articles.\textsuperscript{117}

Judge Leon Yankwich in his impeachment study found two substantial precedents in this outcome:

(1) It is very significant that by this ruling the Senate gave sanction to the proposition that to justify removal of a judge it is not necessary that he be guilty of violation of law.\textsuperscript{118}

(2) This ruling definitely lays down the principle that even though upon specific charges amounting to legal violations, the impeaching body 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.\textsuperscript{119}

In his closely reasoned analysis of American impeachment proceedings,\textsuperscript{120} Paul S. Fenton points out that at least some articles in the Swayne, Archbald, and Ritter impeachment proceedings involved conduct that was not an indictable crime. He suggests two other impeachable categories—violation of civil law and official misconduct—and argues persuasively that these three categories together cover completely every article in all twelve American impeachment proceedings.

Without finding fault with this analysis as a factual statement, one looks in vain for evidence that the Founders inserted "high crimes and misdemeanors" in the Constitution with the design of delegating to Congress the task of filling in its content by either criminal or civil statutes. Further, the category "official misconduct" hardly adds new clarity to the contours of impeachable offenses. With respect to the first point—Congress' alleged content-giving role—the Swayne, Archbald, and Louderback impeachments all included articles charging an official with conduct which Congress had specifically proscribed by statute and labelled "high misdemeanors"—i.e. living outside of the federal district in which he served as a judge and the practice of law by a federal judge. Unless they were more than borderline cases or more than mere technical violations, these articles exceeded pre-Convention English dimensions of "high misdemeanors" and would thus involve questionable extension by Congress beyond constitutional limits. In defending his category of "official misconduct", Fenton was arguing against

\textsuperscript{117} 80 Cong. Rec. 5602-5606 (1936).
\textsuperscript{118} Yankwich, note 116 supra at 858.
\textsuperscript{119} Id. at 697. Fenton argues differently: "While Judge Ritter was acquitted on these [first] six articles, he was convicted on the charge of bringing his court into disrepute, through the conduct alleged in these six articles, which is neither a violation of civil nor criminal law, nor is it official conduct per se. The underlying conduct by which this was accomplished was, however, either official misconduct or violation of criminal or civil law. Article 7 must be construed accordingly." Fenton 745.
\textsuperscript{120} See note 105 supra,
the propriety of, or precedent for, articles of impeachment based on "misconduct" which was private and unrelated to official duties. In this regard his position is strong. Fenton's overall conclusion is rounded out by an insistence that "a minor or technical violation of the judicial canons of ethics, or the civil law, or even the criminal law would not be impeachable. The violations must be serious . . . ."121

These authors confirm a conclusion that is enshrined in the Convention proceedings, the contemporaneous opinions, and the impeachment precedents that we have reviewed: the Constitution does not require an indictable offense as the basis for impeachment. Moreover, this conclusion is shared by a near unanimity of writers who have considered the question.

The Constitutional Limits

A far more complex question is this: If "high crimes and misdemeanors" are not limited to indictable offenses, what legal limits does the Constitution prescribe to circumscribe the House and Senate in impeachment proceedings? As we have seen in reviewing the Convention proceedings, after talk of "corruption" and "maladministration," the term "high crimes and misdemeanors" came out of the blue as a more acceptable substitute.122 There is no question that "high crimes and misdemeanors" was a technical term that had grown up in the history of English impeachments, and not as part of its ordinary common law.123 There is an accepted doctrine concerning

121. Fenton 747. For a further discussion of impeachable offenses as "serious" see note 126 infra.
122. See p. 213 supra.
123. Managers for the House, and counsel for the accused in the impeachment trial of Judge Charles Swayne agreed on this point. The House Managers' brief, submitted by Henry W. Palmer on February 23, 1905, stated:

Whatever crimes and misdemeanors were the subjects of impeachment in England prior to the adoption of our Constitution, and as understood by its framers, are, therefore, subjects of impeachment before the Senate of the United States, subject only to the limitations of the Constitution.

The framers of our Constitution, looking to the impeachment trials in England, and to the writers on parliamentary and common law, and to the constitutions and usages of our own States, saw that no act of Parliament or of any State legislature ever undertook to define an impeachable crime. They saw that the whole system of crimes, as defined in acts of Parliament and as recognized at common law, was prescribed for and adapted to the ordinary courts. (2 Hale, Pl. Crown, ch. 20, p.150; 6 Howell State Trials, 313, note.)

With these landmarks to guide them, our fathers adopted a Constitution under which official malfeasance and nonfeasance, and, in some cases, misfeasance, may be the subject of impeachment, although not made criminal by act of Congress, or so recognized by the common law of England, or of any State of the Union. They adopted impeachment as a means of removing men from office whose misconduct imperils the public safety and renders them unfit to occupy official position. All American text writers support this view.
technical terms in the Constitution borrowed from English law. The Founders are taken to have intended its meaning in English legal usage at the time the term was adopted, in 1787, subject to any specific limitations made by the Convention.124

Are there such express or implied limitations with respect to “high crimes and misdemeanors”? One limitation that must be drawn from the Convention’s deliberations on impeachment is that “high crimes and misdemeanors” was substituted for what was viewed, at least by some, as a broader, vaguer term, one which would bring the chief executive too much within the clutches of the legislative branch. At the Convention, Madison questioned the term “maladministration” as an appropriate constitutional category for impeachment. Later and officially, he took the position that the substituted term “high crimes and misdemeanors” did not exclude grosser instances of maladministration from coverage as a “high misdemeanor”.125 But the background of adoption of the term certainly excludes the intention that “maladministration” could be treated as per se an impeachable offense, as English practice would have sanctioned.126

While the above constitutes the only specific qualification made by the Convention on the term “high crimes and misdemeanors,” what was adopted by the Convention was not a set of legal concepts, but an ongoing legal institution—parliamentary impeachment. Having determined to adopt it, the Convention turned its attention thereafter to specific modifications in the “institution” of English origin and use. The Founders made many significant alterations in the English impeachment model in the course of adopting

Commentaries on the Constitution of the United States, supra note 92 at 583.

In a brief filed for Judge Swayne, on February 22, 1905, Anthony Higgins and John M. Thurston, who successfully rebutted the Managers on other points, agreed with them that the impeachment provisions derived from Parliamentary law: “[T]hose who have made a careful study of the subject find no difficulty in reaching the obvious conclusion that the term ‘high crimes and misdemeanors’ embraces simply those offenses impeachable under the parliamentary law of England in 1787, subject to such modifications as that law suffered in the process of reproduction.” Id.

124. See note 123 supra.
125. See p. 215 supra.
126. Berger has interpreted the legislative history on the adoption of the language “high crimes and misdemeanors” as limiting impeachable presidential conduct to “great offenses.” BERGER 91. I do not quarrel with that to the extent that it connotes that impeachment for “petty misconduct” (BERGER 90) whether maladministration or otherwise, is not consistent with the mood of the Convention in substituting “high crimes and misdemeanors” for “maladministration.” But his suggested constitutional standard of “great offenses” for impeachment of a President is one of his own making, is not illuminating, and, as he concedes, raises “problems” when applied to other officers. Id. On the other hand, we must reject the implication of Anthony Lewis in the passage quoted at the head of this article that mere maladministration, i.e. just any sort of maladministration, is considered within the constitutional bounds by any reputable scholar.
it, as we have already seen. Against this pattern of adoption of the institution and modification of its facets, the Convention, after considering other alternatives, came back to what had been the British formula for impeachable offenses—"high crimes and misdemeanors." But, as I have urged, they qualified it by muting "maladministration" as a per se impeachable event, yet stopped short of ruling out all maladministration as an impeachable element.

Having agreed upon the significance of both prior English practice and the modifications specified in the Convention, does the understanding of "high crimes and misdemeanors" in the Constitution come down to this: Only those offenses which had been denominated as "high crimes" or "high misdemeanors" in English practice by 1787? This was the specific contention of defense counsel in the Swayne impeachment.127

In making this argument, Judge Swayne's counsel cited the judicial construction of other constitutional concepts derived from English law, most notably "due process of law."

When in the case of Murray v. the Hoboken Land Co. (184 How., 272) it became necessary for the Supreme Court to construe the formula "due process of law," as embodied in the fifth amendment, Mr. Justice Curtis, speaking for the court, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta . . . ."

Beyond all question . . . the immemorial formulas or "terms of art" transferred from the English constitution to our own were adopted, not as isolated or abstract phrases, but as epitomes or digests of the great principles which they embodied. That is to say, the term "levying war" carried with it the identical meaning given it as a part of the statute of Edward III; the term "due process of law," the identical meaning given to it as a part of Magna Charta; the term "high crimes and misdemeanors," the identical meaning given it as a part of the law of the High Court of Parliament.128

127. Substantial extracts from the materials in HINDS' and CANNON'S PRECEDENTS on the impeachments of Judges Swayne and Archbald are contained in the House Judiciary Committee document IMPEACHMENT: SELECTED MATERIALS, note 100 supra. This publication also contains the entire proceedings of the impeachment of President Johnson, Id. at 203-370. Extracts from the Swayne impeachment are at 27-87, and from the Archbald impeachment at 88-123.

128. Id. at 32-33. Swayne's counsel were arguing (successfully, as his acquittal evidences) against Congress' power to make an offense impeachable per se by enacting legislation labelling it a "high misdemeanor." They continued:

Or in other words, when such formulas were embedded in the Constitution of 1787, their historical meaning and construction went along with them as completely as if such meaning and construction had been written out at length upon the face of the instrument itself. If that be true, the conclusion is self-evident that no subsequent Congressional legislation can change in any way.
The due process example, however, exposes the fallacy of this notion that we have inherited a static concept, frozen at the historical date of separation from England. The theory of the Murray case had been discarded by the Supreme Court long before the Swayne impeachment, and the notion of due process has been constantly expanding beyond notions enshrined in pre-Revolutionary English practice. What is the precise content of due process, and what are the precise criteria for determining the content, have been subjects of continuous debate in the Supreme Court. But all the disputants have been agreed that the frozen historical formula of Murray is not viable.

The need for development, as opposed to liquefaction, of broad constitutional concepts, was early voiced by Chief Justice Marshall in his much cited “[I]t is a constitution we are expounding,” i.e., not a precise statutory code which may be easily revised by subsequent legislation. In the context of impeachment, brief consideration shows the inadequacy of the notion advanced by the Swayne brief. What existed in England in 1787 was more than a set of those offenses which had been, as of that date, identified as “high crimes and misdemeanors”; there was an ongoing institution of parliamentary impeachment which was capable of expanding its list of impeachable offenses, not necessarily by looser standards but by more particularization. To impute to the Founders an intention to freeze impeachable offenses to the specific situations which had historically been included to that date by English Parliament is to impute to them an intention not to adopt a viable institution of government but a fossilized list of static offenses. The error, again, is to fail to see that impeachment as adopted in the Constitution was not a law, or set of laws, but an institution modified in certain respects by specific enumerated legal changes. This institution, like the Constitution itself, must be capable of growth and development under the conditions of American society, just as English impeachment would continue to develop after 1789 in England under the conditions there.

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by addition or subtraction, the definitions embodied in such formulas at the time of their adoption.

Id. at 33.


130. The most useful recent cases on the Court's mode of interpreting constitutional language derived from English law are those involving the functional approach to "jury", as guaranteed by the sixth amendment, and derivatively as an aspect of fourteenth amendment "due process." Duncan v. Louisiana and Williams v. Florida, note 129 supra, and Baldwin v. New York, 399 U.S. 66 (1970).


132. By a strange turn of events, English impeachment, which was very much before
Misgivings about conceiving "high crimes and misdemeanors" frozen in 1787 English practice was the basis for the contention that the Founders conceived the growth in the American list of impeachable offenses to be measured by subsequent development of "high crimes and misdemeanors" in American law outside the impeachment forum. There were but three ways in which this could happen: by state criminal statutes, by non-statutory federal crimes, or by statutory federal law crimes. Each of these had been considered in the course of the trial debate on "impeachable offenses." There is just no basis, either in the Convention or contemporary sources, to support the notion that the Founders intended to 'delegate' to the states the power to identify the offenses which would become impeachable. The suggestion that the Founders intended common law crimes by "high crimes and misdemeanors" has been perhaps too abruptly dismissed out of hand. From an early date the United States Supreme Court held that in the United States, unlike England, there are no common law crimes, only crimes established by statute. This interpretation would re-

133. The articles against Blount (1799) charged "criminal designs" to incite Indians to war; arguably this urged a non-statutory crime, short of treason, against the "laws" of the United States. Judge Pickering's impeachment (1804) charged intoxication on the bench, arguably a federal common law crime at that date, but certainly a violation of a state statute. The Louderback impeachment articles cited as a charge the maintaining of a fictitious residence against state law. In the Swayne and Louderback impeachments specific articles alleged violations of federal statutes which characterized the charged conduct as a "high misdemeanor" (non-residence in the district and practice of law by a federal judge).

134. An argument to the contrary can be made from the change in article II, section 4 from "high crimes and misdemeanors against the state" to "against the United States." Although this concluding phrase was itself subsequently deleted, this deletion must be accepted as stylistic rather than substantive.

135. Justice Robert Jackson wrote of this development in his Godkin Lectures, published posthumously as The Supreme Court in the American System of Government (1955):

Americans, too, had some curiosity as to the law under which federal judges were assuming to try . . . crimes, and the Jeffersonian party was strongly opposed to this extension of judicial power.

In 1812 the Supreme Court put to rest the division of opinion which had theretofore prevailed and held that the courts of the United States have no common law criminal jurisdiction. Crimes against the United States must be made so by Congressional act: United States v. Hudson and Goodwin, 7 Cranch (11 U.S.) 32, and United States v. Coolidge, 1 Wheat. (14 U.S.) 415 . . . . They cite no authority, but the Hudson and Goodwin opinion significantly observes that "although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion."

Id. at 31.

Justice Jackson then addresses a revealing comment: "Thus the Court itself, anticipated by a century Mr. Dooley's remark that it follows the election returns. These
strict impeachments to "treason" and "bribery" and leave "high crimes and misdemeanors" as a phrase utterly without content.

What of the third alternative: that by "high crimes and misdemeanors" the Founders intended federal statutory crimes and nothing else. The difficulty here is that there were no federal statutory crimes at the outset of the Republic, and relatively few even today. An early Congress may have considered this alternative viable when it designated the failure to reside in his judicial district and the continuing practice of law by a federal judge as "high misdemeanors." But the Senate, at least, may be taken to have repudiated this as an analysis when it acquitted Judge Swayne, notwithstanding that the facts of his non-residence, the statutory violation, appear to have been unchallenged.

If these three alternatives are rejected, we are still not reduced to accepting the suggestion of Swayne's counsel that the Founders' intent was a limitation of impeachment, outside of bribery and treason, to those "high crimes and misdemeanors" that were recognized as such in England when the Constitution was ratified. The background of the formulation of the impeachment provision in the Constitution leads convincingly to the conclusion that, just as with the "jury" and "due process", the Founders accepted an English institution with well defined outlines. But this did not preclude the possibility of future development. The development, therefore, of impeachment standards would take place not at the hands of Congress (in legislation) or courts, state or federal, as in England, but by the two bodies to whom the Founders had entrusted impeachment and trial, each acting individually in the course of fulfilling its constitutional responsibilities in the matter. There was to be a "parliamentary law" of impeachment that

early cases show how thin is the line that separates law and politics." Id.

Berger correctly points out that "there is little warrant for the conclusion that as the Framers, twenty-five years earlier, drafted the impeachment provisions they intended to circumscribe them by an as yet unborn limitation." BERGER 77. The argument against this alternative does not rest on the court doctrine against common law crimes, but on the fact that there is not a shred of evidence that the Founders intended that impeachable offenses, as they identified them, should be measured by common law criminal offenses as identified from time to time by the courts.

136. Even bribery was not made a federal crime until three years after the drafting of the Constitution. Act of April 30, 1790, Ch. 9, § 21, 1 Stat. 117. This circumstance has been used in support of the argument that the Convention had the laws of the states in mind with respect to bribery, and "other high crimes and misdemeanors" as well. See Fenton 724.

137. See discussion of Swayne impeachment, pp. 224-25 supra. The statute in question was the Act of December 18, 1812, Ch. 5, 2 Stat. 788, as amended, 28 U.S.C. 454 (1964).

138. See discussion of Swayne impeachment, pp. 224-25.

139. But see note 126 supra.
was to develop within the limits expressed by the Founders in adopting the institution of impeachment of "civil Officers of the United States."\textsuperscript{140}

\textit{Conclusions}

The conclusion is irresistible: In specifying "high crimes and misdemeanors" as the only criteria for impeachable offenses other than bribery or treason, the Founders intended:

1. Offenses of the types identified by the English Parliament prior to 1787 as "high crimes" or "high misdemeanors" to be the model of "impeachable offenses" under the Constitution.

2. Except that "maladministration", as such, was not to be identified per se as an impeachable offense.

3. Specific offenses, within the contours fixed by 1 and 2 might be "impeachable offenses," when found to be so by the House of Representatives.

140. Berger argues that the standard for impeachable offenses for judges is more strict than for the President, and therefore there should be constitutional room for Congress to provide for the removal of judges by means other than impeachment. The Constitutional Convention considered and rejected the practice, then existent in England and some states, of removing judges by petition of the two legislative houses to the chief executive. The Founders then established the impeachment process (of article IV, section 2), and that alone, for removal of all "Officers of the United States." Recall that they did this after they had also rejected the argument that impeachment was unnecessary for officers who served only for a term of years, and should be restricted to those officers who serve during "good behavior" (i.e. the federal judges). In his earlier writings Berger took the view that "high crimes and misdemeanors" has the same constitutional meaning for all "Officers of the United States;" in his latest book (see especially Chapter 4 of \textit{BERGER}) he argues for the double standard. He was clearly right the first time. He forces his latest conclusion because: (1) his suggested standard of "serious" or "great" offenses for impeachment of the President does not seem to him to be met by the impeachment convictions of Judges Archbald and Ritter; and (2) he would alleviate the problem of the supposed double standard by having Congress provide another process for removing judges who are no longer on "good behavior." (See note 126 \textit{supra}, for my reservations with imputing to the Founders a \textit{constitutional} standard of "serious" or "great" offenses, while I agree that "high crimes and misdemeanors" must be read as requiring more than petty maladministration for impeachment.) The use Berger makes of his "serious offenses" formula underscores the mischief of interposing his standard between the term used by the Founders, and the \textit{actual} language of their relevant debates, and a given set of would-be impeachable facts. He finds that the palpable misconduct in which the Senate found Archbald and Ritter had been involved does not constitute "serious" or "great" offenses in his sense. Most lawyers, and the aware public, will find this judgment stunning, and consider their proven conduct so "great" and "serious", in terms of detriment to the office of judge, to justify their removal from office. Comparable offenses in relation to other offices, including President, should be dealt with according to the same standards. In any event, the Constitution provides only one impeachment process and one designation of impeachable offenses for all federal officers. If it is inadequate in dealing with judges in view of their mandated "good behavior", the remedy is by Constitutional amendment, and not by rewriting article IV, section 2 by such "interpretation."
in the course of its impeachment function, and the Senate under its "court" function in the impeachment process.

It is true enough that in the earliest days of the Republic there was registered strong distaste for unconfined discretion ("arbitrariness" was the preferred word) whether by court (ruling against non-statutory crimes) or by the legislature (constitutional provision against bills of attainder, specific definition of treason, removal of impeachment from the normal criminal process, and, perhaps, the acceptance of judicial review\textsuperscript{141}). And the verdict of history has certified that the most celebrated impeachment cases (Justice Chase and President Johnson)—the technical merits of the charges notwithstanding—were rank with raw partisan passion. Nevertheless, throughout 187 years—as at the Convention—the country has found need for institutional machinery that makes possible the removal from office of faithless "civil Officers of the United States" when the two highest elected bodies of government agree that the interests of the nation require it. There was full realism in the Convention as to the risks of this procedure. These apprehensions have often been realized as in the Chase and Johnson impeachments. But perhaps the most important single fact in history of the impeachment institution in the United States is that it has been used, as Bryce thought it should be,\textsuperscript{142} sparingly.

\textbf{II. The Politics of Impeachment: Citizen and Congress}

Impeachment in the American constitutional scheme comes down, in a practical sense, to being a political process, if one surrounded by quasi-judicial safeguards.\textsuperscript{143} There are legal—constitutional—limits. But they

\textsuperscript{141} While the Founders did not explicitly provide for judicial review of legislative acts, the supremacy clause (article VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.") laid adequate grounds upon which Chief Justice Marshall and the Supreme Court would assert it as a constitutional necessity in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{142} "[I]mpeachment is what physicians call a heroic medicine, an extreme remedy, proper to be applied against an official guilty of political crimes, but ill adapted for the punishment of small transgressions." J. Bryce, 1 American Commonwealth 233 (1908).

\textsuperscript{143} In the House, the Constitution requires only that the basis for the impeachment vote be "treason, bribery and other high crimes and misdemeanors", which, we have seen, leaves broad scope for the political judgment of that body. In the Senate the reference to "trial," the requirement that members be under special oath, and the presiding of the Chief Justice when the President is being tried, constitute elements familiar to a court. But in the Johnson impeachment the rulings of the Chief Justice were constantly overridden by political judgments of the Senators. There is no reasoned
are so supple that the actual operation takes place within the joints. The question for an impeaching House or a convicting Senate, once facts charged are fairly established, becomes not so much “may we do this legally (constitutionally),” but “should we do this” in view of the ends that establishment of the impeachment process had in view. This is what may fairly be called “constitutional politics” by us. In England, where Parliament is “legally” supreme, it is called “constitutional law.”

What is the end that the Founders sought to achieve by adopting the impeachment process? The Convention itself and the post-Philadelphia sources (the Federalist and the state ratifying conventions) give us the clear early view: to protect the nation. This seems reinforced by the “development” of the federal impeachment institution across the 187 years. While the precedents are skimpy, perhaps more can fairly be made of them than we have been wont to do. There may indeed be a message in the very limited use that has been made of impeachment. The unfavorable verdict of history upon the use of impeachment in highly charged partisan atmosphere in the impeachments of Justice Chase and President Johnson may have stamped itself upon the American impeachment institution. Only three officials with less than life tenure have been impeached, and they have all been acquitted.

opinion given with the Senate’s judgment, an intrinsic element in our judicial process. And it has been generally understood that there is no appeal—even on “constitutional” grounds—to the Supreme Court. Berger has recently challenged this traditional view. BERGER 103-21. The specification of “trial” is significant, and is reinforced by article III, § 2, cl. 3: “The Trial of all Crimes, except in Cases of Impeachment. . . .” In the first impeachment trial (Blount), the record of proceedings states that the Senate “formed itself into a High Court of Impeachment, in the manner directed by the Constitution.” F. WHARTON, STATE TRIALS OF THE UNITED STATES 257 (1849), cited in BERGER 134. In the Johnson trial the Chief Justice suggested that the Senate adopt rules for the trial after it constituted itself as a Court of Impeachment, and not proceed with rules of procedure it had adopted for impeachment trials as the Senate. The Senators concurred, and adopted on the spot the rules that had previously been agreed upon. IMPEACHMENT: SELECTED MATERIALS 220. The difficulty is compounded by the fact that the High Court of Parliament is a judicial court, the highest court in the land, as well as a High Court of Impeachment. Neither the Senate or the House has “the judicial power” of the United States, which is committed by the Constitution to the Supreme Court and inferior courts created by Congress. The law applied in Parliament in impeachments was not the “law of the land”, but a special form of parliamentary law, lex parliamentaria.

145. Hamilton, for example, wrote in THE FEDERALIST: “The subjects of its [impeachment’s] jurisdiction are those offenses which proceed from the misconduct of public men, or in other words, from abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.” THE FEDERALIST, No. 65, at 490 (J. Hamilton ed. 1909).
146. See discussion at p. 235 supra.
147. Senator Blount, who had resigned, Justice Chase and President Johnson.
the Senate for want of jurisdiction. This may as well mean that the impeachment process is not to be used when other means are at hand for protecting the state, as mean that the Senate protects its own.\footnote{148}

In a marvelous way the impeachment process\footnote{148} may be seen as a microcosm of our entire system of constitutional representative government, and in no way can it be studied as simply a “question of law.” The parameters, of course, are set by law. But the working out of decisions—impeach-or-not, convict-or-not—are strikingly interdisciplinary, and the input is as much from history, political science, ethics and morals, and perhaps even psychology and statistics, as from law. It is to identify the crucial need for all to be freed here from the tyranny of legal mystique, and for the citizen to take hold of his proper responsibility in the matter of impeachment of a President, that I suggest as a framework for discussion the exploratory analysis which follows.

My assumption here, that the action of the House and Senate in the impeachment process is final and unreviewable, has until recently been undisputed.\footnote{149} In that sense we may understand Vice President Ford’s statement, when House minority leader, that: “[A]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office.”\footnote{150} The statement partially answers\footnote{151} the question of who decides what is an impeachable offense.

\footnote{148} Berger argues that the acquittal of Blount on jurisdictional grounds was wrong, and that its implied rule that impeachment is not applicable to legislators should be changed at the earliest opportunity. BERGER 223.

\footnote{149} One is tempted to limit this statement to impeachment of a President, but this would not go far enough. Certainly there were national issues at stake in the impeachment of Justice Chase. (And cf. the attempted impeachment of Mr. Justice Douglas in 1970, in which context the famous Ford statement was made note 3 \textit{supra}.) And while large citizen interest in impeachment of inferior court federal judges may rarely be great, the bar has great interest here. And when issues are posed by such impeachments that reach the integrity of the system of justice, they should be large enough to stimulate the interest and participation of an alert citizenry, especially in this day of instant, vivid, and ample media communication.

\footnote{150} But see Berger’s argument for judicial review of impeachment in his \textit{Impeachment}, supra note 5, at 103-121.

\footnote{151} 116 CONG. REc. 11913 (1970).

\footnote{152} It answers the question as to power. It needs amplification to answer what the House may “rightly” do, of what would be wise, or appropriate, exercise of that power. I have suggested that there are constitutional parameters (see pp. 228-32 \textit{supra}). I also agree with the accepted view that there is no official review of the congressional action (but see note 150, supra). Ford does have in mind that Congress does not act arbitrarily in exercise of this power. But he finds the \textit{lex parliamentaria} inconclusive: “There are few fixed principles among the handful of precedents.” \textit{Id.} It is hard to disagree too vigorously with this statement.
It seems to concede the relevance of precedents, but finds impeachment precedents unhelpful as guides. It stresses the contemporaneous situation "at a given moment in history." But a vacuum occurs when the further question is asked: What factors are relevant to this "consideration" made by the House or Senate? Assuming the "legal" standards of "impeachable offenses" are met, what political factors bear on the decision of individual members, the applicable Committee, or the Houses of Congress whether to impeach and to convict when the official in question is the President? I use the word "political" with two models in mind: the legislative choice with respect to passage of a statute, and the citizen's choice with respect to exercising his vote at the ballot box. Consider legislation; the ultimate product of Congress' work the Act may be later set aside by a court as not consonant with the Constitution. But no external legal pressure or compulsion may be brought to bear upon a legislator as to how he votes on particular legislation. And once a legislative body certifies that a bill has passed that house, in accordance with a vote taken according to its rules, no external legal veto may be made of that decision. No legislator or legislative body is completely "free" in a psychological sense in voting individually, or collectively, for or against a bill. They are subject to "political" pressures—or they would not be truly representative. But they are free of "legal" or "constitutional" restraint in so acting.

Now consider the voter; once he has fulfilled the legal qualifications to participate in a valid election or referendum, there is no legal restraint upon how he exercises his vote. Perhaps he too is not "psychologically" free, but we have built our system upon faith in the citizen's capacity to make this ultimate choice unimpeded and unconstrained. The use of the law is to protect this freedom from outside constraint.

The model of the free voter in a system of universal suffrage does not presuppose equal human capacity—that all are equally intelligent, productive, or well-informed. It is, however, a pledge of faith in human dignity that

153. The discussion at pp. 227-28 supra suggests that there are some precedents of value, at least as ideas for development.
154. See discussion at pp. 234-35 supra.
155. I use "political" here, not in the sense of raw partisan action, but with reference to responsible governmental action exercised in matters that are unrestricted by strict law and concern the functioning of the political society, the polis, the state.
156. The possible sanction of course is the political one—at the polls.
157. The decision that the bill legally passed that legislative body is unexaminable. The Act, passed by both houses of Congress, is subject, of course, to a presidential veto. Unless two-thirds of both houses override this veto, the bill fails to become "law."
158. The direct tie-in between the opportunity for a citizen to be well-informed and the successful functioning of our governmental system, which rests so heavily on the citizen as voter, has been recognized in Supreme Court decisions consistently giving wide protection under the first amendment to communication of ideas. It un-
in those matters which give government power to direct and confine citizen activities, and to provide for citizen needs and well being, every one is to be treated as equal—in the Supreme Court's formula of the 1960's "one man, one vote." The word "official" is usually reserved for those on the public payroll, but in a true political sense the voter is the ultimate official in our constitutional system. He has the crucial "office." He is the elector. He puts the elected, "popular", public officials in office, and in his periodic return to the polls he keeps them there or "retires them to private life." There is still no artificial supposition of equal human capacity in his exercise of this role, just an equal opportunity to participate in these "political" activities, in the functioning of the polis, the state—the nation as operated by laws and law-regulated institutional arrangements. The Founders never presupposed these electors would be "philosopher kings" who would always exercise their functions out of dispassionate concern for the public welfare. The debates of the Philadelphia Convention, the proceedings of the state ratifying conventions which brought the constitutional United States into being, and the Federalist papers are filled with consciousness of human excesses—both the spoiliations and power—lust of office holders and the selfishness and faction-proneness of voters. The voter was envisaged as one with personal and group and class interests as well as with concern to keep the nation together against its enemies, within and without. The voter voted his interests, his values, as well as the nation's; and who was to know in what proportion. There was that act of faith.

The Convention had not envisaged the development of political parties, but parties appeared before the first President had retired. The Founders did not provide for universal suffrage, nor did they provide for direct
doubtedly underlies the protections afforded by the Court in Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny, against racial discrimination in public education. These considerations produced considerable shock when the Supreme Court held last term that education is not a fundamental right explicitly or implicitly protected by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

159. In the Convention great fears of voter rampages were evident. There were frequent references to Rhode Island (which had not even sent a delegation to the Convention) as a warning against super-popular government. The Founders insulated the new government from the voter in many ways—the complex form of electing a President (electors selected by states operating as a body to choose the President), election of Senators by the state legislatures (only the House members were open to popular election), and the qualifications of voters were left originally to the individual states.

160. There is small need to wax romantic about the Founders. They come through in the records we have of their proceedings, both at the Convention and in the later state ratification period, as a hard-headed lot. There does seem to have been one man at the Convention who did not have to swallow hard to accept some provision or other of the final product.

It is interesting that the last act of the Convention, taken on Washington's only di-
popular election of the Senate, nor of the President. And the blight of human slavery, which they ratified and accepted, is enough to disarm us from accusing them of idealism. Limited popular government, like slavery, was the price of union as they saw it. But in the course of "development", and only after civil war and almost a century of repressive aftermath, the limited suffrage became universal, and the indirect impediments were removed or substantially nullified.\(^{161}\)

The voter remains a responsive as well as a theoretically responsible being, but human. No less than in 1789, his vote is the immediate product of his interests and values; and, no less than in 1789, do we have any grounds to doubt these interests and values include, in varying and unascertainable individual potions, his concept of national interest. There is still neither basis nor need to believe that he weighs these values and interests and at each election votes to support the resultant. He may well respond at any one election to the one issue that then seems to him conclusive and make his selection among candidates accordingly. That is his right, and may well be the way the system works, and how it was envisaged by the Founders. But the vote is more than a right, it is the underpinning of the entire system. The voters under our system are the ultimate "officials" in the sense that from them, speaking as an electoral body, the other officials are installed and major policies of movement or inertia take their cue. If events force major new policies to emerge between elections, the voter's chance to pass on them "officially" will come after the event at the next election. So much for the "elector-official" and his function. What of the other major political model of our system—the "elected-official?" There is more controversy here.

It is the elected representative, the legislator in the national system, with which I am here concerned, the Representative and the Senator. Is he elected to reproduce in the national legislature the views of the majority of electors of his district or state, or is he elected to be his own man, vote according to his own desires subject only to the penalty of voter-rejection if voter views next election day are at a variance with his actions? He is free, in the sense I suggested earlier—not restrained by any law—in how he shall vote. I would argue, without insisting, that the Founders' notion of the leg-

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\(^{161}\) Direct popular election of senators came in 1913 in the seventeenth amendment, but the indirect election of the President by the electoral college remains as an anachronism. With isolated exceptions, the state electors have considered themselves bound to honor the popular vote of their state. Even when they do so, however, the President elected might be the choice of only a minority of the popular vote.
islator was that he should represent. There would be matters of "conscience" in which he would insist upon exercising his prerogative against popular sentiment. In these hardly commonplace situations, he is willing to "pay the price." My argument here, upon which I do insist, is that an elected representative, who exercises his legally free, supreme political act to vote in the political body to which he has been accredited in accordance with his assessment of the views of his constituents, is acting officially within the expectations of our governmental system so long as he is acting in accordance with the law, the law of the Constitution, of the nation, and of the political representative body in which he serves. Within that legal framework he may elect to go against the popular view, whether for reasons of conscience (and that, I believe, might include his view of true party responsibility and loyalty), or because he anticipates that other issues will prove more conclusive on election day.

I would apply this analysis directly to the question of impeachment of a President. Because it concerns dislodging the supreme national elected official who has been installed by action of the whole body of national electoral officials, the vote of a representative to impeach a President may well be the supreme representative act. Above all others, it may be the one on which he should and will be held to strictest accountability. My argument here is that these general considerations of the functions of representative and voter give good grounds that there should be responsiveness by the one to the other if the system is to operate as it was designed, and as it has developed. My next point is that there are special reasons basic to impeachment of a President that give an unusual significance to citizen views.

Because it is a political act according to the constitutional design, impeachment requires representative awareness and voter input. But because it is a unique political act, with consequences to the nation almost without parallel, impeachment of a President should have significant citizen input before the event. The citizen acts as an "official," in the electoral sense, only at the election box. There is no before-the-event provision explicitly made for receiving his "official" views on impeachment. The citizen input

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162. That this was their view of the House member, at least, is clear. Since the seventeenth amendment put Senators in the same mold, except that they represent the entire state, this broader statement is fair.

163. Cf. the successful book of President (then Senator) Kennedy, PROFILES IN COURAGE (1956), about elected officials who dared to follow their conscience, braving the electoral crowd.

164. Perhaps he may believe in, or be willing to risk, his ability to convince his constituents of the rightness of his views, or stimulate conclusive respect for his courage or integrity in dissent from his constituents.

165. The fact that election of the President is by state, and not by national popular vote (cf. note 161 supra), has a minor relevance with which I shall deal later.
into the impeachment decision must be made like any between-the-elections representative decision: by availing of unofficial but familiar means. Letters, telegrams, visits, even private polls come to mind. It would seem that the reasons for impeachment, or lack of them, are closely tied to citizen reaction here in a unique way.

So I believe that the design of the constitutional impeachment process with respect to the President implies citizen input to get it in motion. Certainly in a day such as ours where relevant data becomes public property so swiftly through the media, the House would be justified in holding back from initiating the impeachment process until in receipt of ample indication of citizen concern.

The dynamics of the process, as it has developed historically, include the following steps: (1) introduction of a resolution for impeachment and referral to the House Judiciary Committee for recommendation to the whole House; (2) vote by the House to impeach or not; (3) trial by the Senate in the event of impeachment by the House. Not until very late in the Convention had it been finally determined that the Senate should be the court of impeachment. This conclusion was reached in the face of continuing argument by Madison and others that this would subject the President to the possibility of removal by a hostile and partisan legislature. While there was recognition by the Founders, both in Convention and later, that this forum subjected a President to the possibility of political reprisal, the choice was deliberately made that the forum for decision was to be political.

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166. It will be remembered that almost the entire debate on impeachment in the Convention was in terms of the President.

167. Arguably, upon adequate evidence of treason or bribery, the House has an obligation to go forward. What is said here has peculiar force with respect to "other high crimes and misdemeanors."

168. In point of fact, the initiation of the present investigation by the Judiciary Committee, upon reference by the Speaker, was triggered by the unprecedented public response to events of the weekend of October 27-28, 1973.

169. Recent impeachment investigations have all been handled by the Judiciary Committee of the House—all since the Swayne impeachment in 1905. The Peck (1826), Humphreys (1862), and Johnson impeachments also originated in the Judiciary Committee. The Blount, Pickering and Chase impeachments were handled by special select committees, and Secretary Belknap's originated in the Committee on Expenditures in the War Department. See IMPEACHMENT: SELECTED MATERIALS 714-18.

170. August 27, 1789. See note 34 supra.

171. This prediction was realized in the impeachment of President Johnson. But the House had refused previously to impeach him, and ultimately the "partisan" Senate did acquit—though by the slenderest possible margin.

172. The two-thirds vote for conviction was adopted to limit the likelihood of partisan decision. Some Founders thought this made nugatory the whole impeachment process. Cf. address of Luther Martin in 3 FARRAND 219.
This is not to suggest that the Founders intended that a President, or any other official, should be impeached or convicted for less than "high crimes and misdemeanors."173 The President should have fair treatment in this process, but no protections are enshrined in the constitutional provisions other than to put senators under special oath.174 The implementation of fairness was left to the legislative bodies, and in practice, they have had good days and bad.175 The Founders, in short, had opted for a "political trial", and not for a judicial one. It is the clearer that they did so by the misgivings that were stressed in route to their final determination. In this "political" climate, elected representatives of localities would be acting on the fate of an elected representative of the whole people. But they are representatives, and as such must be understood as supposedly responsive.

Investigation—Judiciary Committee of House

There is no constitutional function to this Committee. It is acting solely as an appointed committee of the House, the body entrusted with the constitutional decision of impeachment. But, in fact, the work of this Committee has been critical in impeachments. Rarely has the House rejected its recommendation whether to impeach or not to impeach.176 Two "political factors" of the constitutional impeachment design compete here, in my judgment, to influence the conduct of its work. On the one hand, the aspect of fairness to one accused would justify an in camera element to some of its preliminary investigation. On the other hand, the fact that public reaction should itself be data of whether to impeach or not means that some opportunity should be given the citizenry to react to the factual data which the Committee accumulates. But, arguably, this feature could be

173. See discussion at pp. 228-35 supra.
174. The oath administered to the Chief Justice, and to the Senators at the Johnson trial read: "I do solemnly swear that in all things appertaining to the trial of the impeachment of Andrew Johnson, President of the United States, now pending, I will do impartial justice according to the Constitution and laws. So help me God." IMPEACHMENT: SELECTED MATERIALS 218.
175. The addition of the provision for the Chief Justice to preside at the impeachment trial of the President was prompted chiefly by the Founders' conception of the impropriety of having the Vice-President, as a successor in the event of removal, presiding over the trial. Cf. 2 Farrand 532.
176. A noteworthy exception was the House's rejection, on December 7, 1867, of the Judiciary Committee's first report recommending the impeachment of President Johnson. IMPEACHMENT: SELECTED MATERIALS 716. And see discussion of the Louderback impeachment, p. 226 supra, where the Committee recommended against impeachment, and the House impeached. In at least two instances the Committee recommended impeachment of district judges and the House declined to impeach. J. Borkin, THE CORRUPT JUDGE 224, 237 (1962).
achieved by making public its report to the House before the House votes the impeachment resolution up or down.\textsuperscript{177}

\textit{Impeachment Decision—The House Deliberations.}

It has been suggested that the role of the House of Representatives in its impeachment decision is comparable to the grand jury in the criminal process—that it should impeach a charged official if there is "probable cause" to believe that the official under investigation has committed impeachable offenses.\textsuperscript{178} Although this proposition has implicitly been accepted in some past impeachments, I believe this is a faulty interpretation of the constitutional design. By removing impeachment from the criminal process, the Founders, as we have seen,\textsuperscript{179} specifically removed impeachment from the force of the English criminal precedents.\textsuperscript{180} It is true that the vote of impeachment by the House is only the preliminary step, and it will lead to removal only if the Senate so votes after "trial." It is also true that House proceedings, like those of the grand jury, have sometimes only considered evidence on one side of the case. At least there is no requirement, and perhaps no opportunity, for the accused official to present his side in the context of House proceedings. In fact, however, there have generally been

\textsuperscript{177} Recent House practice has been for the articles of impeachment, the specific charges against the "respondent," to accompany the Committee resolution to impeach. This has been the case since the Archbald impeachment in 1912. Prior thereto, the House would adopt the impeachment resolution and then authorize either the Judiciary Committee, or a special committee, to prepare the articles of impeachment.

\textsuperscript{178} Most recently by Congressman John Rhodes, who succeeded Vice President Ford as House minority leader. "Face the Nation", CBS TV program, December 17, 1973.

\textsuperscript{179} See pp. 217-18 supra.

\textsuperscript{180} Cf. Berger 67.

Although English impeachments did not require an indictable crime they were nonetheless criminal proceedings because conviction was punishable by death, imprisonment, or heavy crime. The impeachable offense, however, was not a statutory or ordinary common law crime but a crime by "the course of Parliament," the \textit{lex parliamentaria}.

\textit{But cf.} art. I, \$ 3. Yet Berger also writes that "The age-old division of functions which assigned the role of prosecutor to the Commons while the Lords sat in judgment was the 'model' of the parallel divisions of functions between the House of Representatives and the Senate. Id. at 54.

It is true that the House Managers argue the case in support of their resolution of impeachment before the Senate. Yet the removal of the criminal nature of the process makes it more appropriate to style their role as advocates of the view of their chamber rather than as prosecutors pressing a true bill. In fact, the eventual insertion of the Commons in the English impeachment process was the result of their hard-won battle to share political power as against the Lords, where the judicial power lay. The House, like the Commons, was given a comparable share of power in the political process of impeachment under the American Constitution.
Representatives friendly to the official under investigation who have brought counter-evidence to the attention of the House.\textsuperscript{181} The context of the adoption of the impeachment provisions by the Convention suggests that, while the House may certainly impeach if the evidence before it indicates to its satisfaction that “treason, bribery or other high crimes or misdemeanors” have been committed, it is treating too lightly its independent legal and political responsibility, in my opinion, for the House to vote impeachment of an official on a one-sided criminal law model of grand jury practice.\textsuperscript{182}

The House vote of impeachment connotes the responsible view of that body that evidence before it constitutes “high crimes or misdemeanors”, and if this evidence is not answered to the satisfaction of the Senate, it invokes the constitutional consequence that one “shall be removed from Office.”\textsuperscript{183} In my view, this independent legal and political responsibility of the House fairly implies both a legal and a political judgment. The legal judgment is that the evidence before it constitutes “high crimes and misdemeanors” in the constitutional sense.\textsuperscript{184} There is also the political judgment that some “high crime” or “high misdemeanor” is sufficiently serious to justify impeachment.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{181} Although in the absence of statutory provision the person under investigation has no right to appear before a grand jury, he may ordinarily appear to forestall indictment, after waiving his constitutional immunity against self-incrimination. (U.S. \textsc{Const.} amend. V.) Because prosecutors will not ordinarily give such persons immunity, their lawyers hesitate to advise them to appear, lest they make inadvertent admissions of guilt, or supply missing links in the chain of evidence against them.
\item \textsuperscript{182} Cf. Mr. Justice Field’s well-known grand jury charge (as a circuit court judge in California in 1872): “To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty—in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury.” \textit{Quoted in M. Paulsen \& S. Kadish, Criminal Law and Its Processes 943 (1962).} Consider against this the Supreme Court’s rejection of inquiry into the substance of a grand jury’s basis for an indictment in \textit{Costello v. United States}, 350 U.S. 359 (1956): “An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” \textit{Id.} at 363 (footnotes omitted). The Court refused to “establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. . . . It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules.” \textit{Id.} at 364.
\item \textsuperscript{183} U.S. \textsc{Const.} art. II, § 4.
\item \textsuperscript{184} As argued earlier, I believe Fenton correct (see note 105 \textit{supra}) when he says some indictable crimes are not “high crimes” or “high misdemeanors,” even when they have been labelled such by Congress acting in its legislative capacity. (Cf. Swayne impeachment, pp. 224-25 \textit{supra}).
\item \textsuperscript{185} Political considerations may often be relevant to a determination by the House or Senate that a particular course of conduct that is not indictable, and has not previously been cause for an impeachment conviction, constitutes a “high crime” or “high misdemeanor.”
\end{itemize}
There are legitimate political factors which might justify a vote against impeachment in some cases, even when there was adequate evidence before the House to meet the constitutional standard of impeachable offenses. The overarching design of the Founders in fashioning a constitutional provision for impeachment of a President was unarguably the national need to remove from office a chief executive whose continued presence in office was disadvantageous to the nation. This consideration was sufficient to withstand arguments that impeachment was not necessary so long as the President did not serve for life. The mere protection of voting him out of office was not enough. So strongly held was this view of the need for impeachment that the Founders were willing to assign the impeachment role to political bodies, despite Madison's continued urging that the Supreme Court should be the court for trial of an impeached President. It is true that a concern for fair treatment and protection of a President against partisan legislative removal was expressed, and this should be kept in mind, but the only constitutional limitations on the process implementing these concerns were the special oath to be given the Senate members prior to trial and the requirement of "concurrence of two-thirds of the Members present" for conviction. In this context it would seem that the following would be among the political factors which might justify the House to decline to impeach.

1. Availability of less drastic means to achieve removal.

The stage of the presidential term in which the impeachment process matured would make germane the consideration that the shortness of a presidential term has some relevance. The consequences of continuing an incumbent in office for a brief time would be balanced against the disruption which would be caused by an impeachment trial.

The likelihood of resignation in the absence of impeachment has been considered a possibly relevant factor. There is some danger, however, that giving credit to such a consideration would set an unhealthy precedent for partisan pressures against the presidency in the future.

2. The consequences of a presidential removal in a specific context.

186. However, it would be hard to justify as falling within this category, a situation in which there is substantial unanswered evidence of treason or bribery, or perhaps other instances of gross unfaithfulness.
187. 2 Farrand 68.
188. 1 Farrand 232 and 2 Farrand 42 and 551.
189. U.S. Const. art. I, § 3. In addition, there was the entire withdrawal of the proceeding from the criminal arena and restriction of penalties to removal from office and disqualification from holding further federal office.
190. This list is merely intended to be suggestive; it is certainly not exhaustive.
The concept of national need entails consideration of the consequences of removal of an incumbent President: (a) in terms of what would be the quality and public receptivity of his successor; and (b) in terms of the effect of removal on the conduct of national affairs, of the foreign relations of the nation, and of the implementation of the national will expressed in his election. These factors would be balanced against the incumbent's continued ability to govern in light of present citizen and foreign reaction.

3. Consideration of the constitutional "high crimes" or "high misdemeanors" in light of the positive qualities the incumbent may still effectively exert in the public interest.

This factor is somewhat duplicative of aspects of the previous one but perhaps merits independent evaluation, particularly if the constitutional offenses are borderline. One of the journalists quoted at the head of this study put it this way: "Are the offenses . . . sufficiently heinous to nullify and wipe out the recognized achievements in other areas?"\(^\text{191}\)

4. Even in the absence of other means to achieve removal, the fact that impeachment of the President was conceived as an emergency measure\(^\text{192}\) gives political counsel that it should not be employed in borderline situations.

The vigorous debate on the need for an impeachment provision as a "bridle"\(^\text{193}\) on the chief executive ended by adopting one. But it was not without cautions as to the partisan use to which it might be put. The lessons of the impeachment of President Andrew Johnson should not be forgotten,\(^\text{194}\) and the use of impeachment in a borderline situation could do much to destroy the effectiveness of the presidency as a creative agency of popular government.

Without passing on the merits of any of these considerations in the present political context, it seems that they are all fairly subject to consideration as legitimate political factors. There may be other political considerations tilting towards impeachment that might legitimately bear on an impeachment

191. Consider here the comments of Richard Wilson, note 1 supra. James J. Kilpatrick, a well-regarded commentator on constitutional matters, suggested that recent decisions of the Supreme Court "may remind some of my brother conservatives, otherwise disenchanted with their President, that we would not be seeing these trends if the elections had gone" to the President's opponents. Wash. Star-News, December 24, 1973, p. A7 col. 5. These suggestions point more to gratitude for the past than to the prospects for the future, which my "political factor" here envisages.
192. 2 FARRAND 65, 69, 550.
193. BERGER 122.
194. \textit{Id. at} 295. \textit{But cf.} E. CORWIN, \textsc{The President: Office and Powers} 79 (3d ed. 1948).
decision. Some are implied in the factors already discussed: loss of ability to provide governmental leadership, loss of credibility among the electorate, or loss of capacity to deal with foreign relations. But other factors that we might consider "political" are derived from ethical or moral implications of declining to impeach on the basis of certain evidence: What effects would non-impeachment have upon future conduct of the presidential office, or derivatively, other offices of government? What impact would non-impeachment have upon professed national ideals? To what extent does non-impeachment imply approval of conduct based upon evidence at hand? What effect upon private morals? What likelihood of inciting cynicism among present and future generations? These, too, it seems, may be actual political factors. If they are not, perhaps the evidence in question in a given case may not be so deviant from current standards in the nation as to warrant invocation of the emergency measure of impeachment of the elected chief executive.195

The Citizen Input

Able constitution-watchers throughout our history have stressed the relation of citizen input to decision-making in the impeachment process. Bryce characterized impeachment in his classic study: "It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at." And Woodrow Wilson noted that the impeachment process "requires something like passion to set them agoing; and nothing short of the grossest offenses against the plain law of the land will suffice to give them speed and effectiveness. Indignation so great as to overcome party interest may secure a conviction; nothing else can."197

These authors were writing in terms of the actual operation rather than the conscious design of impeachment. But at least some Founders predicted that it would function sluggishly.198 It seems reasonable that legislators called to make impeachment decisions should react, at least in borderline cases, only when citizen reaction to impeachment evidence, adequate in a constitutional sense, clearly calls for impeachment of a President. Reluctance by a congressman to vote for a marginal impeachment on grounds of

195. Cf. note 193 supra.
196. J. BRYCE, 1 THE AMERICAN COMMONWEALTH 233 (1908).
197. W. WILSON, CONGRESSIONAL GOVERNMENT 275-76 (1911).
198. Cf. address of Luther Martin, 3 FARRAND 219 "[T] here is little reason to believe, that a majority will ever concur in impeaching the President, le[sl] his conduct be ever so reprehensible . . . ."
citizen apathy is not, I believe, "petty politics" but legitimate fulfillment of
his representative role in the impeachment process. Gross violations apart,
seems that this is how the process is supposed to work.

The member of the House called to vote impeachment up or down may
properly make his judgment based upon factors such as those suggested
above, and he may legitimately (apart from special knowledge) take his cue
largely from citizen reaction, particularly today when he may assume that
the media has produced in these exotic matters, at least, a citizen well-in-
formed. There are, however, political factors which all will identify as ille-
gitimate: the manipulation of an impeachment proceeding to make an
opposing party vulnerable at election time; the refusal to impeach because
the opposing party may be weaker with the incumbent in rather than out;
the refusal to impeach in the face of strong evidence because of damage to
the political party; the citing of absence of legal (constitutional) grounds for
impeachment, when they are obviously there, to screen a "political" de-
cision; the manufacture of "conscience" reasons pro or con impeachment
to screen raw partisan ones.

All this points to the aim of this study: to underscore the central political
role that citizens have in the impeachment of a President and the conse-
quences of their declining to participate. There is a role for education
here, particularly in avoiding the continuing confusion of the "legal" and
the "political", all the time keeping full respect for the legitimate "political"
functioning of our governmental system.

The Senate Trial

If there is no impeachment of a President by the House, there is, of course,
no Senate trial. But the confusion of the largely "political" trial in the Senate

199. Examples may readily be cited of unacceptable, raw partisan, political moti-
vations for an impeachment decision. For the party of an incumbent President to
refuse to impeach despite clear demands of unchallenged facts and national needs is too
obvious. A recent "Washington dateline" story suggests the other side of the same
coin:

A consultant to Democrats seeking re-election to the House said that his
clients would "just as soon the President stay in office" to dramatize the Wa-
tergate issue . . . . Similarly Mr. [Robert J.] Keefe [executive director,
Democratic National Committee] said that if President Nixon were to resign
"we'd be a little nervous about circumstances," with Vice President Ford mov-
ing into the White House.

N.Y. Times, Dec. 19, 1973, at 8, col. 6. And for an incumbent to be forced out of
office by his own party in the absence of impeachable facts, merely to improve its elec-
tion prospects, needs no characterization.

200. There may obviously be genuine conscience grounds for, or against, im-
peachment. Cf. J. KENNEDY, PROFILES IN COURAGE, note 163 supra. Such instances
more generally result in personal political loss, rather than political gain.
with a criminal proceeding—an aspect the Founders specifically expunged—and the rampant partisan unfairness of the Johnson impeachment, have obscured the legitimate political considerations which may be invoked by the Senate, particularly in a borderline case, with respect to whether to convict or not. It is true the Chief Justice presides at the proceedings, that there are rules for the conduct of the trial adopted at its outset,201 that each Senator takes a special oath of fairness. But after weighing the evidence fairly and determining the facts, the Senate, as court, is limited only by the constitutional requirement that there shall be “Treason, Bribery or other high Crimes [or] Misdemeanors.”202 The range of this provision is broad, but, no less than the House, the Senators are entitled to consider the same legitimate political factors recited above in deciding whether to convict and thereby remove an incumbent from office.203 This includes, of course, the degree of citizen urgency which has such a bearing upon ability to govern, views with respect to impact on national moral values, and, I believe, even estimated citizen reaction at the polls to their performance at the trial. These political factors, of course, cannot justify a conviction where offenses of constitutional proportion have not been committed, but they may make "serious" offenses which milder citizen reaction might justify overlooking. For the impeachment mechanism was contrived to satisfy a national need, and when the people bespeak no such need, their representative is under no obligation to convict.

III. Conclusions

The citizen's role in voicing his views within the political frame of impeachment of a President is as significant as in exercising his right to vote for him. Once the constitutional parameters have been met by a body of evidence before either the House in impeachment, or the Senate in trial, these political factors reach right into the decision to impeach or not to impeach, and to convict or not to convict. The citizen's role entitles him to as much infor-

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201. Assuming as I have (see note 5 supra) that there is no legal agency in the land that can bring the Senate to account in this sphere, the Senate has the power to do what it wills. But the rightful, appropriate, exercise of that power, which their special oath entails, does require Senators to act in “accordance with law”—the Constitution—and, it may be argued, their own body of law as an impeachment court, the lex parliamentaria. Their oath also binds them to “impartial justice.” See note 174 supra.


203. The penalty clause, U.S. CONST. art. I, § 3, has been interpreted to require removal, but to make disqualification from office optional. One of the partisan moves of Thaddeus Stevens, one of the House Managers in the Johnson trial, was to solicit a Senate vote during the trial amending its rules to provide that the disqualification could be voted, after conviction, by simple majority. IMPEACHMENT: SELECTED MATERIALS 357.
mation about the pending proceeding as reasonable fairness to the beleaguered President will allow. The citizen's responsibility requires him to make his views known, and to the proper source, and at the proper time. He may, of course, withhold his verdict of approval or disapproval until subsequent elections. And perhaps the Representative or Senator, on his part, is entitled to interpret lack of citizen response as freeing his hand. And he may fairly assess, perhaps at his peril, that his failure, for conscience or otherwise, to accord with his constituents' political views on the impeachment will bring no election sanctions, because the citizen is (or then will be) more interested in other issues: job, peace, or energy comfort.

From all this I would draw certain immediate practical conclusions: (1) it is consistent with the constitutional design that, within the broad constitutional limits, public response, or the lack of it, should be ordinarily persuasive, if not conclusive, upon the House in an impeachment decision; (2) there is general unawareness of this key public role. Congressmen recognize as a "fact of life" that they must, in general, listen to constituents. But in impeachment matters, the connotation sometimes comes through that this listening is somehow "dirty politics." It is politics, I have argued, but not on the seamy side, unless it lapses into raw partisan advantage without regard for the facts.

Given the existence of a crucial citizen role in the impeachment decision, certain consequences follow irresistibly:

1. There is, first of all, a need that citizens be educated to this very fact—that they have this vital function to perform, and they are responsible for whatever decision is made either as a result of their action or lack of it.

2. As much information as fairness permits on the specific situation at hand should be made available to citizens so that they may exercise their important function knowledgeably. This means information should be made known by the House Judiciary Committee engaged in the investigation, and much more so later by the full House considering its report—information and evidence as to the charges made, and credible evidence in support of and against the charges. The President's response should be expected at this stage and should be fully available. Just as he would not leave damaging charges unanswered in an election campaign, so he would not, under this understanding, stand back and withhold his response until a Senate trial.

3. There is need for full opportunity for public debate. Here the responsibility of the communications media would seem to extend to offering a generous forum for diverse views, arguments, and weighing of relevant factors.
beyond being sheer advocates for one position or the other.

4. The public should give substantial response to their representatives in Congress at each stage of consideration of the impeachment decision. There is no accepted dogma as to what form this response must take.

The ordinary means of between-election communication are relevant: mail, telegrams, visits of representative delegations, responsible group action. Congressmen have the experience of distinguishing their mail as drummed-up artifices of public relations counselor design and as true indicators of intense public concern. It is no coincidence that the reference of the present impeachment resolutions to the Judiciary Committee followed almost immediately upon the unprecedented citizen response to the orchestrated events of the weekend of October 27-28, 1973 (identified by a White House spokesman as the "Saturday massacre"). Certainly the responsible polling organizations have a contribution to make here, although careful thought must be given to the formulation and methods used in translating their input into a national, state or district decision. Certain questions should be answered. In computing a national decision, is a simple overall popular percentage breakdown—e.g. 40% for impeachment, 40% against—an appropriate political indicator for the removal, or retention, of a national official chosen by electoral votes of states? While popular vote may be the preferable way of electing a President, the Constitution does not yet so provide. So should not a weighing by states be considered? Should the state decision with respect to House proceedings of impeachment be the simple addition of the popular components of its congressional districts? Should the emphasis not be placed on securing reliable indicators of public sentiment in each congressional district? Could there not be federal appropriations to support such local polls, or, better, referenda conducted by local election officials? As an alternative could not the great independent foundations give financial support to such local polls or elections, and if local election officials were unwilling, enlist the resources of private election organiza-

204. The argument against this, of course, is that the House is the popular body, par excellence, and that the votes there are in proportion to population. This is true, and this factor would realize itself when each Congressman votes. But the most precise national decision, whatever impact it would have as a component of each House member's vote, needless to say, less than the public decision registered in his district, should be compiled in the same way as was the original presidential election decision—by states.

205. In the House proceedings the state decision would have only the indirect input referred to in the preceding note. At any Senate impeachment trial, it would have the additional relevance of furnishing data from each Senator's constituency—legitimate citizen input on the factors of governability, moral climate, considerations transcending removal, etc., as discussed earlier.
tions, such as the Honest Ballot Association? There is no need that such polls or elections be official; they need only be reliable.

5. One question remains: what quantum of public support for impeachment of a President should be taken as adequate? Again, the question should be considered both from the national and the congressional district aspect. A measure of a national consensus adequate for impeachment could more reasonably be keyed to the actual national consensus average in presidential elections. In the last seven presidential elections the successful candidate received the following percentages of the vote cast: 1972, 61.7%; 1968, 43.6%; 1964, 61%; 1960, 50%; 1956, 57.8%; 1952, 55.4%; 1948, 49.8%. The elected President received an average of 54.2% of the vote in these seven elections. If the average is computed on the basis of the last six elections (omitting the close Truman election of 1948) it is 54.9%. This same range persists when elections are similarly computed back to 1900 (1900-1972 average: 55.2%).

In this study I have struggled to lay to rest several enervating myths: that an indictable crime is required to constitute an impeachable offense; that citizens cannot read pertinent constitutional language and clear passages from the Convention and make their own judgments; that grounds for impeachment are exclusively a legal and not a political question; that the citizens' role in impeachment is to sit back and let "experts" and Congressmen make the impeachment decision without their intervention; that impeachment is a criminal proceeding in which the House's function is to act as a grand jury and consider impeachment as in the nature of an indictment. Of all these myths the last is the most difficult, but the most necessary, to smother. So long as this myth persists against all the constitutional language and history we have seen, emphasis will be put on secrecy of House proceedings (like a grand jury). This flies squarely in the face of the political aspect of impeachment and the need to share data with the citizen, so that he may play his proper role. Simple fairness may argue in favor of the Judiciary Committee's proceedings being conducted with circumspection until evidence develops which meets the constitutional minimum. When that point is reached, the legal inquiry is completed, and for this no more specific definition of impeachable offenses is needed than history has furnished to this date. There may still be doubt, however, whether impeachment is politically appropriate. To answer this last, political, question

206. The figures used for these averages were compiled from figures in the 1974 Edition, World Almanac (L.H. Long, ed., 1974); the Almanac sources were official state returns.
the citizen must be informed adequately, so that he will have basis for the political judgment he is expected to make if our representative system is worth the candle.