

1998

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Repository Citation

Gerhardt, Michael J., "Chancellor Kent and the Search for the Elements of Impeachable Offenses" (1998). *Faculty Publications*. 988.
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CHANCELLOR KENT AND THE SEARCH FOR THE ELEMENTS OF IMPEACHABLE OFFENSES

MICHAEL J. GERHARDT*

INTRODUCTION

I imagine that more than a few people are wondering why a symposium in honor of Chancellor James Kent includes an essay on the scope of impeachable offenses. After all, Chancellor Kent focused primarily on the judiciary's special role in the development of American equity and common law. Moreover, Chancellor Kent distrusted legislatures and did not devote his creative energies to explicating congressional lawmaking or the legislative process. When Chancellor Kent did address impeachment, he had little to say, and the little he did say seemed primarily descriptive, such as his acknowledgement of impeachment as the principal means for disciplining federal judges for "any corrupt violation of their trust."¹

Yet, there is more. If one reads further in Chancellor Kent's commentaries, there is another comment about impeachment that is of great contemporary significance for anyone interested in the constitutional limitations on judicial independence. In his first introductory lecture given to aspiring law students at Columbia University, Chancellor Kent acknowledged impeachment as the principal checking mechanism against judicial abuse of power. Like Alexander Hamilton,² Chancellor Kent expected the exercise of judicial review to be "the weakest of all" powers in the Constitution, entailing nothing more than the exercise of reasoned judgement.³ If this power

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1. 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 295 (12th ed. 1884).

2. See *THE FEDERALIST* NO. 78, at 437-38 (Alexander Hamilton) (Issac Kramnick ed., 1987).

3. See James Kent, *An Introductory Lecture to a Course of Law Lectures*, in 2 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805*, at 936, 943 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

were abused, i.e., “if [any federal judge] should at any time be prevailed upon to substitute arbitrary will, to the exercise of a rational Judgment, as it is possible it may do even in the ordinary course of judicial proceeding,” the judiciary “is not left like [the legislature], to the mere contro[ll] of public opinion. The Judges may be brought before the tribunal of the Legislature, and tried, condemned, and removed from office.”⁴

Chancellor Kent did not elaborate on the reasons he thought it would be appropriate to impeach a federal judge on the basis of certain decisions. Nevertheless, Kent’s comment is useful today to many people who express interest in trying to impeach “activist” judges.⁵ Kent’s suggestion that it is permissible for Congress to impeach a federal judge for his or her erroneous constitutional decisions is not a novel argument, for every generation has toyed with the possibility of impeaching judges for their most unpopular decisions.

The purpose of this essay is to explore the continued importance of Kent’s suggestion of impeaching judges for erroneous decisions. Part I examines the significance of the apparent conflict between the aforementioned suggestion and Kent’s repeated expressions of distrust of legislatures and pronouncements regarding the need for judicial independence to protect against legislative abuses of power. Part I suggests that Kent’s faith in judicial review of all constitutional issues (including any raised in impeachment proceedings) probably provides the basis for resolving the tension in Kent’s statements.

Part II identifies the likely sources that would serve in the impeachment context as an analogue to the precedents and tradition on which the common law that was the focus of Kent’s commentaries was based. The sources of the law of federal impeachment include the text and the history of the Constitution and particularly historical practices and tradition.

Part III explores in some detail how the application of the skills required for judicial development of the common law, as suggested by Kent, elucidates the essential elements of impeachable offenses. These elements include, most notably, the requirements of mens rea—a culpable mind-set—and actus reus—the commission of certain bad acts that cause serious injury to the Republic.

4. *Id.* at 943-44.

5. See, e.g., David Kairys, *Clinton’s Judicial Retreat: When Naming Judges, He Is Quick to Cave*, WASH. POST, Sept. 7, 1997, at C1-C2 (noting House Majority Whip Tom Delay’s proposal that “activist” judges should be impeached).

As discussed in Part IV, the essential elements of impeachable offenses limit the circumstances in which a federal judge may be impeached for a decision. Such impeachments are permissible when a federal judge repeatedly flouts his or her duty to follow a well-settled principle of law, order, or directive from a higher authority, such as the Supreme Court. It is both ironic and significant that Chancellor Kent, who never intended to explicate the impeachment process, identified a solution to a problem of current and future concern involving the appropriate bases for judicial impeachment.

I

The first issue raised by Chancellor Kent's suggestion that judicial impeachments may be based on arbitrary decisions is whether the suggestion is reconcilable with his repeated pronouncements about the importance of judicial independence from political retaliations. For Chancellor Kent, the judiciary occupied a special place in the constitutional universe as the primary protector of individual rights, particularly property rights. He viewed an independent judiciary as essential to guarantee natural rights from the threat of excessive democratic impulses. As Kent explained:

[I]n monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics it is equally salutary, in protecting the constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; . . . [and] [t]o give them the courage and firmness to do it, the judges ought to be confident of the security of their . . . station.⁶

According to Chancellor Kent, a fundamental reason for the Constitution's granting life tenure to federal judges was that legislatures could not be—and indeed, should not be—trusted to act responsibly absent judicial review. According to Kent, legislatures were prey to a number of pernicious influences: the “insidious operation of factions,”⁷ the overbearing nature of legislative majorities, and the pressure of popular enthusiasms, which make legislatures “liable to be constantly swayed by popular prejudice and passion.”⁸

6. 1 KENT, *supra* note 1, at 294.

7. *Id.* at 332.

8. *Id.* at 422.

If legislatures generally should not be trusted, but the most powerful of them all—Congress—wielded the single most important check against judicial abuse of power, it would follow that Congress could not be expected in an impeachment proceeding to behave itself properly or to be immune to the usual pressures or inclinations likely to corrupt its performance. If Congress were the final judge of arbitrariness in impeachment proceedings, the exercise of judicial review would expose federal judges to the possibility of impeachment in any case in which they ruled against Congress.

While Chancellor Kent acknowledged the importance of judicial review as a check against legislative abuses of power and the significance of impeachment as a limit on judicial misconduct, he did not explain how, or even whether, one might trust impeachment to work given the propensity of legislatures to act arbitrarily, if not maliciously. Kent never explained what, if anything, protected judges from being abused by Congress in the federal impeachment process because of their decisions.

Yet, one can extrapolate a possible reconciliation of these pronouncements from the same introductory lecture in which Chancellor Kent proclaimed that it would be legitimate to impeach judges because of their arbitrary decisions. In defending the need for judicial review, Kent explained:

[I]f the Legislature was left the ultimate Judge of the nature and extent of the barriers which have been placed against the abuses of its discretion, the efficacy of the check would be totally lost. The Legislature would be inclined to narrow or explain away the Constitution, from the force of the same propensities or considerations of temporary expediency, which would lead it to overturn private rights.⁹

Kent's statement could be read as suggesting the possibility that, if left unchecked, Congress might be disposed to deviate from or to take great liberties with the Constitution in determining upon which judicial decisions to base impeachment proceedings. The normal check against legislative deviations generally was judicial review. As Kent explained:

The Courts of Justice which are organized with peculiar advantages to exempt them from the baneful influence of Faction, and to secure at the same time, a steady, firm and impartial interpretation of the Law, are therefore the most proper power in the Government to keep the Legislature within the limits of its duty, and to maintain the Authority of the Constitution.¹⁰

9. Kent, *supra* note 3, at 942.

10. *Id.*

This is not surprising, for Chancellor Kent believed that judicial review of constitutional matters “is necessary to preserve the equilibrium of the government, and prevent usurpations of one part upon another; and of all parts of government, the Legislative body is by far the most impetuous and powerful.”¹¹ Kent had far more confidence in the judiciary’s ability to properly exercise its power than he had in the legislature’s capacity for doing so.¹²

The problem at this stage is that it is not clear how either Congress or the federal judiciary would determine the kinds or range of arbitrary judicial decisions on which to base judicial impeachments. One could easily imagine that Congress might lean in the direction of a broad definition to preserve for itself the flexibility in retaliating against the decisions that most of its members disliked, while federal judges might endorse a much narrower definition to protect their autonomy in exercising judicial review.

Once again, it is possible to discern a resolution to this dilemma from Chancellor Kent’s commentaries on the common law. Given Chancellor Kent’s belief that judges had the training and skill to deduce the appropriate principles and rules to govern the common law, they likewise possessed the abilities to deduce the law of impeachment, including the appropriate scope of impeachable offenses. Presumably, they—or others similarly trained and disposed—could do this by applying reasoned judgment to those sources of authority in the impeachment field analogous to the materials on which the common law has been based—i.e., the text and history of the Constitution, historical practices, and tradition.

II

The Constitution sets forth the grounds for impeachment in relatively opaque language. The Constitution provides that “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.”¹³ The Constitution defines treason as “consist[ing] only in levying War against [the United States], or in

11. *Id.* at 943.

12. For an especially thoughtful commentary in support of judicial review of the impeachment process, see Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125. *But see* Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974).

13. U.S. CONST. art. II, § 4.

adhering to their Enemies, giving them Aid and Comfort.”¹⁴ Moreover, “Bribery” has been widely understood as encompassing an indictable crime, even though not made indictable by Congress until 1790.¹⁵ The Constitution does not, however, define any of the other offenses for which one may be impeached. Consequently, the perennial challenge has been to clarify the phrase “high Crimes and Misdemeanors” by means of other authoritative sources of constitutional meaning.

The most obvious sources of constitutional meaning are the text and history of the Constitution. Moreover, in a field such as separation of powers (and there is no question that impeachment is a component of the constitutional scheme of separation of powers), congressional practices, particularly if they are consistent or unbroken over time, have been generally regarded as useful guides for illuminating constitutional meaning.¹⁶ Consequently, another source to consider in deciphering the phrase “high Crimes and Misdemeanors” is the history of Congress’ exercise of impeachment authority.

If past impeachment proceedings carry some weight in elucidating the meaning of the phrase “high Crimes and Misdemeanors,” it is not clear precisely how much weight they do carry. The precedential effect of such proceedings often seems strongest if a question of constitutional interpretation is involved. In such a case, Congress appears to have been especially sensitive to the likely permanent impact, including any harm, of its decisions on the Constitution and on its relationship with the other federal branches in both the short- and long-terms.¹⁷

Congressional reaction to the outcome of the first impeachment proceeding illustrates the potentially lasting influence of a constitutional decision made by Congress in an impeachment matter. That proceeding was initiated by Representative John Q. Adams in 1797 against William Blount, a United States Senator from Tennessee. The House impeached Senator Blount for taking various actions to undermine the relationship between the United States and native Americans, and for conspiring to aid England in its war with Spain despite the official neutrality of the United States.¹⁸ By a vote of twenty-five to one, the Senate expelled

14. *Id.* art. III, § 3, cl. 1.

15. *See id.* art. II, § 4; 18 U.S.C. §§ 201-203 (1994); *see also* Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (1845) (establishing bribery for the first time as a federal criminal offense).

16. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

17. *See* MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 47 (1996).

18. Blount was specifically charged with (1) conspiring to lead a military expedition on behalf of England to take land in Florida and Louisiana from Spain, thus violating the neutrality of the

Blount on July 8, 1797, the day following his impeachment in the House.¹⁹ Blount challenged the Senate's jurisdiction to subject him to an impeachment trial.²⁰ He claimed that he was not a "civil officer" of the United States within the meaning of the Constitution.²¹ He argued that "civil officers" were only those appointed by the President; that the clause providing for their removal upon impeachment for, and conviction of, high crimes and misdemeanors applied only to such "civil officers"; and that the impeachment process, therefore, could not be used to punish a Senator.²² On January 10, 1799, the Senate voted fourteen to eleven to defeat a resolution stating that Blount was a "civil officer" of the United States and, therefore, subject to impeachment.²³ By the same margin, the Senate voted on January 11, 1799, to dismiss the impeachment resolution against Blount for lack of jurisdiction.²⁴ Neither the House nor the Senate subsequently has entertained any impeachment action against a member of either chamber.²⁵

In contrast, the influence of impeachment decisions involving mixed questions of constitutional interpretation and policy, such as the legality or effectiveness of using trial committees, primarily depends on the preferences of current members of Congress. For example, there are several reasons not to interpret the Senate's rejection of the third article of impeachment against Judge Harry Claiborne in 1987—asking for issue preclusion based on prior felony convictions—as a lasting rejection of the application of collateral estoppel in the impeachment context. First, the third article of impeachment did not directly ask the senators

United States in the war between Spain and England; (2) inciting the Creek and Cherokee Indians to commit hostile acts against the Spanish; (3) alienating the confidence of the Indians in the United States agent residing with them; (4) convincing another United States agent to assist him in the expedition; and (5) conspiring "to diminish and impair the confidence of the said Cherokee nation in the Government of the United States." 7 ANNALS OF CONG. 951 (1798); see also 3 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2302, at 653 (1907) [hereinafter HINDS' PRECEDENTS].

19. See 7 ANNALS OF CONG. 43-44 (1797).

20. See 8 ANNALS OF CONG. 2248 (1798).

21. See 8 ANNALS OF CONG. 2271-72 (1799); HINDS' PRECEDENTS, *supra* note 18, § 2310, at 663.

22. See 8 ANNALS OF CONG. 2270-72 (1799); HINDS' PRECEDENTS, *supra* note 18, § 2316, at 671.

23. See 8 ANNALS OF CONG. 2318 (1799); HINDS' PRECEDENTS, *supra* note 18, § 2318, at 679.

24. See 8 ANNALS OF CONG. 2319 (1799); HINDS' PRECEDENTS, *supra* note 18, § 2318, at 679.

25. Most commentators who have addressed this issue agree with the congressional opposition to the impeachability of national legislators. See, e.g., John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 26 (1970); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 48-50 (1989); C.S. Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 30 (1927). For a contrary view, see Ronald D. Rotunda, *An Essay on the Constitutional Parameters of the Federal Impeachment*, 76 KY. L.J. 707, 716 (1987).

about whether Claiborne's prior convictions settled certain key facts underlying his impeachment. Second, despite the Senate's refusal to endorse the third article, it is unclear whether the prior felony convictions strongly motivated senators to convict Judge Claiborne on the other two articles. As Senator Carl Levin admitted, "My own gut feeling is one way or another, following some fiction or reality, we will find a way to remove somebody from office who [has] been convicted of a crime [and] who [has] exhausted the appeal"²⁶ Third, Judge Claiborne's acquittal on the third article was made possible by thirty-five senators voting present rather than on the merits of the third article.²⁷ While Senator Levin has suggested that the thirty-five present votes were cast to indicate those senators did "not want[] to base the removal on the conviction itself,"²⁸ those same votes could reflect a desire (by at least some senators) simply to avoid taking a stand on the issue. Lastly, the third article of impeachment against Judge Claiborne may have gone too far, i.e., asked the Senate to find that a felony conviction is an impeachable offense, rather than to make an independent judgment as to whether, accepting the facts underlying a felony conviction, the conduct in question constituted an impeachable offense.²⁹

Of course, Congress retains the authority or discretion to reach a different conclusion even as to a matter of constitutional interpretation. Moreover, impeachments rarely present pure questions of constitutional law, and it is unusual for Congress not to follow some prior impeachment practice (assuming it is discernible and known), unless it decides that modern circumstances require updating or abandoning certain procedures for the sake of efficiency, expediency, or fairness. One example of the latter situation is that, despite having approved Rule XI in 1935,³⁰ the Senate did not invoke the rule in Judge Ritter's 1936 impeachment trial partly because a number of senators continued to express doubts about its constitutionality.³¹ Subsequently, the Senate

26. *Hearings Before the National Commission on Judicial Discipline and Removal*, 103rd Cong. 161 (1993) [hereinafter *Hearings*] (testimony of Senator Carl Levin on May 15, 1992).

27. See PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, S. DOC. NO. 99-48, at 289-97 (1987).

28. *Hearings*, *supra* note 26, at 161 (testimony of Senator Levin).

29. See Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 683-84 (1988).

30. See S. Res. 18, 74th Cong., 79 CONG. REC. 8309-10 (1935).

31. See PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, S. DOC. NO. 74-200, at 47 (1936).

has given no indication that it is legally bound to use Rule XI trial committees.

If Congress were to give some precedential effect to its prior decisions in impeachment proceedings, it still must confront the troublesome matter of figuring out the meaning of a specific precedent. The difficulty of achieving consensus on the precise significance of a prior impeachment decision may preclude that precedent from having any seriously binding effect on a subsequent Congress, or may make it easier for subsequent members of Congress to interpret the prior practice or judgment in a way that suits their present purposes. Modifying impeachment procedures has been further complicated by institutional inertia to maintain tradition, as reflected in its requirement of unanimous consent for modifying procedural rules³² and preference for allowing each member to vote his or her conscience on the appropriate law or standards to apply.

Four examples illustrate the dilemmas involved in relying on an impeachment decision as embodying a single principle of law. Each demonstrates that the likely weight Congress will give to an impeachment precedent depends heavily on the collective will and desires of current members of Congress, the facts of the case, and the political climate in which an impeachment inquiry or investigation arises.

One confusing precedent is the Blount impeachment. The Senate's votes on the impeachment resolution against Senator Blount can be read as reflecting the Senate's view—or at least that of the fourteen senators who voted against the impeachment resolution and assertion of jurisdiction against him—that senators are not impeachable officials. Those votes, however, could be construed in other ways. The attempt to impeach and convict Senator Blount arguably reflects the kinds of party divisions and regional antagonisms that existed during the early years of the nation. Blount was a Republican. Ten of the eleven senators voting to assert impeachment jurisdiction over Blount were Federalists; and five out of the six Republicans in the Senate voted to reject jurisdiction.³³ Yet, the fact that nine Federalists voted to reject jurisdiction, combined with the prior twenty-five to one vote to expel Blount,³⁴ reflect that something more than partisan politics may have motivated these proceedings and that most of the senators refused to

32. See Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341, 1345 (1990).

33. See ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 36 (1992).

34. See *id.* at 29, 36.

convict a corrupt individual on an improper basis.³⁵ In addition, Blount's popularity in the West, based on his leadership of a controversial movement to separate the West from the United States, may have influenced the vote to reject jurisdiction as reflected in the fact that every senator from the West voted against accepting jurisdiction.³⁶ The votes rejecting jurisdiction can also be read as reflecting the Senate's reluctance to convict someone whom it already had expelled or who was no longer in office at the time of his impeachment trial. Moreover, the latter votes could be construed as reflecting a sentiment among some senators that impeachment could be based only on indictable offenses. Even though twenty-five of the twenty-six members of the Senate voted to expel Blount for "a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator,"³⁷ the term, as used in that context, does not seem to have meant a crime, because no one accused Blount of having committed any recognized crime or violation of the law.³⁸ Furthermore, the Senate never voted directly on another question debated in the Blount impeachment; namely, whether impeachable misconduct must have occurred during the performance of official duties rather than apart from or outside the scope of those responsibilities.

The principle underlying the nation's second impeachment, involving United States District Judge John Pickering of New Hampshire, is subject to debate. The House impeached Pickering by a vote of forty-five to eight on March 2, 1803. The impeachment articles charged drunkenness, profanity on the bench, and the rendering of judicial decisions based neither on fact nor law.³⁹ Although Judge Pickering, like Senator Blount, did not appear on his own behalf in the Senate proceedings, his son filed a petition arguing that Pickering was so ill and deranged that he was incapable of exercising any kind of judgment or transacting any business and, therefore, should not be

35. See PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 162 (1984) ("Blount's case was an object lesson to both Federalists and Republicans: there was no hope for a sweeping politicization of impeachment law without a suitable revision or extension of the doctrine of impeachment.").

36. See *id.* at 162-63.

37. *Id.* at 152-53 (internal quotation and footnote omitted).

38. See *id.* at 153.

39. In particular, Pickering had been charged with ordering that a seized ship be delivered to Eliphalet Ladd contrary to the law requiring a claimant to produce a tax certificate; refusing to hear a witness on behalf of the United States also claiming the ship and then refusing to hear an appeal on the same matter; and being inebriated and disorderly while sitting in his capacity as a judge. See 13 *ANNALS OF CONG.* 319-22 (1804); *HINDS' PRECEDENTS*, *supra* note 18, § 2328, at 690-92.

removed from office for misconduct attributable to insanity.⁴⁰ Nevertheless, the Senate voted eighteen to twelve to accept evidence of Judge Pickering's insanity,⁴¹ nineteen to seven to convict,⁴² and twenty to six to remove him from office.⁴³ Consequently, Pickering became the first federal official impeached by the House and convicted and removed from office by the Senate.

Controversy still exists over whether Pickering's impeachment should be construed as standing for the principle that the charges in an impeachment proceeding are not limited to indictable criminal offenses.⁴⁴ On the one hand, Simon H. Rifkind, counsel for Justice William O. Douglas during a brief impeachment inquiry against the latter in 1970, contended that Pickering was charged "with three counts of wilfully violating a Federal statute relating to the posting of bond in certain attachment situations, and the misdemeanors of public drunkenness and blasphemy."⁴⁵ On the other hand, the authors of one important impeachment study claim that "no federal statute made violation of the bond-posting act a crime, nor obviously were drunkenness or blasphemy federal crimes. The Pickering impeachment . . . confirms that the concept of high crimes and misdemeanors is not limited to criminal offenses."⁴⁶ In his examination of the historical foundations of the federal impeachment process, Raoul Berger added that "[a] system which did not provide for removal of a demented judge because insanity was not a 'crime' would be sadly wanting."⁴⁷

Yet, it may be unfair to interpret the Pickering impeachment in either of these ways because, as Eleanore Bushnell has suggested, "[t]he question [of guilt] was put in the form of asking [senators] whether the judge stood guilty as charged,"⁴⁸ rather than whether the acts of which he had been accused constituted high crimes and misdemeanors. Consequently, the Senate's votes to convict and remove were not based on any explicit acknowledgement that an impeachable offense, indictable or otherwise, was actually involved. Indeed, several senators

40. See 13 ANNALS OF CONG. 328-30 (1804).

41. See *id.* at 332-33.

42. See HOFFER & HULL, *supra* note 35, at 217.

43. See *id.*

44. See Charles Morgan, Jr. et al., *Impeachment: An Historical Overview*, 5 SETON HALL L. REV. 689, 698 (1974).

45. *Id.* (quoting SPECIAL SUBCOMM. ON H. RES. 920 OF THE HOUSE COMM. ON THE JUDICIARY, 91ST CONG., LEGAL MATERIALS ON IMPEACHMENT 20 (Comm. Print 1970)).

46. *Id.* (footnote omitted).

47. *Id.* at 698-99 (quoting RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 57 n.15 (1973)).

48. BUSHNELL, *supra* note 33, at 51-52.

were offended by the form of the question put to them in the Pickering impeachment trial. Senator Jonathan Dayton of New Jersey

had no doubt that Pickering had been proved guilty of most of the acts described in the articles, but he [doubted] that any of them was impeachable. Five senators—Federalists Dayton and Samuel White (Delaware) and Republicans John Armstrong (New York), Stephen R. Bradley (Vermont), and David Stone (North Carolina)—withdrew from the court [of impeachment] when the Senate agreed to put the question in the form of “guilty as charged.” The two Federalists objected to irregularities in the proceedings and declined to be recorded on a solemn vote framed so improperly and not directed to the essential question of whether the charges did in fact describe high crimes and misdemeanors.⁴⁹

John Quincy Adams, by then a vigorous opponent of the Republican attempts to unseat Federalist judges, observed that “the three Republicans who withdrew probably also objected to certain irregularities and did not want to separate from their party by voting against the judge’s conviction.”⁵⁰ One such irregularity was that, even though it did not ultimately change the outcome of Pickering’s impeachment trial, the Senate allowed three senators to vote to convict and to remove the judge in spite of their each having also served in the House that had impeached the judge.

Another problem with relying on the Pickering impeachment as a precedent is that party affiliation seems to have played a major role in the Senate’s votes to admit the evidence of insanity and to convict and remove Pickering. All nineteen of the Senate’s votes to convict the Federalist judge came from Republicans, while all seven of Pickering’s acquittal votes came from Federalists.⁵¹ (In the Senate vote on removal, only one Federalist—William H. Wells from Delaware—moved sides and, in doing so, joined the nineteen Republicans who already voted to convict the judge.⁵²) Even the seemingly bipartisan vote to admit evidence of Judge Pickering’s insanity arguably could be explained on partisan grounds: the Federalist senators may have moved for the introduction of this evidence because they believed that proof of the judge’s insanity would save him from a guilty verdict given their position that insanity could not be classified as a high crime or misdemeanor and thus did not constitute an impeachable offense; while the Republicans might have expected the admission of this evidence to have led to the

49. *Id.* at 51 (footnote omitted).

50. 1 MEMOIRS OF JOHN QUINCY ADAMS 309 (Charles Francis Adams ed., 1970).

51. See HOFFER & HULL, *supra* note 35, at 217.

52. *See id.*

judge's conviction because they believed it demonstrated the need to remove him before he could damage the judicial system any further.

The Senate's failure to convict and remove Justice Chase and President Johnson also constitute dubious precedents despite their notoriety. Some commentators, such as Chief Justice William Rehnquist, view the outcomes of both of these impeachments as primarily signaling the end of the Congress' attempt to impeach and remove officials primarily for partisan reasons.⁵³ In Justice Chase's case, the House began the formalities of his impeachment just one day after approval of the articles of impeachment against Judge Pickering. The House, by a vote of seventy-three to thirty-two, impeached Justice Chase on March 12, 1804, for interfering with the due administration of justice and for depriving various defendants, accused of violating the Sedition Act, of the right to due process of law.⁵⁴ Approximately one year later, on March 1, 1805, the Senate voted to acquit Chase on all eight of the articles of impeachment brought against him, even though a majority of senators, numbering far less than two-thirds of the Senate, found him guilty on three articles.⁵⁵

Following several unsuccessful attempts, the House, by a vote of 126 to 47, impeached President Andrew Johnson on February 24, 1868.⁵⁶ Johnson angered many Republicans by opposing the drafting and ratification of the Fourteenth Amendment and by vetoing Reconstruction legislation,⁵⁷ interfering with the enforcement of Reconstruction, and trying to remove Republican appointees who did not share his constitutional vision.⁵⁸ To prevent Johnson from removing Republican appointees from office,⁵⁹ Congress passed the Tenure of Office Act over the President's veto.⁶⁰ Believing the act

53. See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 277-78 (1992).

54. Justice Chase was charged with condemning a defendant to death in violation of the Eighth Amendment's prohibition against cruel and unusual punishment, refusing to discharge a grand jury until it succumbed to his will and returned a specific indictment against a "seditious printer," and interfering with a prosecutor, ordering him "to find some passage which might furnish the groundwork of a prosecution" against the printer whom he insisted on having indicted. See 1 *TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS BEFORE THE SENATE OF THE UNITED STATES* 7-8 (De Capo Press 1970) (1805).

55. See 14 *ANNALS OF CONG.* 669 (1805).

56. See *CONG. GLOBE*, 40th Cong., 2d Sess. 1400 (1868).

57. See ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 12 (1960).

58. See *id.* at 11-12, 291-92.

59. See DAVID MILLER DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 180 (1903).

60. See *CONG. GLOBE*, 39th Cong., 2d Sess. 1966 (1867).

unconstitutional,⁶¹ President Johnson refused to abide by it and fired Secretary of War Edwin Stanton on February 21, 1868.⁶² That same day a resolution to impeach Johnson was referred to the Committee on Reconstruction,⁶³ and three days later it was adopted on the floor of the House.⁶⁴ All but one of the specific charges brought against President Johnson in the House involved violations of the Tenure of Office Act,⁶⁵ while the tenth article charged that President Johnson, intending to bring the Congress into “disgrace, ridicule, hatred, contempt, and reproach,” openly and publicly declared “with a loud voice certain intemperate, inflammatory, and scandalous harangues” against Congress and its laws.⁶⁶ Ultimately, the Senate voted on only three of the eleven articles of impeachment approved in the House.⁶⁷ Two of the three involved his appointment of a new Secretary of War to replace Stanton, and the other charged President Johnson with usurping the powers of Congress.⁶⁸ The Senate, whose membership was eighty percent Republican, acquitted President Johnson by a vote on each article of thirty-five guilty to nineteen not guilty, one less than the number necessary for conviction.⁶⁹

The Chase and Johnson impeachments can be read as confirming the House’s view that it may impeach for nonindictable offenses,⁷⁰ the Senate’s position that it can refuse to convict on such a basis, and perhaps the general proposition that the impeachment process may not be used to discipline Supreme Court Justices or Presidents for differences of opinion on policy or law or for errors of judgment. Yet, both impeachments arguably turned on other factors. The latter include the following: all nine Federalist senators voted to acquit Chase, who was a Federalist;⁷¹ some senators were concerned about the implications of Chase’s removal for the future judicial independence or doubted that

61. See CONG. GLOBE, 40th Cong., 2d Sess. 1350 (1868) (speech of Representative Beck, February 22, 1868, in which he quotes from a letter sent by Johnson to the Senate).

62. The letter from President Johnson to Secretary Stanton was set out in the first article of impeachment. See CONG. GLOBE, 40th Cong., 2d Sess. 1647 (1868).

63. See *id.* at 1329-30.

64. See *id.* at 1400.

65. See *id.* at 1349-51.

66. See *id.* at 1648.

67. See CONG. GLOBE SUPP., 40th Cong., 2d Sess. 411, 414-15 (1868).

68. See *id.*

69. See *id.*

70. See Morgan, *supra* note 44, at 699 (suggesting that the impeachment of Justice Chase confirmed the House’s view that it could impeach for both indictable and nonindictable offenses).

71. These Federalists were joined by six Republicans, who broke ranks to vote not guilty on each article of impeachment. See BUSHNELL, *supra* note 33, at 85; REHNQUIST, *supra* note 53, at 108.

Justice Chase committed an impeachable offense or engaged in any misconduct;⁷² one of the prosecutors in the Senate, John Randolph, was an unpopular politician and alienated fellow Republicans by strenuously opposing the Jefferson administration's settlement of a dispute involving the Georgia legislature's rescission of a land grant it had made a year earlier with different members who had been bribed to make the conveyance by land speculators;⁷³ and the House Managers may have been overmatched by Justice Chase's defense counsel, led by Luther Martin.⁷⁴

Whereas one must speculate as to the reasons for the failure to convict Justice Chase, "[t]hirty of the fifty-four senators who participated in the Johnson trial filed written opinions in which they explained their view[s] . . . and why they had voted the way they did."⁷⁵ These statements reflect that the outcome of the Johnson impeachment seems to have turned on several factors, including genuine doubts, even among those who voted guilty, that impeachable acts had been charged or proved;⁷⁶ uncertainty that the Tenure of Office Act covered Secretary of War Stanton;⁷⁷ signals from President Johnson that he would be easier to deal with in the future;⁷⁸ and the fear harbored by many Republicans that Benjamin Wade, a strident radical, who was the Senate Pro Tempore and the person who would become President if Johnson were ousted, would be even more difficult to deal with than Johnson had been.⁷⁹

The Chase, Johnson, Blount, and Pickering impeachments illustrate some of the difficulties with relying on past impeachments as representing simple principles of law. A prior impeachment trial might provide some persuasive argument, evidence, or illustration of some

72. See REHNQUIST, *supra* note 53, at 113.

73. See *id.* at 110-13. See generally C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC, THE CASE OF FLETCHER V. PECK (1966).

74. See BUSHNELL, *supra* note 33, at 87.

75. REHNQUIST, *supra* note 53, at 240.

76. See BUSHNELL, *supra* note 33, at 159; see also REHNQUIST, *supra* note 53, at 240-46.

77. See BUSHNELL, *supra* note 33, at 159; see also REHNQUIST, *supra* note 53, at 246.

78. See BUSHNELL, *supra* note 33, at 159; see also REHNQUIST, *supra* note 53, at 247.

79. See BUSHNELL, *supra* note 33, at 159; see also REHNQUIST, *supra* note 53, at 246-47. Chief Justice Rehnquist suggests that another possible reason for acquitting President Johnson may have been that "the tactics of the managers from beginning to end undoubtedly antagonized not only senators who were doubtful to begin with but some who leaned toward conviction at the beginning of the Senate trial." *Id.* at 247. He notes one commentator's observation that the House Managers "exhausted every device, appealed to every prejudice and passion, and rode roughshod, when they could, over legal obstacles in their ruthless attempt to punish the President for his opposition to their plans." *Id.* (quoting 2 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 1789-1877, at 517 (1965)).

principle for guiding some future proceeding, but Congress retains the discretion to change its mind, and the facts of any given case might dictate different outcomes. For instance, Congress' failure to impeach and remove a federal judge on the basis of an erroneous decision might lead some judges to rely on this failure in developing a sense of confidence or security that they may render constitutional decisions with substantial, if not total, impunity from political retaliation. Yet, Congress may not have brought any impeachments based on a judge's decisions for a wide variety of reasons, and, in any event, Congress is not bound by this failure to forego proceeding to try to impeach and remove a federal judge if Congress believes it has good reason to try to do so.

III

As one commentator summarized Chancellor Kent's thinking:

Settled rules, administered by an independent judiciary, constraints upon discretion to prevent arbitrariness, and uniformity in interpretation, were all necessary ingredients for the security of the natural right of property. That right, in turn, was inextricably linked to the right of liberty, both of which were entrusted to a judiciary charged with discovering the common law. The judiciary was an "enlightened body", made up of lawyers possessing a high degree of cultivated reason which equipped them for the task. This provided security from the dangers of factionalism arising from democratically elected legislatures.⁸⁰

It is reasonable to assume that judges would examine the historical and legal foundations of federal impeachment to illuminate the constitutional limitations on the appropriate grounds for judicial impeachments and thus to further protect their independence or security from legislative factionalism. As someone who appreciated the need for an independent judiciary and judicial identification and enforcement of clear, inflexible legal rules as protection against arbitrary majoritarian decision-making, Kent almost certainly would have approved of the development of similar rules for conducting impeachments. The development of such rules—or at least the development of a common law from which such rules may be discerned—would help to preclude the arbitrary if not hostile decision-making that almost certainly results in their absence.

No such common law developed for two reasons. First, the nature of the impeachment process is not amenable to simple or clear-cut

80. Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440, 450-51 (1993).

principles or rules because the standard of impeachment is quite vague and thus removal decisions turn on political judgments and circumstances.⁸¹ The process is concerned with the abuses of power, so that the kinds of things for which certain officials may be impeached vary widely, depending on the responsibilities of the official subject to impeachment and the circumstances under which that official exercises his or her respective responsibilities. Second, the Senate has voted to convict and remove only seven officials in American history.⁸² This number is quite small—perhaps, for some, too small—to serve as a reliable or authoritative source of a common law of impeachment. Third, the successful impeachment attempts largely—i.e., four of the seven—involved statutory crimes.⁸³ Hence, there is arguably little need to codify impeachable offenses because they may have been largely codified in the actions already deemed felonious by Congress.

While no formal common law of impeachment has developed, it is possible to discern something analogous to it—the various sources of decision relating to impeachment substitute in the impeachment context for the traditional sources of the common law, including judicial precedents. Notwithstanding the reasons a common law of impeachable crimes never developed, the history of the impeachment clauses and the history of Congress' exercises of its impeachment authority provide at least some insight into the substantive scope of impeachable offenses. Even if not fully determinative, the insights derived from such materials provide some illumination of the constitutional meaning of “high Crimes and Misdemeanors,” and some insight is certainly better than none. Consequently, I canvass below the historical materials relating to impeachment to clarify the basic elements of impeachable offenses. The first section focuses on the *actus reus* of impeachable offenses, i.e., the bad acts for which certain high-ranking officials may be impeached. The second section, relying primarily on postratification historical practices,

81. See GERHARDT, *supra* note 17, at 104-05.

82. All seven of those convicted were federal judges, each of whom was removed from office: John Pickering (for drunkenness and senility), West Humphreys (for incitement to revolt and rebellion against the nation), Robert Archbald (for bribery), Halsted Ritter (for engaging in actions impugning the integrity of the federal judiciary), Harry Claiborne (for tax evasion), Alcee Hastings (for conspiracy to solicit a bribe), and Walter Nixon (for giving false statements to a grand jury). See *id.* at 185 n.4. Only Judge Humphreys and Judge Archbald were also disqualified from holding future offices of honor or trust of the United States. See *id.*

83. Pickering, Humphreys, and Ritter were convicted of misconduct that was not, at least at the time of their convictions, codified as criminal conduct. See Edwin Brown Firmage, *The Law of Presidential Impeachment*, 1973 UTAH L. REV. 681, 695-98. The other four—Archbald, Hastings, Claiborne, and Nixon—were all convicted of misconduct codified as criminal. See *id.*; Edwin Brown Firmage & R. Collin Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023.

elucidates the required mens rea of impeachable offenses, i.e., the requisite intent or mind-set for an impeachment.

A. *The Actus Reus of Impeachable Offenses*

At common law, crimes consists of two essential elements—actus reus and mens rea. While there is ample evidence to suggest that the Founders did not intend for the impeachment process to track the criminal law in all essential respects,⁸⁴ the criminal law did provide a backdrop, as did the impeachment experiences in England and the states, for the drafting of the impeachment clauses of the Constitution. The influence of these disparate sources on the latter clauses is evident in both the language adopted and postratification historical practices.

Historical practices and the original understanding of the Constitution suggest that the bad acts constituting impeachable offenses are what the Founders understood to be political crimes. To appreciate the essential nature of an impeachable offense, particularly of a so-called “political crime,” one needs to examine the different sources of the constitutional language and design for impeaching certain high-ranking federal officials.

1. The Nature of Political Crimes

The operative constitutional language—“high Crimes and Misdemeanors”—is subject to at least two different interpretations. The first is that the term “high” modifies traditional categories of criminal offenses.⁸⁵ The second is that the inclusion of some indictable crimes, such as treason and bribery, as impeachable offenses limits impeachable offenses to indictable crimes.⁸⁶

In the English experience prior to the drafting and ratification of the Constitution, impeachment was primarily a political proceeding, and impeachable offenses were political crimes. Even though he ultimately shied away from the implications of his research, Raoul Berger observed that the English practice treated “[h]igh crimes and misdemeanors’ [as] a category of *political* crimes against the state.”⁸⁷ Berger supports this observation with quotations from relevant periods in which the speakers use terms equivalent to “political” and “against the state” to identify the distinguishing characteristics of an

84. See generally Rotunda, *supra* note 25, at 721-28.

85. See BERGER, *supra* note 47, at 53-59.

86. See *id.*

87. *Id.* at 61.

impeachable event.⁸⁸ In England, the critical element of injury in an impeachable offense was injury to the state.⁸⁹ The eminent legal historian, William Blackstone, traced this peculiarity to the ancient law of treason, which distinguished “high” treason—disloyalty against some superior—from “petit” treason—disloyalty to an equal or an inferior.⁹⁰ The late Professor Arthur Bestor further explained that “[t]his element of injury to the commonwealth—that is, to the state itself and to its constitution—was historically the criterion for distinguishing a ‘high’ crime or misdemeanor from an ordinary one.”⁹¹ The English experience, therefore, reveals that there was

[a] difference of degree, not a difference of kind, separat[ing] “high” treason from other “high” crimes and misdemeanors [and that] [t]he common element in [English impeachment proceedings] was [the] injury done to the state and its constitution, whereas among the particular offenses producing such injury some might rank as treasons, some as felonies and some as misdemeanors, among which might be included various offenses that in other contexts would fall short of actual criminality.⁹²

The constitutional convention and ratification campaign reflect a widespread understanding of impeachment as a political proceeding and impeachable offenses as essentially political crimes.⁹³ The delegates at the constitutional convention were intimately familiar with impeachment in colonial America, which, like impeachment in England, had basically been a political proceeding. Although the debates in the convention primarily focused on the offenses for which the President could be impeached and removed, there was general agreement that the President could be impeached only for so-called “great” offenses.⁹⁴

88. See *id.* at 59-62.

89. See Arthur Bestor, *Impeachment*, 49 WASH. L. REV. 255, 264 (1973) (reviewing BERGER, *supra* note 47).

90. See *id.* Blackstone commented that:

TREASON . . . in it's [sic] very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. . . . [T]reason is . . . a general appellation, made use of by the law, to denote . . . that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, . . . and the inferior . . . so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. . . . [T]herefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears it's [sic] crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio*; being equivalent to the *crimen laesae majestatis* of the Romans.

Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75 (1769)).

91. *Id.* at 263-64.

92. *Id.* at 265.

93. See *id.* at 266.

94. See BERGER, *supra* note 47, at 88 (observing that “James Iredell, later a Supreme Court

Drawing in part upon their understanding of the kinds of offenses for which people may be impeached in England, various delegates gave examples of the types of conduct justifying impeachment. In an exchange at the constitutional convention between George Mason and James Madison, Mason objected to limiting impeachment to treason and bribery because he thought impeachment should reach “attempts to subvert the Constitution.”⁹⁵ He recommended that the delegates include “maladministration” as an impeachable offense.⁹⁶ Illustratively, Mason referred approvingly to the contemporary impeachment of Warren Hastings—formerly the Governor-General of India—as based not on treason but an attempt to “subvert the Constitution.”⁹⁷ Madison responded that “maladministration” was “[s]o vague a term [as to] be equivalent to a tenure during [the] pleasure of the Senate.”⁹⁸ Madison preferred the phrase “high crimes and misdemeanors” as an alternative⁹⁹ that would encompass attempts to subvert the Constitution and other similarly dangerous offenses. The debates at the convention confirmed that impeachable offenses included abuses against the state and thus were not limited to indictable offenses. Neither the debates nor the relevant constitutional language eventually adopted, however, identifies the *specific* offenses that constitute impeachable abuses against the state.

Nevertheless, the debates in the ratification campaign also support the conclusion that “other high Crimes and Misdemeanors” was not limited to indictable offenses but rather included great offenses against the federal government.¹⁰⁰ For example, delegates to state ratification conventions often referred to impeachable offenses as “great” offenses (but not necessarily as criminal), and they frequently spoke of how impeachment should lie if the official “deviates from his duty”¹⁰¹ or if he “dare to abuse the powers vested in him by the people.”¹⁰²

Justice, told the North Carolina convention [during the ratification campaign] that the ‘occasion for its exercise [impeachment] will arise from acts of great injury to the community’” (citation omitted) (alteration in original)).

95. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1911).

96. *See id.*

97. *Id.*; *see* Rotunda, *supra* note 25, at 723.

98. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 95, at 550.

99. *See id.* According to Blackstone, “‘High misdemeanors’ in British usage included ‘maladministration of such high officers, as are in public trust and employment.’” Rotunda, *supra* note 25, at 723 (quoting 5 BLACKSTONE, *supra* note 90, at 121).

100. *See* Rotunda, *supra* note 25, at 723.

101. *Id.* (quoting 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 47 (J. Elliott ed., 1836) (quoting Archibald MacLaine of South Carolina)).

102. *Id.* (quoting 2 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 101, at 169 (quoting Samuel Stillman of Massachusetts)).

Alexander Hamilton echoed such sentiments, observing:

The subject [of the Senate's] jurisdiction [in an impeachment trial] 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.¹⁰³

Believing it unwise to submit the impeachment decision to the Supreme Court because of "the nature of the proceeding,"¹⁰⁴ Hamilton argued that the impeachment court could not be "tied down" by strict rules, "either in the delineation of the offense by the prosecutors [the House of Representatives] or in the construction of it by the judges [the Senate]."¹⁰⁵ Hamilton too believed that impeachable offenses comprised a unique set of transgressions that defied neat delineation.

Both Justices James Wilson and Joseph Story expressed agreement with Hamilton's understanding of impeachable offenses as political crimes. In a series of lectures on the new Constitution given immediately after his appointment to the Supreme Court, Justice Wilson referred to impeachments as involving, *inter alia*, "political crimes and misdemeanors."¹⁰⁶ Justice Wilson understood the term "high" describing "Crimes and Misdemeanors" to mean "political."¹⁰⁷ Similarly, Justice Joseph Story recognized the unique political nature of impeachable offenses:

The jurisdiction is to be exercised over offenses, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character¹⁰⁸

Justice Story also viewed the penalties of removal and disqualification as "limiting the punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries."¹⁰⁹ Justice Story understood "political injuries" to be "[s]uch kind of misdeeds . . . as peculiarly injure the

103. *Id.* at 723-24 (quoting THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (New Am. Libr. ed. 1961)).

104. *Id.* at 724 (quoting THE FEDERALIST NO. 65, *supra* note 103, at 398 (Alexander Hamilton)).

105. *Id.* (quoting THE FEDERALIST NO. 65, *supra* note 103, at 398 (Alexander Hamilton)).

106. 1 THE WORKS OF JAMES WILSON 426 (Robert Green McCloskey ed., 1967).

107. *Id.*

108. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 385, at 272-73 (Carolina Academic Press 1987).

109. *Id.* § 407, at 290.

commonwealth by the abuse of high offices of trust.”¹¹⁰

In much the same manner as Hamilton, Justice Story understood that the Framers proceeded as if there would be a federal common law on crimes from which future Congresses could draw the specific or particular offenses for which certain federal officials may be impeached and removed from office. Justice Story explained that “no previous statute is necessary to authorize an impeachment for any official misconduct.”¹¹¹ Nor in Justice Story’s view, could such a statute ever be drafted because “political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.”¹¹² The implicit understanding shared by both Hamilton and Justice Story was that subsequent generations would not have a federal common law of crimes to guide them in determining impeachable offenses, but rather would have to define on a case-by-case basis the political crimes serving as contemporary impeachable offenses.

The remaining problem is how to identify the nonindictable offenses for which certain high-level government officials may be impeached. Historical practices provide some insight into the answer to this dilemma. Mindful of the problems with relying on impeachment precedents as clear expressions of past, present, or future congressional will, one can still identify some trends in formal impeachment practices. First, of the fifteen men impeached by the House of Representatives, only four were impeached technically on grounds which constitute a criminal offense;¹¹³ and one of those four, Alcee Hastings, had been formally acquitted of bribery prior to his impeachment.¹¹⁴ The House’s articles of impeachment against nine others included misuses of power, each nonindictable federal offenses, at least at the time approved.

The Senate’s attitude about the scope of impeachable offenses may be more difficult to discern. The Senate, however, has convicted some officials on the basis of nonindictable offenses, including: Judge

110. Bestor, *supra* note 89, at 263 (quoting 2 STORY, *supra* note 108, § 744, at 217).

111. 1 STORY, *supra* note 108, § 405, at 288.

112. *Id.* § 404, at 287.

113. The four were Secretary of War William Belknap (charged with accepting bribes); Harry Claiborne (charged with wilfully making false tax statements); Alcee Hastings (charged with conspiring to solicit a bribe and perjury), and Walter Nixon (charged with perjury). One should also note that President Clinton was impeached by the House for misconduct—perjury and obstruction of justice—constituting indictable offenses.

114. See *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 95 (D.C. Cir. 1987).

Pickering (public drunkenness and blasphemy);¹¹⁵ Judge West H. Humphreys (convicted and removed by the Senate for having publicly advocated that Tennessee secede from the Union, organized armed rebellion against the United States, accepted a judicial commission from the Confederate Government, holding court pursuant to that commission, and failing to fulfill his duties as a U.S. District Judge);¹¹⁶ Judge Robert Archbald (convicted, removed, and disqualified by the Senate for obtaining contracts for himself from persons appearing before his court and others and for adjudicating cases in which he had a financial interest or received payment—offenses for which, as the Chairman of the House Impeachment Committee at the time conceded, no criminal charges could be brought);¹¹⁷ and Judge Halsted Ritter (convicted and removed from office on the sole basis that he had brought “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[]”¹¹⁸). Even so, the recent trend in the Senate seems to be that charging indictable offenses increases the likelihood of conviction, as occurred with Judges Claiborne, Nixon, and Hastings.

Second, partisan loyalties and differences of opinion have played occasional roles in the impeachment process. For example, heated partisan differences between Republicans and Federalists or Democrats over the appropriate handling and exercise of federal power were driving forces in the impeachments of William Blount, John Pickering, Samuel Chase, James Peck, West Humphreys, and Andrew Johnson. Yet, in American history, no conviction has yet been based solely on partisan grounds. In addition, in the cases of Justice Chase and President Johnson, partisan differences may have given rise to the initiation of their impeachment proceedings but seem to have dissipated or become diffused as the two officials came to the brinks of conviction and removal.

The impeachment attempt against President Nixon seemed to follow a somewhat similar pattern to the impeachments of Justice Chase and President Johnson. In 1974, President Nixon received strong support from party loyalists in the House in the early phases of the impeachment investigation against him. By late July and early August of

115. See 13 ANNALS OF CONG. 319-22 (1804); HINDS' PRECEDENTS, *supra* note 18, § 2328, at 690-92.

116. See CONG. GLOBE, 37th Cong., 2d Sess. 2949-50 (1862).

117. See 48 CONG. REC. 8910 (1912).

118. 80 CONG. REC. 5606 (1936).

1974, the House Judiciary Committee approved three articles of impeachment (each opposed by all of the Republicans on the Committee), charging President Nixon with obstruction of justice, abuse of power, and unlawful refusal to supply material subpoenaed by the House of Representatives.¹¹⁹ Behind the scenes, though, party loyalists encouraged the President to resign, given their assessment that he was likely to be both impeached and removed from office. By early August, Nixon lost the support of all of his fellow Republicans in Congress once he made public several tapes of recorded conversations in which he acknowledged to his aides his involvement in some of the matters giving rise to the impeachment inquiry.¹²⁰ The willingness of prominent and loyal Republicans to join in acknowledging President Nixon's impeachability and in encouraging him to resign obviously helped to precipitate his resignation. Partisanship played a different role in President Clinton's impeachment proceedings. Indeed, partisanship was evident in the voting patterns in both the House and the Senate, with Republicans in the House and the Senate overwhelmingly in favor of his removal and Democrats in both chambers overwhelmingly opposed to his removal. Yet, the apparent partisanship in those proceedings helped to secure, ultimately, an acquittal rather than a conviction.

Given that certain federal officials may be impeached and removed from office for committing serious abuses against the state, and that these abuses are not confined to indictable offenses, the persistent challenge has been to find contemporary analogues to the abuses against the state that authorities such as Hamilton and Justices Wilson and Story viewed as suitable grounds for impeachment. On the one hand, these abuses may be reflected in certain statutory crimes. At least one federal criminal statute—the bribery statute¹²¹—codifies an impeachable offense because bribery is expressly designated as such in the Constitution. Violations of other federal criminal statutes may also reflect abuses against the state sufficient to subject the perpetrator to impeachment, insofar as the offenses involve a serious lack of judgment

119. See IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 1-4 (1974) [hereinafter NIXON IMPEACHMENT REPORT]. Article 1, charging obstruction of justice, received 27 affirmative and 11 negative votes, all 11 of which were cast by Republicans. See *Debate on Articles of Impeachment: Hearings of the Comm. on the Judiciary*, 93rd Cong. 329-31 (1974). Article 2, charging abuse of presidential powers, was adopted by a vote of twenty-eight to ten, all the opposing votes for which came from Republicans. See *id.* at 445-47. The last of the articles, dealing with the President's disregard of a subpoena issued by the House, was approved twenty-one to seventeen with two Democrats joining fifteen Republicans in voting no. See *id.* at 488-89.

120. See NIXON IMPEACHMENT REPORT, *supra* note 119, at 499.

121. 18 U.S.C. § 201 (1994).

and respect for the law and their commission lowers respect for the office. In other words, there are certain statutory crimes that, if committed by public officials, reflect such lapses of judgment, breaches of the public trust, disregard for the welfare of the state, and disrespect for the law and the office held, that the occupant may be impeached and removed from office for lacking the minimal level of integrity and judgment sufficient to discharge the responsibilities of the office.

Not all statutory crimes, however, demonstrate unfitness for office. For example, “a President’s technical violation of a law making jay-walking [or speeding] a crime obviously would not be an adequate basis for presidential [impeachment and] removal.”¹²² Moreover, it is equally obvious that some noncriminal activities may constitute impeachable offenses. As Professor Laurence Tribe observed, “A deliberate presidential decision to emasculate our national defenses or to conduct a private war in circumvention of the Constitution would probably violate no criminal code, but it should surely be deemed a ground of impeachment.”¹²³ The boundaries of congressional power to define the kinds of political offenses that fall in between these extremes defy simple specification because they turn on the circumstances under which they have been committed (including the actor, the forum, other means for redress, and the offensive act) and on the collective *political* judgment of Congress. For instance, the profile or political popularity of the targeted official (including his or her conduct) is a significant factor in every impeachment attempt. Moreover, the history of impeachment attempts illustrates that the more high-profile the target of an impeachment the more serious the charges and the clearer and more compelling the evidence of misconduct must be. This outcome should not be surprising, for the higher the profile of the targeted official, the greater the latter’s resources to muster public support against congressional recourse to punishment in the form of an impeachment, and the greater the downside for those who try but fail in an impeachment setting to oppose political figures who can muster significant political support.

2. The Requisite Connection to a Public Official’s Performance or Responsibilities

Clearly implicit within the prior discussion of the requisite bad acts for which one may be impeached is that officials charged with having committed impeachable offenses have committed the bad acts while in

122. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 294 (2d ed. 1988).

123. *Id.*

office. Indeed, the delegates to the constitutional convention agreed to limit impeachment to officeholders, in deliberate contrast to the English practice in which anyone, except for a member of the royal family, could be impeached.¹²⁴ Moreover, every impeachment inquiry initiated thus far has focused on misconduct allegedly committed while the targeted official occupied an impeachable office.

The open question is not whether misconduct in office may lead to impeachment, but rather what may count for impeachment purposes as “in office.” The most plausible answer is that it is permissible to bring an impeachment action against an official at any time (i.e., while in office or subsequent to resignation of or departure from office) as long as some nexus exists between the misconduct and an impeachable official’s performance in or procurement of office.¹²⁵ Two hypotheticals help to illustrate this point. The first has to do with whether an official may be impeached for conduct in office that does not relate to his or her formal responsibilities. One possible answer to this hypothetical derives from the viewpoint that everything a federal official does while in office is related to his or her office because the person is technically always on duty. According to this viewpoint, everything one does in office is related to official status and thus the performance of official duties.

Historical practices seem to support this viewpoint. For instance, the House impeached and the Senate convicted and removed Harry Claiborne for income tax evasion.¹²⁶ Neither Claiborne’s impeachment by the House nor conviction by the Senate involved or turned on his decision-making as a judge or the performance of his duties while on the bench. Nevertheless, he was impeached by the House and convicted and removed by the Senate.¹²⁷ No one in the House spoke in defense of Judge Claiborne, while the Senate Impeachment Trial Committee quickly dismissed Claiborne’s objection that he could not be impeached because the misconduct with which he was charged did not relate directly to his performance of his official duties.¹²⁸

In other words, the Claiborne impeachment reinforces the notion that someone who holds office also holds the public’s trust, and an

124. See GERHARDT, *supra* note 17, at 10.

125. For a prolonged discussion of the legitimacy of postresignation impeachments, see *id.* at 79-81.

126. See PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, A JUDGE OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, S. DOC. NO. 99-48, at 2-3, 298 (1986).

127. See *id.* at 298.

128. See *Hearings Before the Senate Impeachment Trial Comm.*, 99th Cong., pt. 1, at 77, 80 (1986).

officeholder who somehow violates that trust effectively loses the confidence of the people and, consequently, must forfeit the privilege of holding at least his or her present office.¹²⁹ In this context, conduct that may be seemingly unrelated to the responsibilities of a particular office (such as the failure to pay child support or alimony) may still relate to or reflect on an official's integrity or ability to hold the people's trust. Hence, Harry Claiborne's commissions of income tax fraud may not have been directly related to, or even influenced his performance on, the district court bench, but nevertheless justified his impeachment and removal because they demonstrated some serious lapses of judgment and if left unchecked by Congress had the potential for seriously diminishing the public's confidence in the integrity of the federal bench.

Yet, upon inspection, it is possible to understand Judge Claiborne's misconduct as having a nexus to his official duties. For one thing, his duties as a federal judge entailed overseeing trials, including swearing in witnesses and sentencing people convicted of tax evasion. His conviction for the same offenses for which he might sentence other people clearly robbed him of the requisite moral authority to discharge his sentencing function. Moreover, the *Report of the House Judiciary Committee* recommending Claiborne's impeachment to the full House concluded that Claiborne's conviction (like Pickering's insanity more than a century before) effectively disabled him from performing his duties as a federal judge.¹³⁰

No doubt, President Clinton's acquittal could be construed as having been based in part on the fact that his misconduct—lying about or trying to conceal the nature of his relationship with Monica Lewinsky—did not have a sufficiently close nexus to his official duties nor a public dimension to warrant his removal. At least six senators claimed that the absence of such a clear nexus was a factor for their voting to acquit the President.¹³¹

It is also easy to imagine that a President who murdered someone in a jealous rage has committed an impeachable offense. Even though the crime appears to be unrelated to the President's formal constitutional duties, his criminal act considerably cheapens the presidency and

129. See Bestor, *supra* note 89, at 263 (commenting that the penalties for impeachment were designed to "secure the public against political injuries." And [Justice Story] defined the latter as "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust.") (quoting 2 STORY, *supra* note 108, § 788, at 256, § 810, at 278)).

130. See HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, JR., H. REP. NO. 99-688, at 23 (1986); 132 CONG. REC. 30,251-58 (1986).

131. See, e.g., Closed Door Statements of Senators Beden, Breaux, Boxer, Conrad, Jeffords, Leahy (released into Congressional Record) (Feb. 12, 1999).

demonstrates such lack of respect for human life and disdain for the law (which he is sworn to enforce faithfully) that Congress could reasonably conclude he had effectively disabled himself from continuing his function as President. As Professor Charles Black once observed:

Many common crimes—willful murder, for example—though not subversive of government or political order might be so serious as to make a president simply unviable as a national leader; I cannot think that a president who had committed murder could not be removed by impeachment. But the underlying reason remains much the same; such crimes would so stain a president as to make his continuance in office dangerous to public order.¹³²

The second hypothetical is more difficult. It involves wrongdoing committed before one assumes office. As a general matter, it is noteworthy that no one has ever been impeached, much less removed from office, for something he or she did prior to assuming an impeachable position in the federal government. No doubt, anyone who would ever be subjected to such an impeachment could argue that the Congress' consistent failure ever to bring an impeachment on this basis clearly indicates that Congress has never considered misconduct prior to entering federal office to constitute an impeachable offense. One could further argue that this failure, combined with the consistent congressional practice of bringing impeachments only against officials for their wrongful acts in office, establishes the principle that federal impeachments are limited to the wrongful conduct of impeachable officials committed while they were in office. Moreover, impeaching someone for something they did in their private life prior to entering public office obviously frustrates the Framers' desire to preclude the impeachment of private citizens. In other words, only the misconduct of public officials committed while they are in office may constitute the bases for impeachable offenses.

A counterargument is that one reason no one has ever been impeached on this basis is that Congress has never tried to bring such an impeachment. The failure to impeach someone for something they did prior to entering federal office is not surprising, especially when one considers the opportunity for doing so is likely to have been quite rare and that, even had it arisen, Congress would likely have had great difficulty in marshaling sufficient political support to proceed with an impeachment. Nevertheless, if Congress' failure to bring certain kinds of impeachments permanently precludes their initiation, then Congress could never impeach someone on grounds that virtually everyone would

132. CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 39 (1974).

accept as legitimate, such as a President's commission of a murder while in office. Moreover, the dividing line between the life or conduct of a private citizen (for which the latter may not be impeached precisely because it was done while he or she was a private citizen) and misconduct in office for which one may be impeached is not so neat. For example, it is easy to imagine situations in which impeachable offenses could be based on present misconduct consisting of suppression or misrepresentation of prior misconduct. Particularly in cases in which an elected or confirmed official has lied or committed some other act of wrongdoing to get into their present position, the misconduct that was committed prior to entering office clearly bears on the propriety of the way in which the present officeholder entered office as well as the integrity of that official to remain in office.

The problem of trying to impeach someone for misconduct prior to entering office is further complicated, however, by the fact that it may manifest itself in two different ways, each requiring a separate analysis for determining whether an impeachable offense is involved. First, the public could elect, or the Senate could confirm, an official, even though it knew that he or she had done something wrong. The only reason for invoking the impeachment process in this circumstance is the perceived need for Congress to express its independent judgment that the official in question is not fit for office and should be punished.

The difficulty is that it is unclear how the nation has been injured or the public trust has been violated when the electorate or the Senate was fully informed of the misconduct and still elected or confirmed the person. If the impeachment process is designed for Congress to remove people to protect the public trust, that goal seems to have become mooted when the public has passed on the conduct involved. It is especially difficult to envision how an impeachable offense is involved or an impeachment could be successfully pursued in a case in which Congress is trying to impeach someone for a reason about which the Senate knew at the time it confirmed the person. If the conduct made known to the electorate or the Senate was committed in an elected or confirmed official's private capacity prior to his or her election or confirmation, it is even less clear how the interests protected by the impeachment process are implicated. In the latter circumstance, all that can be safely said is that, as a matter of common sense and good policy—but not constitutional law—Congress may wish to take into consideration the information made public during the election and the nature of the alleged offense involved during its deliberations on impeachment, because a successful impeachment ultimately depends on

the credibility of Congress' claim that it is acting in the best interests of the people, who arguably have ratified or at least expressed no disapproval of the prior conduct in question.¹³³

The other circumstance is when the public or the Senate did not know about the misconduct of an official prior to his or her election or confirmation. In this situation, Congress could claim that something akin to voter fraud occurred, that the integrity of the electoral or confirmation process is involved, and that it has a fiduciary obligation to remedy the situation by conducting an impeachment either to put into effect what the voters likely would have done had they been fully informed or to determine the official's continued fitness to serve in light of the new information.¹³⁴ The kinds of factors Congress might consider in determining the existence of an impeachable offense or the propriety of an impeachment are the seriousness of the misconduct, its timing (i.e., how old it is), the degree to which the offense was discussed in the election or confirmation, the official's job performance thus far in spite of it, and the proximity of the next relevant election (Congress might prefer to let the voters decide).¹³⁵

133. A variation of this situation occurred with respect to the election of Alcee Hastings to the House of Representatives in 1993. See Alan I. Baron, *The Curious Case of Alcee Hastings*, 19 NOVA L. REV. 873, 902 (1995). Even though Hastings had been impeached and removed in 1989 from the office of federal district judge, his subsequent election to the House of Representatives is most commonly viewed as an acceptance of his claims of innocence by the citizens of his district, an expression of their indifference to the conduct that led to his removal, or a statement by them that the conduct for which he was impeached was irrelevant to their election of him as their Representative in the House. See GERHARDT, *supra* note 17, at 60.

134. Shortly before Justice Hugo Black's confirmation, rumors surfaced in the Senate chamber about his possible affiliation with the Ku Klux Klan ("KKK") as a younger man. Black denied the rumor on the Senate floor, but after his confirmation, he publicly addressed the issue in a short radio address—the only time he ever addressed the issue publicly. In his address, he admitted that he had been a member of the KKK only for a short while during his youth and that he did not intend ever again to talk about the issue publicly. It took some time for the uproar to die down. Even though there were threats of impeachment leveled against Justice Black, nothing became of them. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 47-48 (3d ed. 1993); VIRGINIA VAN DER VEER HAMILTON, *HUGO BLACK: THE ALABAMA YEARS* 275, 278-79, 285, 292, 294-96 (1972). Of course, Black was not under oath when he denied the rumor on the Senate floor nor did he suppress evidence in the midst of his confirmation hearing. Nevertheless, the question that intrigues many people today is whether a judge or justice who is believed to have lied in a confirmation hearing but has been confirmed may be impeached for having lied under oath—a federal felony. There is little doubt that such misconduct would constitute an impeachable offense because it is not only very serious but it also has a nexus to the office obtained because the lie arguably helped the person secure the position. No doubt, likely defenses would include that the person did not lie under oath, that the statement made was not pivotal or material to the proceedings, and that the offense alleged generally was not serious.

135. In any event, constitutional safeguards apply to the impeachment process and should circumscribe congressional efforts to define political crimes. The Constitution includes several guarantees to ensure that Congress will deliberate carefully prior to making any judgments in an impeachment proceeding: (1) when the Senate sits as a court of impeachment, "they shall be on Oath

3. The Relevance of Other Avenues of Redress

Several impeachment attempts have raised questions about whether impeachment was the appropriate process for punishing the targeted officials, and the failure to impeach or convict in each of these cases seems to have turned at least to some extent on the judgment of some members of Congress that other avenues of redress were better-suited than impeachment to deal with the conduct in question. For instance, part of Justice Chase's defense, as put forward by Luther Martin, one of his counsel, was that impeachment was ill-suited to deal with less than ideal judicial behavior and that the judicial process was better-suited for dealing with mistakes of law or intemperate outbursts by trial judges.¹³⁶ Similarly, many senators acknowledged in Andrew Johnson's impeachment trial that the political or electoral process was the appropriate forum for holding Johnson accountable for his firing of Edwin Stanton or his efforts to impede the progress of Reconstruction.¹³⁷ More recently, many of President Clinton's defenders in the House and Senate claimed that criminal prosecution or the judgment of history, but not impeachment, was the appropriate means by which to hold him accountable for his misconduct.¹³⁸

Subsequently, no impeachment attempt based solely on a judge's performance on the bench, particularly his decisions or rulings, has proceeded beyond the initial inquiry stage in the House of Representatives. On three occasions Associate Justice William O. Douglas had impeachment resolutions introduced and impeachment inquiries launched against him—in 1953 for granting a stay of execution in the case of Julius and Ethel Rosenberg, in 1957 for marrying for the

or Affirmation," U.S. CONST. art. 1, § 3, cl. 6; (2) at least two-thirds of the Senators present must favor conviction in order for the impeachment to be successful, *see id.*; and (3) in the special case of presidential removal, the Chief Justice must preside so that the Vice-President, who otherwise normally presides, is spared from having to oversee the impeachment trial of the one person who stands between him and the presidency; *see id.*

Two other safeguards are political in nature. First, members of Congress seeking reelection have a political incentive to avoid any abuse of the impeachment power. The knowledge that they may have to account to their constituency may lead them to deliberate cautiously on impeachment questions. Second, the cumbersome nature of the impeachment process makes it difficult for a faction guided by base political motives to impeach and remove someone from office. Thus, these structural and political safeguards help to ensure that, as a practical matter, "[s]ome type of wrongdoing must exist in order for an impeachment to lie—there can be no impeachment for mere policy difference." Rotunda, *supra* note 25, at 726 (footnote omitted).

136. *See* HOFFER & HULL, *supra* note 35, at 248.

137. *See generally* REHNQUIST, *supra* note 53, at 271.

138. *See, e.g.*, Closed Door Statements of Senators Biden, Breaux, Byrd, Cleland, Collins, Durbin, Graham, Kerrey, Kohl, Lautenberg, and Wellstone (released into the Congressional Record) (Feb. 12, 1999).

fourth time, and in 1970 for the supposed immorality of his lifestyle and his judicial decision-making.¹³⁹ Nothing came from any of these. In 1970, for instance, the House Judiciary Committee concluded that a nonpartisan basis for proceeding against Justice Douglas was absent and thus declined to investigate him further.¹⁴⁰

If the absence of any successful impeachment attempt aimed at a judge's decisions or rulings has any significance, it might be for two reasons. First, as this symposium no doubt will demonstrate, judicial independence requires substantial freedom from political retaliation against judicial opinions, decisions, or rulings. Second, impeachment is not the only, or perhaps the preferred, mode of redress for any misconduct or questionable act by an impeachable official. Not all misconduct or mistakes made by high-ranking governmental officials, including the President, necessarily trigger or merit impeachment. Impeachment was not designed to remedy every mistake (or crime, for that matter) committed by an impeachable official. Instead, other mechanisms exist for misconduct falling short of the kind of harm a political crime would entail. For instance, the political process often offers an appropriate forum for redress for some of the misconduct Presidents and other high-ranking officials might have committed. Moreover, the appellate system provides an adequate means or forum for vindicating any wrong done by means of a decision, opinion, or ruling by a federal district or appellate judge. The critical question is whether the vindication provided by the appellate system fully or adequately redresses the wrongs caused by means of judicial opinions or acts. If so, then recourse to impeachment seems both unnecessary and excessive. In addition, the Judicial Disability Act provides various remedies, including temporary suspension of a district or appellate judge who has become incapacitated or unable to perform his or her duties or required disciplining for some misconduct falling short of an impeachable offense.¹⁴¹

B. The Requisite Mens Rea

Although the Founders evidenced no intent to equate common law

139. See MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE 7 (1993).

140. See SPECIAL SUBCOMM. ON H.R. RES. 920 OF THE COMM. ON THE JUDICIARY, 91ST CONG., FINAL REPORT ON ASSOCIATE JUSTICE WILLIAM O. DOUGLAS 349 (Comm. Print 1970); see also GERHARDT, *supra* note 17, at 29.

141. See Judicial Disability Act, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331-332, 372, 604 (1994)).

crimes with political crimes for impeachment purposes, their rhetoric sometimes suggested that the elements might parallel each other. In particular, many Framers seemed to presume that some sort of malicious or bad intent would be an element of an impeachable offense. In discussing the scope of impeachable offenses in the constitutional convention, James Madison suggested that a President's "deliberate" attempt to weaken national defenses should qualify as an impeachable offense. Similarly, in *The Federalist Papers*, Alexander Hamilton suggested that the exercise of "Will" rather than judgment would constitute a nonjudicial act by a judge, something that presumably would constitute in his view an abuse of judicial power.¹⁴² The term "Will" clearly implies a conscious or deliberate mind-set. In addition, the prominent anti-Federalist Brutus suggested that judicial impeachment would be inappropriate if based on a judge's decisions but would be legitimate if the judge "had wicked motives"¹⁴³—plainly implying that some kind of malicious intent had to be present in order for a legitimate judicial impeachment to take place.

Review of the records of debates in some actual impeachment proceedings reveals that some kind of bad or malicious intent constitutes an element of an impeachable offense. The most extensive discussion of this requirement occurred in the impeachment proceedings brought against Justice Samuel Chase. One of the central issues in Chase's impeachment turned on his intent. Malicious or bad intent was an element of each of the charges made against Chase.¹⁴⁴ Chase's prosecutors, led by John Randolph, argued that Chase's bad intent need not be proved but rather should be inferred from the outrageousness of his actions on the bench.¹⁴⁵ The point of this argument was three-fold. First, it saved the prosecution from having to prove something that normally would have been nearly or perhaps absolutely impossible to prove—bad or malicious intent. Second, by making bad motive an element but one that would be relatively easy to show, Chase's prosecutors were trying to develop a standard that could be used for ousting Chase but that could avoid constituting a basis of removal for purely or largely partisan reasons. In the absence of bad intent, Chase's actions were not especially unusual on the bench.

142. See THE FEDERALIST NO. 78, *supra* note 2, at 440 (Alexander Hamilton).

143. Brutus, Brutus Essays IV, XI, XII, and XV N.Y. J., Nov. 29, 1787, Jan. 31, 1788, & Feb. 14, 1788; reprinted in THE ESSENTIAL ANTIFEDERALIST 201, 220-21 (W.B. Allen & Gordon Lloyd eds., 1985).

144. See generally HOFFER & HULL, *supra* note 35, at 236-37.

145. See *id.* at 244.

The presence of bad intent made Chase look more reprehensible and made his ouster, if it did occur, more difficult to use as a precedent for partisan retaliations by the Federalists in the future. Third, the inference of motive from action melded the doctrines of dangerous tendency and criminal culpability that would have been difficult to prove separately in Chase's case but that combined would make Chase look even worse.¹⁴⁶

Chase defended against these charges by arguing that he acted in good faith in each of the incidents mentioned in the articles of impeachment. In his opening remarks in his impeachment trial, Chase categorically "den[ied], in every instance, the *improper* intentions with which the acts charged, are alleged to have been done, and in which their supposed criminality altogether consists."¹⁴⁷ His core defense was that "he had not violated any laws and exhibited nor harbored any bad intentions in any of the actions claimed to be improper. These two themes also dominated the arguments of his attorneys during the trial."¹⁴⁸ In particular, Chase's counsel argued that bad intent had to be proved by the prosecution but that the prosecution had failed to prove it in Chase's case.¹⁴⁹

Moreover, the question put to the Senate at the end of Chase's trial was whether Chase was "guilty or not guilty of a high crime or misdemeanor, as charged in the Article of impeachment."¹⁵⁰ This formulation "underlined the need for proof of 'evil intent,' which, to [then-Senator] John Quincy Adams and some Republicans, was never satisfactorily established."¹⁵¹

The necessity of establishing bad or malicious intent was also a significant factor in the next impeachment trial, that of James Peck. In 1830, the House impeached Peck on a single charge. The thrust of the charge was that Peck abused his authority by citing in contempt and imprisoning a man who had criticized Peck's rulings. Peck contended that he could not be impeached absent proof of bad intent.¹⁵² As one of his counsel argued in summation, Peck could not be impeached for his actions because his actions did not "proceed from the evil and malicious intention with which [he] has been charged, and which it is absolutely

146. *See id.*

147. 1 TRIAL OF SAMUEL CHASE 14 (1970) (internal quote omitted).

148. BUSHNELL, *supra* note 33, at 66.

149. *See* HOFFER & HULL, *supra* note 35, at 245-50.

150. *Id.* at 252 (internal quotation and footnote omitted).

151. *Id.* at 253.

152. *See* ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 62 (De Capo Press 1972) (1833).

necessary should have accompanied it, to constitute the guilt of an impeachable offense.”¹⁵³ A bare majority of the Senate voted not to convict Peck.

The need to establish bad intent arose again in the impeachment trial of Andrew Johnson. The first major question raised in his trial was whether Johnson violated the Tenure in Office Act and, if he did, whether he had done so “willfully.”¹⁵⁴ Like Chase, Johnson contended that he acted in good faith, i.e., that he lacked malicious intent. As one of his defense counsel, former Supreme Court Justice Benjamin Curtis, argued in the opening remarks of his defense of Johnson:

I suppose everyone will agree that so long as the President of the United States, in good faith is endeavoring to take care the laws be faithfully executed, . . . and is preserving, protecting and defending the Constitution of the United States, although he may be making mistakes, he is not committing high crimes or misdemeanors.¹⁵⁵

Sixteen witnesses appeared on Johnson’s behalf, many of whom gave testimony designed to “show that President Johnson had consulted his cabinet about his veto of the Tenure [in] Office Act, that he honestly believed the law to be unconstitutional, and that he had no inclination to violate any laws.”¹⁵⁶ Johnson’s defense seems to have made a difference on the outcome, as six of the seven Republicans who voted not to convict him explained in written opinions filed after the trial that the prosecutors in Johnson’s trial had not established or proved Johnson had done something impeachable, i.e., done something that horribly hurt the Republic with bad intent.¹⁵⁷

Subsequently, every official who has been the target of an impeachment inquiry has had the opportunity to assert any defense he has thought appropriate. In two of the cases—the impeachment trials of Charles Swayne¹⁵⁸ and Harold Louderback¹⁵⁹—the Senate did not

153. *Id.* at 328.

154. See BUSHNELL, *supra* note 33, at 138.

155. 1 TRIAL OF ANDREW JOHNSON 386 (De Capo Press 1970) (1868).

156. BUSHNELL, *supra* note 33, at 149.

157. See *id.*; see also REHNQUIST, *supra* note 53, at 241-45.

158. In 1904, the House impeached Charles Swayne primarily for corruption, including willfully filing false claim reports and accepting the free services of a private railroad car from a company that sometimes appeared in his court; however, the Senate did not convict him. See PROCEEDINGS IN THE SENATE OF THE UNITED STATES IN THE MATTER OF THE IMPEACHMENT OF CHARLES SWAYNE, JUDGE OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF FLORIDA, S. DOC. NO. 58-194 (3d Sess. 1905).

159. The House impeached Harold Louderback for the manner of his appointment and removal of receivers. Louderback’s defense consisted in large part of his demonstration of his good faith in his appointment and removal of receivers. See *generally* PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HAROLD LOUDERBACK, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, S. DOC. NO. 73-73 (1933).

convict the targeted judges. In the cases where the defense failed, such as the impeachment trials of Halsted Ritter¹⁶⁰ and Harry Claiborne,¹⁶¹ it seems to have been because Congress found that bad intent had been proved rather than concluded that such a finding was unnecessary.¹⁶²

IV

Attempting to impeach federal judges on the basis of their decisions poses some serious dangers that Kent neither acknowledged nor addressed. First, it would unquestionably chill the exercise of judicial review. No doubt, any judge who feels inclined, even in good faith, to rule in a similar manner as another judge who has been impeached for his or her decisions will be inclined not to do so in order to preserve his or her job.¹⁶³

Second, since no judge has ever been impeached on the basis of his or her decisions, judges would likely not know in advance the kinds of decisions warranting impeachment. To be sure, Congress' failure to impeach a federal judge for his or her decisions has limited meaning. As I have already shown, many reasons for Congress' failure to act exist, but none of which amounts to a considered congressional judgment that proceeding to impeach a judge on the basis of his or her decisions would be unjustified.¹⁶⁴ Even if such a judgment were discernable, Congress is not bound by it.

Third, impeaching judges for their decisions runs the risk of partisan retaliation. During and immediately after Chase's impeachment trial, many Republicans feared that the easier impeachment

160. One article of impeachment against Ritter charged that he had evaded paying income tax. Ritter countered that he had not "willfully" tried to evade paying income tax. While the Senate voted not to convict Ritter on the basis of this article, he was convicted and removed on the basis of a catch-all article that charged, as one of the House Managers Chatton Sumners explained, that "the sum total of the things he has done has made the people doubt his integrity as a judicial officer." PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, S. DOC. NO. 74-200, at 42 (1936).

161. The House Managers charged Claiborne with "willful, intentional, and fraudulent" evasion of income taxes. See BUSHNELL, *supra* note 33, at 299. In his defense against these charges, Claiborne argued that he had been "damaged by careless tax preparers [and] victimized by an inexorable band of federal prosecutors bent on his destruction." *Id.* at 295. In other words, Claiborne admitted filing erroneous tax returns but claimed that the mistakes were not intentional. Senators who had voted not guilty on at least one article claimed that "Claiborne had made negligent, not willful, errors on his income taxes." *Id.* at 301.

162. See *id.* at 301-07.

163. Of course, intimidation is one of the reasons for threatening to impeach judges for their decisions. The question is whether following through on the threat enhances or diminishes the quality of judicial performance.

164. See *supra* Part III.

became, the easier their political enemies could, once they returned to power, return the favor and target Republican appointees.¹⁶⁵

Moreover, impeaching judges for their decisions casts doubt on the utility or efficacy of the appellate system. If the decisions on which an impeachment action have been based have been affirmed by some higher court, then it makes little sense to single out a judge for punitive action. At the very least it appears as if a judge who is joined in an opinion or supported by other judges had good reason to take the position he or she did.¹⁶⁶ If, however, a higher court reverses the rulings of the targeted judges, then it appears as if the errors have been fully rectified. It is not clear what impeachment would add because the faulty or erroneous judgment has been directly challenged and reversed.

These risks do not necessarily preclude the bringing of an impeachment action based on a judge's decisions. Kent's suggestion that impeaching judges based on their decisions seems more reasonable when one tests it against what one would have to establish in order to satisfy each of the essential elements of impeachable offenses. Perhaps the most serious problem is demonstrating the requisite *mens rea*, which requires a showing that the judge acted in bad faith. In turn, bad faith probably requires a showing that he or she ruled the way he or she did regardless of an awareness of the wrongness of the decision. Alternatively, to establish bad faith one might have to show that a judge ruled the way he or she did knowing that he or she was violating the Constitution or illegitimately exercising the power or authority of another branch.

Establishing bad intent is no easy thing (if the Chase and Johnson impeachments are any indication), for, in the case of a lower court judge, the latter would almost certainly begin the impeachment proceedings with a presumption of innocent intent, leaving to the prosecution the difficult burden of showing that a decision was not just bad, but deliberately erroneous. It would be difficult for the prosecution to meet its burden if the judge's decisions have been upheld by some higher court or the judge insists that he or she was acting in good faith throughout his or her decision-making in the disputed cases.

A different situation arises, however, if the abuses allegedly committed by the targeted judge(s) persist or recur. Imagine a judge who has concluded that a certain interpretation of the Constitution is legitimate and makes a decision based on that judgment in a particular

165. See HOFFER & HULL, *supra* note 35, at 262.

166. See REHNQUIST, *supra* note 53, at 118.

case but later has that judgment reversed by the Supreme Court because of the latter's contrary reading of the Constitution. Here, use of the impeachment process to punish the judge is unnecessary, for the judge's error has been fully remedied. Yet, if the judge were to persist in subsequent cases to ignore or, worse, to condemn the Court's decision and assert the authority to rule in spite of the latter decision, we have a different case. In the latter situation, impeachment seems more appropriate because bad intent could be reasonably inferred from the judge's actions, and an abuse of power—flagrantly disregarding the judgment of a higher court—is reasonably apparent.¹⁶⁷

The counterexample is John Pickering, whom the House impeached and the Senate convicted and removed from the bench on the basis of insanity.¹⁶⁸ In Pickering's case, the formation of the requisite mens rea was an impossibility because of the nature of his infirmity. Indeed, his problem was his infirmity, not deliberate abuse of power. Those in favor of Pickering's impeachment obviously circumvented or disregarded the need to establish the requisite mens rea or at least something paralleling the mens rea necessary for the establishment of a criminal offense.

The Pickering impeachment is, however, distinctive for three reasons. First, one might argue that mens rea in the impeachment context differs from the mens rea in the criminal context. The former kind of mens rea might include not only malicious intent but also the inability to exercise the requisite mental abilities to perform one's constitutional duties. If this first basis for distinction seems problematic because of the slippery slope it might erect or because it is based on a single case, two other bases for distinction are conceivable. Pickering's mental instability fully disabled him from performing his judicial duties. Moreover, the impeachment and conviction of Pickering might have been appropriate because no other means of redress was then available. True, the appellate system could have been used repeatedly to correct his mistakes, but the fact of his insanity promised judicial resources would be increasingly used to remedy the errors he repeatedly committed and the erratic behavior in which he repeatedly engaged in

167. This hypothetical is not unrealistic. For instance, Federal District Judge Willis Ritter repeatedly refused to comply with an order to recuse himself issued by the U.S. Court of Appeals for the Third Circuit. Ritter died while the case was pending with the Judicial Council. See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 264 n.87 (1993). If the Judicial Council had failed to resolve the matter or if Judge Ritter had persisted in refusing to comply with an order from a superior court, the matter likely would have been appropriate for impeachment.

168. See *supra* notes 39-52 and accompanying text.

the courtroom. Today, the Judicial Disability Act provides temporary suspension of a judge for mental disability or insanity.¹⁶⁹ No such mechanism existed in the days of Pickering, so the only realistic alternatives were to persuade him to leave the bench (something that would not work because of his state of mind) or impeachment.

Of course, some of the factors relevant to determining the propriety of impeaching a federal judge for his or her decisions do not apply when the targeted official is a Supreme Court Justice. In the latter circumstance, there is no realistic possibility of an appeal. Moreover, the Justice is likely to feel greater freedom in not following Supreme Court precedent, though such a disposition is quite common because of the traditional view among Justices that constitutional precedents are entitled to less deference than common law or nonconstitutional ones and thus oftentimes might deride prior decisions or steadfastly refuse to follow them.¹⁷⁰

Of course, the major problem with trying to impeach a Justice because of his or her dissents is that dissents are not the law and do not carry any legal weight. Moreover, there is an even bigger problem if the decisions for which a Justice is being targeted for impeachment are not lone dissents, for then it seems patently unfair to single the Justice out for disparate or punitive treatment. The more people who have joined the dissenting Justice the more credible the latter's belief in the soundness of his or her opinions. In addition, persistent dissenting—even on one's own—is not necessarily a sign that a Justice is operating recklessly or maliciously. Given the frequency with which some dissents have later become the law, a Justice has good reason to believe that dissenting repeatedly is an appropriate way to act on the basis of what he or she believes to be a sound constitutional point of view. To put the point slightly differently, there is ample precedent for Justices to engage in such decision-making. Hence, establishing the requisite *mens rea* for the impeachment of a Supreme Court Justice for his or her decisions would seem to be nearly impossible. It would require aberrant behavior of such unprecedented proportions or such extreme expressions of disdain that insanity would likely appear to be the more likely explanation for the judge's behavior than malicious intent.

169. See *supra* note 141 and accompanying text.

170. See MICHAEL J. GERHARDT & THOMAS ROWE, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 180 (1993).

CONCLUSION

Chancellor Kent never set out to study the impeachment process systematically. One would not have expected that this great expositor of the common law would figure prominently in clarifying a perennial question about the proper scope of impeachable offenses. Yet, his pronouncement about the legitimacy of basing a judicial impeachment on a judge's decisions is of such great contemporary interest that it cannot be ignored. Moreover, the methodology Kent suggested for elucidating the common law provides a useful model for trying to determine the extent to which his statement aptly fits the scheme of federal impeachment set forth in the Constitution.

While it is difficult (if not dangerous) to try to clarify the elements of impeachable offenses, some illumination is better than none. The vagueness of the impeachment standard complicates developing simple rules to govern its exercise. Nevertheless, bringing some clarity or order to the exercise of the impeachment authority is crucial for preventing abuses and for ensuring some minimal fairness. A close examination of the sources of decision on federal impeachment reflects the likely prerequisites of impeachable offenses. At the very least, the *actus reus* or bad acts are political crimes. Moreover, many impeachment attempts have turned on the notion that the bad acts that qualify as impeachable offenses must cause serious harm to the Republic and have a close nexus to the actor's official duties. In addition, some kind of bad or malicious intent seems necessary to reflect that the misconduct did not result from a simple or innocent mistake in judgment rather than a desire to cause or some extremely reckless disregard about the possibility of causing some serious harm to the Republic. In some cases, other available systems of redress, such as the appellate process, might have some impact on the perceived necessity for making recourse to the impeachment process.

The search for the elements of impeachable offenses helps to clarify the extent to which Chancellor Kent's belief that impeachment based on a judge's decisions is sound. Both *actus reus* and *mens rea* would be difficult to prove in a case involving a single decision. The *actus reus* would be difficult to prove because the appellate system might provide full restitution or protection against harm to any individuals or the Republic. In addition, *mens rea* would be difficult to prove if there were only a single decision involved, particularly if other judges on the same or some higher court have expressed agreement with its reasoning or outcome. Consequently, the likeliest scenario in

which a federal judge might face impeachment because of his or her decisions would be one in which the judge has consistently flouted the authority of some binding principle of law or higher court. As one might imagine, such a scenario is likely to be quite rare.

Nevertheless, the identification of even this singular circumstance in which impeaching a judge for his or her decision-making helps to clarify the scope of impeachable offenses. Such clarification helps to define the limits of the federal impeachment process and the range of judicial independence secured by the Constitution. Such clarification is also a function of the enduring wisdom of Chancellor Kent, whose legacy no longer can fairly be said to be limited strictly to the judicial development of the early American common law and equity.

