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PUTTING THE LAW OF IMPEACHMENT IN PERSPECTIVE

MICHAEL J. GERHARDT

INTRODUCTION

In his excellent paper, Professor Richard Pious has reminded us of something whose importance we cannot overemphasize—the popular law of impeachment. As Professor Pious explains, constitutional text, history, structure and precedent are all crucial for understanding the basic purposes of and procedures employed in the federal impeachment process. These conventional sources of constitutional decisions do not, however, tell the full story. Impeachment proceedings do not occur in a vacuum. It is not possible to appreciate fully the dynamics of impeachment proceedings without understanding the historical, social and political contexts in which they have arisen. In other words, the direction, outcome and perceived legitimacy of any given impeachment proceeding depends a great deal upon the popular law of impeachment.

In this essay, my purpose is to supplement and to expand on Professor Pious' important study. Over the past decade, I have had several occasions to study in detail the background and history of the federal impeachment process. In this essay, I wish to share the results of these prior studies. These studies have the advantage of having been undertaken at times when the Congress was not in the midst of any ongoing impeachment proceedings. My focus in the past has not been on setting the record straight in any particular case, nor is it in the present circumstance on resolving whether the misconduct for which the House of Representatives impeached President Clinton—particularly perjury and making false statements to a grand jury—actually rises to the level of an impeachable offense. Instead, my focus has been to clarify what constitutional structure and history has to teach us generally about the process of impeachment. These lessons in turn help to clarify the kinds of questions that members of Congress should ask and the kinds of factors members of Congress should take into consideration when trying to decide whether to impeach and remove

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the President of the United States.

As background, Part I identifies the ways in which the founders purposely tried to distinguish the federal impeachment process from its British counterpart. Of particular importance were the founders' desires to narrow or restrict the range of both impeachable offenses and the persons who would be subject to impeachment. This narrowing is in sharp contrast to the British system in which there was no limit to either the kinds of people who could be impeached or the kinds of offenses for which the latter may have been impeached.

Part II examines the likeliest meaning of the terms of art "other high crimes and misdemeanors" that provide the bases for federal impeachment. The weight of authority, as most other scholars and commentators have found, is that these words constitute technical terms of art that refer to political crimes. For the most part, the founders did not regard political crimes as the functional equivalent of indictable crimes nor did they regard all indictable crimes as constituting impeachable offenses. Rather, they considered political crimes to consist of "great" and "dangerous" offenses committed by certain federal officials. Oftentimes, these offenses were further characterized as serious abuses of official power or serious breaches of the public trust. The founders also understood that these offenses might have been but were not necessarily punishable in the courts. Indeed, many founders had the further understanding that the scope of impeachable offenses largely consisted of those misdeeds for which an impeachable official was not likely (for whatever reason) to be held liable at law.

Given that the founders expected that the scope of impeachable offenses would work itself out over time on a case-by-case basis, I turn in Part III to consider the possible lessons that might be derived from trends or patterns in the Congress' past impeachment practices.

Six patterns are especially noteworthy. The first is that proof an impeachable official's commission of an indictable crime has tended to increase the odds of impeachment. This trend poses a problem of constitutional dimension because it blurs the lines that the framers tried to draw between criminal and impeachable offenses.

The second pattern is that members of Congress, particularly in the Senate, have agreed with the view that impeachable offenses are not necessarily indictable crimes but rather political crimes in which the critical elements are serious injury to the republic or the constitutional system.

The third is the relatively widespread recognition of the paradigmatic case

2. See infra notes 11-50 and accompanying text.
3. See infra notes 51-94 and accompanying text.
4. See infra notes 95-124 and accompanying text.
5. See infra note 95 and accompanying text.
6. See infra note 96 and accompanying text.
for impeachment as being based on the abuse of power. The three articles of impeachment approved by the House Judiciary Committee against President Richard Nixon have come to symbolize this paradigm. The great majority of impeachments brought by the House and convictions by the Senate approximate this paradigmatic case, for all of these cases, with the possible exception of one or two, involve the serious misuse of office or official prerogatives or breaches of the public trusts held.

The fourth trend is based on the recognition of some legitimate impeachment actions falling outside of the paradigmatic case. The latter category, best symbolized by the Claiborne decision, is that there may be some kinds of misconduct in which an impeachable official might engage that are so outrageous and thoroughly incompatible with an official's status or responsibilities that they effectively disable a person from being able to continue to function at all in his or her present office. In such a case, Congress has no choice but to impeach and remove an official who has so behaved.

The fifth conceivable trend is the relatively widespread recognition in Congress over the years (consistent with the constitutional structure) that impeachment is not the only means available to the House and/or the Senate to express its disapproval of an impeachable official's misconduct. In other words, censure—consisting of a resolution passed by one or both houses of Congress that is highly critical of an impeachable official's conduct—is a constitutionally acceptable alternative (or, for that matter, supplement) to impeachment.

The final pattern is that members of the House and, particularly, the Senate have recognized in the course of debating impeachment that their impeachment judgments are sui generis. Unlike decisions about legislative matters, congressional impeachment decisions are not subject to presidential review or judicial review. Instead, impeachment judgments are, for all intents and purposes, final. Their legitimacy turns on the judgment of history. Consequently, in rendering decisions on impeachment matters, members of Congress generally have had to consider whether their decisions to impeach (or to forego impeachment) can withstand the test of time. Members of Congress have appreciated that their decisions constitute precedents in the field of impeachment, and these precedents have had a significant impact on the balance of power between the Congress and the other branches (whose officials have been the subject of impeachment actions). In the final analysis, the critical questions are structural and historical. The structural questions have to do with the degree to which impeachments decisions are consistent with or alter basic sepa-

7. See infra notes 97-109 and accompanying text.
8. See infra note 110 and accompanying text.
9. See infra notes 111-122 and accompanying text.
10. See infra notes 123-24 and accompanying text.
ration of powers, while the historical questions have to do with whether subsequent generations will largely agree that impeachment decisions were made on a non-partisan basis.

I.

The discussions of the delegates to the constitutional convention and state ratifying conventions provide some important background for appreciating the distinctive features of the federal impeachment process. The founders wanted to distinguish the impeachment power set forth in the U.S. Constitution from the British practice in at least eight important ways. First, the founders limited impeachment only to "[t]he President, Vice-President and all civil officers of the United States,"11 whereas in England at the time of the founding of Republic anyone (except for a member of the royal family) could be impeached.12 Second, the delegates to the constitutional convention tried to narrow the range of impeachable offense for public officeholders to "treason, bribery, and other high crimes or misdemeanors,"13 while the English Parliament had always refused to constrain its jurisdiction over impeachments by restrictively defining impeachable offenses.14 Third, whereas the English House of Lords could convict upon a bare majority,15 the delegates to the constitutional convention agreed that in an impeachment trial held in the Senate "no Person shall be convicted [and removed from office] without the Concurrence of two thirds of the Members present."16 Fourth, the House of Lords could order any punishment upon conviction,17 but the delegates limited the punishments in the federal impeachment process "to removal from Office, and disqualification to hold and enjoy any Office or honor, Trust or Profit under the United States . . . ."18 Fifth, the King could pardon any person after an impeachment conviction,19 but the delegates expressly prohibited the President from exercising such power in the Constitution.20 Sixth, the founders provided that the President could be impeached,21 whereas the King of England could not be

12. 15 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1061, 1064 (David S. Garland & Lucius P. McGehee eds., 1900)[hereinafter AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW].
14. 15 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1066.
15. Id. at 1071.
17. 15 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1072.
19. 15 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1072.
21. Id. at art. II, § 4.
impeached. 22 Seventh, impeachment proceedings in England were considered to be criminal, 23 while the Constitution separates criminal and impeachment proceedings. 24 Lastly, the British provided for the removal of their judges by several means, whereas the Constitution provides impeachment as the sole political means of judicial removal. 25

Of these distinctive features, the one of greatest contemporary concern is the founders' choice of the words—"treason, bribery, and other high crimes or misdemeanors"—for delineating and narrowing the scope of the federal impeachment process. The founders did not discuss the meaning of "other high crimes or misdemeanors" extensively, certainly not in any way that definitively resolves the precise meanings of those terms. Nevertheless, the context and content of the founders' principal discussions about the phrase "other high crimes or misdemeanors" provide an important backdrop to contemporary efforts to understand the meaning of the phrase.

Throughout the early debates in the constitutional convention on the scope of impeachable offenses, every speaker agreed that certain high-ranking officials of the new national government should not have immunity from prosecution for common law crimes, such as treason and murder. 26 Many delegates also envisioned a body of offenses for which these federal officials could be impeached. They figured that clarifying this body of offenses was important for two reasons—the first was to narrow the bases for which people could be impeached in the United States (in contrast to the unbounded system in England), and the second was to clarify the grounds for which people could be impeached and removed.

Early in the convention's proceedings, several delegates referred to "mal-" and "corrupt administration," "neglect of duty" and "misconduct in office" as the only impeachable offenses and maintained that common law crimes such as treason and bribery were to be heard in the courts of law. 27 Some delegates notably William Paterson, Edmund Randolph, James Wilson and George Mason, argued that the federal impeachment process should apply to misuse of

22. 15 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1064.
23. Id. at 1062.
25. See generally MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 82-102 (1996). The founders also provided a couple of other special protections in the Senate; they required that "[w]hen sitting for [th[e] Purpose of trying impeachments, senators] shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside . . . ." U.S. CONST. art. I, § 3, cl. 6.
27. Id.
official power in accordance with their respective state constitutions and experiences.\(^{28}\) As late as August 20, 1787, the Committee of Detail reported that federal officials “shall be liable to impeachment and removal from office for neglect of duty, malversation, or corruption.”\(^ {29}\)

Yet, in its report on September 4, the Committee of Eleven proposed that the grounds for conviction and removal of the President should be limited to “treason or bribery.”\(^ {30}\) On September 8, George Mason opened the convention’s discussion on this latter proposal by questioning the wisdom of limiting impeachment to those two offenses. He argued that “[t]reason as defined in the Constitution [would] not reach many great and dangerous offences.”\(^ {31}\) He used as an example of such subversion the contemporaneous English impeachment of Governor Warren Hastings of the East India Company, whose trial was based in part not upon specific criminal acts but rather upon the dangers presented to the government by his wielding of virtually absolute power within the Indian colony. Mason was concerned that “[a]ttempts to subvert the Constitution may not be Treason as ... defined,” and that, since “bills of attainder ... are forbidden, ... it is the more necessary to extend the power of impeachments.”\(^ {32}\) Mason, therefore, moved to add the term “maladministration” to permit impeachment upon less conventionally defined common law offenses.\(^ {33}\) Elbridge Gerry seconded the motion.\(^ {34}\) James Madison, without taking issue with either the appropriateness of including such subversion or the need to expand the standard to include such potentially non-criminal wrongs, responded that “[s]o vague a term will be equivalent to a tenure during pleasure of the Senate.”\(^ {35}\) Recalling an earlier debate on June 20, in which he had asked for more “enumerated and defined” impeachable offenses, Governeur Morris agreed with Madison.\(^ {36}\) Mason thereupon withdrew his motion and substituted “bribery and other high crimes or misdemeanors against the States,” which Mason apparently understood as including maladministration.\(^ {37}\) Without further comment, the motion was approved by a vote of eight to three.\(^ {38}\)

The convention, again without discussion, later agreed to replace the word

\(^{28}\) Id.
\(^{29}\) 2 id. at 429.
\(^{30}\) Id. at 508.
\(^{31}\) 2 Debates 535.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id.
\(^{36}\) 2 Debates 535.
\(^{37}\) Id.
\(^{38}\) Id.
“State” with the words “United States.”\(^{39}\) The Committee of Style and Arrangement, which was responsible for reworking the resolutions without substantive change, eliminated the phrase “against the United States,” presumably because it was thought to be redundant or superfluous. The convention accepted the shortened phrase without any further debate on its meaning.

Subsequently, the most substantial discussion of the scope of impeachable offenses, besides those in The Federalist Papers (discussed in the section below), occurred in the ratification conventions in North Carolina and Virginia. For instance, in the North Carolina ratifying convention, James Iredell, who would later serve as an Associate Justice on the Supreme Court, called attention to the complexity, if not impossibility, of defining the scope of impeachable offenses any more precisely than to acknowledge that they would involve serious injustices to the federal government. He understood impeachment as having been “calculated to bring [great offenders] to punishment for crime which it is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government. [T]he occasion for its exercise will arise from acts of great injury to the community.”\(^{40}\) As examples of impeachable offenses, he suggested that the “president must certainly be punishable for giving false information to the Senate” and that “the president would be liable to impeachments [if] he had received a bribe or had acted from some corrupt motive or other.”\(^{41}\) He warned, though, that the purpose of impeachment was not to punish a president for “want of judgment” but rather to hold him responsible for being a “villain” and “willfully abusing his trust.”\(^{42}\) Governor Johnston, who would later become North Carolina’s first U.S. senator, agreed that “impeachment . . . is a mode of trial pointed out for great misdemeanors against the public.”\(^{43}\)

In the Virginia convention, several speakers argued that impeachable offenses were not limited to indictable crimes. For instance, James Madison argued that, if the president were to summon only a small number of states in order to try to secure ratification of a treaty that hurt the interests of the other unrepresented states, “he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor.”\(^{44}\) Madison suggested further that, “if the president be connected, in any suspicious manner with any person, and there be grounds to believe that he will shelter him,” the president may be impeached.\(^{45}\) George Nicholas agreed that a president could be im-

\(^{39}\) Id. at 536.
\(^{40}\) 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113 (J. Elliot ed., 1854).[hereinafter STATE DEBATES]
\(^{41}\) Id. at 126.
\(^{42}\) Id.
\(^{43}\) Id. at 48.
\(^{44}\) 3 id. at 500.
\(^{45}\) 3 STATE DEBATES 498.
peached for a nonindictable offense. Edmund Randolph explained that “[i]n England, those subjects which produce impeachments are not opinions... It would be impossible to discover whether the error of the opinion resulted from a willful mistake of the heart, or an involuntary fault of the head.” He stressed that only the former constituted an impeachable offense. He insisted that no one should be impeached for “an opinion.”

In the decade following ratification, the federal impeachment process remained a subject of some debate and concern. For instance, in the First Congress, then-Representative James Madison tried to calm the fears of some of his colleagues about possible presidential abuse of authority to remove executive officials by suggesting that the President “will be impeachable by the House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from [office].” Although one could construe Madison’s comment as meretricious because it supported a position he had taken in a partisan debate rather than as a framer (and because it arguably conflicted with his objection in the constitutional convention to making “maladministration” a basis for impeachment), Madison’s comment is consistent with the stance he took in the Virginia ratifying convention to support presidential impeachment for nonindictable abuses of power.

Immediately following his appointment to the Supreme Court in 1790, James Wilson gave a series of lectures as a professor of law at the College of Philadelphia to clarify the foundations of the American Constitution. In these talks, given in 1790-91 but published posthumously, Justice Wilson described the essential character of impeachments as “proceedings of a political nature... confined to political characters, to political crimes and misdemeanors, and to political punishments.” He emphasized that the founders believed that “[i]mpeachments, and offenses impeachable, [did not] come... within the scope of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects: for this reason, the trial and punishment of an offence on an impeachment, is no bar to a trial and punishment of the same offence at common law.”

II.

The relatively few comments made about the meaning of “other high

46. Id. at 401.
47. Id.
50. Id. at 408.
crimes and misdemeanors” by the founders in the constitutional and state ratifying conventions do not definitively clarify the scope of impeachable offenses. The reason that this is so is not just because the founders failed to discuss the topic extensively or to anticipate all of the likely issues or cases that would arise in this area. The reason is that in choosing to make “other high crimes or misdemeanors” the basis for impeachable offenses, the founders chose terms of art that referred to a general category of offenses, the specific contents of which have to be worked out over time on a case-by-case basis.

The great majority of commentators who have closely examined the likely meaning of the constitutional phrase “other high crimes or misdemeanors,” including, among others, Justice James Wilson,51 Justice Joseph Story,52 Chief Justice Charles Evans Hughes,53 Justice Arthur Goldberg,54 Charles Black,55 Raoul Berger,56 George Curtis,57 Arthur Bestor,58 Paul Fenton,59 Peter Hoffer and N.E.H. Hull,60 John Feerick,61 and John Labovitz (a former staff member of the House Judiciary Committee investigating President Nixon),62 have reached the same conclusion—that the phrase “other high crimes and misdemeanors” consists of technical terms of art referring to “political crimes.” They also have agreed that “political crimes” had a special meaning in the eighteenth century; “political crimes” were not necessarily indictable crimes. Instead, “political crimes” consisted of the kinds of abuses of power or injuries to the republic that could only be committed by public officials by virtue of the public offices they held. Although the concept of “political crimes” uses the term “crimes,” it did not necessarily include all indictable offenses. Nor were all indictable offenses political crimes.

To appreciate what would constitute “political crimes,” one needs to go back to the British impeachment practices from which the founders drew the language “other high crimes and misdemeanors” and thus the concept of

51. See id.
52. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at 269-87 (1987).
“political crimes.” In the English experience prior to the drafting and ratification of the Constitution, impeachment was primarily a political proceeding, and impeachable offenses were regarded as “political crimes.” For instance, Raoul Berger observed in his influential study of the impeachment process that the English practice treated “[h]igh crimes and misdemeanors [as] a category of political crimes against the state.” Berger supported 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 impeachable event. In England, the critical element of injury in an impeachable offense had been injury to the state. The eminent legal historian, Blackstone, traced this peculiarity to the ancient law of treason, which distinguished “high” treason, which was disloyalty against some superior, from “petit” treason, which was disloyalty to an equal or an inferior. The late Professor Arthur Bestor explained further that “[t]he element of injury to the commonwealth—that is, to the state and to its constitution—was historically the criterion for distinguishing a ‘high’ crime or misdemeanor from an ordinary one.” In summary, the English experience 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.

In addition, those delegates in the constitutional and state ratifying conventions who supported the federal Constitution seemed to have a shared un-

63. See BERGER, supra note 56, at 61 (emphasis in original).
64. Id. at 59-61.
65. Bestor, supra note 58, at 264.
66. See id. at 264 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75 (1765-69)). Blackstone commented:

Treason ... in its 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.
67. Bestor, supra note 58, at 263-64.
68. Id. at 265.
understanding of impeachment as a political proceeding and impeachable offenses as essentially “political crimes.” 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. Moreover, the majority of examples given throughout the convention debates about the scope of impeachable offenses, such as Madison’s preference for the phrase “other high crimes and misdemeanors” because it encompassed attempts to subvert the Constitution, confirm that impeachable offenses primarily consisted of abuses of power that injured the state (and thus were not necessarily limited to indictable offenses). Neither the debates nor the relevant constitutional language eventually adopted, however, identify the specific offenses that constitute impeachable abuses against the state.

The ratification campaign further supports the conclusion that “other high Crimes and Misdemeanors” were not limited to indictable offenses, but rather included great offenses against the federal government. For example, delegates to state ratification conventions often referred to impeachable offenses as “great” offenses (as opposed to common law crimes), and they frequently spoke of how impeachment should lie if the official “‘deviates from his duty’” or if he “‘dare[s] to abuse the powers vested in him by the people.’”

In Federalist No. 65, 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.” Believing it unwise to submit the impeachment decision to the Supreme Court because of “the nature of the proceeding,” Hamilton argued 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].”

In short, Hamilton too believed that impeachable offenses comprised a unique set of transgressions that defied neat delineation.

69. See id. at 266.
70. See BERGER, supra note 56, at 88 (observing that “James Iredell, later a Supreme Court 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’”).
71. 4 STATE DEBATES 47.
72. Id.
74. Id. at 398.
75. Id.
Both Justices James Wilson and Joseph Story expressed agreement with Hamilton's understanding of impeachable offenses as political crimes. In his 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." 76 Justice Wilson understood the term "high" describing "Crimes and Misdemeanors" to mean "political," while the latter term referred to bad conduct against the state. 77 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 character. 78

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." 79 Justice Story understood "political injuries" to be "[s]uch kind of misdeeds... as peculiarly injure the commonwealth by the abuse of high offices of trust." 80

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." 81 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." 82 The implicit understanding shared by both Hamilton and Justice Story was that subsequent generations 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. This task is

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77. Id.
78. Story, *supra* note 52, at 272-73.
79. Id. at 290.
80. Bestor, *supra* note 58, at 263 (quoting Joseph Story, 2 *Commentaries on The Constitution* 256 (1833)).
82. Id. at 287 (citations omitted).
critical for providing notice to impeachable officials as to the conditions of, and for narrowing in some meaningful fashion, the grounds for their removal. The likeliest places to look for guidance are to the framers' debates or authoritative commentary on the meaning of the relevant constitutional language (as reflected above) and historical practices. The latter do provide some insight into the answer to this challenge. First, it is noteworthy that of the sixteen men impeached by the House of Representatives, only five were impeached primarily or solely on grounds strictly constituting a criminal offense: Secretary of War William Belknap (charged with accepting bribes); Harry Claiborne (charged with willfully making false tax statements); Alcee Hastings (charged with conspiring to solicit a bribe and perjury); Walter Nixon (charged with perjury); and Bill Clinton (for perjury and obstruction of justice). One of these five—Alcee Hastings—had been formally acquitted of bribery prior to his impeachment. The House’s articles of impeachment against the other eleven include misuses of power that were not indictable federal offenses at the time they were approved.

Of the seven men who have been convicted and removed from office by the Senate, four were convicted and removed from office on the basis of non-indictable offenses. These four officials included Judge John Pickering (convicted and removed for public drunkenness and blasphemy), Judge West H. Humphreys (convicted and removed by the Senate for having publicly advocated that Tennessee secede from the Union, organizing armed rebellion against the United States, accepting 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); 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); and Judge Halsted Ritter (who was 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[""]).

Of the remaining three officials who were convicted and removed from office by the Senate, all three were convicted and removed from office on the basis of indictable crimes. These three officials are Harry Claiborne (income

83. 2 ANNALS OF CONGRESS 319-22 (1804).
84. CONG. GLOBE, 37th Cong., 2d Sess. 2949-50 (1862).
85. 48 CONG. REC. 8910 (1912).
86. 80 CONG. REC. 5606 (1936).
87. See NATIONAL COMM’N ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT OF THE
tax invasion), Alcee Hastings (bribery and perjury) and Walter Nixon (making false statements to a grand jury).\textsuperscript{88} Prior to their impeachments and removals from office, two of these judges—Claiborne and Nixon—had been indicted, convicted in federal court, and exhausted their criminal appeals.\textsuperscript{89}

Given that certain federal officials may be impeached and removed from office for committing serious abuses against the state and that these abuses have not always been, nor necessarily should be, 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. (The Constitution itself defines treason as "consist[ing] only in levying War against the [United States], or in adhering to their Enemies, giving them Aid and Comfort."\textsuperscript{90} At least one federal criminal statute—the bribery statute\textsuperscript{91}—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 involved demonstrate willful misconduct and serious lack of judgment and respect for the law in the course of performing one's duties. In other words, it is conceivable there are certain statutory crimes that, if committed by public officials, reflect such abuses of the privileges of their offices, breaches of the public trust, disregard for the welfare of the state and disrespect or disdain for the constitutional system, the officials who have committed such misconduct have effectively disabled themselves from continuing in office and thus merit impeachment and removal.

On the other hand, not all statutory crimes demonstrate complete unfitness for office. For example, a President's technical violation of a law making jaywalking or speeding a crime "obviously would not be an adequate basis for presidential impeachment and removal."\textsuperscript{92} Moreover, it is equally obvious that some non-criminal activities may constitute impeachable offenses. As Profess-
sor 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,"^{93} but would probably constitute a nonindictable, impeachable offense. The full range of such political crimes defies further specification because it rests on the circumstances under which the offenses have occurred (including the actor, the forum, the scope of the officer's official duties and the nature and significance of the offensive act), alternative remedies and the collective political judgment of Congress.^{94}

III.

The founders believed that political crimes would be clarified over time on a case-by-case basis. In other words, the founders figured that while the standard for impeachment would remain constant over time—consisting of whether someone had seriously injured the republic or the constitutional system—it would be applied on a case-by-case basis to determine whether it had been met in any given circumstance. Consequently, congressional practices are important because they help to illuminate Congress' deliberate judgments over the past two centuries on what constitutes an impeachable offense. Given the likelihood that Congress' judgments on impeachment are largely, if not wholly immune to presidential and judicial review, these judgments take on even more importance. For all practical purposes, Congress' decisions on impeachment constitute the final word on the scope of the federal impeachment power. Congress thus gives extra special consideration to its impeachment decisions. Indeed, a survey of the sixteen formal impeachments brought by the House and the seven convictions and six acquittals rendered by the Senate in-
icates six noteworthy patterns.

A. The Relationship Between Criminal Actions and Impeachment Proceedings

I have already alluded to the fact that the House has impeached and the Senate has removed people for offenses that have (at least technically) not constituted indictable crimes. There is, however, a related tendency for the Senate to convict on the basis of indictable crimes or at least to find conviction easier to effect if an indictable offense were involved. Moreover, in the 1980s, the Senate convicted Judges Claiborne, Hastings and Nixon on the basis of indictable offenses. The convictions of Claiborne and Nixon demonstrate that the Congress is especially likely to impeach and remove officials who have been previously convicted of felonies in court. Indeed, the criminal convictions of Claiborne and Nixon (and the Judicial Council's finding that Hastings had engaged in criminal misconduct) clearly put pressure on Congress to bring impeachment actions against these officials. That such convictions can bring such pressure is a matter of concern to many members of Congress and scholars because it indicates that under certain circumstances criminal prosecutors can drive the impeachment process. Since the framers envisioned that criminal and impeachment proceedings are separate and that the discretions for initiating each belong to authorities in different branches, it is important for members of Congress to ensure that criminal prosecutors do not rob nor unduly influence the Congress' constitutional discretion to initiate or conduct impeachment actions on the grounds that its members think are appropriate.

B. The Relative Consensus on the Scope of Impeachable Offenses

The second pattern consists of the most common characterizations of impeachable offenses made in the constitutional and state ratifying conventions and in Congress (particularly in the Senate) as consisting of serious abuse of power, serious breach of the public trust and serious injury to the republic or to the constitutional system. Given the division of impeachment authority between the House and the Senate, the Senate has had the opportunity to review House decisions on what constitutes an impeachable offense and concluded that impeachable offenses do not include errors of judgment or policy differences. Instead, the seven removal decisions made by the Senate have in common the judgment that impeachable offenses consist of serious breaches of the public trust or misconduct that are so incompatible with the office that conviction and removal by the Senate are required.

95. See JUDICIAL DISCIPLINE, supra note 87, at 30.
C. The Relative Consensus on the Paradigm for Presidential Impeachment

The third trend is the apparent recognition among constitutional scholars and historians (if not also by members of Congress) that there may be a paradigmatic case for impeachment consisting of the abuse of power. In the paradigmatic case, there must be a nexus between the misconduct of an impeachable official and the latter's official duties. It is this paradigm that Alexander Hamilton captured so dramatically in his suggestion that impeachable offenses derive from "the abuse or violation of some public trust" and are "of a nature which may be peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."97 This paradigm is also implicit in the founders' many references to abuses of power as constituting political crimes or impeachable offenses. The paradigm has come to be symbolized by the three articles of impeachment approved by the House Judiciary Committee against Richard Nixon—charging obstruction of justice, abuse of powers and unlawful refusal to supply material subpoenaed by the House of Representatives.98 These charges derived from Nixon's misuse of the powers and privileges of his office to facilitate his reelection and to hurt his political enemies as well as to frustrate or undermine inappropriately legitimate attempts to investigate the extent of his misconduct. Nixon's misconduct effectively disabled him from continuing to exercise the constitutional duties of his office. Keeping Nixon in office would have countenanced serious breaches of the public trust and abuses of power and substantially demeaned the office of the presidency.

Many the House's decisions not to initiate impeachments nor to approve impeachment articles as well as the Senate's decisions to acquit are consistent with this paradigm. For example, the Senate failed to convict Associate Justice Samuel Chase in part because some members did not believe that the conduct, on which the House's charges had been based, rose to the level of impeachable offenses or could fairly be characterized as being the kinds of indiscretions or mistaken judgments that fall within the legitimate scope of a judge's authority.99 Similarly, the House voted 127-83 not to impeach President Tyler for abusing his powers based on his refusals to share with the House inside details on whom he considered nominating to various confirmable positions and his vetoing of a wide range of Whig-sponsored legislation. Tyler's attempts to protect and assert what he regarded as the prerogatives of his office were a function of his constitutional and policy judgments; they might have been wrong-headed or even poorly conceived (at least in the view of many Whigs in Congress), but they were not malicious efforts to abuse

99. 8 ANNALS OF CONG. 669, 728-31 (1803-1804).
or expand his powers, as was true in Richard Nixon’s case, for purely personal gain or aggrandizement. The Senate also refused to convict Andrew Johnson by the slimmest of margins because a small but pivotal number of senators believed, among other things, that the charges brought by the House against him did not rise to the level of impeachable offenses and because Johnson’s real ‘crimes’ were mistaken or erroneous judgments rather than malicious abuses of power. The outcomes of the efforts to try to oust Presidents Tyler and Johnson confirm the suggestion made by Professors Peter Hoffer and N.E.H. Hall in their excellent study of the history of impeachment in the United States, that impeachable offenses are not “simply political acts obnoxious to the government’s ruling faction.”

In this century, the House rejected then-Representative Gerald Ford’s resolution to initiate an impeachment action against William O. Douglas, at least in part because a majority of members were not persuaded that either Douglas’ lifestyle or the substance or content of his decisionmaking was a relevant subject for an impeachment inquiry. Indeed, then-Representative Ford agreed in introducing his impeachment resolution against Justice Douglas that the standards for impeaching judges and presidents are different and that presidents could be impeached and removed from office only for “great” and “dangerous” offenses. Moreover, the House Judiciary Committee refused to bring an article of impeachment against President Nixon based on fraud in preparing his taxes, at least in part because it was not the kind of misconduct that could only have been committed by a president because of the special office or trust he held.

It is also fair to say that the vast majority of the impeachments that have been brought by the House and the convictions that have been rendered by the Senate follow the paradigmatic case. Most if not all of the officials impeached by the House and the seven officials convicted and removed by the Sen-

100. HOFFER & HULL, supra note 60, at 101.
101. See generally, ASSOC. JUSTICE WILLIAM O. DOUGLAS, HOUSE COMM. ON THE JUDICIARY, 91st Cong., FINAL REPORT BY THE SPECIAL SUBCOMMITTEE ON H. RES. 920 (Comm. Print 1970) (investigating the charges against Justice Douglas). The special subcommittee concluded that its investigation did “not disclose credible evidence that would warrant preparation of charges on any acceptable concept of an impeachable offense [against Justice Douglas].” Id. at 349.
103. See ARTICLES OF IMPEACHMENT OF RICHARD M. NIXON, supra note 98, at 105 (citing the “Proposed Article on Emoluments and Tax Evasion”).
104. These officials include the following: Senator William Blount (for engaging in conduct that not only undermined presidential authority and undermining the national government’s relations with various Indian tributes but also acting in a manner “contrary to the duty of his trust . . . in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof”); Judge John Pickering (for making errors in conducting a trial in violation of his duty and trust and engaging in behavior on the bench unbecoming of a federal judge); Associate Justice Samuel Chase (for conducting himself on the bench “in a manner highly
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were found to have misused their offices or their prerogatives or seriously injured the republic by breaching the special trusts that they held by virtue of holding their federal offices. For example, in 1986, the House impeached and the Senate convicted and removed federal district judge Harry Claiborne from office based on income tax evasion. At first glance, it seems as if Claiborne’s misconduct has no formal relationship to his official duties. Nevertheless, in impeaching and removing Claiborne, Congress reached the judgment that integrity is an indispensable criterion for someone to function as a federal judge. Moreover, as the House Report and subsequent Senate debate on Claiborne’s impeachment reflected, the members of Congress concluded that commission of tax evasion robs a federal judge of the moral authority required to oversee the trials and sentencing of others for the very same offense. In other words, a federal judge must have integrity beyond reproach in order to perform the functions of his or her office. Incontrovertible proof that a federal judge lacks integrity effectively disables a federal judge completely from performing his or her duties.

There is no doubt that integrity is also important for a president (or, for that matter, any appointed or elected official) to do his job. There is also no doubt that demonstrated lack of integrity poses a problem for a president. Whether demonstrated absence of integrity poses a problem of impeachable

arbitrary, oppressive, and unjust”); Judge West Humphreys (for neglect of duty); President Andrew Johnson (for violating the Tenure in Office Act and exercising his authority to interfere with the proper execution of the law); Judge Mark Delahay (for intoxication both on and off the bench); Secretary of War Belknap (for receiving an illegal payment in exchange for making a military appointment); Judge George English (for using his office for personal monetary gain); Judge James Peck (for vindictive use of power); Judge Charles Swayne (for exercising his power maliciously and using his office for personal monetary gain); Judge Robert Archbald (for using his office for improper financial gain); Judge Harold Louderback (for using his office for improper financial gain); Judge Halsted Ritter (for engaging in behavior that brought disrepute to the judiciary); Harry Claiborne (for income tax evasion); Alcee Hastings (for bribery); and Walter Nixon (for making false statements to a grand jury). See STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93d Cong., REPORT ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 41-55 (Comm. Print 1973) (discussing impeachment cases prior to 1973); See MODERN PRECEDENTS, supra note 89, at 5-14 (discussing impeachment cases since 1973). All seven convictions and removals made by the Senate have involved abuses of power and serious breaches of the public trust: Judge John Pickering (for drunkenness and senility); Judge Humphreys (for neglect of duty); Judge Archbald (for bribery); Judge Ritter (for engaging in misbehavior that brought the judiciary into disrepute); Judge Claiborne (for tax evasion); Judge Hastings (for conspiracy to solicit a bribe); and Judge Nixon (for making false statements to a grand jury). JUDICIAL DISCIPLINE AND REMOVAL, supra note 87, at 30.

105. See supra notes 83-86 and accompanying text.

106. See generally Reams & Gray, supra note 89. Article IV of the Articles of Impeachment state that Judge Claiborne “betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary. . . .” See H.R. Res. 461, 99th Cong. (1986).
dimensions for a president depends on the circumstances giving rise to questions about the President's integrity. If a president were to commit perjury or to make false statements in a case unrelated to his actions or responsibilities as president, one must still ask whether this misconduct effectively robs him of all moral authority to continue to function as president. It is conceivable that a president who has had his integrity scrutinized in an election and nevertheless been elected has achieved sufficient legitimacy to function as president and obviously not been completely disabled by the questions raised about his integrity. Under these circumstances, elections perform a check on presidential misconduct. Such a check does not exist with respect to misconduct by federal judges. The fact that such ratifying elections have occurred should be taken into account in calculating the magnitude of the offense committed and the magnitude of the harm resulting to the republic.

A variation on this reasoning could be used to explain the House's impeachment and the Senate's conviction of Walter Nixon in 1989. Nixon was impeached and removed from his federal district judgeship for making false statements to a grand jury. In a criminal trial, he had been convicted of making false statements to a grand jury about the efforts he had undertaken to influence a criminal prosecution of the son of a business partner. Clearly, the misconduct alleged did not strictly relate to Nixon's formal actions as a federal judge (i.e., he was not necessarily functioning as a federal judge when talking with the state prosecutor about dropping the case.) Nevertheless, whatever influence Nixon had had available to exercise on behalf of his business partner's son existed by virtue of the federal judgeship he held. Moreover, making false statements to a grand jury impugns a judge's integrity at least as much, if not more, than tax evasion (which involves the making of false statements under oath in a different manner.) Again, the House and the Senate each reasonably concluded that the demonstrated lack integrity robs a federal judge of the most important commodity he must have in order to perform his constitutional function. Nixon's misconduct completely disabled him from continuing to function as a federal judge.

107. See generally, Modern Precedents, supra note 89, at 9-13 (discussing the impeachment of Judge Nixon).

108. See United States v. Nixon, 816 F.2d 1022 (5th Cir. 1987) (affirming a jury trial conviction), reh'g denied, 827 F.2d 1019 (5th Cir. 1987), and cert. denied, 484 U.S. 1026 (1988).

109. "[T]he crime for which [Judge Nixon] was convicted, lying to a grand jury in testimony under oath, is particularly serious because a judge must bear the awesome responsibility of swearing witnesses, judging credibility, and finding truth in cases that come before him." See Modern Precedents, supra note 89, at 10 (quoting Representative Don Edwards, who served as Chairman of the House Judiciary Committee's subcommittee that held hearings on Judge Nixon's impeachment and also as House manager in the subsequent Senate trial).
D. The Significance of Especially Outrageous or Incompatible Conduct.

My understandings of Congress’ impeachment decisions regarding Claiborne, if not those involving Walter Nixon, suggest that these decisions might also be understood as reflecting not an extension or variation of the paradigm for impeachment but rather the possible existence of yet another trend of impeachment proceedings in which the nexus between an official’s misconduct and his or her official duties is not so clear. This latter circumstance consists of those cases in which the misconduct in which an impeachable official has engaged is so outrageous and so plainly incompatible with their status that Congress has no choice but to impeach and remove those officials from office. Congress could have decided that the misconduct for which it was impeaching and removing Claiborne Nixon was sufficiently outrageous or destructive of their capacities to function effectively as federal judges so as to justify their impeachments and removals from office. There is little doubt that Congress’ perception that each judge had engaged in such outrageous misconduct had been reinforced by the facts that prior to both judges’ impeachments they had been criminally prosecuted, convicted, and imprisoned. Indeed, they were both continuing to receive their judicial salaries while incarcerated. This outrageous circumstance intensified the pressure placed on Congress to impeach the two federal judges.

The possible existence of this second category of impeachable offenses helps to explain one of the most vexing hypotheticals, repeatedly raised involving the impeachment process, namely whether a president may be impeached and removed from office for murder. The nexus between the president’s misconduct—murder—and his official duties (taking care to enforce the laws faithfully) is not readily apparent, for it is not clear that a President’s oath obligates a President in his private capacity to comply with every single law, even those that he does not have the formal authority to enforce. Nevertheless, impeachment, in all likelihood, is appropriate. The best explanation why this is so was made by Professor Charles Black in his magnificent study of the impeachment process:

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. 110

110. BLACK, supra note 55, at 39. It is noteworthy that Justice Story was uncertain about whether murder was an impeachable offense. He was not sure about the validity of William Rawle’s assertion that the “legitimate causes of impeachment . . . have reference only to public character, and official duty. . . . In general, those offenses, which may be committed equally by a private citizen, as a public officer, are not the subjects of impeachment. Murder, burglary, rob-
E. Alternative Means of Redress.

Yet another pattern is the persistent recognition by Congress that its constitutionally vested authority or power includes the discretion not to exercise the power or authority if it sees fit. In the realm of impeachment, the House has recognized that its "sole Power of Impeachment"\textsuperscript{111} includes the discretion not to impeach an official even if a majority of its members thought or believed that the official had committed an impeachable offense or engaged in a misconduct that could reasonably be characterized as impeachable. Similarly, the Senate has the authority implicit within its "sole power to try an Impeachment"\textsuperscript{112} to decide not to convict or remove an official even if most if not all of its members believed the latter had committed an impeachable offense.

In deciding whether to impeach or not, the House and the Senate each have the power to consider whether it (or some other official body) has available alternatives (or supplements) to impeachment.\textsuperscript{113} One such alternative (or supplement) is censure. If one were to understand censure as consisting of nothing more than a resolution passed by the House or the Senate, it is plainly constitutional.\textsuperscript{114} In my opinion, every conceivable source of constitutional

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  \item \textsuperscript{111} U.S. CONST. art. I, § 2, cl. 5.
  \item \textsuperscript{112} U.S. CONST. art. I, § 3, cl. 6.
  \item \textsuperscript{113} See generally, Michael J. Gerhardt, The Constitutional Limits To Impeachment And Its Alternatives, 68 TEX. L. REV. 1 (1989).
  \item \textsuperscript{114} It is noteworthy that prior to the House's vote to impeach President Clinton, Representative William Delahunt (D.-Mass.) had sought the opinions regarding the constitutionality of censure of the nineteen constitutional scholars and historians who had testified on November 9, 1998, before the House Subcommittee on the Constitution. Fourteen of the nineteen indicated that they thought censure was constitutional. Joan Biskupic, \textit{Many Scholars Say Censure Is an Op-
authority—text, structure, and history—supports the legitimacy of the House’s or the Senate’s (or both’s) passage of a resolution expressing its disapproval of the President’s conduct. First, there are several textual provisions of the Constitution confirming the House’s authority to memorialize its opinions on public matters. The Constitution both authorizes the House of Representatives to “keep a Journal of its Proceedings” and provides that “for any Speech or Debate in either House, [members] shall not be questioned in any other Place.” One may plainly infer from these textual provisions the authority of the House or the Senate or both to pass a non-binding resolution in which each expresses its opinion—pro or con—on some public matter.

Second, the passage of resolutions critical of a president is quite compatible with the constitutional structure. The Constitution does not establish impeachment as the only constitutionally authorized means by which the House or the Senate may “censure” the President. Instead, impeachment exists as the only means by which the House may formally charge and thereby obligate the Senate to consider the removal of a president for certain kinds of misconduct. Removal and disqualification are the only sanctions that the Senate may impose if it were to convict an impeached official at the end of an impeachment trial. Otherwise, the constitutional structure leaves to the criminal process the investigation and punishment of all sorts of misconduct (some but not all of which might overlap with impeachable misconduct) and to the political process—broadly understood—the checking or censure of misconduct of a wide variety (including but not limited to offenses that do not rise to the level of an impeachable offense).

Moreover, it is nonsensical to think that if a resolution has no legal effect it somehow still might violate the law. By definition, a resolution has no effect on the law (or legal arrangements) in any way. To think that a resolution might have little or no practical effect is not a reason to think that it is unconstitutional; it is a reason to think perhaps that a resolution critical of the President might be a futile act politically. The calculation of whether a resolution is a worthwhile endeavor politically is separate and distinct from whether it is constitutional.

In addition, the House and the Senate each have passed resolutions condemning or criticizing the misconduct of presidents and other high-ranking officials. Indeed, on at least two occasions, the House has memorialized its disapproval of presidential misconduct. The subjects of the latter resolutions

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117. U.S. Const. art. I, § 3.
were Presidents Polk\textsuperscript{118} and Buchanan.\textsuperscript{119} Moreover, though the House had decided not impeach President Tyler for his exuberant exercises of his veto authority, the House did adopt a House Committee report that had been highly critical of President Tyler's exercise of his veto authority.\textsuperscript{120} In addition, the Senate censured President Andrew Jackson for firing his Treasury Secretary because he refused to implement Jackson’s instructions to withdraw national bank funds and to deposit them in state banks.\textsuperscript{121} Such resolutions provide historical precedents for the House and the Senate to do something similar with respect to President Clinton (or any other official). For that matter, the thousands of resolutions that the House and the Senate each have passed over the years expressing its opinions on a wide variety of public matters constitute other relevant precedents supporting the House’s or the Senate’s passage of a resolution expressing its condemnation or disapproval of a President’s conduct. (Indeed, the House has also passed at least three resolutions expressing its disapproval of conduct by high-ranking executive officials other than the President, while the Senate also passed two such resolutions in the 19\textsuperscript{th} century.)\textsuperscript{122}

F. The Judgment of History.

Yet another significant pattern in impeachment proceedings is that as the latter unfold members of Congress increasingly feel the pressure to find some non-partisan basis for their decisions that will withstand the test of time. This pressure comes from the increasing awareness that the legitimacy of their decisionmaking will depend largely on the judgment of history. In Federalist Number Sixty-Five, Alexander Hamilton warned that impeachments would often begin in a partisan atmosphere.\textsuperscript{123} Consequently, Hamilton counseled, the further along an impeachment proceeded the more members of Congress needed to find a non-partisan basis on which to resolve the proceedings. The historical record is replete with senators who in the midst or near the end of impeachment trials expressed the awareness that their final decision to achieve legitimacy needed to withstand the test of time. As Senator William Fessenden commented near the end of President Andrew Johnson’s trial, the bur-


\textsuperscript{121} Submission by Counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives, Associated Press Pol. Service, Dec. 9, 1998, \textit{available in 1998 WL 7470314}.

\textsuperscript{122} See Scully, \textit{supra} note 119.

\textsuperscript{123} The Federalist No. 65, at 365 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
den was then on the Senate, given the partisan origins of the proceedings, to reach a judgment about which "all right thinking men" would agree. This comment is consistent with not only many of the ratifiers' expectations about impeachment but also most subsequent scholars' and senators' perceptions of the very high threshold an impeachment decision must satisfy in order to be viewed historically as a legitimate exercise of Congress' impeachment power.

**CONCLUSION**

My sense of the history of the federal impeachment process, as reflected in the debates in the constitutional and state ratifying conventions and Congress' subsequent exercises of its impeachment authority, is that "other high crimes or misdemeanors" are technical terms of art that refer to so-called political crimes. Political crimes are abuses of power or the kinds of misconduct that can only be committed by some public officials by virtue of the public offices or special trust that they hold. These political crimes are not necessarily indictable offenses. Not all political crimes are indictable offenses, and not all indictable offenses are political crimes.

Whether or not some misconduct by a public official is a political crime or rises to the level of an impeachable offense turns on a number of different factors. These factors are apparent from studying the constitutional and state ratifying convention debates as well as Congress' impeachment decisions and practices. These factors include but are not limited to the seriousness of the misconduct, its timing, the link between the misconduct and the official's official responsibilities or special trust held by virtue of the positions held by the official, alternative means of redress, and the degree of injury caused to the public by the misconduct in question.

Studying Congress' impeachment decisions also reveals some noteworthy patterns. Most if not all impeachments made by the House and convictions made by the Senate have followed or approximated the paradigm of an impeachment—the abuse of official power or privilege. In doing so, congressional practices have been quite consistent with the framers' and ratifiers' statements and scholarly commentary recognizing impeachment as a unique component of the constitutional scheme of checks and balances. The Constitution embodies the judgments that the judiciary and the President (as a symbol of the executive branch) each need to be independent (to some meaningful degree) and possess the vitality and stature necessary to allow the judiciary and the President to act in their respective ways as checks on the national legislature. In other words, congressional practices reflect the judgment that the Constitution envisions that impeachment should not be used to punish or retaliate against impeachable officials, such as the President and federal judges,

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because of their opinions, policy differences, or innocent errors of judgment. Nor should impeachment be used for largely partisan purposes; hence, some senators refused to convict Associate Justice Samuel Chase or President Andrew Johnson for fear that if either were removed future presidents or judges from their party would likely be punished in the impeachment process just by virtue of their party affiliation. Rather, impeachment generally should be deployed against impeachable officials for having engaged in some misconduct that (1) has caused some serious injury to the republic or to the constitutional system and (2) has a nexus with the official's formal duties.

The one or at most two impeachments that do not fit neatly into the paradigm—those of Harry Claiborne and Walter Nixon—might be explained in two ways. They could be explained on the grounds that integrity is the single most important asset that a federal judge needs to do his job and that demonstrated lack of integrity robs a judge of the moral authority to continue to function and disables him completely from continuing to perform his constitutional function. Alternatively, the Nixon and particularly the Claiborne impeachment could be explained as signaling the existence of a second category of offenses consisting of the kinds of misconduct that are so outrageous and so incompatible with the status or duties of the officials who have committed them that Congress has no choice but to impeach and remove those officials.