

1999

The Lessons of Impeachment History

Michael J. Gerhardt

Repository Citation

Gerhardt, Michael J., "The Lessons of Impeachment History" (1999). *Faculty Publications*. 978.
<https://scholarship.law.wm.edu/facpubs/978>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

The Lessons of Impeachment History

Michael J. Gerhardt*

Introduction

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

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

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

* Professor of Law, The College of William & Mary. B.A., Yale University; M.Sc., London School of Economics; J.D., University of Chicago. This Article is an edited version of my prepared statement submitted to the House Subcommittee on the Constitution for its special hearing on November 9, 1998, regarding the background and history of impeachment. I am very grateful to the editors and staff of *The George Washington Law Review* for their interest in and support and patience throughout the editing process for this Article.

those misdeeds for which an impeachable official was not likely (for whatever reason) to be held liable at law.

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

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

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

The third is the relatively widespread recognition of the paradigmatic case for impeachment as being based on the abuse of power. The three articles of impeachment approved by the House Judiciary Committee against President Richard Nixon have come to symbolize this paradigm. The great majority of impeachments, if not all of the impeachments brought by the House and convictions by the Senate, approximate this paradigmatic case; all of these cases, with the possible exception of one or two, involve the serious misuse of office or official prerogatives or breaches of the public trusts held.

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

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

The final pattern is that members of the House, and particularly the Senate, have recognized in the course of debating impeachment that their impeachment judgments are *sui generis*. Unlike decisions about legislative matters, congressional impeachment decisions are not subject to presidential review or veto or judicial review. Instead, impeachment judgments are, for all intents and purposes, final. Their legitimacy turns on the public's acceptance of Congress's actions and ultimately the judgment of history. Consequently, in rendering decisions on impeachment matters, members of

Congress generally have had to consider whether their decisions to impeach (or to forego impeachment) can withstand the test of time. Members of Congress have appreciated that their decisions constitute precedents in the field of impeachment, and these precedents have had a significant impact on the balance of power between the Congress and the other branches (whose officials have been the subject of impeachment actions). In the final analysis, the critical questions are structural and historical. The structural questions have to do with the degree to which impeachment decisions are consistent with or alter basic separation of powers, while the historical questions have to do with whether subsequent generations largely will agree that the impeachment decisions were made on a nonpartisan basis.

I. The Framers' Objectives in Structuring the Impeachment Process

The discussions of the delegates to the Constitutional Convention and state ratifying conventions provide some important background for appreciating the distinctive features of the federal impeachment process. The Founders wanted to distinguish the impeachment power set forth in the United States Constitution from the British practice in at least eight important ways. First, the Founders limited impeachment only to "[t]he President, Vice President and all civil Officers of the United States,"¹ whereas at the time of the founding of the Republic, anyone (except for a member of the royal family) could be impeached in England. Second, the delegates to the Constitutional Convention narrowed the range of impeachable offenses for public officeholders to "Treason, Bribery, or other high Crimes and Misdemeanors,"² although the English Parliament always had refused to constrain its jurisdiction over impeachments by restrictively defining impeachable offenses. Third, whereas the English House of Lords could convict upon a bare majority, the delegates to the Constitutional Convention agreed that in an impeachment trial held in the Senate, "no Person shall be convicted [and removed from office] without the Concurrence of two thirds of the Members present."³ Fourth, the House of Lords could order any punishment upon conviction, but the delegates limited the punishments in the federal impeachment process "to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States."⁴ Fifth, the king could pardon any person after an impeachment conviction, but the delegates expressly prohibited the President from exercising such power in the Constitution.⁵ Sixth, the Founders provided that the President could be impeached,⁶ whereas the King of England could not be impeached. Seventh, impeachment proceedings in England were considered to be criminal, but the Constitution separates criminal and impeachment proceedings.⁷ Lastly, the

1 U.S. CONST. art. II, § 4.

2 *Id.*

3 *Id.* art. I, § 3, cl. 6.

4 *Id.* art. I, § 3, cl. 7.

5 *See id.* art. II, § 2, cl. 1.

6 *See id.* art. II, § 4.

7 *See generally* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 23 (1989).

British provided for the removal of their judges by several means, whereas the Constitution provides impeachment as the sole political means of judicial removal.⁸

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

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

Early in the Convention's proceedings, several delegates referred to "mal-" and "corrupt administration," "neglect of duty," and "misconduct in office" as the only impeachable offenses and maintained that common law crimes such as treason and bribery were to be heard in the courts of law.⁹ Some delegates, notably William Paterson, Edmund Randolph, James Wilson, and George Mason, argued that the federal impeachment process should apply to misuse of official power in accordance with their respective state constitutions and experiences. As late as August 20, 1787, the Committee of Detail reported that federal officials "shall be liable to impeachment and removal from office for neglect of duty, malversation, or corruption."¹⁰

Yet, in its report on September 4, 1787, the Committee of Eleven proposed that the grounds for conviction and removal of the President should be limited to "treason or bribery."¹¹ On September 8, George Mason opened the Convention's discussion on this latter proposal by questioning the wisdom of limiting impeachment to those two offenses. He argued that

⁸ See generally MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 82-102 (1996). The Founders also provided a couple of other special protections in the Senate; they required that "[w]hen sitting for th[e] Purpose [of trying impeachments, senators] shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside." U.S. CONST. art. I, § 3, cl. 6.

⁹ See Peter CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 101 (1984); see also 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 64-69 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND].

¹⁰ 2 FARRAND, *supra* note 9, at 101.

¹¹ See *id.* at 495.

"[t]reason as defined in the Constitution [would] not reach many great and dangerous offences."¹² He used as an example of such subversion the contemporaneous English impeachment of Governor Warren Hastings of the East India Company, whose trial was based in part not upon specific criminal acts, but rather upon the dangers presented to the government by the Governor's wielding of virtually absolute power within the Indian colony. Mason was concerned that "[a]ttempts to subvert the Constitution may not be Treason as . . . defined," and that, since "bills of attainder . . . are forbidden, it is the more necessary to extend[] the power of impeachments."¹³ Mason therefore moved to add the term "maladministration" to permit impeachment upon less conventionally defined common law offenses.¹⁴ Elbridge Gerry seconded the motion. James Madison, without taking issue with either the appropriateness of including such subversion or the need to expand the standard to include such potentially noncriminal wrongs, responded that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate."¹⁵ Recalling an earlier debate on June 20 in which he had asked for more "enumerated and defined" impeachable offenses, Gouverneur Morris agreed with Madison.¹⁶ Mason thereupon withdrew his motion and substituted "other high crimes & misdemeanors ag[ain]st the State," which Mason apparently understood as including maladministration.¹⁷ Without further comment, the motion was approved by a vote of eight to three.¹⁸

The Convention, again without discussion, later agreed to replace the word "State" with the words "United States."¹⁹ The Committee of Style and Arrangement, which was responsible for reworking the resolutions without substantive change, eliminated the phrase "against the United States,"²⁰ presumably because it was thought to be redundant or superfluous. The Convention accepted the shortened phrase without any further debate on its meaning.

Subsequently, the most substantial discussions of the scope of impeachable offenses, besides those in *The Federalist* (discussed in the section below), occurred in the ratification conventions in North Carolina and Virginia. For instance, in the North Carolina ratifying convention, James Iredell, who later would serve as an Associate Justice on the Supreme Court, called attention to the complexity, if not impossibility, of defining the scope of impeachable offenses any more precisely than to acknowledge that they would involve serious injustices to the federal government. He understood impeachment as having been "calculated to bring [great offenders] to punishment for crime which it is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against the government. . . . [T]he occasion for

¹² *Id.* at 550.

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *See id.* at 65.

¹⁷ *Id.* at 550.

¹⁸ *See id.*

¹⁹ *See id.* at 551.

²⁰ *See id.* at 600.

its exercise will arise from acts of great injury to the community”²¹ As examples of impeachable offenses, he suggested that the “president must certainly be punishable for giving false information to the Senate” and that “the president would be liable to impeachments [if] he had received a bribe or had acted from some corrupt motive or other.”²² He warned, though, that the purpose of impeachment was not to punish a President for “want of judgment,” but rather to hold him responsible for being a “villain” and “willfully abus[ing] his trust.”²³ Governor Johnston, who would later become North Carolina’s first U.S. senator, agreed that impeachment “is a mode of trial pointed out for great misdemeanors against the public.”²⁴

In the Virginia convention, several speakers argued that impeachable offenses were not limited to indictable crimes. For instance, James Madison argued that, if the President were to summon only a small number of states in order to try to secure ratification of a treaty that hurt the interests of the other unrepresented states, “he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor.”²⁵ Madison suggested further that “if the president be connected, in any suspicious manner, with any person, and there be grounds to believe that he will shelter him,” the President may be impeached.²⁶ George Nicholas agreed that a President could be impeached for a nonindictable offense. Edmund Randolph explained that “[i]n England, those subjects which produce impeachments are not opinions It would be impossible to discover whether the error in opinion resulted from a willful mistake of the heart, or an involuntary fault of the head.”²⁷ He stressed that only the former constituted an impeachable offense.

In the decade following ratification, the federal impeachment process remained a subject of some debate and concern. For instance, in the First Congress, Representative James Madison tried to calm the fears of some of his colleagues about possible presidential abuse of authority to remove executive officials by suggesting that the President “will be impeachable by this House, before the Senate for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from [office].”²⁸ Although one could construe Madison’s comment as meretricious, because it supported a position that he had taken in a partisan debate rather than as a framer (and because it arguably conflicted with his objection in the Constitutional Convention to making “maladministration” a basis for impeachment), Madison’s comment is consistent with the stance he took in the Virginia ratifying convention to support presidential impeachment for nonindictable abuses of power.

21 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113 (photo. reprint 1937) (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES].

22 *Id.* at 526-27.

23 *Id.* at 126.

24 *Id.* at 48.

25 3 ELLIOT’S DEBATES, *supra* note 21, at 500.

26 *Id.* at 498.

27 *Id.* at 401.

28 1 ANNALS OF CONG. 498 (Joseph Gales ed., 1789).

Immediately following his appointment to the Supreme Court in 1790, James Wilson gave a series of lectures as a professor of law at the College of Philadelphia to clarify the foundations of the American Constitution. In these talks, given in 1790-1791 but published posthumously, Justice Wilson described the essential character of impeachments as proceedings of a political nature, "confined to political characters, to political crimes and misdemeanors, and to political punishments."²⁹ He emphasized that the Founders believed that

[i]mpeachments, and offences and offenders impeachable, [did not] come . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects: for this reason, the trial and punishment of an offence on an impeachment, is no bar to a trial and punishment of the same offence at common law.³⁰

Hence, Wilson, one of the most thoughtful and influential of the proponents of the new Constitution, strongly endorsed the basic idea that one of the fundamental features of the federal impeachment process is its separateness and distinctiveness from judicial proceedings.

II. *The Historical and Constitutional Meaning of Political Crimes*

The relatively few comments made about the meaning of "other high Crimes and Misdemeanors," as understood by the Founders in the constitutional and state ratifying conventions, do not definitively clarify the scope of impeachable offenses. The reason is not just because the Founders failed to discuss the topic extensively or to anticipate all of the likely issues or cases that would arise in this area. The reason is that in choosing to make "other high Crimes or Misdemeanors" the basis for impeachable offenses, the Founders deliberately chose terms of art that referred to a general category of offenses, the specific contents of which would have to be worked out over time on a case-by-case basis.

The great majority of commentators who have examined closely the likely meaning of the constitutional phrase "other high Crimes and Misdemeanors," including Justice James Wilson,³¹ Justice Joseph Story,³² Chief Justice Charles Evans Hughes,³³ Justice Arthur Goldberg,³⁴ Charles Black,³⁵ Raoul Berger,³⁶ George Curtis,³⁷ Arthur Bestor,³⁸ Paul Fenton,³⁹ Peter

²⁹ JAMES WILSON, *Lectures on Law* part 2, No. 1, *Of the Constitutions of the United States and of Pennsylvania—of the Legislative Department*, in 1 THE WORKS OF JAMES WILSON 399, 426 (Robert G. McCloskey ed., 1967).

³⁰ JAMES WILSON, *Lectures on Law*, No. 11, *Comparison of the Constitution of the United States, with that of Great Britain*, in 1 THE WORKS OF JAMES WILSON, *supra* note 29, at 324.

³¹ See *id.*

³² See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 796-800, at 580-85 (photo. reprint 1994) (Melville M. Bigelow ed., 1891).

³³ See CHARLES E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 19 (1928).

³⁴ See ARTHUR J. GOLDBERG, *The Question of Impeachment*, 1 HASTINGS CONST. L.Q. 5, 6 (1974).

³⁵ See CHARLES L. BLACK, *IMPEACHMENT: A HANDBOOK* 35, 39-40 (1974).

³⁶ See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 58, 59 (1973).

Hoffer and N.E.H. Hull,⁴⁰ John Feerick,⁴¹ and John Labovitz (a former staff member of the House Judiciary Committee investigating President Nixon),⁴² have reached the same conclusion: The phrase "other high Crimes and Misdemeanors" consists of technical terms of art referring to "political crimes." They also have agreed that "political crimes" had a special meaning in the eighteenth century; "political crimes" were not necessarily indictable crimes.⁴³ Instead, "political crimes" consisted of the kinds of abuses of power or injuries to the Republic that only could be committed by public officials by virtue of the public offices or privileges that they held.⁴⁴ Although the concept "political crimes" uses the term "crimes," the phrase did not necessarily include all indictable offenses.⁴⁵ Nor were all indictable offenses considered "political crimes."⁴⁶

To appreciate what would constitute "political crimes," one needs to examine the British impeachment practices from which the Founders drew the language "other high crimes and misdemeanors" and thus the concept of "political crimes." In the English experience prior to the drafting and ratification of the Constitution, impeachment was primarily a political proceeding, and impeachable offenses were regarded as "political crimes." For instance, Raoul Berger observed in his influential study of the impeachment process that the English practice treated "[h]igh crimes and misdemeanors" [as] a category of *political* crimes against the state.⁴⁷ Berger supported this observation with quotations from relevant periods in which the speakers use terms equivalent to "political" and "against the state" to identify the distinguishing characteristics of an impeachable event.⁴⁸ In England, the critical element of injury in an impeachable offense had been injury to the State.⁴⁹ The eminent legal historian, Blackstone, traced this peculiarity to the ancient law of treason, which distinguished "high" treason, which was disloyalty against some superior, from "petit" treason, which was disloyalty to an equal or an inferior.⁵⁰ The late Professor Arthur Bestor explained further that "[t]his element

37 See 1 GEORGE T. CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 481-82 (photo. reprint 1974) (1896).

38 See Arthur Bestor, *Impeachment*, 49 WASH. L. REV. 255, 264-66 (1973) (reviewing RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973)).

39 See Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719, 726-28 (1970).

40 See HOFFER & HULL, *supra* note 9, at 101.

41 See John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 47-58 (1970).

42 See JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 27-31, 127 (1978).

43 See, e.g., *id.* at 27; HUGHES, *supra* note 33, at 19; Fenton, *supra* note 39, at 727.

44 See, e.g., Bestor, *supra* note 38, at 264-65; Feerick, *supra* note 41, at 50, 53.

45 See, e.g., Feerick, *supra* note 41, at 53.

46 See, e.g., BLACK, *supra* note 35, at 35-36; STORY, *supra* note 32.

47 BERGER, *supra* note 36, at 61.

48 See *id.* at 59-61.

49 See Bestor, *supra* note 38, at 264.

50 See *id.* Blackstone commented that:

Treason . . . in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith . . . [T]reason is . . . a general appellation, made use of by the law, to denote . . . that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, . . . and the inferior . . .

of injury to the commonwealth—that is, to the state itself and to its constitution—was historically the criterion for distinguishing a ‘high’ crime or misdemeanor from an ordinary one.”⁵¹ In summary, the English experience reveals that there was a

difference of degree, not a difference of kind, separat[ing] ‘high’ treason from other ‘high’ crimes and misdemeanors . . . [and that] [t]he common element in [English impeachment proceedings] was . . . injury done to the state and its constitution, whereas among the particular offenses producing such injury some might rank as treasons, some as felonies and some as misdemeanors, among which might be included various offenses that in other contexts would fall short of actual criminality.⁵²

In addition, those delegates in the constitutional and state ratifying conventions who supported the federal Constitution seemed to have a shared understanding of impeachment as a political proceeding and impeachable offenses as essentially “political crimes.”⁵³ The delegates at the Constitutional Convention were intimately familiar with impeachment in colonial America, which like impeachment in England, had basically been a political proceeding. Although the debates in the Convention primarily focused on the offenses for which the President could be impeached and removed, there was general agreement that the President could be impeached only for so-called “great” offenses.⁵⁴ Moreover, the majority of examples given throughout the Convention debates about the scope of impeachable offenses, such as Madison’s preference for the phrase “other high Crimes and Misdemeanors” because it encompassed attempts to subvert the Constitution, confirm that impeachable offenses primarily consisted of abuses of power that injured the State (and thus were not necessarily limited to indictable offenses). Neither the debates nor the relevant constitutional language eventually adopted, however, identifies the specific offenses that constitute impeachable abuses against the State.

The ratification campaign further supports the conclusion that “other high Crimes and Misdemeanors” were not limited to indictable offenses, but rather included great offenses against the federal government. For example, delegates to state ratification conventions often referred to impeachable of-

so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. . . . [T]herefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears it’s [sic] crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio*; being equivalent to the *crimen laesae majestatis* of the Romans.

Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75 (1765-69)).

⁵¹ See *id.* at 263-64.

⁵² *Id.* at 265.

⁵³ See *id.* at 266.

⁵⁴ See BERGER, *supra* note 36, at 88 (“James Iredell, later a Supreme Court Justice, told the North Carolina Convention [during the ratification campaign] that the ‘occasion for its exercise [impeachment] will arise from acts of great injury to the community.’”).

fenses as "great" offenses (as opposed to common law crimes), and they frequently spoke of how impeachment should lie if the official "deviates from his duty"⁵⁵ or if he "dare[s] to abuse the powers vested in him by the people."⁵⁶

In *The Federalist* No. 65, Alexander Hamilton echoed such sentiments, observing that:

[t]he subjects [of the Senate's] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.⁵⁷

Believing it unwise to submit the impeachment decision to the Supreme Court because of "the nature of the proceeding,"⁵⁸ Hamilton argued that the impeachment court could not be "tied down" by "strict rules, either in the delineation of the offense by the prosecutors [the House of Representatives] or in the construction of it by the judges [the Senate]."⁵⁹ In short, Hamilton too believed that impeachable offenses comprised a unique set of transgressions that defied neat delineation.

Both Justice James Wilson and Justice Joseph Story expressed agreement with Hamilton's understanding of impeachable offenses as political crimes. In his lectures on the new Constitution given immediately after his appointment to the Supreme Court, Justice Wilson referred to impeachments as involving, *inter alia*, "political crimes and misdemeanors."⁶⁰ Justice Wilson understood the term "high," describing "Crimes and Misdemeanors," to mean "political," while the term "Misdemeanors" referred to bad conduct against the state. Similarly, Justice Joseph Story recognized the unique political nature of impeachable offenses: "The jurisdiction is to be exercised over offences which are committed by public men in violation of their public trust and duties. Those duties are in many cases political Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character"⁶¹ Justice Story also viewed the penalties of removal and disqualification as "limiting the punishment to such modes of redress as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries."⁶² Justice Story understood "political injuries" to be "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust."⁶³

Like Hamilton, Justice Story understood that the Framers proceeded as if there would be a federal common law on crimes from which future Con-

⁵⁵ 4 ELLIOT'S DEBATES, *supra* note 21, at 32 (J. Iredell of North Carolina).

⁵⁶ 2 *id.* at 169 (S. Stillman of Massachusetts).

⁵⁷ THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵⁸ *Id.* at 398.

⁵⁹ *Id.*

⁶⁰ See WILSON, *supra* note 29, at 426.

⁶¹ STORY, *supra* note 32, § 746, at 547.

⁶² *Id.* § 812, at 591.

⁶³ *Id.* § 790, at 575.

gresses could draw the specific or particular offenses for which certain federal officials may be impeached and removed from office. Justice Story explained that "no previous statute is necessary to authorize an impeachment for any official misconduct."⁶⁴ Nor, in Justice Story's view, could such a statute ever be drafted, because "political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."⁶⁵ The implicit understanding shared by both Hamilton and Justice Story was that subsequent generations would have to define on a case-by-case basis the political crimes serving as contemporary impeachable offenses.

The remaining problem is how to identify the nonindictable offenses for which certain high-level government officials may be impeached. This task is critical for providing notice to impeachable officials as to the conditions of, and for narrowing in some meaningful fashion, the grounds for their removal. The likeliest places to look for guidance are to the Framers' debates or authoritative commentary on the meaning of the relevant constitutional language (as reflected above) and historical practices. The latter do provide some insight into the answer to this challenge. First, it is noteworthy that of the sixteen men impeached by the House of Representatives, only four were impeached primarily or solely on grounds strictly constituting a criminal offense: Secretary of War William Belknap (charged with accepting bribes); Judge Harry Claiborne (charged with willfully making false tax statements); Judge Alcee Hastings (charged with conspiring to solicit a bribe and perjury), and Judge Walter Nixon (charged with perjury). One of these four, Alcee Hastings, had been acquitted formally of bribery prior to his impeachment. The House's articles of impeachment against the other twelve include misuses of power that were not indictable federal offenses, at least at the time that they were approved.⁶⁶

⁶⁴ *Id.* § 799, at 583.

⁶⁵ *Id.* § 797, at 581.

⁶⁶ These twelve include Senator William Blount (impeached in 1797 for engaging in a conspiracy to compromise the neutrality of the United States in disregard of the constitutional provisions for the conduct of foreign affairs and for an attempt to oust the President's lawful appointee as principal agent for Indian affairs, thereby intruding upon the President's supervision of the executive branch); Judge John Pickering (impeached in 1803 for making errors in conducting a trial in violation of his trust and duty and for "being a man of loose morals and intemperate habits," 13 *ANNALS OF CONG.* 322 (1803), who appeared on the bench drunk and used profane language); Associate Justice Samuel Chase (impeached in 1804 for allowing his partisan views to influence his conduct of two trials and for delivering "an intemperate and inflammatory political harangue" to a grand jury and thus conducting himself "in a manner highly arbitrary, oppressive, and unjust," 14 *ANNALS OF CONG.* 731 (1804)); Judge James Peck (impeached in 1826 for vindictive use of power in charging with contempt, imprisoning, and disbaring a lawyer who publicly had criticized one of his decisions); Judge West W. Humphreys (impeached in 1862 for neglect of duty because he had joined the Confederacy without resigning his position as a federal judge); President Andrew Johnson (impeached in 1868 for violating the Tenure in Office Act by removing a member of his cabinet, interfering with execution of that Act, and making inflammatory speeches that subjected the Congress to ridicule); Judge Mark Delahay (impeached in 1876 for intoxication both on and off the federal bench); Judge George W. English (impeached in 1926 for using his office for personal monetary gain as well as for threatening to jail a local newspaper editor for printing a critical editorial and summoning local

Of the seven men who have been convicted and removed from office by the Senate, four were convicted and removed from office on the basis of nonindictable offenses. These four officials included Judge John Pickering (convicted and removed for public drunkenness and blasphemy);⁶⁷ Judge West H. Humphreys (convicted and removed by the Senate for having advocated publicly that Tennessee secede from the Union, having organized armed rebellion against the United States, having accepted a judicial commission from the Confederate Government, holding court pursuant to that commission, and failing to fulfill his duties as a United States District Judge);⁶⁸ Judge Robert Archbald (convicted, removed, and disqualified by the Senate for obtaining contracts for himself from persons appearing before his court and others and for adjudicating cases in which he had a financial interest or received payment—offenses for which, as the Chairman of the House Impeachment Committee at the time conceded, no criminal charges could be brought);⁶⁹ and Judge Halsted Ritter (who was convicted and removed from office on the sole basis that he had brought “his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary.”).⁷⁰ Of the remaining three officials who were convicted and removed from office by the Senate, all three were convicted and removed from office on the basis of indictable crimes. These three officials included Harry Claiborne (income tax invasion), Alcee Hastings (bribery and perjury), and Walter Nixon (making false statements to a grand jury). Prior to their impeachments and removals from office, two of these judges, Claiborne and Nixon, had been indicted, convicted in federal court, and had exhausted their criminal appeals.

Given that certain federal officials may be impeached and removed from office for committing serious abuses against the state and that these abuses have not always been, nor necessarily should be, confined to indictable offenses, the persistent challenge has been to find contemporary analogues to the abuses against the state that authorities such as Hamilton, Justice Wilson, and Justice Story viewed as suitable grounds for impeachment. On the one hand, these abuses may be reflected in certain statutory crimes. (The Constitution itself defines treason as “consist[ing] only in levying War against [the United States], or, in adhering to their Enemies, giving them Aid and Comfort.”⁷¹) At least one federal criminal statute, the bribery statute,⁷² codifies

officials into court under false pretext to harangue them); Judge Charles Swayne (impeached in 1903 for maliciously and unlawfully imprisoning two lawyers and a litigant for contempt and for using his office for personal monetary gain); Judge Robert Archbald (impeached in 1912 for direct and indirect personal monetary gain); Judge Harold Louderback (impeached in 1932 for direct and indirect personal monetary gain); and Judge Halsted Ritter (impeached in 1936 for direct and indirect personal monetary gain and for engaging in behavior that brought the judiciary into disrepute). See Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117 (1998).

67 See 13 ANNALS OF CONG. 319-22 (1804).

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

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

70 80 CONG. REC. 5606 (1936).

71 U.S. CONST. art. III, § 3, cl. 1.

an impeachable offense because bribery expressly is designated as such in the Constitution. Violations of other federal criminal statutes may also reflect abuses against the State sufficient to subject the perpetrator to impeachment, insofar as the offenses involved demonstrate willful misconduct and serious lack of judgment and respect for the law in the course of performing one's duties. In other words, it is conceivable that there are certain statutory crimes that, if committed by public officials, reflect such abuses of the privileges of their offices, breaches of the public trust, disregard for the welfare of the state, and disrespect or disdain for the constitutional system, that the officials who have committed such misconduct have effectively disabled themselves from continuing in office and thus merit impeachment and removal.

On the other hand, not all statutory crimes demonstrate complete unfitness for office. For example, "a President's technical violation of a law making jaywalking [or speeding] a crime obviously would not be an adequate basis for presidential [impeachment and] removal."⁷³ Moreover, it is equally obvious that some noncriminal activities may constitute impeachable offenses. As Professor Laurence Tribe observed, "[a] deliberate presidential decision to emasculate our national defenses, or to conduct a private war in circumvention of the Constitution, would probably violate no criminal code,"⁷⁴ but probably would constitute a nonindictable, impeachable offense. The full range of such political crimes defies further specification, because it rests on the circumstances under which the offenses have occurred (including the actor, the forum, the scope of the officer's official duties, and the nature and significance of the offensive act), alternative remedies, and on the collective political judgment of Congress.⁷⁵

III. The Trends and Tenor of Congressional Practices Relating to the Scope of Impeachable Offenses

The Founders considered that the political crimes constituting impeachable offenses would be clarified over time on a case-by-case basis. In other

⁷² 18 U.S.C. § 201 (1982).

⁷³ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 294 (2d ed. 1988).

⁷⁴ *Id.*

⁷⁵ Certain constitutional safeguards apply to the impeachment process and should circumscribe congressional efforts to define political crimes. The Constitution includes several guarantees to ensure that Congress will deliberate carefully prior to making any judgments in an impeachment proceeding: (1) when the Senate sits as a court of impeachment, "they shall be on Oath or Affirmation," U.S. CONST. art. I, § 3, cl. 6; (2) at least two-thirds of the senators present must favor conviction in order for the impeachment to be successful, *see id.*; and (3) in the special case of presidential removal, the Chief Justice must preside so that the Vice President, who otherwise normally presides, is spared from having to oversee the impeachment trial of the one person who stands between him and the presidency. *See id.*

Two other safeguards are political in nature. First, members of Congress seeking reelection have a political incentive to avoid any abuse of the impeachment power. The knowledge that they may have to account to their constituency may lead them to deliberate cautiously on impeachment questions. Second, the cumbersome nature of the impeachment process makes it difficult for a faction guided by base political motives to impeach and remove someone from office. Thus, these structural and political safeguards help to ensure that, as a practical matter, serious abuse of power and serious injury to the Republic are the prerequisites for Congress to find impeachable offenses.

words, the Founders expected that although the standard for impeachment would remain constant over time—whether an impeachable official had injured seriously the Republic or the constitutional system—it would be applied on a case-by-case basis to determine whether it had been met in any given circumstance. Consequently, congressional practices are important, because they help to illuminate Congress's deliberate judgments over the past two centuries on what constitutes an impeachable offense. Given the likelihood that Congress's judgments on impeachment are largely, if not wholly, immune to judicial review,⁷⁶ these judgments take on even more importance than typical legislative actions because the former are prone neither to presidential veto nor to judicial review. For all practical purposes, Congress's decisions on impeachment constitute the final word on the scope of the federal impeachment power. Members of Congress thus give special consideration to their impeachment decisions. Indeed, a survey of the impeachments considered but formally rejected by the House and the sixteen formal impeachments brought by the House and the seven convictions and six acquittals rendered by the Senate indicates six noteworthy patterns.

A. The Relationship Between Criminal Actions and Impeachment Proceedings

I already have alluded to the fact that the House has impeached and the Senate has removed persons for offenses that have not constituted (at least technically) indictable crimes. There is also a related tendency, however, for the Senate to convict on the basis of indictable crimes or at least to find conviction easier to effect if an indictable offense were involved. For example, in the 1980s, the Senate convicted Judges Claiborne, Hastings, and Nixon on the basis of indictable offenses. The convictions of Claiborne and Nixon demonstrate that the Congress is especially likely to impeach and to remove officials who previously have been convicted of felonies in court. Indeed, the criminal convictions of Claiborne and Nixon (and the Judicial Council's finding that Hastings had engaged in criminal misconduct) clearly put pressure on Congress to bring impeachment actions against these officials. That such convictions can bring such pressure is a matter of concern to many members of Congress and to many scholars, because it indicates that under certain circumstances criminal prosecutors can drive the impeachment process. Because the Founders envisioned that criminal and impeachment proceedings would be separate, and that the discretions for initiating each belong to authorities in different branches,⁷⁷ members of Congress must undertake special efforts to ensure that criminal prosecutors do not rob or unduly influence Congress's constitutional discretion to initiate or to conduct impeachment actions on the grounds that members think are appropriate.

B. The Relative Consensus on the Scope of Impeachable Offenses

The second pattern consists of the most common characterizations of impeachable offenses made in the constitutional and state ratifying conven-

⁷⁶ See BERGER, *supra* note 36, at 103.

⁷⁷ See The Federalist No. 65, *supra* note 57.

tions and in Congress (particularly in the Senate) as consisting of serious abuse of power, serious breach of the public trust, and serious injury to the Republic or to the constitutional system. Given the division of impeachment authority between the House and the Senate, the Senate has had the opportunity to review House decisions on what constitutes an impeachable offense and has concluded (in the Chase and Johnson impeachment trials) that impeachable offenses do not include errors of judgment or policy differences. Instead, the seven removal decisions made by the Senate have in common the judgment that impeachable offenses consist of serious abuses of power or privilege, breaches of the public trust or misconduct that is so incompatible with the office that conviction and removal by the Senate are required.

C. The Relative Consensus on the Paradigm for Presidential Impeachment

The third trend is the apparent consensus among constitutional scholars and historians (if not also by members of Congress) that there may be a paradigmatic case for impeachment consisting of the abuse of power. In the paradigmatic case, there must be not only serious injury to the constitutional order but also a nexus between the misconduct of an impeachable official and the official's formal duties. It is this paradigm that Alexander Hamilton captured so dramatically in his suggestion that impeachable offenses derive from "the abuse or violation of some public trust" and are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."⁷⁸ This paradigm is also implicit in the Founders' many references to abuses of power as constituting political crimes or impeachable offenses.

The paradigm has come to be symbolized by the three articles of impeachment approved by the House Judiciary Committee against Richard Nixon—the articles charged obstruction of justice, abuse of powers, and unlawful refusal to supply material subpoenaed by the House of Representatives.⁷⁹ These charges derived from Nixon's misuse of the powers and privileges of his office to facilitate his re-election and to hurt his political enemies, as well as to frustrate or to impede inappropriately legitimate attempts to investigate the extent of his misconduct. Nixon's misconduct effectively disabled him from continuing to exercise the constitutional duties of his office. Keeping Nixon in office would have countenanced serious breaches of the public trust and abuses of power and would have demeaned the office of the presidency irreparably.

Some of the House's decisions not to initiate impeachments or to approve impeachment articles, as well as by the Senate not to convict, are consistent with this paradigm. For example, the Senate failed to convict Associate Justice Samuel Chase in part because some members did not believe that the conduct on which the House's charges had been based rose to the level of impeachable offenses or could be characterized fairly as the kinds of indiscretions or mistaken judgments that fall within the legitimate scope of

⁷⁸ *Id.* at 396.

⁷⁹ See HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 1-4 (1974).

a judge's authority. Similarly, the House voted 127-83 not to impeach President Tyler for abusing his powers based on (1) his refusals to share with the House details on whom he was considering to nominate to various confirmable positions and (2) his vetoing of a wide range of Whig-sponsored legislation. Tyler's attempts to protect and to assert what he regarded as the prerogatives of his office were a function of his constitutional and policy judgments; they might have been wrong-headed or even poorly conceived (at least in the view of many Whigs in Congress), but they were not malicious efforts to abuse or to expand his powers, as was true in Richard Nixon's case, for purely personal gain or aggrandizement. The Senate also refused to convict Andrew Johnson by the slimmest of margins, because a small but pivotal number of senators believed, among other things, that the charges brought by the House against him did not rise to the level of impeachable offenses and because Johnson's real "crimes" were mistaken or erroneous policy judgments rather than malicious abuses of power.

The outcomes of the efforts to try to oust President Tyler and President Johnson confirm the suggestion made by Professors Peter Hoffer and N.E.H. Hull, in their excellent study of the history of impeachment in the United States, that impeachable offenses are not "simply political acts obnoxious to the government's ruling faction."⁸⁰ In this century, the House rejected then-Representative Gerald Ford's resolution to initiate an impeachment action against Justice William O. Douglas, at least in part because a majority of members were not persuaded that either Douglas's lifestyle or the substance or content of his decisionmaking was a relevant subject for an impeachment inquiry. Indeed, then-Representative Ford agreed in introducing his impeachment resolution against Justice Douglas that the standards for impeaching judges and presidents are different and that presidents could be impeached and removed from office only for "great" and "dangerous" offenses. Moreover, the House Judiciary Committee refused to bring an article of impeachment against President Nixon based on fraud in preparing his taxes, at least in part because it was not the kind of misconduct that could have been committed only by a President because of the unique office or trust he held.

It is also fair to say that the vast majority of the impeachments that have been brought by the House and the convictions that have been rendered by the Senate are consistent with the paradigmatic case. Most, if not all, of the officials impeached by the House⁸¹ and the seven officials convicted and re-

⁸⁰ HOFFER & HULL, *supra* note 9, at 101.

⁸¹ These officials include the following: Senator William Blount (not only for engaging in conduct that undermined presidential authority and undermined the national government's relations with various Indian tribes, but also for acting in a manner "contrary to the duty of his trust . . . in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof," 5 ANNALS OF CONG. 948-49 (1798)); Judge John Pickering (for making errors in conducting a trial in violation of his duty and trust and for engaging on the bench in behavior unbecoming of a federal judge); Associate Justice Samuel Chase (for conducting himself on the bench "in a manner highly arbitrary, oppressive, and unjust," 14 ANNALS OF CONG. 728-29 (1804)); Judge West Humphreys (for neglect of duty); President Andrew Johnson (for violating the Tenure in Office Act and for exercising his authority to interfere with the proper execution of the law); Judge Mark Delahay (for intoxication both on and off the bench);

moved by the Senate⁸² were found to have misused their offices or their prerogatives or to have injured seriously the Republic by breaching the special trusts that they held by virtue of holding their federal offices. For example, in 1986, the House impeached and the Senate convicted and removed from office federal district judge Harry Claiborne based on income tax evasion. At first glance, it seems as if Judge Claiborne's misconduct had no formal relationship to his official duties. Nevertheless, in impeaching and removing Claiborne, Congress reached the judgment that integrity is an indispensable criterion for someone to function as a federal judge. Moreover, as the House Report and subsequent Senate debate on Claiborne's impeachment reflected, the members of Congress concluded that the commission of tax evasion robs a federal judge of the moral authority required to oversee the trials and sentencing of others for the very same offense.⁸³ In other words, a federal judge must have integrity beyond reproach in order to perform the functions of his or her office. Incontrovertible proof that a federal judge lacks integrity effectively disables a federal judge completely from performing his or her duties.

There is no doubt that integrity is also important for a President (or, for that matter, any appointed or elected official) to do his job. There is also no doubt that a demonstrated lack of integrity poses a problem for a President. Whether demonstrated absence of integrity poses a problem of impeachable dimensions for a President depends on the circumstances giving rise to questions about the President's integrity. If a President were to commit perjury or to make false statements in a case unrelated to his actions or responsibilities as President, one still must ask whether this misconduct effectively robs him of the requisite moral authority to continue to function as President. It is conceivable that a President who has had his integrity scrutinized in an election and nevertheless has been elected has achieved sufficient legitimacy to function as President and obviously has not been disabled completely by the questions raised about his integrity. Under these circumstances, elections perform a check on presidential misconduct. Such a check does not exist with respect to misconduct by federal judges. The fact that such ratifying elections have occurred should be taken into account in calculating the mag-

Secretary of War William Belknap (for receiving an illegal payment in exchange for making a military appointment); Judge George English (for using his office for personal monetary gain); Judge James Peck (for vindictive use of power); Judge Charles Swayne (for exercising his power maliciously and for using his office for personal monetary gain); Judge Robert Archbald (for using his office for improper financial gain); Judge Harold Louderback (for using his office for improper financial gain); Judge Halsted Ritter (for engaging in behavior that brought disrepute to the judiciary); Harry Claiborne (for income tax evasion); Judge Alcee Hastings (for bribery and perjury); and Judge Walter Nixon (for making false statements to a grand jury). All seven convictions and removals made by the Senate have involved abuses of power and serious breaches of the public trust: Judge Pickering (for drunkenness and senility); Judge Humphreys (for neglect of duty); Judge Archbald (for bribery); Judge Ritter (for engaging in misbehavior that brought the judiciary into disrepute); Judge Claiborne (for tax evasion); Judge Hastings (for conspiracy to solicit a bribe); and Judge Nixon (for making false statements to a grand jury). See Vicente, *supra* note 66.

⁸² See *supra* notes 66-70 and accompanying text.

⁸³ See HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE HARRY E. CLAI-BORNE, H.R. REP. NO. 99-688, at 23 (1986); 132 CONG. REC. 30,251-58 (1986).

nitude of the offense committed and the magnitude of the harm resulting to the Republic from the misconduct.

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

D. The Significance of Especially Outrageous or Incompatible Conduct

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

The possible existence of this second category of impeachable offenses helps to explain one of the most vexing hypotheticals repeatedly raised involving the impeachment process: whether a President may be impeached and removed from office for murder. The nexus between the President's misconduct (murder) and his official duties (taking care to enforce the laws faithfully) is not readily apparent, for it is not clear that the President's oath obligates the President in his private capacity to comply with every single

law, even those that he does not have the formal authority to enforce. Nevertheless, impeachment, in all likelihood, is appropriate. The best explanation why this is so was made by Professor Charles Black in his magnificent study of the impeachment process:

Many common crimes—willful murder, for example—though not subversive of government or political order, might be so serious as to make a president simply unviable as a national leader; I cannot think that a president who had committed murder could not be removed by impeachment. But the underlying reason remains much the same; such crimes would so stain a president as to make his continuance in office dangerous to public order.⁸⁴

E. Alternative Means of Redress

Yet another pattern is the persistent recognition by Congress that its constitutionally vested authority or power includes the discretion not to exercise the power or authority of impeachment if it sees fit. In the realm of impeachment, the House has recognized that its “sole Power of Impeachment,”⁸⁵ includes the discretion not to impeach an official even if a majority of its members thought or believed that the official had committed an impeachable offense or had engaged in misconduct that reasonably could be characterized as impeachable. Similarly, the Senate has the authority, implicit within its “sole Power to try all Impeachments,”⁸⁶ to decide not to con-

⁸⁴ BLACK, *supra* note 35, at 39. It is noteworthy that Justice Story was uncertain about whether murder was an impeachable offense. He was not sure about the validity of William Rawle’s assertion that

[t]he legitimate causes of impeachment . . . have reference only to public character, and official duty. . . . In general, those offences which may be committed equally by a private person as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offences not immediately connected with office, except [treason and bribery], are left to the ordinary course of judicial proceeding.

STORY, *supra* note 32, § 801, at 585 (quoting WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 215 (2d ed. 1829)). In other words, at least for Rawle, the impeachment process could focus properly only on those acts committed or performed by a President strictly in “his public character.” See 2 ELLIOT’S DEBATES, *supra* note 21, at 480 (quoting James Wilson in the Pennsylvania ratifying convention). The distinction recognized by Justice Story between the public acts that provide appropriate bases for impeachment and the private conduct that does not is accepted by most impeachment scholars. The critical question has to do with what is the appropriate dividing line between the two. Congress tends to answer this question on a case-by-case basis. Even so, this distinction does help to explain further why the House Judiciary Committee decided not to charge Richard Nixon with income tax fraud, why the House decided not to approve an impeachment inquiry of Justice William O. Douglas based on his lifestyle or multiple marriages, and why Alexander Hamilton never was subjected to impeachment for having engaged (by his own admission) in an adulterous affair with a married woman (whose husband then blackmailed Hamilton to keep the liaison secret). The fact that Harry Claiborne and Walter Nixon each were impeached and removed for arguably private actions turns on appreciating that the felonies each committed effectively robbed each of the basic asset necessary to function as a federal judge, integrity, and thus disabled each from continuing to function effectively as a federal judge.

⁸⁵ U.S. CONST. art. I, § 2, cl. 5.

⁸⁶ U.S. CONST. art. I, § 3, cl. 6.

vict or to remove an official even if most if not all of its members believed the latter had committed an impeachable offense.

In deciding whether or not to impeach, the House and the Senate each have the power to consider whether it (or some other official body) has available alternatives (or supplements) to impeachment. One such alternative (or supplement) is censure. If one were to understand censure as consisting of nothing more than a resolution passed by the House or the Senate, it is plainly constitutional.⁸⁷ In my opinion, every conceivable source of constitutional authority—text, structure, and history—supports the legitimacy of the House's or the Senate's (or both's) passage of a resolution expressing disapproval of the President's conduct. First, there are several textual provisions of the Constitution confirming the House's authority to memorialize its opinions on public matters. The Constitution both authorizes the House of Representatives to "keep a Journal of its Proceedings"⁸⁸ and provides that "for any Speech or Debate in either House, [members] shall not be questioned in any other place."⁸⁹ One may plainly infer from these textual provisions the authority of the House or the Senate or both to pass a non-binding resolution in which each expresses its opinion—pro or con—on some public matter.

Second, the passage of resolutions critical of a President is quite compatible with the constitutional structure. The Constitution does not establish impeachment as the only constitutionally authorized means by which the House or the Senate may "censure" the President. Instead, impeachment exists as the only means by which the House may formally charge and thereby obligate the Senate to consider the removal of a President for certain kinds of misconduct. Removal and disqualification are the only sanctions that the Senate may impose if it were to convict an impeached official at the end of an impeachment trial.⁹⁰ Otherwise, the constitutional structure leaves to the criminal process the investigation and punishment of all sorts of misconduct (some but not all of which might overlap with impeachable misconduct) and to the political process, broadly understood, the checking or censure of misconduct of a wide variety (including but not limited to offenses that do not rise to the level of an impeachable offense).

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

⁸⁷ It is noteworthy that prior to the House's vote to impeach President Clinton, Representative William Delahunt (D-Mass.) had sought the opinions regarding the constitutionality of censure of the nineteen constitutional scholars and historians who had testified before the House Subcommittee on the Constitution on November 9, 1998. Fourteen of the nineteen indicated that they thought censure was constitutional.

⁸⁸ U.S. CONST. art. I, § 5, cl. 3.

⁸⁹ U.S. CONST. art. I, § 6, cl. 1.

⁹⁰ See U.S. CONST. art. I, § 3, cl. 7.

In addition, the House and the Senate each have passed resolutions condemning or criticizing the misconduct of presidents and other high-ranking officials. Indeed, on at least two occasions, the House has memorialized its disapproval of presidential misconduct. The subjects of the latter resolutions were President Polk and President Buchanan.⁹¹ Moreover, though the House had decided not to impeach President Tyler for his exuberant exercises of his veto authority, the House did adopt a House Committee report that was highly critical of President Tyler's exercise of his veto authority.⁹² In addition, the Senate censured President Andrew Jackson for firing his Treasury Secretary for refusing to implement Jackson's instructions to withdraw national bank funds and to deposit them in state banks.⁹³ Such resolutions provide historical precedents for the House and the Senate to do something similar with respect to President Clinton (or any other official). For that matter, the thousands of resolutions that the House and the Senate each have passed over the years expressing their opinions on a wide variety of public matters constitute other relevant precedents supporting the House's or the Senate's passage of a resolution expressing its condemnation or disapproval of a President's conduct. (Indeed, the House also has passed at least three resolutions expressing its disapproval of conduct by high-ranking executive officials other than the President, while the Senate also has passed two such resolutions in the nineteenth century.)⁹⁴

F. *The Judgment of History*

Yet another significant pattern in impeachment proceedings is that as they unfold, members of Congress increasingly feel the pressure to find some nonpartisan basis for their decisions that will withstand the test of time. This pressure comes from the increasing awareness that the legitimacy of senators' decisionmaking will depend on not just the public's acceptance of its actions but also the judgment of history. In *The Federalist* No. 65, Alexander Hamilton warned that impeachments often would begin in a partisan atmosphere.⁹⁵ Consequently, Hamilton counseled, the further along an impeachment proceeded, the more that members of Congress needed to find a nonpartisan basis on which to resolve the proceedings. The historical record is replete with senators who in the midst or near the end of impeachment trials expressed the awareness that their final decision to achieve legitimacy needed to withstand the test of time. As Senator William Fessenden commented near the end of President Andrew Johnson's trial, the burden was then on the Senate, given the partisan origins of the proceedings, to reach a judgment about which "all right-thinking men would agree."⁹⁶ This comment is consis-

⁹¹ See CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848) (resolution describing the Mexican-American War as "a war unnecessarily and unconstitutionally begun by the President of the United States"); JOHN MASKELL, CENSURE OF THE PRESIDENT BY THE CONGRESS 5 (Cong. Res. Serv. No. 98-843A, Dec. 8, 1998).

⁹² See HOUSE JOURNAL, 27th Cong., 2d Sess., 1343-52 (1842).

⁹³ See SENATE JOURNAL, 23rd Cong., 1st Sess., 197 (1834).

⁹⁴ See MASKELL, *supra* note 91, at 4-8.

⁹⁵ See THE FEDERALIST No. 65, *supra* note 57.

⁹⁶ THE TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE

tent not only with many of the Ratifiers' expectations about impeachment but also with most subsequent scholars' and senators' perceptions of the very high threshold that an impeachment decision must satisfy in order to withstand the test of time.

IV. Conclusion

My sense of the history of the federal impeachment process, as reflected in the debates in the constitutional and state ratifying conventions and Congress's subsequent exercises of its impeachment authority, is that "other high Crimes or Misdemeanors" are technical terms of art that refer to so-called political crimes. Political crimes are abuses of power or the kinds of misconduct that can be committed only by some public officials by virtue of the public offices or special trust that they hold. These political crimes are not necessarily indictable offenses. Nor do all indictable offenses constitute political crimes.

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

Studying Congress's impeachment decisions also reveals some noteworthy patterns. Most, if not all, impeachments made by the House and convictions made by the Senate have followed or approximated the paradigm of an impeachable offense—the abuse of official power or privilege. In doing so, congressional practices have been quite consistent with the Framers' and Ratifiers' statements and scholarly commentary recognizing impeachment as a unique component of the constitutional scheme of checks and balances. The Constitution embodies the judgments that the judiciary and the President (as a symbol of the executive branch) each need to be independent (to some meaningful degree) and possess the vitality and stature necessary to allow the judiciary and the President to act as checks on the national legislature. In other words, congressional practices reflect the judgment that the Constitution envisions that impeachment should not be used to punish or to retaliate against impeachable officials, such as the President and federal judges, because of their opinions, policy differences, or innocent errors of judgment. Nor should impeachment be used for largely partisan purposes; hence, some senators refused to convict Associate Justice Samuel Chase or President Andrew Johnson for fear that if either were removed, future presidents or judges from the senators' party likely would be punished in the impeachment process just by virtue of their party affiliation. Rather, impeachment generally should be deployed against impeachable officials for having engaged in

some misconduct that has caused serious injury to the Republic or to the constitutional system.

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

Of course, another important lesson of impeachment history is that it is left to the discretion of the members of Congress to determine whether a particular impeachable official's misconduct fits within the paradigmatic case for impeachment and removal or the exception of outrageousness. In exercising their discretion, members of Congress must confront unique and significant issues and the necessity to rise above partisan politics to make principled constitutional judgments that will withstand the test of time or face the possibility of short-term political fall-out or the condemnation of history for their failure to do so.