Restoring the Balance of Power: Impeachment and the Twenty-Second Amendment

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The recent proceedings against President William Jefferson Clinton brought Congress’ impeachment power into the national spotlight. In the public debate on when it is appropriate for Congress to exercise this power, it is important to consider that the Framers gave this power to the legislature principally as a tool to maintain a balance of power between the legislative and executive branches of the federal government. Examining the debates at the Constitutional Convention, this Note details how the Framers deliberately sought to balance the President’s term in office and eligibility for re-election with the Congress’ impeachment power in order to prevent one branch from attaining superiority over the other. This Note argues that the Twenty-Second Amendment, which limits the President to two terms in office, has shifted the delicate balance of power established by the Framers in favor of the legislative branch. The Note also suggests that the Framers’ desired balance of power between the two branches could be re-established more closely if the phrase "high crimes and misdemeanors" in Article II of the Constitution were to be construed narrowly.

INTRODUCTION

The impeachment proceedings in the fall and winter of 1998 and 1999 against President William Jefferson Clinton provided a crash course for the American public in this unique constitutional power given to Congress. To those who did not simply tune out the political din of the impeachment proceedings, armchair pundits across the nation opined as to whether they believed the President’s actions, in a phrase that has now entered the popular lexicon, “rose to the level of an impeachable offense.” This Note is not about the Clinton impeachment per se, but it would be disingenuous to suggest that it was not, at least in part, inspired by the proceedings. Discussions, academic and popular, about the impeachment brought an arcane constitutional phrase to the forefront of national discourse: “high Crimes and Misdemeanors.” While this Note does not attempt principally to define this phrase, it does argue, from constitutional structure and history, that it should be construed narrowly when used against the President.

1 U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).
2 Although the impeachment power also can be used against the Vice President “and all civil Officers of the United States,” U.S. CONST. art. II, § 4, because the Twenty-Second
The thesis of this Note is straightforward: the Twenty-Second Amendment to the Constitution, which limits a President to two terms in office, requires that the impeachment power held by the Congress—specifically, the definition of "high crimes and misdemeanors"—be construed narrowly when used against the President. At first blush, these two provisions in the Constitution, the President's term and the Congress' impeachment power, seem to have little in common. The argument that one should consider these provisions together is premised on the assumption that the Framers constructed the Executive deliberately, in order to assure its internal consistency and its relationship with the other branches of the federal government. With respect to the other branches (especially the Legislature, with whose relationship to the Executive this Note is primarily concerned), this relationship is commonly referred to as the separation of powers with attendant "checks and balances." This Note is concerned with the manner in which the Framers purposefully constructed, or "constituted," the Executive and the matter in which this constitution of the Executive is conceptualized in terms of a balance of power between itself and the Legislature (the "external balance"). Second, continuing with the theme of balance, there is implicitly an internal balance within the executive office. When the Framers constructed the Executive, they sought to establish internal cohesion between its constituent powers. Thus, when the Twenty-Second Amendment was ratified, it changed the manner in which the presidency was constituted, throwing both the internal and external constitution of the Executive out of balance. As a result of the external imbalance caused by the Twenty-Second Amendment, this Note argues that the impeachment power should be construed narrowly.

Principally, this Note presents an argument about the structure of the office of the President as set forth in the Constitution. To advance this structural argument, this Note relies primarily on the history surrounding the Constitution's drafting. Part Amendment pertains only to the President, this Note is concerned with the impeachment power only when it is used against the President.

3 See U.S. Const. amend. XXII, § 1.

4 A word about terminology is in order. Not until relatively late in the Constitutional Convention did the title "President" arise; during most of the debate, the Framers used the terms "the Executive" or "Executive Magistrate." Thus, seeking to reflect usage appropriate to the context of the Convention debates, in the subsequent pages this Note uses "President" only when the Convention delegates began using the term. References herein to the Executive, then, unless clearly indicated by their context, do not refer to the executive branch as it has evolved today, but to the Chief Executive.

5 Because this Note examines impeachment (and its relationship to the Twenty-Second Amendment) from the perspective of the Constitution's structure, it does not discuss the considerable body of material surrounding the various impeachments that have taken place in American history. These impeachments, judicial and Presidential, shed light on how the impeachment power has been interpreted, and they are important primarily for addressing that issue. This Note, however, considers why the Framers constructed the impeachment power as they did and, in light of the Twenty-Second Amendment, what implications that
I provides a brief tour through eighteenth-century Anglo-American political philosophy, establishing the rudiments of the constitutional theory that influenced the Framers. Drawing on the intellectual history of eighteenth-century political thought, this Part argues that the Framers' constitutional ideal was rooted in the fear of corruption and tyranny and the need for balance—balancing both the interests of different factions in society and the "passions" that animate individual human beings. Part II examines in detail the debates at the Constitutional Convention regarding the internal balance of the Executive and why the Framers constituted that office the way they did. This Part focuses especially on the troublesome issues facing the Framers of deciding on the Executive's term in office and how his term related to internal and external balance in the office—particularly the relationship between the President's term and the Congress' power of impeachment. Having shown why the Framers constituted the Executive in the manner they did, Part III argues that the Twenty-Second Amendment throws out of balance the constitutional structure of the Executive.

I. ENGLISH CONSTITUTIONAL THEORY IN THE PRE-REVOLUTIONARY ERA

The end of the French and Indian War in 1763 left England's colonists in America generally content in their proud status as Englishmen. Within a few short years, however, in response to Parliament's new programs to manage its empire more closely (especially the taxation programs enacted, at least in part, to recover the cost of protecting the colonies during the War), the colonists' attitudes changed dramatically: they had come to believe that the Crown was corrupt.6 More accurately, they believed that the vaunted English mixed constitution had become corrupt.7

Not a written document like the subsequent American Constitution, the English Constitution was the political arrangement that developed over many centuries and which was formalized after the Glorious Revolution of 1688.8 Principally, the constitution balanced the interests of what seventeenth-century Englishmen considered to be the three natural "estates" in society: the monarchy, the aristocracy (through the House of Lords), and the democracy (comprised of all other Englishmen, represented by the House of Commons), or the One, the Few, and the Many.9 It was a "mixed constitution" precisely because it constituted the government by mixing construction has for the balance of power between the executive and legislative branches of the federal government.

7 See id.
8 See id. at 10-11; FRANCIS D. WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM 174-206 (1949).
9 See WOOD, supra note 6, at 18-20.
together these three disparate estates with conflicting interests. "By balancing... the ancient contending interests of English society and by mixing within a single government the several categories of politics that had been known to the Western world for centuries, the English, it seemed, had concretely achieved what political philosophers from antiquity on had only dreamed of."10

The issue of balance between the interests of the three estates was crucial to the English system, for any imbalance, it was feared, would wreak political havoc upon the nation. Unchecked, a monarchy would naturally and inevitably devolve into tyranny, an unchecked aristocracy into oligarchy, and an unchecked democracy into anarchy.11 This fear of imbalance stemmed from the belief that a principal human impulse was to exert power over others; the function of government, then, was to preserve liberty for all Englishmen by restraining the power of each estate.12

Englishmen, whether residing in England proper or in the colonies, shared this general conception of constitutional theory. However, due to the American colonists’ position on the outskirts of the empire, seemingly alienated from the corridors of power, a particularly radical strain of English political thought resonated with them—a strain of thought hypersensitive to any perceived imbalance in the power structure.13 Gordon Wood refers to this strain of thought as the "Whig science of politics."14 In the historiography of eighteenth-century England and America, the terms "republicanism" or "classical republicanism" often are employed as well.15

10 Id. at 11.
12 See BAILYN, supra note 11, at 70.
13 See WOOD, supra note 6, at 14-17; see also MARY BETH NORTON, THE BRITISH-AMERICANS: THE LOYALIST EXILES IN ENGLAND, 1774-1789, at 141-45 (1972) (arguing that the colonial Loyalists perceived the cause of the revolution as stemming from a radical Whig (or "republican") ideology possessed by the self-styled Patriots).
14 WOOD, supra note 6, at 3.
15 See, e.g., JOYCE APPLEBY, Liberalism and Republicanism in the Historical Imagination, in LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 1, 17-23 (1992) [hereinafter APPLEBY, LIBERALISM AND REPUBLICANISM] (describing the
the early eighteenth century, the English aristocracy had been tamed sufficiently, so
development of republican, or Whig, thought in 17th- and 18th-century England and its
explication by historians beginning in the 1960s).

To avoid unnecessary complication, only the barest outline of Whig/classical
republican thought is set forth in this Note. A considerable body of literature, however, has
examined the theme of classical republican political thought and ideology at the time of the
Revolution and through the early decades of the new nation's existence. For an overview
of the historiography of republicanism, see Robert E. Shalhope, Republicanism and Early
American Historiography, 39 WM. & MARY Q. 334-56 (1982), and Robert E. Shalhope,
Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism

The "republican synthesis" is not without its critics. Most important are those who
assert that the ideological pretensions of republicanism often elide the influence of
liberalism (as derived from Lockean theory and as experienced in the developing market
economy of North America) on Revolutionary and post-Revolutionary America. Edward
Countryman provides perhaps the best one-sentence synopsis of these criticisms: "Beneath
[the] concern with republicanism as a mode of political relations lies an awareness that its
emergence was linked to that of liberalism as a mode of social relations and of capitalism
as a mode of economic production and exchange." Edward Countryman, Of Republicanism,

Among the most trenchant critics are Joyce Appleby, see, e.g., the essays collected
in APPLEBY, LIBERALISM AND REPUBLICANISM, supra, especially Liberalism and the
American Revolution, 140, 160 (arguing that a "[t]ransformation of values" brought about
by demographic and economic changes throughout the eighteenth century "which
accompanied the intrusion of the market into social relations can scarcely be distinguished
from the liberal philosophy which found expression in revolutionary rhetoric"); The Social
Origins of American Revolutionary Ideology, 161, 163 (criticizing historians of classical
republicanism for constructing "a colonial past ill-adapted to serve as the story of the
beginnings of what was to come"); and Republicanism in Old and New Contexts, 320, 323
(arguing that a "classical republicanism" and a "liberal republicanism" "represent the
contending republican paradigms of Federalists and Jeffersonians" in the Founding and
Early National periods), John Patrick Diggins, see, e.g., JOHN PATRICK DIGGINS, THE LOST
SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF
LIBERALISM, 16 (1984) (exploring the "dilemma of American politics" found in the tension
between "[c]lassical political philosophy [which] aims to discipline man's desires and raise
him far above his vulgar wants' and liberalism, which "promises to realize desires and
satisfy wants"), and Isaac Kramnick, see, e.g., Isaac Kramnick, Republican Revisionism
Revisited, 87 American Historical Review 629, 635 (1982) (arguing that English and
American radicals in the late eighteenth century were much less likely to base their
arguments on the abstract notions of rights found in classical republicanism than on
"modern socioeconomic grievances" based on Lockean ideas, producing a critique of
governmental authority articulated in terms of property rights and opposition to taxation).
See also T.H. Breen, Ideology and Nationalism on the Eve of the American Revolution:
Revisions Once More in Need of Revising, 84 J. AM. HIST. 13, 35 (1997) (arguing that the
assertion of "national superiority" by England in the 1760s and 1770s caused the colonists
to develop a distinct sense of American national identity that gave salience to the otherwise
abstract theories of Locke: "Locke's political writings took on special significance for
people trying to resist the intrusive nationalism of the metropolitan state."
that for English Whigs, the contest for power had become one primarily between the Crown and the Commons; Whigs sided with the Commons.  

Whigs championed government as "an essential restraint on the lusts and passions that drove all men" and those chosen to rule were to protect the rights and liberties of the people.

The Whigs' definition of liberty also was rooted in power. Liberty was not the absence of restraint; rather, liberty was the "minimal amount of power a man deserved, because he was a man," the power "which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry," the right to control his own destiny, and the right to his life and property. Just as the Crown could abuse its power by tyrannizing the people and subjecting them to slavery, the people could abuse their power—their liberty—through licentiousness or anarchy that would destabilize the social order. The Whigs' fear of anarchy, though, paled in comparison with their fear of tyranny.

When Whigs looked at history, they saw repeated examples of rulers who abused their trust, trampling the people's rights and making them surrender to the rulers' arbitrary power. Indeed, Whigs regarded virtually all of human history as evidence of civilizations seeking, but ultimately failing to achieve, lasting liberty. Liberty, achieved through the balance of power in society, was like the apex of a triangle. Even for those societies that were able to reach the apex, their attainment was precarious, tenuous, and fleeting, devolving quickly into anarchy or tyranny—usually tyranny. The English believed that they alone, through their glorious constitution, had been able to achieve lasting balance and to sustain liberty. Yet, to persevere in liberty, Whigs believed, required constant vigilance against corruption of the constitution.

It is worth noting at this point, if only by way of reminder, that the modern use of the term "constitution" to refer to a document that sets forth the fundamental law of a nation, such as the United States Constitution, is not the manner in which the term was used in reference to the English Constitution. Rather, the term "constitution" in the context under discussion here draws on a more basic definition of the word: "the way in which a thing is made up; structure; organization." In the

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16 See WOOD, supra note 6, at 20.
17 Id.
18 Id. at 21.
19 See id. at 23 ("It is much easier to restrain liberty from running into licentiousness than power from swelling into tyranny and oppression." (quoting Josiah Quincy)).
20 See id. at 51-53.
21 See id. at 28-32 (describing the English as the only group of people in history to be so “watchful of their liberty, and so successful in their struggles for it”).
22 See APPLEBY, LIBERALISM AND REPUBLICANISM, supra note 15, at 21 (stating that the development of republican thought in seventeenth-century England “created a new historical consciousness that produced a heightened sense of the dangers of corruption”).
23 WEBSTER’S NEW WORLD DICTIONARY 298-99 (3d college ed. 1988); see also
same way, when Revolutionary-era writers wrote of the “corruption” of the English constitution, they were not referring to corruption in the way that one might do so currently (in reference to bribery of a public official, for example). Corruption of the constitution, in the eighteenth-century sense, meant disturbance of the precarious balance of power between the Crown and the people.\textsuperscript{24} To be sure, that balance could be upset by an act such as bribery. Yet, such an act evidenced corruption only because bribery of a public official usurped the power of the people whose interests the official was bound to protect.\textsuperscript{25}

By the 1770s, whiggish political observers on both sides of the Atlantic had become profoundly pessimistic, seeing corruption in virtually every act of the government:

\begin{quote}
As the Whigs interpreted the events of the eighteenth century, the Crown had been able to evade the restrictions of the revolutionary settlement of 1688 and had “found means to corrupt the other branches of the legislature,” upsetting the delicately maintained balance of the constitution from within. Throughout the eighteenth century the Crown had slyly avoided the blunt and clumsy instrument of prerogative, and instead had resorted to influencing the electoral process and the representatives in Parliament in order to gain its treacherous ends. This seemed in the minds of devout Whigs a far more subtle tyranny than the Stuarts' usurpations of the previous century, because “the very means which were devised to secure and protect” the people had become “the engines of destruction.” George III was “now tearing up the constitution by the roots, under the form of law.” . . . It appeared to those who clung to original principles of the constitution and the growing tradition of separation of powers that the Crown, in its painful efforts to build majorities through borough-mongering and the distribution of patronage, was in fact bribing its way into tyranny.\textsuperscript{26}
\end{quote}

\textsuperscript{24} BAILYN, supra note 11, at 66-69.

Like their contemporaries in England and like their predecessors for centuries before, the colonists at the beginning of the Revolutionary controversy understood by the word “constitution” not, as we would have it, a written document or even an unwritten but deliberately contrived design of government . . . ; they thought of it . . . as the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them.

\textit{Id.} at 67-68.

\textsuperscript{25} See WOOD, supra note 6, at 32-33.

\textsuperscript{26} See \textit{id.}

\textsuperscript{26} \textit{Id.} at 33.
As if the Crown's efforts at subversion were not bad enough, Whigs observed the lifestyles of ordinary people, flush with wealth due to increased trade from Britain's ever-growing Empire. The people, Whigs believed, were blind to the Crown's usurpations because they themselves were becoming corrupt—licentious, apathetic, and ultimately inattentive to their civic duties. Commentators found haunting parallels in classical Rome, which, they contended, fell after the Asian wars brought previously unknown levels of luxury.

That corruption "which always begins among the Rich and the Great" soon descended to the common people, leaving them "enfeebled and their souls depraved." With the character of the Roman people so corrupted, dissolution had to follow. "The empire tottered on its own foundation, and the mighty fabric sunk beneath its own weight."

Observing George III's machinations and what they perceived to be the growing venality of English society, American Whigs feared the worst: that England had lost its precarious balance at the apex of liberty and had begun the inevitable descent into tyranny. It was in this light that Americans viewed the imperial taxation programs of the 1760s and 1770s, most infamously, the Stamp Act, the Tea Act, and the Intolerable Acts. With England a cauldron of corruption and on the verge of tyranny, colonial patriots chose revolution not principally to gain independence from Britain, they claimed, but to purify and to revitalize the English constitution and thus to ensure for themselves the rights and liberties of Englishmen to which they were by nature entitled.

II. CONSTITUTIONAL THEORY IN THE NEW POLITICAL PARADIGM: IMPEACHMENT AND THE STRUCTURE OF THE EXECUTIVE BRANCH

The American Revolution, of course, did away with the institutionalized authority of monarchs and aristocrats in American government and society and thereby also obviated the need for balancing the interests of the three traditional estates in the United States Constitution. Likewise, conceptions of "tyranny", so closely tied prior to the Revolution to the balance of power between the estates, evolved to fit the new constitutional paradigm. This Part examines the manner in which the Framers, at the Constitutional Convention, sought to constrain the nascent government's perceived predilection toward tyranny; it pays particular attention to the debates surrounding

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27 See id. at 35-36.
28 See id. (quoting editorials from 18th-century American newspapers).
29 Id. at 35.
30 See BAILYN, supra note 11, at 94-143.
31 See WOOD, supra note 6, at 43-45.
the composition, power, and limitations of the executive branch. Ultimately, this Part's focus is on how and why the impeachment power came to be structured in the way it is in the United States Constitution, arguing that, although the impeachment power is given distinctly to the Legislature, it is also an integral part of the composition of the executive branch.

One might say that the Revolution decapitated the classical republican conception of politics that had sought to balance the conflicting interests of rulers and those they ruled; the ruler as a distinct entity was now gone, and the people would rule themselves. In post-revolutionary America, government became a means simultaneously to avoid anarchy and to promote the liberty and prosperity of individuals. Yet, the government was never to be separate from the people; the people breathed life into it through the Constitution, and the Constitution, in the hands of the people was to be as "clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to furnish it as they please." James Madison noted, "[T]he important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government." That is, the government, through the people’s Constitution, was to be the servant of the people, not vice versa.

While the structure of government in the Constitution was designed to balance the interests of the former colonies that had become independent states, one of the purposes of government under the Constitution was to balance or reconcile the competing interests that arose from among the people themselves. Accordingly, the Constitution also was designed to prevent one legitimate interest from overwhelming another. This modified political paradigm (i.e., balancing interests rather than estates) produced an altered conception of "tyranny"—a fundamental concept that fueled the Revolution and retained salience in the new nation. Tyranny came to be regarded as the abuse of power by any branch of government. Madison, in Federalist Nos. 47 and 48, explained why the separation of powers provisions in the proposed Constitution must be tempered with the checks and balances provisions; otherwise, unchecked, one branch conceivably could aggregate all power in itself and "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or

33 WOOD, supra note 6, at 600-01 (quoting James Wilson of Pennsylvania).
35 See WOOD, supra note 6, at 608.
36 See id. ("The accumulation of all powers, . . . legislative, executive, and judiciary, in the same Lords . . . may justly be pronounced the very definition of tyranny." (quoting James Madison)).
elective, may justly be pronounced the very definition of tyranny.” By making pointed reference to “one, a few, or many” and “hereditary” power, Madison implicitly linked the specter of tyranny under the English constitution with the continuing need for vigilance against tyranny under the new United States Constitution.

When the Constitutional Convention convened in Philadelphia in May of 1787, in addition to the copious personal study of classical and contemporary political writing in which many of the delegates had engaged, these men also drew on a decade of practical experience in trying to establish just republican governments in the thirteen former colonies. Each state had devised its own constitution, and some were regarded as providing better models than others for the proposed federal constitution. Some states had bicameral legislatures, some unicameral. Some employed a single governor or president in the executive, while others had, effectively, an executive committee. The most pressing issue for the Framers, exemplified in the various state constitutions, was whether to create a powerful legislature. Indeed, chary of the specter of monarchical power vested in an individual executive, in breaking with Britain, many states sought to democratize government by exalting the legislature. In many cases, the judiciary and the executive were secondary to the legislature; they were appointed by the legislature and serving at its pleasure. Observing human nature at work once again, many of the delegates in Philadelphia likely agreed with Madison’s sentiment that “[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex;” the corollary to this observation was that tyranny would result from an unchecked legislature. Thus, in the course of the Constitutional Convention, the need for a powerful Executive, whose authority arose apart from the legislature and who

37 THE FEDERALIST NO. 47, supra note 34, at 336 (James Madison).
38 See generally WOOD, supra note 6, at 127-255 (discussing in detail the constitutions of the states).
39 See id.
40 See id.
41 See id.
42 See id.
43 See id.
44 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 338 (Adrienne Koch ed., Ohio University Press 1966) (1840) [hereinafter MADISON’S NOTES]; see also THE FEDERALIST NO. 49, supra note 34, at 350 (James Madison) (“[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”); MADISON’S NOTES, supra at 312.

Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable.
could act as a check on the legislature, became apparent to many of the delegates.

Edmund Randolph, a prominent member of the Virginia delegation, submitted what came to be known as the Virginia Plan to the Convention on its first day of substantive debate, Tuesday, May 29, 1787. Article Seven of the Virginia Plan concerned the appointment of a National Executive magistracy. When delegates began to debate Article Seven on June 1, the first speaker to rise and comment with respect to the proposed Executive, Charles Pinckney of South Carolina, expressed the fear that it might become a monarchy. Pinckney’s statement begged the question of whether the functions of the Executive would be fulfilled by an individual or a committee—a question the delegates addressed next. James Wilson of Pennsylvania preferred a single executive magistrate “as giving most energy dispatch and responsibility to the office,” while Randolph thought that a committee of three would be as effective, and more independent, than a single magistrate and feared that a single magistrate would be the “[fetus] of monarchy.” Wilson replied that “unity in the Executive instead of being the fetus of monarchy would be the best safeguard against tyranny.” Due to the consensus of subsequent speakers that an Executive comprised of more than one member probably would be ineffectual because of disagreements among its members, the Convention chanced the specter of monarchy and agreed that a single individual would constitute the Executive.

A. The Term of the Executive and its Relationship to the Legislature

The term for which the Executive would hold office was a crucial issue for the Framers and was intimately affected by a number of other issues. This Note shall

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45 A word is in order about the spelling of the names of delegates to the Constitutional Convention. Spellings were considerably more fluid in the eighteenth century than they are today. A particularly good example is the name of John Dickenson of Delaware, whose name also is frequently spelled “Dickinson.” See, e.g., THE WRITINGS OF JOHN DICKINSON (Paul Leicester Ford ed., 1895). For the sake of consistency, then, in this Note, delegates’ names are spelled as they appear in MADISON’S NOTES, supra note 44.

46 See MADISON’S NOTES, supra note 44, at 28. The Convention formally had convened on Friday, May 25, but all business on that day and on Monday, May 28, consisted merely of housekeeping matters. Randolph’s proposal was the first substantive issue submitted to the Convention, and, as the Virginia delegates no doubt hoped, it provided the foundation for all subsequent debate.

47 See id. at 31.

48 See id. at 45. Pinckney averred that, although he favored a “vigorous Executive,” he feared that if its powers extended to executing “peace & war,” this “would render the Executive a monarchy, of the worst kind, to wit an elective one.” Id.

49 Id. at 46.

50 Id.

51 Id. at 47.

52 See id. at 60.
examine the constitution of the Executive from the perspective of the length of the term to see how the following issues interrelate. First, and most importantly, fearing the monarchic tendencies of a single executive officer, the Framers believed that the more closely they tethered the Executive to the Legislature, the longer his term of office could be. Second, the delegates debated whether the Executive should be eligible for re-election to subsequent terms in office. Third, the delegates discussed extensively the specific powers to be given to the Executive, especially the Executive's authority over the military and his veto power. Fourth, the delegates intentionally limited the power of impeachment vested in the Legislature in relation to the power given the Executive, his term of office, and his eligibility for re-election. The delegates regarded each of these issues as fundamental to the constitution of the Executive, and each shaped the Executive's independence from or dependence on the Legislature. The Executive, then, was the great “push-me/pull-you” of the Constitutional Convention: each change fundamentally affected other aspects of the Executive's composition. Indeed, in the words of Governor Morris of Pennsylvania, "It is the most difficult of all rightly to balance the Executive. Make him too weak: The Legislature will usurp his powers: Make him too strong. He will usurp the Legislature.”

1. Appointment of the Executive: By the Legislature or by the People?

   The delegates realized that every power given to the executive branch meant weakening the relative strength of the Legislature, and while they wished to avoid oligarchic tyranny by the Legislature, they also did not want to establish so strong an Executive that the inevitable pull of monarchy might triumph. Both the Virginia Plan and the New Jersey Plan contemplated an Executive elected by the Legislature. Throughout the debates, the thorny issues surrounding the method of selecting the Executive persisted; alternative suggestions included the direct election of the Executive by the people, or through electors (which, naturally, raised the related problem of how the electors would be chosen).

53 Id. at 361.

54 Throughout his notes on the Convention, Madison employed the terms “appointment” and “election” of the Executive by the Legislature without providing any clear distinction between them. When the Convention began to consider public election of the Executive, whether directly or through electors, Madison always employed the term “election”. When discussing the debates, this Note will always use the term that is appropriate to the context of the debate.

55 See MADISON'S NOTES, supra note 44, at 31, 119 (setting forth, respectively, the Virginia Plan by Edmund Randolph and the New Jersey Plan by William Patterson, both of which were proposals for the federal constitution).
The Virginia Plan suggested that the Executive "be chosen by the National Legislature for a term of [blank] years," and the New Jersey Plan suggested, similarly, "that the U. States in Cong[ress] be authorized to elect a federal Executive . . . to continue in office for the term of [blank] years." Both plans left the term of years open to debate. When debate was first opened on this issue under the Virginia Plan, James Wilson of Pennsylvania spoke in favor of election by the people; Roger Sherman of Connecticut, however,

was for the appointment by the Legislature, and for making [the Executive] absolutely dependent on that body, as it was the will of that [body] which was to be executed. An independence of the Executive [from] the supreme Legislature, was in his opinion the very essence of tyranny if there was any such thing.

The debate on this issue would continue to swing between these two poles—the dependence and the independence of the Executive vis-a-vis the Legislature, as well as the relative dependence of either of these bodies on the state governments. Wilson averred not only that the Executive and Legislature should be independent of each other, but that both should be independent of the state governments. Later, Wilson modified his suggestion, submitting for the first time the idea of electors to represent the will of the people in choosing the executive magistrate. Election without the intervention of the states, he asserted, "would produce more confidence among the people in the first magistrate, than an election by the national Legislature."

Elbridge Gerry of Massachusetts opined that if the Executive were elected by the National Legislature, "[t]here would be a constant intrigue kept up for the appointment," and that corrupt *quid pro quo* arrangements would result between the Executive and members of the Legislature. This initial debate ended with support for the idea that the Executive be elected by the Legislature for a term of seven years.

When the Convention revisited the issue of appointment of the Executive on July 17, however, Gouvernor Morris of Pennsylvania opposed appointment by the Legislature because the Executive would "be the mere creature of the Legisl[ature]: if appointed & impeachable by that body." Election by the Legislature, Morris

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56 Id. at 31.
57 Id. at 119.
58 Id. at 48.
59 See id. at 50. Earlier, during debate on the election of House members, Sherman had suggested that they be selected by the State legislatures rather than popularly elected as suggested in the Virginia Plan. See id. at 39.
60 Id. at 50.
61 Id. at 50-51.
62 See id. at 51.
63 Id. at 306.
averred, “will be the work of intrigue, of cabal, and of faction”—in other words, election by the Legislature would lead to corruption.\numref{64} To drive home his point, Morris invoked references to Roman Catholicism, the embodiment of anti-republican tyranny for the Founders’ generation: “[I]t will be like the election of a pope by a conclave of cardinals.”\numref{65} Opponents of popular election mounted various arguments: the Legislature would be better able to express the “sense of the Nation;” the people could never be as well informed as the Legislators of a candidate’s “character;” individuals would vote for someone from their own state, putting the small states at a disadvantage; and the common people—their prudence always in question by eighteenth-century gentlemen such as the Convention’s delegates—would be led into voting “by a few active & designing men,” while the National Legislature would “be most attentive to the choice of a fit man to carry [its laws] properly into execution.”\numref{66} Proponents of popular election, however, retorted that all the people of so large a country could not possibly be led astray by “‘a few active & designing men.”\umref{67} The core of their argument, however, was that “[i]f the Executive be chosen by the Nat[ional] Legislature, he will not be independent [of] it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence.”\umref{68}

The Convention next addressed the question of the Executive’s appointment when debating whether his term should be renewable. In opposing a non-renewable term for the Executive, Gouvernor Morris argued that such a large country demanded “an Executive with sufficient vigor to pervade every part of it.”\umref{69} Indeed, Morris continued:

One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, against Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose the Legislative body.\umref{70}

\begin{itemize}
  \item[\numref{64}]\emph{Id.}
  \item[\numref{65}]\emph{Id.}
  \item[\numref{66}]\emph{Id.} at 306-07; see also \emph{id.} at 368 (quoting Elbridge Gerry’s assertion that, were a popular election to be enacted, “[t]he ignorance of the people would put it in the power of some one set of men dispersed through the Union & acting in Concert to delude them into any appointment”).
  \item[\numref{67}]\emph{Id.} at 307 (statement of Charles Pinckney).
  \item[\numref{68}]\emph{Id.} at 308.
  \item[\numref{69}]\emph{Id.} at 322.
  \item[\numref{70}]\emph{Id.} at 322-23.
\end{itemize}
control the military and, if necessary, use it to protect the people from legislative overreaching.\footnote{See id. at 322-25.}

When the issue arose again in debate some weeks later, Morris argued that if elected by the Legislature, the Executive would be "uninterested in maintaining the rights of his Station, as leading to Legislative tyranny."\footnote{Id. at 525.} Indeed, he asserted, an Executive with a limited term would still have reason to curry favor with the Legislature:

If the Legislature have the Executive depe[n]dent on them, they can perpetuate & support their usurpations by the influence of tax-gatherers & other officers, by fleets armies &c. Cabal & corruption are attached to that mode of election: so also is ineligibility a second time. Hence the Executive is interested in Courting popularity in the Legislature by sacrificing his Executive Rights; & then he can go into that Body, after the expiration of his Executive office, and enjoy there the fruits of his policy. To these considerations he added that rivals would be continually intriguing to oust the President from his place.\footnote{Id. at 525-26.}

James Madison also argued that the Executive should not be appointed by the Legislature, but should be elected by the people:

If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be \textit{separately} exercised, it is equally so that they be \textit{independently} exercised. There is the same & perhaps greater reason why the Executive [should] be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty. It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature. This could not be if he was appointable from time to time by the Legislature.\footnote{Id. at 326-27.}

Madison asserted that election by the people was far superior to appointment by the Legislature. There was one problem, however, with such an election: suffrage was far more "diffusive" in the North than in the South, because slaves could not vote in the South.\footnote{See id. at 327.} Madison thought a system of electors would obviate the problem posed...
by non-voting slaves by establishing a program closely akin to direct election that would give the southern states a number of electors in accordance with their population.\textsuperscript{76} Madison’s separation of powers argument, rooted in the desire to prevent an Executive and Legislative “coalition” that would be “dangerous to public liberty,” ultimately carried the day on this issue and, as the Convention continued, infused the subsequent design of these two branches of the federal government.\textsuperscript{77}

2. Limited Term or an Open-Ended Executive?

The context of Madison’s separation of powers argument, during debate on the election of the Executive, clearly shows how the Convention struggled to find balance when constituting the various aspects of the Executive. Similar struggles ensued with another principal issue surrounding the Executive’s constitution: Whether the delegates could provide the Executive with adequate power and autonomy without making him subservient to or too independent from the Legislature. Throughout the Convention, the Framers continued to debate and alter the balance between these central issues: the manner of the Executive’s election, the duration of his term in office, whether he could be re-elected for subsequent terms, and the possibility and extent of any impeachment power held by the Legislature.\textsuperscript{78}

The Framers, as discussed above, worked within a whiggish frame of reference, believing that the desire for power, influence, and wealth were part of human nature, and that wise governments must be designed to allow men to exercise these passions in a controlled and productive, rather than a licentious and destructive, manner.\textsuperscript{79} Thus, Gouvernor Morris believed that if a powerful Executive were not given the possibility of being “rewarded with a reappointment” to this post of honor then he might stage a coup. “Shut the Civil road to Glory,” Morris warned, and “he may be compelled to seek it by the sword.”\textsuperscript{80} Further, Morris believed that a finite term for the Executive might cause him to “make the most of the short space of time allotted him, to accumulate wealth and provide for his friends,” and would ultimately “produce violations of the very constitution it is meant to secure.”\textsuperscript{81} Morris argued for complete independence of the Executive from the Legislature: “He saw no

\textsuperscript{76} See id. The problem, more clearly stated, was that if the President were to be elected by popular vote from the country as a whole, the northern states would have a far greater advantage because a higher percentage of their population could vote. With electors interposed, however, and allotted according to population, each of the states would have a more equitable number of votes for President.

\textsuperscript{77} See id. at 326-27.

\textsuperscript{78} See supra text accompanying notes 54-77.

\textsuperscript{79} See supra text accompanying notes 13-17.

\textsuperscript{80} MADISON’S NOTES, supra note 44, at 323.

\textsuperscript{81} Id. Morris also stated that making the Executive ineligible for re-appointment was like saying to him, “make hay while the sun shines.” Id. at 310.
alternative for making the Executive independent of the Legislature but either to give him his office for life, or make him eligible by the people." Morris suggested a two-year term, election by the people, the possibility of re-election, and no impeachment power held by the legislature over the principal Executive, but only over subordinate officers. Edmund Randolph of Virginia disagreed with Morris' recommendations. Randolph argued that making the Executive ineligible for reappointment would be the better course of action because it would increase his independence from the Legislature. If more than one term were possible, Randolph argued, the Executive would be "under a temptation to court a re-appointment. If he should be re-appointable by the Legislature, he will be no check on it. His revisionary [i.e., veto] power will be of no avail." Furthermore, Randolph argued, if the Executive is eligible for re-appointment by the Legislature, the Legislature may prefer "to continue an unfit man in office in preference to a fit one." Although he disagreed with Morris' recommendations, Randolph implicitly accepted Morris' whiggish assumptions: the machinations of a corrupt Executive who would seek to usurp power could "have no effect unless the people be corrupt to such a degree as to render all precautions hopeless." James Wilson of Pennsylvania expressed what he perceived to be the growing consensus of the delegates: "that the Executive should not be appointed by the Legislature, unless he be rendered in-eligible a 2d time." Contrary to Randolph's desire, however, Wilson "perceived with pleasure that the idea was gaining ground, of an election mediately or immediately by the people." Elbridge Gerry of Massachusetts concurred, "If the Executive is to be elected by the Legislature he certainly ought not to be re-eligible. This would make him absolutely dependent" on the Legislature. Ratifying the motion of Connecticut's Oliver Ellsworth, the delegates agreed that the Executive would be elected by electors appointed by the several state legislatures, not the national Legislature. On a separate motion, the Convention affirmed that the Executive would be eligible for a second term.

The Convention revisited the issue a few days later. The delegates carried a motion that the Executive be elected by the Legislature, then Luther Martin of

82 Id. at 325.
83 See id. at 324-25.
84 See id. at 325.
85 Id.
86 Id.
87 Id. at 326.
88 Id.
89 Id.
90 Id. at 327.
91 See id. at 328.
92 See id. at 329.
Maryland and Elbridge Gerry moved to reinstate the ineligibility of the Executive for a second term. While Gerry agreed that the Executive should be independent from the Legislature, he suggested, "The longer the duration of his appointment the more will his dependence be diminished." Therefore, Gerry suggested that it would be "better then for him to continue 10, 15, or even 20, years and be ineligible afterwards." Rufus King of Massachusetts thought that re-eligibility combined with the Legislature’s impeachment power would amount to tenure at their pleasure; amid various other suggestions of eleven, fifteen, and eight years, King suggested, perhaps in jest, a twenty year, renewable term for the Executive. James Wilson said that he would agree to practically any length of tenure for the Executive, provided that he was not elected by the Legislature, because of "the dependence which must result from" such an election. Wilson believed that a "capacity & inclination for public service existed" when a man reached the later stages of life and that to restrict an Executive from holding office by an arbitrarily mandated short tenure would deprive the country of his accumulated wisdom just as he reached the prime of life.

Charles Pinckney of South Carolina moved that election by the Legislature be qualified: the Executive would have a six-year term, but could hold office for no more than six of any twelve-year period. He believed this would avoid most of the objections to election by the Legislature (i.e., that the Executive would be compromised by seeking the Legislature’s favor), while also meeting the objections lodged against an absolute bar to re-election (i.e., Gouvernor Morris’ contention that an ambitious Executive might resort to force to secure his place in office). Pierce Butler, also representing South Carolina, rejoined that the Government “should not be made so complex & unwieldy as to disgust the States,” and argued for election by electors chosen by the state legislatures. Regardless, Butler was against re-eligibility “at all events.” Morris also argued against Pinckney’s proposal. By seeking to avoid the undue influence of the Legislature, Morris stated, this plan would result in “instability of Councils” because any change in administration “is ever followed by a change of measures.”

93 See id. at 358.
94 Id.
95 Id.
96 See id. Madison’s footnote suggested, “This might possibly be meant as a caricature of the previous motions in order to defeat the object of them.” Id. at 358 n.4.
97 Id.
98 Id. at 359.
99 See id. at 358-59.
100 See id. at 366.
101 See id.
102 Id.
103 Id.
104 Id. at 367.
3. Powers of the Executive

There were two specific powers of the Executive that gave the Framers pause and to which this Note shall give attention: the Executive’s role as Commander in Chief of the nation’s armed forces and his veto power over legislation. While seeking to keep the Executive independent of the Legislature, in each of these areas the Framers saw the potential for corruption and tyranny.

a. **Commander in Chief of the Military**

The Virginia Plan did not assign the role of Commander in Chief to the Executive. Its only mention of military power was to permit the Legislature to “call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.” The New Jersey Plan gave the Executive the power “to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General or in other capacity.” Clearly, the object of this qualification of the executive power was to give the Executive general authority over the military forces, while keeping him from exercising any direct control that could be used to effect a coup.

We have already encountered Governor Morris’ fear that the Executive, if denied the possibility of re-election, might be compelled to seek glory “by the sword,” and Charles Pinckney’s fear that extending the power of “peace & war” to the Executive “would render the Executive a monarchy, of the worst kind, to wit an elective one.” Other delegates harbored similar fears. Roger Sherman of Connecticut expressed this fear most directly, when he objected to the power to appoint military officers during times of peace, which was given to the President in an early draft of the Constitution. “Herein lay the corruption in Great Britain,” Sherman warned. “If the Executive can model the army, he may set up an absolute Government; taking advantage of the close of a war and an army commanded by his creatures.” When considering the issue of impeachment, then, Edmund Randolph

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105 Id. at 31.
106 Id. at 120.
107 Id. at 323; see also supra text accompanying note 80.
108 MADISON’S NOTES, supra note 44, at 45; see also supra note 48.
109 MADISON’S NOTES, supra note 44, at 527. Here, Sherman draws on a long-standing fear in England and the American colonies that a standing army is likely to be used as a tool of oppression. See, e.g., THE FEDERALIST NO. 8 supra note 34, at 120-21 (Alexander Hamilton) (arguing that although standing armies are “problematical and uncertain,” the political exigencies of the new nation require them); THE FEDERALIST NO. 26 supra note 34, at 214-15 (Alexander Hamilton) (stating that, due to the use of standing armies by the despotic monarchs Charles II and James II, in order to “to abolish the exercise of so
favored endowing the Legislature with the power to impeach, because "[t]he Executive will have great opportunities of abusing his power; particularly in time of war when the military force . . . will be in his hands."\textsuperscript{110} For these reasons, along with the power of impeachment the Framers gave the power to declare war to the Legislature, although they anticipated that due to the slow, deliberate nature of a legislative body, the Executive as Commander in Chief should have "the power to repel sudden attacks."\textsuperscript{111}

b. The Veto Power

The veto power—or, as it was generally called in the Convention, the revisionary power—brought forward profound issues concerning the independence of the Executive from the Legislature. With the veto power, the Executive possessed some considerable independence from the Legislature; without it, he was merely its puppet. There was little disagreement that the Executive should possess a veto, but there was great disagreement on how broadly it could be exercised and how the Legislature might overcome it. As with all the issues surrounding the constitution of the Executive, seemingly minute adjustments in an area such as the veto power required reconsideration of other, seemingly unrelated issues such as impeachment.

The best example of such adjustments arose when the penultimate draft of the Constitution was presented to the whole Convention on September 12, 1787, after being assembled and published by the "Committee of Stile & arrangement."\textsuperscript{112} Some delegates wished to fine-tune certain portions of the document; Article I, Section 7, clause 3, which set forth the ability of the Congress to override the President’s veto by a three-fourths vote,\textsuperscript{113} elicited the first motion for reconsideration. Hugh Williamson of North Carolina moved to substitute two-thirds instead of three-fourths to override a veto, as three-fourths "puts too much in the power of the President."\textsuperscript{114} Roger Sherman of Connecticut concurred, adding that the sense of the people could easily be thwarted by "so small a minority [i.e., one-quarter of each House] and the President, prevailing over the general voice."\textsuperscript{115} Elbridge Gerry of Massachusetts detected a possibility of corruption in a three-quarters requirement and characterized the veto power as primarily an element of the separation of powers:

dangerous an authority," following the Glorious Revolution "the raising or keeping a standing army within the kingdom in time of peace, unless with the consent of Parliament, was against the law").

\textsuperscript{110} M\textsc{adison’s} \textsc{notes}, supra note 44, at 334.
\textsuperscript{111} Id. at 476.
\textsuperscript{112} Id. at 616.
\textsuperscript{113} \textit{See id.} at 619.
\textsuperscript{114} Id. at 628.
\textsuperscript{115} Id.
[Three-fourths] puts too much in the power of a few men. The primary object of the revisionary check of the President is not to protect the general interest, but to defend his own department. If 3/4 be required, a few Senators having hopes from the nomination of the President to offices, will combine with him and impede proper laws. Making the vice-President Speaker [of the Senate] increases the danger.¹¹⁶

In arguing in favor of retaining the three-fourths requirement, Gouvernor Morris returned to the issue of the President’s term (which, in the draft under consideration, was the same as in the draft ultimately ratified—four years, elected by electors appointed by the states, and not limiting the possibility of re-election), arguing that “[i]f one man in office will not consent where he ought, every fourth year another can be substituted.”¹¹⁷ James Madison also noted, “When 3/4 was agreed to, the President was to be elected by the Legislature and for seven years,” again calling attention to the close relationship between the method of election, the duration of the President’s term, and the structure of the veto power.¹¹⁸ Madison continued, arguing that the purpose of the veto was both “to defend the Executive Rights,” as Gerry had suggested, and “to prevent popular and factious injustice.”¹¹⁹ As such, the veto power “was an important principle . . . to check legislative injustice and incroachments.”¹²⁰ Over Madison’s and Morris’ protests, the amendment substituting two-thirds for three-fourths passed.¹²¹

4. The Impeachment Power in the Legislature

Similar to the other elements constituting the Executive, the power of impeachment vested in the Congress does not exist in a vacuum, but is one element in a delicately balanced system designed to distribute power between the Executive and the Legislature. Raoul Berger demonstrated the English heritage of the impeachment power from which the Framers derived the concept.¹²² Yet, the Framers did not simply import English notions of impeachment. Rather, they took the term and the rudimentary conceptual apparatus they received from English law and

¹¹⁶ Id.
¹¹⁷ Id. at 629.
¹¹⁸ Id.
¹¹⁹ Id.
¹²⁰ Id.
¹²¹ Id. See id. at 629-30.
reinterpreted it, fitting it carefully into the new political paradigm. Historically a
broad power in England, directed at ordinary citizens as well as government
officials, the Framers drastically limited its scope. Under the Constitution, it would
apply only to "[t]he President, Vice President and all civil Officers of the United
States" who were impeached for and convicted of "Treason, Bribery, or other high
Crimes and Misdemeanors." Initially, the Virginia Plan had given the Judiciary the power to "hear &
determine" impeachments of any federal officer. On June 2, during the first course
of debate on the Plan, John Dickenson of Delaware moved "that the Executive be
made removeable by the National Legislature on the request of a majority of the
Legislatures of individual States." Roger Sherman suggested that the National
Legislature should have the power to remove the Executive at its pleasure. George
Mason "decidedly" objected to this suggestion, because it would make the Executive
"the mere creature of the Legislature," which would be "a violation of the
fundamental principle of good Government." Dickenson's motion failed, but
almost immediately thereafter a motion passed without discussion to make the
Executive "removeable on impeachment & conviction of mal-practice or neglect of
duty."

The New Jersey Plan, submitted on June 15, incorporated some ideas similar to
the suggestions Dickenson had made earlier. The Executive, which would be
appointed by the Legislature, was also "removeable by Cong[ress] on application by
a majority of the Executives of the several States."

The Legislature, however, possessed no impeachment power, for this power was reserved to the Judiciary, which
would have the "authority to hear & determine... on all impeachments of federal
officers."

123 See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A
CONSTITUTIONAL AND HISTORICAL ANALYSIS 3 (1996) ("[T]he framers set forth a special
impeachment mechanism in the Constitution that reflected their intention to differentiate
the newly proposed federal impeachment process from the English and state experiences
with impeachment prior to 1787.").
124 See id. at 4-5.
126 See MADISON'S NOTES, supra note 44, at 32.
127 Id. at 55 (emphasis added). Interestingly, Dickenson differentiated impeachment from
the removal of the Executive in the manner he proposed—indeed, he was opposed to
"impeaching the Great officers of State"—but he did not elaborate on the difference
between removal and impeachment. Id.
128 See id. at 56.
129 Id. at 56.
130 Id. at 57-58.
131 Id. at 120.
132 Id.
Like Dickenson’s efforts, the New Jersey Plan sought to “sustain[ ] the sovereignty of the respective States” against the perceived nationalizing tendencies of the Virginia Plan. Not surprisingly, the introduction of the New Jersey Plan sparked vigorous debate over the advisability of pursuing a strong national government rather than simply strengthening some of the weaknesses in the Articles of Confederation. Representing New York, Alexander Hamilton rose during this discussion and offered a different plan—quite the opposite of the New Jersey Plan and consciously modeled on the British system. Hamilton proposed that the lower house of the Legislature (the “Assembly”) be elected by the people for three years. The Senate and the Executive “Governour,” however, as well as all federal judges, would be elected by electors chosen by the people, and would serve “during good behaviour.” In Hamilton’s mind, this was the closest Americans could get to the ideal English system without fabricating a hereditary monarch and an aristocracy. “The Governour[,] Senators[,] and all officers of the United States” would be liable for “impeachment for mal- and corrupt conduct”, and would be “removed from office, & disqualified [from] holding any place of trust or profit.” These impeachments would be tried by the chief judge of the supreme court of each state, “provided such Judge shall hold his place during good behavior, and have a permanent salary.”

The issue of impeachment in all of these plans sought to provide some check on potentially tyrannical or corrupt officers. During the course of the debates, the impeachment provisions in the Constitution changed in direct proportion to the Framers’ tinkering with the composition of the executive office. When debating a motion that the Executive serve during good behavior, George Mason of Virginia strenuously objected to the proposition, for an Executive holding office during good behavior was “a softer name only for an Executive for life,” from which it would be “an easy step to hereditary Monarchy.” Neither did Mason think impeachment for misbehavior was an appropriate check on a nascent monarchy, for it would “be impossible to define the misbehaviour in such a manner as to subject it to a proper trial.” When impeachment itself came up for debate later in the week, Charles Pinckney opined that the Executive “ought not to be impeachable whilst in office;” thus, Pinckney and Gouvernor Morris moved that the portion of the plan permitting the Executive “to be removeable on impeachment and conviction for mal practice or

133 Id. at 121.
134 See id. at 121-29.
135 See id. at 138 (§ II).
136 Id. at 138 (§§ III, IV, and VII).
137 See id. at 134-37.
138 Id. at 138 (§§ III, IV, and VII).
139 Id.
140 Id. at 139 (§ IX).
141 Id. at 312.
142 Id.
neglect of duty” be excised. William Davie of North Carolina disagreed: impeachment was “an essential security for the good behaviour of the Executive.” Arguing in support of his own motion, Gouvernor Morris noted the obvious point that impeachment, to have any substance, must “suspend his functions.” If this is the result, Morris argued, “impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach.” Charles Pinckney agreed: if there must be impeachments, he thought, “they ought not to issue from the Legislature who would in that case hold them as a rod over the Executive and by that means effectually destroy his independence.” If the Legislature were able to impeach, Pinckney argued further, the Executive’s veto power “would be rendered altogether insignificant.” Rufus King of Massachusetts argued that, as the Executive was to be appointed for a limited term, “he would periodically be tried for his behaviour by his electors, who would continue or discontinue him” according to his performance in office; thus, King argued, “he ought to be subject to no intermediate trial, by impeachment.” King conceded that impeachments should be permitted if the Executive were to hold his office, like members of the Judiciary, during good behavior—but “under no circumstances ought he to be impeachable by the Legislature,” for this “would be destructive of his independence and of the principles of the Constitution.” Edmund Randolph upheld the “propriety of impeachments,” believing that “[g]uilt wherever found ought to be punished.” Because the Executive would “have great opportunities of abusing his power,” if there were “no regular punishment” to be provided, Randolph feared that “tumults & insurrections” would result. He agreed, however, with the need to “proceed[] with a cautious hand,” and to “exclude[ ] as much as possible the influence of the Legislature.” Rufus King again noted that impeachments would only be necessary if the Executive “held his place for life, and was not periodically elected . . . the periodical responsibility to the electors being an equivalent security.”

Madison supported the idea of impeachment, as “[t]he limitation of the period of his service, was not a sufficient security” against the “incapacity, negligence or

142 Id. at 331.
143 Id.
144 Id.
145 Id.
146 Id. at 333.
147 Id.
148 Id.
149 Id. at 333-34.
150 Id. at 334.
151 Id.
152 Id.
153 Id.
He feared the Executive "might lose capacity after his appointment... [or] pervert his administration into a scheme of peculation or oppression... [or] betray his trust to foreign powers." Because the Executive was to be administered by a single man, Madison thought, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic." It is important to note that Madison's concerns arose because, unlike the final draft of the Constitution, the draft under discussion here did not provide a non-impeachment means of removing from office an Executive who had become incapacitated. As ultimately ratified, the Constitution separated the power of impeachment from the issue of removal due to the President's "Death, Resignation or Inability to discharge the Powers and Duties" of his office; impeachment was reserved as a limited means of removal for a specific set of circumstances.

Gouvernor Morris changed his mind during the discussion and came to agree that impeachment would be necessary if the Executive "was to continue for any time in office":

The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office. ... When we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the Legislature.

On the question of whether the Executive should be removable by impeachment, the motion passed by a margin of eight to two.

The issue of impeachment, along with a number of other troubling issues for the Convention, was given to a Committee of Eleven who, it was hoped, would be able to design efficient compromises. On September 4, the Committee reported to the

154 Id. at 332.
155 Id.
156 Id. at 333.
157 U.S. Const. art. II, § 1, cl. 6; see also U.S. Const. amend. XXV, §§ 3-4 (defining further the circumstances under which a President may be declared "unable to discharge the powers and duties of his office," either by his own declaration, or by the written declaration of the Vice President along with specified other officers, transmitted to the President pro tempore of the Senate and the Speaker of the House).
158 See U.S. Const. art. II, § 4 (specifying that the President, among others, "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors").
159 Madison's Notes, supra note 44, at 335.
160 Id.
161 See id.
162 See id. at 569 (appointing the committee); see also id. at 573 (receiving the report
Convention its recommendations with respect to the provisions pertaining to the executive branch.\footnote{See id. at 573-75.} In large measure, the proposal as presented became in substance the text of Article II in the final draft of the Constitution. The President would hold office for four years (with no limitation as to re-election), and he would be elected by electors in the same manner as in the final Constitution—not by the Legislature.\footnote{See id. at 574 (§ 4).} As for impeachment, the report read simply that "[h]e shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery."\footnote{Id. at 575 (§ 9).}

George Mason objected to the limitation on impeachment to treason and bribery, arguing that "[t]reason as defined in the Constitution will not reach many great and dangerous offenses. . . . Attempts to subvert the Constitution may not be Treason as above defined."\footnote{Id. at 605.} Thus, Mason moved to add "or maladministration" to the actions giving rise to impeachment.\footnote{Id.} James Madison objected to this addition because "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate."\footnote{Id.} Gouvernor Morris thought the amendment could do no harm and would never be "put in force" because an "election every four years will prevent maladministration."\footnote{Id.} Mason withdrew "maladministration" and substituted "other high crimes & misdemesnors ag[ainst] the State,"\footnote{Id. at 605.} which passed by a vote of eight to three\footnote{Id. at 606.} and was clarified a short time later to read "against . . . [the] United States."\footnote{Id. at 606.}

Some debate ensued on the issue of whether the President should be tried by the Senate. Madison and Charles Pinckney thought this made the President too dependent on the Legislature.\footnote{See id. at 605-06.} Pinckney argued, "If he opposes a favorite law, the two Houses will combine ag[ainst] him, and under the influence of heat and faction throw him out of office."\footnote{Id. at 606.} Madison's motion to delete the words "by the Senate" failed, nine votes to two.\footnote{See id.}

Later that day, all the provisions that had been amended during debate were sent to a committee appointed "to revise the stile of and arrange the articles which had

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\item \footnote{Id. at 606.
\item \footnote{See id.}
been agreed to by the House."¹⁷⁶ The document that emerged from the "Committee of Stile and arrangement" was the penultimate draft of the Constitution; with respect to Article II, defining the Executive, there was little subsequent debate and no debate at all on the fourth section, which pertained to impeachment.¹⁷⁷ Perhaps unnoticed, and certainly not remarked on by the delegates (for no one drew attention to the fact), George Mason's amendment that added "against the United States" was dropped from the impeachment section. That section now read: "The president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors."¹⁷⁸ Section Four would continue to read this way when ratified in the Constitution.¹⁷⁹

III. IMPLICATIONS OF THE TWENTY-SECOND AMENDMENT FOR THE STRUCTURE OF THE IMPEACHMENT POWER

The debates at the Constitutional Convention show that the length of the President's term of office changed as the delegates constructed the internal and external balance of the Executive. The Framers debated at length the duration of the Executive's term—seven years? six years? four years? two years? for life? during the Legislature's pleasure?—and whether to limit the number of terms for which the President would be eligible. Ultimately, they decided on a relatively short four-year term, with eligibility for re-election—and potentially for multiple re-elections. The Framers established these provisions, however, only after balancing the other elements of the Executive with the Legislature: the President would not be elected by the Legislature; his veto power was carefully balanced and only could be overridden by a two-thirds vote; although he was given the role of Commander in Chief, the power to declare war rested in the Congress; and the Executive would be comprised of one individual rather than a committee.

Impeachment was another variable in the constitution of the Executive, a variable that was even more closely tied to the length of the Executive's term and the issue of re-eligibility than the variables just mentioned. When debating whether the Executive should serve for life, most delegates thought impeachment was a necessary power for the Legislature. The same argument for impeachment's necessity arose during discussion of the Executive serving at the pleasure of the Legislature. However, neither of these term options had broad-based support during the Convention: one

¹⁷⁶ Id. at 608.
¹⁷⁷ See id. at 645-47 (debating for the last time various aspects of Article II).
¹⁷⁸ Id. at 624.
clearly would be too close to a monarchy, while the other would make the Executive overly dependent on the Legislature.\footnote{See supra text accompanying notes 78-104.}

The real tug-of-war happened in the middle ground, when deciding the length of the President’s term and whether he would be eligible for re-election. Here, the impeachment variable played a crucial role. Many of the delegates opposed impeachment when the Executive was allowed only one term in office. Giving the power of impeachment to the Legislature in that situation, they argued, would only make the Executive dependent upon it.\footnote{See, e.g., MADISON’S NOTES, supra note 44, at 358-61 (debating the eligibility of the Executive for additional terms in office).} Allowing the Executive multiple terms in office, however, a provision accepted in the ultimate draft of the Constitution, raised other concerns. The delegates realized the benefits of allowing a wise, experienced, and efficient Executive to continue to serve over an extended period of time if continually re-elected.\footnote{During debate on the length of the Executive’s term in office and whether the term should be renewable, James Wilson of Pennsylvania averred that a natural equilibrium of sorts would be established as to the duration of the Executive’s term in office: “[A]t a certain advance in life, a continuance in office would cease to be agreeable to the officer, as well as desirable to the public.” \textit{Id.} at 358-59. Wilson noted, however, “Experience [has] shewn in a variety of instances that both a capacity & inclination for public service existed—in very advanced stages,” and he bemoaned arbitrary limitations on the Executive’s term: If the Executive should come into office at 35 years of age, which . . . may happen & his continuance should be fix[ed] at 15 years[,] at the age of 50 in the very prime of life, and with all the aid of experience, he must be cast aside like a useless hulk. \textit{Id.} at 359. Alexander Hamilton, in \textit{Federalist} 72, made the same general point with a different emphasis. A principle advantage, Hamilton argued, of having the President eligible for multiple terms is “to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration.” THE FEDERALIST NO. 72 supra note 34, at 463 (Alexander Hamilton). Continuing, Hamilton argued that an “ill effect” of excluding the President from multiple terms is that doing so would: depriv[e] the community of the advantage of the experience gained by the chief magistrate in the exercise of his office. That experience is the parent of wisdom, is an adage the truth of which is recognized by the wisest as well as the simplest of mankind. What more desirable or more essential than this quality in the governors of nations? Where more desirable or more essential than in the first magistrate of a nation? Can it be wise to put this desirable and essential quality under the ban of the Constitution, and to declare that the moment it is acquired, its possessor shall be compelled to abandon the station in which it was acquired, and to which it is adapted? \textit{Id.} at 465.}
to return a wise executive to office repeatedly, they also possess the power every four years to remove an unwise Executive from office. At the same time, however, the delegates harbored fears that an Executive in office for a long period of time would accrue an inordinate amount of power and that such power would be used to corrupt the Constitution and establish the President as a tyrannical *de facto* monarch.\textsuperscript{183}

Balancing the benefits and burdens of the Executive as constituted, the Framers gave the power of impeachment to the Legislature to prevent Executive abuse of power.\textsuperscript{184}

This careful balancing by the Framers of the President’s term in office and eligibility for re-election with the Legislature’s power of impeachment was altered considerably with the ratification of the Twenty-Second Amendment in 1951. That Amendment provides in pertinent part:

\begin{quote}
No person shall be elected to the office of the President more than twice, and no person who has held the office of the President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.\textsuperscript{185}
\end{quote}

Historians have argued that the Republican Party forced this Amendment through Congress and the state ratification process in a frustrated response to the four terms to which President Franklin D. Roosevelt was elected.\textsuperscript{186} Because the proper procedure was followed for ratification, this Note does not question the Amendment’s constitutional validity, regardless of the motivation of its supporters.

The question then arises as to what effect, if any, the Twenty-Second Amendment has on the impeachment power. In altering one of the principal elements constituting the Executive (i.e., the renewability of the President’s term in office), the Twenty-Second Amendment reduced the power of the Presidency by altering the finely-tuned balance of power between the Executive and Legislative branches established by the Framers. The logic is simple: because the President is eligible for only two terms due to the Twenty-Second Amendment, and because the impeachment power was given to the Legislature in large measure to provide a check on a potentially multi-

\textsuperscript{183} See supra text accompanying notes 45-52; see also MADISON’S NOTES, supra note 44, at 312-13 (debating whether the Executive should serve, like the Judiciary, “during good behavior;” George Mason, James Madison, Gouvernor Morris, and James McClurg discussed the extent to which such an open-ended term of office would lead to a monarchy).

\textsuperscript{184} See supra text accompanying notes 122-79.

\textsuperscript{185} U.S. CONST. amend. XXII, § 1.

\textsuperscript{186} See generally Stephen W. Stathis, The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?, 7 CONST. COMMENTARY 61 (1990) (providing a sound account of the congressional debates and ratification process, and arguing that Republicans, joined by southern Democrats who were angry at President Harry S Truman, provided the impetus for the Amendment).
term President, and because the Legislature's power of impeachment is undiminished by the Twenty-Second Amendment, the power of the Executive, therefore, has decreased in relation to that of the Legislature.

The diminution of the President's power has not been merely theoretical. The impact of the Twenty-Second Amendment has changed the complexion of a President's second term. First, any second-term President is now a "lame duck," whose power (measured by his effective influence on the Legislature) decreases the closer his second term comes to its end. Second, because he is ineligible for a subsequent term, a second-term President need not be as responsive to domestic issues as he might otherwise be. The conventional wisdom is that second-term Presidents begin looking toward their "place in history"; as such, foreign affairs issues, such as brokering peace treaties, often take precedence over more mundane domestic issues.

Returning to the issue of the impeachment power, its purpose is to allow Congress a means to remove from office a President who has committed treason, bribery, or "other high crimes and misdemeanors." The principal effect of the Twenty-Second Amendment on the impeachment power is that impeachment, when viewed from the Framers' perspective, is now less necessary. The Framers feared an abusive President who would become a de facto monarch by corrupting his electors into continually returning him to office, or who would take control of the military and use it to keep himself in power.\textsuperscript{187} Because the President can now serve a maximum of only eight years, the possibility of continued, long-term abuse of office is limited; the impeachment power should be limited accordingly.

First, the impeachment power should be limited by construing the phrase "high crimes and misdemeanors" to encompass principally those actions by a President that corrupt his office, in the eighteenth-century sense of the term "corrupt."\textsuperscript{188} That is, impeachment should lie principally for actions by a President that tend to imbalance the power accorded to the Executive in relation to the Legislature or the Judiciary. For instance, a President may be subject to impeachment for attempting to use the power of his office to influence (outside of appropriate channels) the decision of the Supreme Court on a case before it.

To be sure, such issues are not always clear cut. For example, one questions whether President Franklin D. Roosevelt should have been subject to impeachment for attempting to pack the Supreme Court in 1937. One also questions whether he should have been subject to impeachment if his efforts had been successful. The court-packing plan stemmed from Roosevelt's desire that the Court bend to his will by ceasing to invalidate New Deal legislation.\textsuperscript{189} He articulated the threat in terms

\textsuperscript{187} See supra text accompanying notes 48-52, 107-11.
\textsuperscript{188} See supra text accompanying notes 24-26.
\textsuperscript{189} See ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 86-123, 176-96 (1941) (discussing the Court's nullification of the early New Deal and providing a friendly
of the need to "save the Constitution from the Court and the Court from itself." Specifically, Roosevelt implied that many of the justices were so old that their judgment was impaired. His plan, therefore, sought to add one justice to the bench for every "incumbent judge[ ] of retirement age who do[es] not choose to retire or to resign." Clearly, Roosevelt sought a means around the constitutional provision of lifetime tenure for federal judges; because he could not remove the justices who disagreed with his legislative plan, he sought to dilute their power. Roosevelt also sought to justify the court-packing plan by asserting that the Court's recent judgments holding unconstitutional several pieces of New Deal legislation were themselves an unconstitutional extension of judicial power into the province of the Legislature and the Executive.

One can argue that Roosevelt sought, under the guise of a national emergency, to co-opt the Court's decision-making process and its judicial independence and to subordinate the Court to Executive will. Such an attempt would seem to "corrupt" the balance of power between the Executive and the Judiciary in precisely the way the Framers feared. The means Roosevelt proposed to influence the Court's decision-making, however, were, at least in form, constitutional: he simply sought to exploit Congress' power to expand the size of the Court. The Senate Judiciary Committee, however, viewed Roosevelt's plan as an "utterly dangerous abandonment of constitutional principle," recommending its rejection in the most earnest language:

[Under] the form of the Constitution it seeks to do that which is unconstitutional. [I]ts practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is—an interpretation to be changed with each change of administration. It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.

interpretation of why FDR's court-packing plan was necessary).


192 See *Radio Address*, supra note 190, at 184.

193 This power has been implied from Article III, section 1, clause 2 of the Constitution, which gives to Congress the power to "ordain and establish" courts inferior to the Supreme Court. Congress assumed the power to articulate the size of the Supreme Court in the Judiciary Act of 1789. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 32-33, 186-87 (1997).

The abstract question of whether Roosevelt should have been impeached for the court-packing scheme, although interesting, is not the focus of the argument here.\textsuperscript{195} The important point is that this sort of attempt at a broad assertion of executive power over a co-equal branch of government—an assertion that, if effected, essentially would have made the target branch, the Judiciary, subservient to the Executive—is precisely the type of action that the Framers envisioned as an impeachable offense.\textsuperscript{196}

The second type of actions to which impeachment should extend are those that a President may undertake that subvert the government, or, in the words proposed by George Mason and adopted by the Convention, those actions that are "against the United States."\textsuperscript{197} There are a number of reasons why the phrase "high crimes and misdemeanors" should be construed narrowly in this manner. First, such an interpretation of the phrase extends from the context in which it is found. Article II, section 4 states that the President "shall be removed from Office on Impeachment for,

\textsuperscript{195} Regardless of one's personal views on the Roosevelt Administration or New Deal legislation in general, it seems in hindsight that given the nation's precarious social, political, and economic climate in the depths of the Depression, it was probably fortuitous that any thoughts that members of Congress may have harbored as to the impeachment of Roosevelt did not come to fruition.

The question of impeaching Roosevelt, though undoubtedly some Republicans would have favored it, also was unfeasible politically, as Roosevelt had been re-elected in 1936 with one of the most impressive mandates in American presidential history. Roosevelt won 27.7 million out of about 44.4 million of the popular votes cast (60.8%), but secured an extraordinary 523 out of 531 electoral votes—the electors of every state except Maine and Vermont. See I CONG. QUARTERLY'S GUIDE TO THE PRESIDENCY 375 (Michael Nelson ed., 2d ed. 1996); see also JACKSON, supra note 189, at 176 (discussing FDR's impressive victory, but providing slightly different vote tallies); ARTHUR M. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 642-43 (1960) (same).

\textsuperscript{196} Madison favored giving the Legislature the power of impeachment, for he feared that the "incapacity, negligence or perfidy of the chief Magistrate"—specifically, that the "loss of capacity or corruption" of the President "might be fatal to the Republic." MADISON'S NOTES, supra note 44, at 332-33. Madison's concerns about problems arising from the President's loss of capacity have since been addressed by the Twenty-Fifth Amendment, discussed supra at note 157, leaving corruption as the remaining justification for the impeachment power. In 18th-century Anglo-American political discourse, "corruption" referred fundamentally to the aggrandizement of power by one branch of government at the expense of another. See supra text accompanying notes 23-25, 35-44; see also THE FEDERALIST NO. 78, supra note 34, at 491 (Alexander Hamilton) (stating that "the judiciary is beyond comparison the weakest" of the three branches of government, so although "individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . so long as the judiciary remains truly distinct from both the legislature and the Executive." (emphasis added)).

\textsuperscript{197} MADISON'S NOTES, supra note 44, at 605-06; see also supra text accompanying notes 162-68.
and Conviction of, *Treason, Bribery, or other high Crimes and Misdemeanors.*\(^{198}\)

The construction of Section 4 seems to indicate that treason and bribery are examples of high crimes and misdemeanors—that is, not just any crime fits the category of “high crimes and misdemeanors,” but only those crimes, like treason and bribery, that subvert the constitutionally established political system. Professor Charles L. Black argues that the common rule of legal construction, *eiusdem generis* (“of the same kind”), should apply to the definition of “high crimes and misdemeanors.”\(^{199}\) According to Professor Black, the phrase “high crimes and misdemeanors” extends logically from the preceding two words, “treason” and “bribery”; thus, “high crimes and misdemeanors” are those actions that are “of the same kind” as treason and bribery.\(^{200}\)

Professor Raoul Berger agrees: “[T]he association, as a matter of construction, of ‘other high crimes and misdemeanors’ with ‘treason, bribery,’ which are unmistakably ‘political’ crimes, lends them a similar connotation under the maxim *noscitur a sociis.*”\(^{201}\)

A simple definition of the kind of offense addressed in Article II, section 4, suggests Professor Black, would not include all crimes, but specifically would include those offenses “which in some way corrupt or subvert the political and governmental process . . . .”\(^{202}\)

The history of the phrase “high crimes and misdemeanors” provides a second reason to construe it narrowly to apply only to executive acts that subvert the governmental system. Professor Raoul Berger, among others, has argued that the phrase is deeply rooted in English law and that “[h]igh crimes and misdemeanors” were a category of political crimes against the state.\(^{203}\) That is, such high crimes were political specifically because they were against the state. Professor Berger states that “high misdemeanors,” for example,

> are contempts against the King’s prerogative, against his person and government, against his title, “not amounting to treason,” in a word, “political crimes.” Treason is plainly a “political” crime, an offense against the State; so too bribery of an officer attempts to corrupt administration of the State. Indeed, early in the common law bribery “was

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\(^{198}\) U.S. CONST. art. II, § 4 (emphasis added).


\(^{200}\) *Id.* at 37.

\(^{201}\) Berger, *supra* note 122, at 65. According to Black’s Law Dictionary, “*noscitur a sociis*” means:

> It is known from its associates. The meaning of a word is or may be known from the accompanying words. Under the doctrine of “*noscitur a sociis*”, the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it.


\(^{202}\) Black, *supra* note 199, at 37.

\(^{203}\) Berger, *supra* note 122, at 64.
sometimes viewed as high treason." ... In sum, "high crimes and misdemeanors" appear to be words of art confined to impeachments, without roots in the ordinary criminal law and which ... had no relation to whether an indictment would lie in the particular circumstances.\textsuperscript{204}

Therefore, while the criminal law applied to "misdemeanors" and "crimes," the uniquely political punishment of impeachment applied to the uniquely political acts constituting "high crimes" and "high misdemeanors."\textsuperscript{205} Indeed, as Professor Berger argues, the phrase is unique to the realm of impeachments and was not employed outside that context in the common law.\textsuperscript{206} Professor Michael Gerhardt has argued similarly: "In England, the critical element of injury in an impeachable offense was injury to the state."\textsuperscript{207}

We have noted how the debates at the Constitutional Convention resolved that the language of Article II, section 4 should read "high crimes and misdemeanors against the United States," but that the last clause was dropped in the Committee on Stile and Arrangement.\textsuperscript{208} While this alteration by the Committee seems problematic, in fact it did not reflect a change in the Framers' intent. The Committee on Stile and Arrangement had no authority to change substantively the text of the Constitution; rather, its job was to put the document in order and to polish the prose where necessary.\textsuperscript{209} The intent of the Framers, then, as resolved in debate on the Convention floor, was that "high crimes and misdemeanors" should be limited to actions "against the United States."\textsuperscript{210} Indeed, it has been argued that the Committee dropped the clause "against the United States" because it was redundant—as impeachment could only lie for actions against the state, which, in the context of the Federal Constitution, could only mean the United States.\textsuperscript{211}

\begin{footnotes}
\item[204] Id. at 65-66.
\item[205] See id.
\item[206] See id. at 66-67
\item[207] GERHARDT, supra note 123, at 103.
\item[208] See supra text accompanying notes 166-79.
\item[209] The Committee was appointed by the Convention solely to "revise the stile of and arrange the articles which had been agreed to by the House." MADISON'S NOTES, supra note 44, at 608.
\item[210] Id. at 606. The motion to substitute "against the United States" for "against the State" was agreed to unanimously "in order to remove ambiguity," and the question of accepting the clause as amended passed by a vote of ten to one. Id.
\item[211] The argument that the Committee on Stile and Arrangement dropped as redundant the phrase "against the United States" is implicitly supported by Professor Berger's argument, see supra text accompanying notes 201-06, that in the English legal tradition the phrase "high crimes and misdemeanors" applied solely to political crimes against the state. Indeed, it is from the English tradition that the delegates at the Constitutional Convention derived the impeachment power in the Constitution. See BERGER, supra note 122, at 57; see also THE FEDERALIST NO. 65, supra note 34, at 426 (Alexander Hamilton) (stating that
\end{footnotes}
CONCLUSION

At the Constitutional Convention, the Framers sought to establish a government that was powerful without being tyrannical. To do this, they separated the functions of government into three discrete branches so that no one branch would have concentrated in it all the power. They sought to achieve equipoise between the three branches, a counterbalanced system in which the inherent power in each branch—each pulling in its own direction and each pushing against, thus restraining the other two—would create a tension strong enough to hold the political system together. With respect to the executive and legislative branches, the Framers impeachable crimes are those that involve “the abuse or violation of some public trust”).

The recent impeachment proceedings against President Clinton provided examples of arguments for and against the proposition that the phrase “against the United States” was dropped due to redundancy. See Impeachment Inquiry of President William Jefferson Clinton: Hearing Before the House Committee on the Judiciary, 105th Cong. (Dec. 7, 1998), available in 1998 WL 846818 (F.D.C.H.) (statement of Sean Wilentz, Dayton Stockton Professor of History, Princeton University) (stating that “many, if not most American historians . . . hold to the view that Mason’s wording [“high crimes and misdemeanors against the United States”] . . . best express[es] the letter and the spirit of what the framers had in mind”); Impeachment Trial of William Jefferson Clinton, President of the United States, 145 CONG. REC. S832-01, S847 (daily ed. Jan. 21, 1999) (statement of White House Counsel Dale Bumpers) (arguing that the purpose of the Committee on Stile and Arrangement at the Constitutional Convention was to “draft the language in a way that everybody would understand—that is, well-crafted from a grammatical standpoint,” and that “against the United States” was dropped because it was redundant).

But see Impeachment Inquiry of President William Jefferson Clinton: Hearing Before the House Subcommittee on the Constitution, Committee on the Judiciary, 105th Cong. (Nov. 9, 1998), available in 1998 WL 781692 (F.D.C.H.) (written statement of Forrest McDonald, Historian and Distinguished University Research Professor, University of Alabama) (stating with respect to the Committee of Stile’s deletion of the phrase “against the United States”: “That was a significant deletion, for had those qualifiers been retained, all impeachable offenses would have been limited to actions taken in the performance of public duties.”); id., available in 1998 WL 783740 (F.D.C.H.) (statement of Jonathan Turley, J.B. and Maurice C. Shapiro Professor of Public Interest Law, George Washington University Law School). Professor Turley stated, with respect to the phrase “against the United States”:

It is not clear, however, whether the Committee on Style and Arrangement simply viewed this language as redundant or, alternatively, too restrictive. The Committee on Style and Arrangement was not given authority to make major changes in such standards and most (but not all) changes in the Committee were made for cosmetic or consistency purposes. Nevertheless, there was no objection to the removal of a phrase that would clearly narrow the scope of impeachments. Regardless of the reason for this final change, the final version of “treason, bribery, and other high crimes and misdemeanors” emerged without the potentially restrictive phrase “against the United States.”

balanced the President’s term of office and his eligibility for repeated re-election by the people with the Legislature’s limited power of impeachment for “treason, bribery and high crimes or misdemeanors.” Limiting the number of terms to which a President can be elected, as the Twenty-Second Amendment does, alters the balance between the executive and legislative branches in favor of the legislative branch.

To restore this imbalance, the impeachment power—specifically, the definition of “high crimes and misdemeanors”—should be construed narrowly. The Framers clearly granted the impeachment power to Congress to prevent corruption of the Constitution by the President. That is, they sought to protect against a President whose actions undermined the Constitution by seeking to subordinate a co-equal branch of government to the will of the Executive, or whose actions were subversive of the government or the political process through treason, bribery, or other such high crimes and misdemeanors. To place appropriate limits on the impeachment power and to restore the balance between the legislative and executive branches, the definition of “high crimes and misdemeanors,” when applied to a President, should reflect the qualifying phrase “against the United States,” and find application only in those acts that subvert the government or seek to usurp the power of the Judiciary or the Legislature. By narrowly construing the impeachment power in this manner, the balance of power between the executive and the legislative branches of the Federal government created by the Twenty-Second Amendment can be restored.

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